



Wake Forest Legal Studies
Research Paper Series

Research Paper No. 05-22
October 2005

*Leaving Guantànamo:
The Law of International Detainee Transfers*
University of Richmond Law Review
(forthcoming 2006)

Robert M. Chesney
Associate Professor
Wake Forest University School of Law

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection:
<http://ssrn.com/abstract=827604>

An index to the working papers in the
WFU School of Law Research Paper Series is located at:
<http://www.law.wfu.edu/x3205.xml>

DRAFT

LEAVING GUANTÁNAMO: THE LAW OF INTERNATIONAL DETAINEE TRANSFERS

By: Robert M. Chesney*

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

- Secretary of Defense Donald Rumsfeld, June 14, 2005¹

The United States military has had custody of more than 68,000 detainees since 9/11 as a consequence of the war on terrorism and the war in Iraq.² The legality of these detentions under domestic and international law has been explored exhaustively in legal scholarship³ and has been the subject of extensive litigation.⁴ Until recently, however, relatively little attention has been paid to a closely-related

* Associate Professor of Law, Wake Forest University School of Law. J.D., Harvard University. Portions of this paper were presented to the NORAD/NORTHCOM Staff Judge Advocate’s Conference in April 2005, the June 2005 meeting of the Law and Society Association, and the July 2005 Law of War course at the Judge Advocate General’s Legal Center and School. Thanks to Bo Cooper, Jennifer Elsea, Michael Kelly, Marty Lederman, Peter Margulies, John Parry, Lt.Col. Mick Waggoner, and Maj. Sean Watts for their comments and criticisms. Special thanks to Major General Jay Hood, commander of Joint Task Force-GTMO, and Brigadier General Thomas Hemingway, Legal Adviser to the Appointing Authority, Office of Military Commissions, for their hospitality during a tour of Camp Delta in September 2005.

¹ Secretary of Defense Donald Rumsfeld, Press Conference (June 14, 2005), available at <http://www.defenselink.mil/transcripts/2005/tr20050614-secdef3042.html>.

² See News Release, U.S. Dep’t of Defense, Guantanamo Provides Valuable Intelligence Information (June 12, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050612-3661.html> (observing that “[m]ore than 68,000 detainees have been held in Afghanistan, Iraq and Guantanamo”). Iraq-related detainees outnumber those from Afghanistan and elsewhere. See Secretary of Defense Donald Rumsfeld, Press Conference at the Meeting of NATO Defense Ministers, Brussels, Belgium (June 9, 2005), available at <http://www.defenselink.mil/transcripts/2005/tr20050609-secdef3021.html>.

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

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

issue: What domestic and international legal frameworks apply to the transfer of a detainee from U.S. custody to the custody of another state, particularly where fear of torture is a concern?

This once obscure topic has become the subject of intense debate in recent months in connection with the CIA's extraordinary rendition program.⁵ But the issue also is significant for the U.S. military's detention facility at the U.S. Naval Station at Guantánamo Bay, Cuba ("GTMO"). Significant numbers of GTMO detainees already have been transferred to the custody of their own governments, and the Pentagon intends eventually to transfer most of those who remain. Meanwhile, dozens of detainees have filed motions seeking advance notice of any such transfers, on the theory that such notice will give them an opportunity to then seek a court order barring the transfer on risk-of-torture grounds.⁶ These preliminary motions have met with mixed results, with the judges largely able to avoid coming to grips with the substantive issues raised by the risk-of-torture issue. Eventually, though, these same judges will be forced to determine whether they have authority to regulate or perhaps even prohibit the custodial transfer of a GTMO detainee. The relevant law is not well-understood, unfortunately, and the existing legal scholarship on the topic is too sparse, polarized, and out-of-date to provide guidance.⁷

This Article fills the resulting gap in the literature by examining the full range of legal issues – both domestic and international – presented when the military seeks to transfer a detainee from GTMO to the custody of another state and the detainee objects on risk-of-torture grounds.⁸ Part I begins by describing the "first wave" of GTMO transfer litigation – a veritable flood of motions filed by detainees in 2005 seeking preliminary relief in anticipation of potential transfers. These motions and the conflicting opinions they generated are harbingers of

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

⁶ See *infra*, Part I.

⁷ There are just two articles that directly grapple with the issues raised by GTMO transfers. See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183 (2004) (arguing that Article II empowers the Executive branch to dispose of the liberty of wartime detainees, in keeping with practices in past, traditional armed conflicts); Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L. REV. 457 (2003) (arguing that detainees are not subject to armed conflict concepts concerning detainee transfers, at least when captured outside a zone of actual combat operations). Both articles are insightful, but have been superseded in important respects by post-publication developments such as the Supreme Court's 2004 decision in *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that GTMO detainees may invoke federal habeas corpus statute).

⁸ I do not in this article address these issues as they arise in the context of "extraordinary renditions." Cf. *Arar v. Ashcroft*, No. 04-cv-249 (DGT) (E.D.N.Y.) (lawsuit filed by Canadian citizen allegedly tortured after being rendered by U.S. to Syria).

litigation to come. Parts II-IV then explore the laws that will be relevant to that litigation. Part II takes up the topic of international human rights law, focusing on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the related issue of “diplomatic assurances.” Along the way, I identify complex issues of statutory implementation associated with the Convention Against Torture, including potential Defense Department obligations under the Administrative Procedure Act. Against this backdrop, Part III addresses the relationship of international human rights law to the law of war when both apply simultaneously, with particular reference to the *lex specialis* rule. With this relationship in mind, Part IV then considers the extent to which any GTMO detainees may be protected by the handful of transfer rules provided by the law of war. Part V is perhaps the most unexpected section of the Article, as it addresses the extent to which substantive due process may provide an alternative restraint on GTMO transfers – a discussion necessitated by the possibility that the GTMO detainees have been invested with fundamental rights under the federal constitution as a result of the Supreme Court’s 2004 decision in *Rasul v. Bush*.⁹ Part VI concludes with criticisms of the current state of the law of international detainee transfers offered both from the perspective of the government and of the detainees, coupled with preliminary suggestions for statutory reform.

I. THE FIRST WAVE OF GTMO TRANSFER LITIGATION

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

A. GTMO Transfers Before and After *Rasul*

The decision to house detainees at GTMO was not made lightly. Policymakers sought a location that would provide greater security and convenience than would be available in Afghanistan.¹⁰ GTMO would satisfy both interests, but given the relatively comprehensive and perpetual nature of U.S. control there, it also raised the possibility of enabling federal judicial oversight of the detentions. The General Counsel of the Department of Defense turned to the Justice Department’s Office of Legal Counsel (“OLC”) for an opinion on whether use of

⁹ 542 U.S. 466.

¹⁰ See Rumsfeld, *supra* note 1 (“The detention facility at Guantanamo Bay was established for the simple reason that the United States needed a safe and secure location to detain and interrogate enemy combatants. It was the best option available.”).

GTMO would lead to federal court involvement, and was told that “the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [GTMO].”¹¹ OLC cautioned, however, that a “detainee could make a non-frivolous argument that jurisdiction does exist” and that “there remains some litigation risk that a district court might reach the opposite result.”¹²

Eventually, these expectations would be dashed by the Supreme Court’s decision in *Rasul*. But in the interim approximately 748 detainees were sent to GTMO on the assumption that the change of scenery would not involve a change in legal status as well.¹³

Notably, the military began releasing some detainees on its own initiative long before the pace of GTMO litigation accelerated in mid-2004. Ninety-one detainees were released during GTMO’s first two years of operation,¹⁴ and 55 more were released during the first six months of 2004,¹⁵ bringing the total to 146. Only 129 of these detainees were released outright, however. The other seventeen were transferred from U.S. custody to the continuing custody of their own governments, as described in Table 1 below:

¹¹ Memorandum from Office of Legal Counsel, U.S. Dep’t of Justice, Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001) at 1.

¹² *Id.*

¹³ It is possible to calculate the approximate number of detainees sent to GTMO during the period based on information disclosed in periodic Defense Department press statements concerning releases from GTMO. Initially the Defense Department did not issue press statements announcing the release of detainees from GTMO. It began to do so in October 2002, however, and by the middle of 2003 it also began providing information about the total number of detainees still present at GTMO. Then, in January 2004, it began to provide information about the total number of detainees previously released. A careful reconstruction of these releases indicates that 88 detainees had been released or transferred as of November 21, 2003, on which date the Defense Department described the remaining population at GTMO as consisting of approximately 660 detainees. See News Release, U.S. Dep’t of Defense (Jan. 29, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040129-0934.html>; *id.* (Nov. 23, 2003), available at <http://www.defenselink.mil/releases/2003/nr20031124-0685.html>.

¹⁴ See *id.* (Nov. 23, 2003).

¹⁵ See *id.* (Feb. 13, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040213-0365.html>; *id.* (Feb. 25, 2004) available at <http://www.defenselink.mil/releases/2004/nr20040225-0365.html>; *id.* (Mar. 1, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040301-0389.html>; *id.* (Mar. 3, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040303-0403.html>; *id.* (Mar. 9, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040309-0443.html>; *id.* (Mar. 15, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040315-0462.html>; *id.* (Apr. 2, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040402-0505.html>.

Table 1 - Custodial Transfers (1/2002 – 6/2004)¹⁶

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

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

The situation grew more complicated in June 2004, after the Supreme Court held in *Rasul* that the federal habeas corpus statute, 28 U.S.C. § 2241, “confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.”¹⁷ There were approximately 595 detainees at GTMO at that time, the flow of new detainees having largely ceased back in November of 2003.¹⁸ Within a year of *Rasul*, approximately half of these detainees would have habeas corpus petitions pending in federal district court in the District of Columbia.¹⁹

During the same post-*Rasul* period, large numbers of detainees continued to be released. Fifty additional detainees were released outright in the sixteen months following *Rasul*, bringing the all-time total

¹⁶ See *id.* (May 16, 2004), available at http://www.defenselink.mil/releases/2003/b05162003_bt338-03.html; *id.* (Feb. 13, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040213-0981.html>; *id.* (Mar. 1, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040301-0389.html>. The language of the press release associated with the UK transfer is ambiguous as to the detainees’ status, and the numbers provided along with it suggest that at first it was deemed an outright release. Subsequent press releases concerning other detainees, however, made clear that the release of the British detainees had been classified as a custodial transfer. See *id.* (July 27, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040727-1062.html>.

¹⁷ 124 S.Ct. 2686, 2698 (2004).

¹⁸ See News Release, U.S. Dep’t of Defense (Nov. 24, 2003), available at <http://www.defenselink.mil/releases/2003/nr20031124-0685.html> (20 detainees); *id.* (July 28, 2003), available at <http://www.defenselink.mil/releases/2003/nr20030718-0207.html> (10 detainees). Only ten more detainees were sent to GTMO in the months following *Rasul*. See *id.* (Sep. 22, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040922-1310.html> (10 detainees). After September 2004 the government placed further transfers “on hold while officials await the outcome of . . . legal challenges in U.S. federal courts by detainees seeking their release.” See Robin Wright and Josh White, *U.S. Holding Talks on Return of Detainees*, WASH. POST, Aug. 9, 2005, at A13.

¹⁹ A table listing these petitions is provided in the online appendix to this article. See Online Appendix Table A, available at <http://www.wfu.edu/~chesner/NationalSecurityLaw/GTMO/OnlineAppendix.doc>. In addition to the individual petitions, the Center for Constitutional Rights (“CCR”) has filed a “John Doe” petition on behalf of the class of all GTMO detainees who have not yet filed their own habeas petition. See *John Does 1-570 v. Bush*, No. 05-313 (CKK) (D.D.C.).

for outright releases (as opposed to custodial transfers) to 179.²⁰ This reflects a slower pace than before June 2004. In contrast, the pace of custodial transfers has accelerated, with 51 such transfers occurring during the same post-*Rasul* period. These transfers are described in Table 2, below:

²⁰ See Department of Defense Fact Sheet, Guantanamo Detainees by the Numbers, available at www.defenselink.mil/news/Aug2005/d20050831sheet.pdf (identifying 177 outright releases as of August 31, 2005); News Release, Department of Defense (Sep. 12, 2005) (describing release of Afghan detainee, raising total to 178), available at www.defenselink.mil/news/releases/2005/nr20050912-4722.html; News Release, Department of Defense (Oct. 1, 2005) (describing release of Egyptian detainee, raising total to 179), available at www.defenselink.mil/news/releases/2005/nr20051001-4826.html. Approximately twenty-eight of these recently-released detainees had been found to be “no longer enemy combatants” (“NLEC”) by a Combatant Status Review Tribunal (“CSRT”). See Fact Sheet, *id.*; Combatant Status Review Tribunal Summary, available at <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf> (describing CSRT proceedings and exoneration of thirty-eight detainees); Testimony of Rear Admiral James M. McGarrah, Senate Armed Services Committee, 109th Cong., 1st Sess. (July 14, 2005) (explaining that twenty-three of the 38 exonerated detainees had been released at that point); News Release, Department of Defense (July 20, 2005) (describing release of three detainees exonerated by a CSRT), available at www.dod.mil/releases/2005/nr20050720-4122.html; *id.* (Aug. 22, 2005) (describing release of two detainees exonerated by a CSRT), available at www.dod.mil/releases/2005/nr20050822-4501.html. Approximately ten detainees exonerated by the CSRT process, moreover, still await their outright release. See McGarrah testimony, *supra*. These individuals most likely are Chinese nationals from the Uighur minority group; the U.S. is unwilling to return them to China out of concern that they will be abused, and is attempting to place them instead with a third country. See Wright and White, *supra* note 18; Jackie Northam, National Public Radio, *Chinese Detainees at Guantánamo Get Hearing*, Aug. 26, 2005. In any event, some twenty *other* detainees also have been released during this period, in some but perhaps not all cases in connection with Administrative Review Board proceedings. See, e.g., News Release (July 20, 2005), *supra* (describing release of three detainees based on ARB determinations, but not indicating the grounds for releasing one Saudi detainee).

Table 2 - Custodial Transfers (7/2004 – 7/2005)²¹

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

Combined with the seventeen custodial transfers that occurred before *Rasul*, these transfers bring the all-time total for custodial transfers to 68 (and the absolute number of releases of both varieties to 247).²²

It is now clear, moreover, that even larger numbers of additional custodial transfers are on the horizon. In August 2005 the United States disclosed that it is negotiating with at least thirteen governments whose nationals are held at GTMO, in hopes of transferring to them the burden of custody for some 400 of their own nationals and thus reducing

²¹ See News Release, U.S. Dep't of Defense (July 8, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040708-0994.html>; *id.* (July 27, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040727-1062.html>; *id.* (Aug. 2, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040802-1081.html>; *id.* (Sep. 18, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040918-1363.html>; *id.* (Jan. 11, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050111-1945.html>; *id.* (Jan. 16, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050116-1986.html>; *id.* (Jan. 25, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050125-2007.html>; *id.* (Jan. 28, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050128-2028.html>; *id.* (Mar. 7, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050307-2263.html>; *id.* (Apr. 26, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050426-2821.html>; *id.* (July 20, 2005), available at <http://www.dod.mil/releases/2005/nr20050720-4122.html>.

²² See News Release (Oct. 1, 2005), *supra* note 20. Notably, not all detainees transferred to home-state custody remain in custody long. Pakistan, for example, released a group of seventeen transferees, after nine months detention, “after their parents and guardians furnished guarantees that they would not indulge in terrorist activities.” See *Former Guantanamo Prisoners Freed by Pakistan Allege Abuse of Koran*, June 27, 2005, available at <http://news.yahoo.com/s/afp/20050627>. See also *From Russian to Guantanamo, via Afghanistan*, ST. PETERSBURG TIMES, Dec. 24, 2002, available at http://www.times.spb.ru/archive/times/830/top/t_8262.htm (describing release of Russian transferees). Additionally, at least one transferee who was prosecuted after his return – Nasser al-Mutairi, of Kuwait – has been acquitted and released. See Associated Press, *Ex-Gitmo Inmate Acquitted on All Charges*, FOX NEWS, June 29, 2005. It also is worth noting that in a few instances, individuals released from GTMO have returned to combat. See John Mintz, *Released Detainees Rejoining the Fight*, WASH. POST, Oct. 22, 2004, at A1.

GTMO's population to a core of some 100 "hard-core detainees."²³ Unnamed senior U.S. government "officials" have explained that these transfers will take place "gradual[ly], happening over months or years."²⁴ In contrast to past transfers, however, it is doubtful that these will go unchallenged.

B. Transfer Litigation Begins

Since the spring of 2005, the docket of the district court in D.C. has been flooded with motions by GTMO detainees seeking preliminary relief associated with the possibility of a transfer.²⁵ Specifically, detainees have requested thirty-days advance notice of any custodial transfer, for the specific purpose of enabling them to make ex-ante challenges to such transfers should the need arise.²⁶ By the end of July 2005, at least 36 motions fitting this general description had been filed on behalf of some 93 individual detainees.²⁷ In every instance, the argument turns in significant part on the claim that the detainees face an unacceptable risk of torture if transferred.²⁸

²³ See Wright and White, *supra* note 18 (describing negotiations with Afghanistan, Saudi Arabia, Yemen, Bahrain, Egypt, Kuwait, Morocco, among others). See also Josh White and Robin Wright, *Afghanistan Agrees to Accept Detainees: U.S. Negotiating Guantanamo Transfers*, WASH. POST, Aug. 5, 2005, at A1 (describing progress in the negotiations with Afghanistan in particular, concerning Afghan nationals held both at GTMO and at Bagram).

²⁴ Andrea Koppel & Elise Labott, *U.S. Officials: Gitmo Transfer Talks Active*, CNN.com, Aug. 9, 2005, available at http://www.cnn.com/2005/US/08/09/detainee.release/?section=cnn_world. Even where agreement already has been reached – as is the case with respect to Afghanistan – transfer is expected to be "gradual." Deputy Assistant Secretary of Defense for Detainee Affairs Matthew Waxman, Op-Ed., *Beyond Guantanamo*, WASH. POST, Aug. 20, 2005, at A17.

²⁵ These motions are summarized in Table A of the online appendix. See *supra* note 19.

²⁶ Hard copies of the motion papers are on file with the author, and available online through PACER by reference to the docket numbers and other information provided in Table A, *supra* note 19. In four instances, the detainees initially sought an outright transfer ban rather than mere notification. See *Habib v. Bush*, No. 02-1130 (CKK) (D.D.C. Jan. 24, 2005); *el Banna v. Bush*, No. 04-1144 (RWR) (D.D.C. Mar. 15, 2005); *el Mashad v. Bush*, No. 05-270 (JR) (D.D.C. Feb. 4, 2005); *Batarfi v. Bush*, No. 05-409 (EGS) (D.D.C. Mar. 15, 2005).

²⁷ See Table A, *supra* note 19. Some request relief in the form of a stay, others in the form of a preliminary injunction, and still others pursuant to the All Writs Act. There also is a motion brought on behalf of a purported class action consisting of all GTMO detainees who have not yet filed a habeas petition. See *supra* note 19. I have not included this petition or this motion in my data due to uncertainty as to the viability of that attempt.

²⁸ See *supra* note 26. The motions also argue in the alternative that transfers may be unlawful attempts to circumvent judicial review of the detainees' underlying habeas corpus petitions. The merits of that argument are beyond the scope of this Article, but for compelling criticism of this view, see *O.K. v. Bush*, 2005 WL 1621343, No. 04-1136 (JDB), at *12-13 (D.D.C. July 12, 2005). Cf. *Abu Ali v. Ashcroft*, 350 F. Supp.2d 28

Are the detainees simply conflating the risks associated with a custodial transfer at the direction of the U.S. military with those associated with the CIA's much-criticized program of extraordinary rendition?²⁹ Possibly. But then again, it is worth noting that in November 2002, an FBI official at GTMO wrote a memo to a senior FBI attorney describing a laundry list of interrogation methods under consideration, and noting that one option under consideration was sending GTMO detainees, "either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information."³⁰ It is anything but clear that the transfer-for-interrogation proposal ever was adopted; indeed, a contemporaneous memo to Secretary of Defense Rumsfeld seeking his approval for various interrogation methods refers to every one of the methods described in the FBI memo, except the transfer proposal.³¹ Nor does it follow automatically that those who proposed transfers for interrogation purposes did so in hopes that torture would be used.³² But the fact that interrogation-oriented transfers at least were under consideration should at least give pause to those who otherwise might be tempted to dismiss the risk-of-torture argument out of hand.

In any event, by the end of June 2005, judges had decided thirty-three of the GTMO transfer motions,³³ with twenty-seven pro-detainee decisions imposing the requested notice requirement and five pro-government decisions denying that relief (one split decision granted relief to one petitioner but denied it to two others).³⁴ The first four decisions in this line managed for the most part to avoid the fear-of-torture issue, relying instead on the argument that transfers might

(D.D.C. 2004) (declining to dismiss habeas petition alleging that U.S. had constructive custody of U.S. citizen detained by Saudi Arabia).

²⁹ Extraordinary rendition refers to a CIA program in which noncitizens in U.S. custody, usually captured and held overseas, are transferred to the custody of an allied government such as Egypt for interrogation purposes. See Mayer, *supra* note 5; Katherine Hawkins, *The Practice and Legality of Extraordinary Renditions* (forthcoming) (manuscript on file with author).

³⁰ See also Michael Isikoff, *Exclusive: Secret Memo – Send to Be Tortured* (Aug. 8, 2005), available at <http://www.msnbc.msn.com/id/8769416/site/newsweek>.

³¹ Memorandum from William J. Haynes II to Secretary of Defense, "Counter-Resistance Techniques," Nov. 27, 2002, available at http://www.npr.org/documents/2004/dod_prisoners/20040622doc5.pdf.

³² U.S. officials have repeatedly noted that interrogation of noncitizen detainees by non-U.S. personnel may be more effective because of language considerations and matters of cultural affinity.

³³ One motion became moot after the petitioner was transferred to Australian custody (the detainee had moved to prevent transfer to Egypt). See *Habib v. Bush*, No. 02-1130 (CKK) (D.D.C.). Decisions in two others cases were pending at the time of this writing. *Batarfi v. Bush*, No. 05-409 (EGS) (D.D.C.); *Aboassy v. Bush*, No. 05-748 (RMC) (D.D.C.).

³⁴ See Table A, *supra* note 19.

unlawfully circumvent review of pending habeas petitions.³⁵ But the torture issue was central to most of the rulings that followed.³⁶

The first opinions to come to grips with the torture issue in this context – *al Marri v. Bush* and *al Joudi v. Bush* – are illustrative of the approach to the issue taken in the twenty-seven pro-detainee rulings.³⁷ The court did not identify the sources of law that might give rise to a right not to be transferred based on risk-of-torture concerns, nor did it explain the substantive standard that would have to be met in order to succeed in invoking such a right or the type of evidence that might suffice to meet that standard. Instead, the court implicitly assumed the existence of such a right, and built its analysis of the traditional factors for preliminary injunctive relief (i.e., risk of irreparable harm and probability of success on the merits) on that foundation.³⁸ The five pro-government rulings on the notice issue reach contrary conclusions, of course, but otherwise resemble the pro-detainee decisions with respect to the depth of their treatment of the substantive law applicable in this context.³⁹ *Almurbati v. Bush*, for example, notes that the detainees invoked the Geneva Conventions, the Convention Against Torture, and the International Covenant on Civil and Political Rights, but does not in any way explore the many complex issues associated with the claim that these sources create judicially-enforceable rights for GTMO detainees.⁴⁰ Ultimately, only one of the thirty-three rulings (*al-Anazi v. Bush*)⁴¹

³⁵ See *Abdah v. Bush*, 2005 WL 711814, No. 04-cv-1254 (D.D.C. 2005) (granting relief on habeas avoidance grounds); *Oshan v. Bush*, No. 05-cv-0520 (D.D.C. 2005) (slip op.) (same); *al Wazan v. Bush*, No. 05-329 (PLF) (D.D.C. Apr. 1, 2005) (slip op.) (same); *al Shihry v. Bush*, No. 05-490 (PLF) (D.D.C. Apr. 1, 2005) (slip op.) (same).

³⁶ Table A in the online appendix indicates the cases in which the torture impacted the judge's ruling. See *supra* note 19.

³⁷ See *al Marri v. Bush*, 2005 WL 774843, No.04-2035 (GK) (D.D.C. Apr. 4, 2005); *al Joudi v. Bush*, No. 05-301 (GK) (D.D.C. Apr. 4, 2005) (slip op.).

³⁸ First, the court determined – not at all unreasonably – that the prospect of torture constituted a threat of irreparable harm. See, e.g., *al Marri*, 2005 WL 774843, at *4. In reaching this determination, the court did not specify any particular source for a right not to be subjected to such a risk. In the context of a preliminary injunction ruling, that discussion might be expected to occur instead in the context of the determination of whether the movant has a probability of success on the merits. But under that heading, the court explained merely that the “issues raised in these motions are sensitive and involve complex constitutional questions” that most likely will be resolved in the end by the Supreme Court. *Id.* at 5.

³⁹ See, e.g., *O.K.*, 2005 WL 1621343, at * 12 (referring briefly to the fact that Convention Against Torture entails a more-likely-than-not standard for measuring the risk a transferee will be tortured, but not otherwise exploring the issue); *Mammar v. Bush*, No. 05-cv-0573, (D.D.C. 2005) (slip op.) (no discussion of possible grounds for relief related to fear-of-torture).

⁴⁰ See 366 F. Supp.2d 72, 80 (D.D.C. Apr. 14, 2005). The decision in *Almurbati*, like the contrary rulings in *al Marri* and *al Joudi*, rested instead on the court's assessment of whether the proffered evidence supported a finding of a sufficient risk of irreparable harm or of a probability of success on (somewhat unspecified) merits.

⁴¹ See *al-Anazi v. Bush*, 370 F. Supp.2d 188 (D.D.C. 2005).

devotes significant attention to exploring the law applicable to the fear-of-torture issue, and even there the discussion is limited to a brief review of one statute that bears on the analysis.⁴²

The government has appealed the pro-detainees decisions, but it will be some time before the D.C. Circuit has the chance to opine on these issues.⁴³ The government and the detainees have reached an agreement that these appeals should be held in abeyance at least pending the D.C. Circuit's resolution of the consolidated appeal of *In re Guantanamo Detainees* and *Khalid v. Bush* – conflicting decisions in early 2005 concerning whether detainees have constitutional rights by virtue of their location at GTMO and whether they may invoke the Geneva Conventions in their habeas proceedings.⁴⁴ Accordingly, it is likely that these “first wave” motions will still be on appeal by the time the military begins the process, described above, of using large numbers of custodial transfers to reduce GTMO's population to a relatively small core of detainees. At that point, we can expect a new round litigation on the risk-of-torture issue, litigation that will require the courts to come to grips directly with the nuances of international detainee transfer law. In this sense, the second wave of GTMO transfer litigation most likely will begin before the first one concludes.

When that time comes, courts will be obliged to delve deeply into the array of domestic and international law concepts that combine to form the law of international detainee transfers. The precise contours of that law are far from clear and deeply contested, unfortunately, particularly insofar as it concerns the issue of domestic judicial enforceability. In an effort to reduce this uncertainty, I aim in the following pages to identify the many constitutional, statutory, administrative, and international law rules that speak to this issue, and, especially, to determine the extent to which each might apply to GTMO detainees.

II. INTERNATIONAL HUMAN RIGHTS LAW

⁴² See *id.* at 194 (discussing § 2242 of the Foreign Affairs Reform and Restructuring Act). The court in *al-Anazi* notes that § 2242(a) purports to establish a policy against transfers where there are substantial grounds to fear torture, and that § 2242(d) purports to exclude judicial review in most contexts. The Court does not discuss, however, the substantial authority suggesting that the language of § 2242(d) fails to exclude habeas corpus review. See *infra* Part III.B.3.c.

⁴³ Table A in the online appendix indicates the appellate status of these decisions. See *supra* note 19. Notably, it does not appear that any of the detainees whose motions were denied have appealed those rulings.

⁴⁴ While these appeals were pending, a panel of the D.C. Circuit addressed the Geneva Convention enforceability issue in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), a case primarily concerned with the legality of the military commission process. The panel held that the Geneva Conventions of 1949 are not judicially enforceable. See *id.* at 35. Hamdan has petitioned for certiorari on this and other issues, bypassing possible *en banc* review. See *Hamdan v. Rumsfeld*, Pet. for Cert., 125 S. Ct. 972 (Jan. 18, 2005).

The most significant international human rights instrument addressing the issue of torture is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).⁴⁵ The U.S. signed CAT in 1988, the Senate consented to it in 1990 subject to a number of reservations, understandings, and declarations, and the U.S. became a party in 1994 when, after passage of certain implementing legislation, the President deposited the instrument of ratification with the U.N.⁴⁶

The central features of CAT are its direct prohibitions on torture⁴⁷ and cruel, inhuman, or degrading treatment,⁴⁸ as well as its requirement that member states take steps to ensure punishment of torturers who come within their jurisdiction.⁴⁹ But CAT also attempts to suppress torture indirectly by limiting the circumstances in which persons may be transferred from one state to another where there is a risk the person will be tortured, a concept often referred to as “*non-refoulement*.”⁵⁰

I begin below by examining the substantive scope of CAT’s *non-refoulement* rule, and then turn to a series of questions that would arise if a GTMO detainee were to invoke this rule in seeking judicial relief. Do CAT obligations apply in this context? If so, can they be judicially enforced in a U.S. court via habeas corpus? If so, is it proper for states to rely on diplomatic assurances to allay fear-of-torture concerns? As it happens, the answers to these questions turn not so much on CAT itself,

⁴⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. G.A.O.R. Supp. No. 51, U.N. Doc. A/39/51 (1984) (hereinafter “CAT”).

⁴⁶ See Letter of Submittal from Secretary of State George Shultz to President Ronald Reagan, May 10, 1988, Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by Unanimous Agreement of the United Nations General Assembly on December 10, 1984 and Signed by the United States on April 18, 1988, as reprinted in SEN. TREATY DOC. 100-20, available in UNITED STATES CONGRESSIONAL SERIAL SET, Serial Number 13857, Senate Treaty Documents Nos. 11-22 (1990); 136 Cong. Rec. S17486-01, 1990 WL 168442, 101st Cong., 2d Sess. (Oct. 27, 1990); SEN. EXEC. REP. 101-30, Resolution of Advice and Consent to Ratification (1990). See also Michael John Garcia, CRS Report for Congress, U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques, No. RL32438 (June 16, 2004), at 3.

⁴⁷ See CAT, *supra* note 45, at art.2.

⁴⁸ See *id.* art. 15.

⁴⁹ See *id.* art. 5.

⁵⁰ See *id.* art. 3. Article 3 refers, of course, to extradition and expulsion as well as *non-refoulement*. The *non-refoulement* (i.e., non-return) concept derives from Article 33 of the 1951 Convention Relating to the Status of Refugees, which similarly regulates international transfers of refugees where persecution on certain specified grounds is an issue. Note that CAT does not also attempt to suppress cruel, inhuman, or degrading (“CID”) treatment other than torture through a comparable transfer ban.

but instead on the details of the complex statutory-regulatory structure through which the U.S. has partly implemented its CAT obligations.

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

CAT anticipates the situation in which one state seeks to transfer an individual to the custody of another in circumstances involving a risk of torture. Its third article provides: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are *substantial grounds* for believing that he would be in danger of being subjected to torture.”⁵¹

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

Recognizing its importance, the President and Senate directly addressed the meaning of “substantial grounds” during the ratification process. In his message submitting CAT to the Senate for advice and consent, President Reagan included the State Department’s transmittal letter, which in turn attached a memorandum surveying CAT’s provisions and detailing the reservations, understandings, and declarations (the “RUDs”)⁵² recommended by the State Department.⁵³ With respect to Article 3, the State Department memo recommended that the Senate include an understanding to the effect that the phrase “substantial grounds for believing he would be in danger of being subjected to torture” should be read “to mean ‘if it is *more likely than not* that he would be tortured.’”⁵⁴ The memo observed that the more-likely-than-not standard already existed in U.S. immigration law with respect to the analogous practice of withholding deportation of aliens who might be subjected to *persecution* on grounds of race, religion, nationality, membership in a particular social group, or political opinion,⁵⁵ and explained that CAT Article 3 should be understood to extend that

⁵¹ CAT, *supra* note 45, at art. 3(1) (emphasis added).

⁵² For a discussion of RUDs as a mechanism for enabling U.S. participation in multilateral human rights instruments, and a defense of their desirability and validity, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000) (arguing that non-self-execution declarations generally are constitutional).

⁵³ See Message from the President, *supra* note 46, at vi.

⁵⁴ See *id.* at 6.

⁵⁵ See *id.* (citing *INS v. Stevic*, 467 U.S. 407 (1984) (holding that the standard employed for § 243 of the Immigration and Nationality Act, then codified at 8 U.S.C. § 1253(h)(1), should be understood not as a well-founded fear standard but instead as a likelihood standard). For a discussion of the similarities and differences between CAT and immigration law provisions, see Garcia, *supra* note 46, at 3 n. 15.

standard to cases of potential torture (as opposed to persecution) that would not already be covered by the immigration provision.⁵⁶

Ultimately, the Senate ratified CAT subject to an understanding adopting the precise language suggested by the State Department's memo.⁵⁷ For purposes of domestic law, therefore, it is well-established that the CAT Article 3 obligation comes into play only where it is more likely than not that an individual will be tortured if transferred.⁵⁸

B. Obstacles to Judicial Enforcement

The fact that the United States is a party to CAT clearly establishes the existence of a *non-refoulement* obligation as a matter of international law. But it does not follow automatically that the GTMO detainees may enforce that obligation in federal court via their habeas petitions. The judicial enforceability of the international law obligations of the United States is a controversial topic, particularly with respect to international human rights law instruments such as CAT. Litigants who seek relief on the ground that the government has breached such obligations may encounter a series of obstacles: Does the treaty apply extraterritorially? Is it self-executing, and if not, has it been implemented by statute? Assuming it does apply and is enforceable (either directly or by statute), what sort of showing is required actually to obtain relief? Below, I consider each of these concerns as they might arise in the context of GTMO transfers and CAT Article 3.⁵⁹

1. Non-Extraterritoriality

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

The U.S. takes the position that all of its international human rights treaty obligations, including in particular CAT, are non-

⁵⁶ See Message from the President, *supra* note 46, at 6.

⁵⁷ See SEN. EXEC. REP. 101-30, *supra* note 46, Understanding 2.

⁵⁸ This construction most likely also defines U.S. obligations under Article 3 on the international plane as well, given that no other State Party clearly objected to this understanding. Cf. U.N. Office of the High Commissioner for Human Rights, Declarations and Reservations, n. 20, available at <http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm>, (listing German statement on Understanding 2, which asserts it does "not touch upon the obligations of the United States of America as State Party to the Convention").

⁵⁹ The only one of these issues to receive any serious attention during the first wave of GTMO transfer litigation is the question of non-self-execution, which was addressed briefly, and somewhat indirectly, by the court's discussion in *al-Anazi*. See *supra* note 41.

extraterritorial.⁶⁰ This view has been sharply criticized,⁶¹ but it also has been endorsed by the Supreme Court with respect to a provision of the Refugee Convention analogous to CAT Article 3. In 1993, in *Sale v. Haitian Centers Council, Inc.*,⁶² the Court held that the *non-refoulement* requirement of Article 33 of the Refugee Convention simply did not apply to the interdiction and return of Haitians on the high seas en route to the U.S. Citing *Sale*, Professor Yoo has written that “[g]iven the Supreme Court’s interpretation of identical language in the Refugee Convention, it makes no sense to view the Torture Convention as affecting the transfer of prisoners held outside the United States to another country.”⁶³

⁶⁰ See, e.g., INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, THE LAW OF WAR HANDBOOK (2004) 284 (stating that international human rights law treaties “do not bind U.S. forces outside the territory of the U.S.” because “the United States interprets [them] to apply to persons living in the territory of the United States, and not to any person with whom agents of our government deal in the international community”); Letter from Assistant Attorney General William Moschella to Senator Patrick Leahy (Apr. 4, 2005), at 1 (stating that CAT Article 16 applies only to overseas locations “under U.S. jurisdiction”), available at <http://www.scotusblog.com/movabletype/archives/CAT%20Article%2016.Leahy-Feinstein-Feingold%20Letters.pdf>. The United States takes this position not only with respect to treaties such as CAT that employ relatively narrow geographic scope language such as “any territory under its jurisdiction” but also to more broadly worded language such as “all individuals subject to its jurisdiction.” See *id.* at n. 16. For an overview of the debate, see Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT’L L. 119 (2005).

⁶¹ See, e.g., Hum. Rts. Comm., General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 10 (2004) (arguing that ICCPR rights apply not only to persons within a member state’s territory but also to “those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained”); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (Int’l Ct. Justice July 9, 2004), 43 I.L.M. 1009 (2004) (concluding that ICCPR obligations apply “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”). See also Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 82 (1995) (stating that the ICCPR “imposes treaty constraints not only on U.S. armed forces abroad, but also on civilian agents and officials exercising power and authority”); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 (Louis Henkin ed., 1981) (arguing that the ICCPR applies extraterritorially); but see *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory; Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT’L L. 119, 122-27 (2005) (criticizing the view that ICCPR protections apply extraterritorially).

⁶² 509 U.S. 155 (1993).

⁶³ Yoo, *supra* note 7, at 1229-30.

Does *Sale* control the interpretation of CAT Article 3?⁶⁴

Actually, that question appears to be moot with respect to the GTMO detainees in light of the Court's 2004 decision in *Rasul v. Bush*. *Rasul* addressed whether the federal habeas statute "confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises *plenary and exclusive jurisdiction*, but not 'ultimate sovereignty.'"⁶⁵ In a critical passage, the majority opinion by Justice Stevens addressed the argument that the detainees should not be able to invoke the habeas statute because of the canon of construction providing that statutes should not be construed to have extraterritorial effect in the absence of a clear statement of congressional intent. The Court found this canon to be entirely irrelevant with respect to GTMO:

"Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained *within* 'the territorial jurisdiction' of the United States. By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."⁶⁶

This language strongly implies that GTMO is within the territorial jurisdiction of the U.S.⁶⁷

If GTMO is "within the 'territorial jurisdiction' of the United States" for purposes of the habeas statute, is there any ground for concluding that it is not also U.S. territory for purposes of U.S. treaty obligations?⁶⁸ Nothing in CAT suggests a narrower vision of the concept of "territory" for purposes of that treaty.⁶⁹ Nor is this reading in tension with *Sale*, which merely addressed the Refugee Convention's

⁶⁴ For the argument that *Sale* was incorrectly decided, and in any event should not be extended to CAT, see Hawkins, *supra* note 29.

⁶⁵ 542 U.S. 466, 124 S. Ct. 2686, 2693 (2004).

⁶⁶ 124 S. Ct. at 2696 (emphasis added).

⁶⁷ If the Court had meant only that the non-extraterritoriality canon has no application to the federal habeas statute in general (perhaps on the ground that the only significant consideration was whether the court had jurisdiction over the custodian rather than the detainee himself) then it would not have included the language "with respect to persons detained *within* 'the territorial jurisdiction' of the United States," nor the next sentence concerning the nature of U.S. control over GTMO. *Id.*

⁶⁸ *Cf.* Yoo, *supra* note 7, at 1230 (referring to a single "canon of construction that statutes and treaties are not to be read to have extraterritorial effect unless Congress clearly states its intentions otherwise in the text").

⁶⁹ Article 3, in fact, does not actually have express language imposing geographic restraints, although other articles do. *See, e.g.*, CAT, *supra* note 45, art. 2 and 16. The pattern in the Refugee Convention is comparable. *See, e.g.*, Refugee Convention Articles 32 and 33.

non-refoulement language in connection with U.S. actions taking place on the high seas. The argument that CAT lacks extraterritorial effect, even if correct, thus should pose no obstacle to finding that CAT's *non-refoulement* obligation applies at GTMO.⁷⁰

Additional support for this conclusion derives from the so-called "Working Group" memos generated by the DoD Law of War Working Group⁷¹ in response to a request from the general counsel of the Defense Department in January 2003 asking the group to provide, among other things, a legal analysis of interrogation standards in connection with the war on terrorism.⁷² The Working Group memos do not specifically address the CAT Article 3 issue (other than to note the existence of the Article 3 obligation), but do draw two conclusions that support the conclusion that GTMO is not extraterritorial for Article 3 purposes. First, they observe with respect to another international human rights treaty – ICCPR – that the "United States has maintained consistently that the Covenant does not apply outside the United States *or its special maritime and territorial jurisdiction*."⁷³ Second, the memos elsewhere expressly conclude that GTMO is *within* the special maritime and territorial jurisdiction of the United States.⁷⁴ Unless one can explain why

⁷⁰ This may explain why the extraterritoriality argument did not appear in the government's motion papers in connection with the first wave of GTMO transfer litigation. *See, e.g.*, *el-Banna v. Bush*, No. 04-cv-1144 (RWR) (Mar. 21, 2005) (consolidated opposition brief in connection with fifteen transfer motions).

⁷¹ The DoD Law of War Working Group is a standing entity consisting of representatives from the DoD General Counsel's office, the Legal Counsel to the Chairman of the Joint Chiefs of Staff, the International and Operational Law Division of the Office of the Judge Advocate General for each military department (and the Operational Law Branch of the Staff Judge Advocate to the Commandant of the Marine Corps). *See* DoD Directive 5100.77 at 5.1.2.

⁷² The Working Group produced two iterations of its report, one on March 6, 2003, and another on April 4, 2003. They are reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel, eds.) (2005), at 241 and 286.

⁷³ *See id.* at 290 (emphasis added). The quote goes on to assert that the ICCPR has no application in the context of international armed conflict. *See id.* This argument is addressed in Part III, *infra*.

⁷⁴ *See id.* at 244, 291. The special maritime and territorial jurisdiction of the United States, better known as SMTJ, is defined in 18 U.S.C. § 7 to include a variety of geographic scenarios. As the Working Group memos observe, GTMO appears to implicate at least three of these scenarios. *See id.* (suggesting that GTMO satisfies § 7(3) ("Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof"); § 7(7) ("Any place outside the jurisdiction of any nation to an offense by or against a national of the United States"); and § 7(9) ("With respect to offenses committed by . . . a national of the United States . . . the premises of United States . . . military . . . missions or entities in foreign states")). SMTJ exists to provide jurisdiction to prosecute certain federal crimes despite the fact that they are committed outside the formal borders of the United States, and thus one might argue that the applicability of SMTJ to GTMO does not control the treaty extraterritoriality issue. The Working Group's statement with respect to the relationship of SMTJ to the extraterritoriality question regarding ICCPR, however, clearly states a contrary view. *But see* Michael John Garcia, CRS Report for Congress, "Renditions: Constraints Imposed by

a different result should follow with respect to CAT Article 3 than ICCPR, it would seem to follow that the Article 3 obligation applies at GTMO irrespective of whether it applies “extraterritorially.”⁷⁵

2. Non-Self-Execution

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

Non-self-execution refers generally to the situation in which U.S. obligations under an international agreement are deemed not to be judicially enforceable without implementing legislation.⁷⁶ Precisely because non-self-execution allows the U.S. to avoid at least some of the practical impact of undertaking international obligations, the concept is the subject of considerable controversy.⁷⁷ The issue of domestic judicial enforceability has arisen in connection with each of the major international human rights law instruments that the U.S. has ratified, including CAT. And in each case, the treaty-makers responded to concerns on this score by adopting express declarations to the effect that

Laws on Torture,” (updated Sep. 22, 2005), at n.39 (taking the position that at least some aspects of CAT apply only to the ordinary territorial jurisdiction of the U.S. but not also to its SMTJ).

⁷⁵ Notably, § 1089 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 amended the definition of the “United States” for purposes of the federal torture statute, 18 U.S.C. § 2340, to remove existing language that included the SMTJ within the scope of that law. See Pub. L. 108-375. Given the situation-specific purpose of the § 2340 definition, however, it would not necessarily follow that this change would impact the question of territoriality vis-a-vis Article 3.

⁷⁶ See Carlos Manuel Vázquez, *The Four Doctrines of Non-Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 695 (1995). As Professor Vázquez notes, there are several distinct accounts for the precise nature of non-self-execution. See *infra* note 81.

⁷⁷ Compare Bradley & Goldsmith, *supra* note 52; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (same); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) (same); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) (providing a qualified defense of non-self-execution); with Malvina Halberstam, *Alvarez-Machain II: The Supreme Court’s Reliance on the Non-Self-Execution Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights*, 1 J. NAT’L SEC. L. & POL. 89 (2005) (arguing that non-self-execution declarations should not be given effect where there treaty text appears self-executing on its face); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U. C. DAVIS L. REV. 1 (2002); Loris Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515 (1991) (denying constitutionality of non-self-execution); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760 (1988) (same); Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT’L L. 211, 221 (1997) (same).

particular provisions of these treaties are to be understood as non-self-executing.⁷⁸ In the case of CAT, for example, the Senate's Resolution consenting to the treaty provides that "the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing."⁷⁹ In light of this declaration, courts have uniformly held that CAT Article 3 is not self-executing.⁸⁰

But what precisely does that mean in practical terms? The question is not as simple as it sounds. Professor Vazquez has observed that the phrase "non-self-execution" has been used indiscriminately by courts and commentators to refer to several distinct grounds for declining to rely on a treaty absent implementing legislation.⁸¹ Two of these approaches have particular relevance in the context of international human rights instruments: the right-of-action model and the rule-of-decision model.⁸²

The right-of-action model interprets the impact of non-self-execution narrowly,⁸³ meaning merely that the treaty does not itself create the procedural vehicle for its enforcement.⁸⁴ Significantly, this leaves open the possibility that a rule established by the treaty can be judicially enforced in other ways, as when the rule is invoked defensively or a statute provides a right of action.⁸⁵ The rule-of-decision model, in contrast, invests non-self-execution with greater significance. Under this approach, non-self-execution precludes courts from relying on a treaty provision as a rule of decision under any circumstances (unless and until the rule set forth by that provision is implemented by legislation, in which case it may be the legislation rather than the treaty that actually provides the rule of decision), even if the litigant has an independent procedural vehicle to raise the treaty issue.⁸⁶

⁷⁸ Section 111 of the Restatement identifies several situations in which a treaty should be deemed non-self-executing, including the situation in which the "Senate in giving consent to a treaty . . . requires implementing legislation." Restatement (Third), § 111(4)(b).

⁷⁹ See SEN. EXEC. REP. 101-30, *supra* note 46, Declaration III(1).

⁸⁰ See *Akhtar v. Reno*, 123 F. Supp.2d 191, 196 (S.D.N.Y. 2000) (collecting cases and observing that "each court that has considered the issue has determined that the Convention is not self-executing").

⁸¹ Vazquez, *Four Doctrines*, *supra* note 76, at 695 (arguing "that much of the doctrinal disarray and judicial confusion is attributable to the failure of courts and commentators to recognize that for some time four distinct 'doctrines' of self-executing treaties have been masquerading as one").

⁸² See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Y. J. INT'L L. 129, 137 (1999).

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See, e.g., Restatement (Third) of the Foreign Relations Law of the United States, § 111 and comment h (supporting the rule-of-decision model and describing the right-of-action issue as a question distinct from self-execution). Defenders of this approach explain that it reflects rather than limits the treaty-makers' intentions, and thus is not inconsistent with

The choice between the right-of-action and rule-of-decision models is particularly significant with respect to GTMO detainees. *Rasul* clearly establishes their right to initiate habeas corpus proceedings under 28 U.S.C. § 2241, which among other things provides for relief in the circumstance where an individual is held “in custody in violation of the . . . treaties of the United States.”⁸⁷ Section 2241 thus constitutes a procedural vehicle for the detainees to attempt to assert claims arising out of U.S. treaty obligations, eliminating any need to extrapolate a right of action from the treaty itself.⁸⁸ If the right-of-action model is the correct way to view non-self-execution, therefore, the detainees are free to litigate their Article 3 claims in the habeas context.

It is far from clear, however, that the right-of-action model should control with respect to CAT. Which model applies in this context, as in any other, turns on the intent of the treaty-makers in adopting a non-self-execution declaration.⁸⁹ The evidence on this point with respect to CAT, unfortunately, is somewhat mixed.

There is considerable reason to believe that the treaty-makers understood the non-self-execution declaration for CAT in the rule-of-decision sense, at least initially. The Reagan Administration submitted CAT to the Senate in May 1988, accompanied by a Letter of Transmittal from the President, a Letter of Submittal from Secretary of State Shultz, and a State Department memorandum providing an article-by-article analysis of CAT and the various reservations, understandings, and declarations (“RUD’s”) sought by the administration.⁹⁰ The President’s letter does not specifically address the issue of non-self-execution, but Secretary Shultz’s letter does. After noting that “a declaration that the Convention is not self-executing is recommended,” Shultz explains that “[w]ith such a declaration, the provisions of the Convention would not of themselves become effective as domestic law.”⁹¹ The accompanying State Department memorandum elaborates that “[a]lthough the terms of the Convention, with the suggested reservations and understandings, are consonant with U.S. law, it is nevertheless preferable to leave any further implementation that may be desired to the domestic legislative and judicial process.”⁹²

the Supremacy Clause’s statement that treaties constitute the law of the land. *See, e.g.,* Bradley & Goldsmith, *supra* note 52. *But see* Sloss, *supra* note 82.

⁸⁷ 28 U.S.C. § 2241(c)(3) (emphasis added).

⁸⁸ OLC had predicted that if courts permitted a GTMO detainee to file habeas petition, this “would allow [the detainee] to challenge the legality of his status and treatment under international treaties” *See* OLC Memo, *supra* note 11, at 8.

⁸⁹ As Professor Sloss has observed, the treaty-makers’ intent on this point may vary from treaty to treaty. *See* Sloss, *supra* note 82.

⁹⁰ *See* SEN. TREATY DOC. 100-20, *supra* note 46.

⁹¹ *Id.* at vi.

⁹² *Id.* at 2. Professor Sloss points out that the Reagan Administration borrowed its language from near-identical statements made by the Carter Administration in 1978 in

Because the nature and quantity of the RUD's originally proposed by the Reagan Administration prompted extensive criticism,⁹³ the Bush Administration subsequently submitted a shortened and revised set of recommendations in January 1990.⁹⁴ The revised package did not alter the proposed non-self-execution declaration, however, which was "[r]etained without modification from the 1988 transmittal."⁹⁵ The Senate Foreign Relations Committee held hearings on CAT soon after this revised package arrived, during which the first witness was State Department Legal Adviser Abraham D. Sofaer.⁹⁶ As Professor Sloss has observed, Judge Sofaer's testimony is ambiguous with respect to his views on the meaning of non-self-execution with respect to CAT in general.⁹⁷ On one hand, there are clear statements in his testimony to the effect that CAT "is not self-executing . . . and thus will require implementing legislation."⁹⁸ On the other hand, Judge Sofaer also stated that the United States will "assume" not only international but also "domestic . . . legal obligations . . . when the Convention is ratified,"⁹⁹ and later added that "[i]f you adopt this treaty, it is not just international law. The standard becomes part of our law."¹⁰⁰

With respect to Article 3 in particular, Judge Sofaer wrote in his prepared statement that the "provisions of Article 3 would be implemented by 'competent authorities' within the Departments of Justice and State as appropriate."¹⁰¹ Mark Richard, then the Deputy Assistant Attorney General for the Criminal Division, elaborated in his

connection with a set of four other international human rights instruments. *See* Sloss, *supra* note 82, at 157-60. The "basic thrust" of the Carter statements, Sloss explains, was "that the human rights treaties, with NSE declarations attached, . . . would require implementing legislation before they could provide a rule of decision for the courts." *Id.* at 159. By the same token, he notes, one might "infer that the Reagan Administration intended to preclude provisions of the Torture Convention [other than those later implemented by statute] from ever having domestic legal effect." *Id.* at 160.

⁹³ *See* SEN. TREATY DOC. 100-20, *supra* note 46, at 2; SEN. HRG. 101-718, Convention Against Torture, Hearing before the Committee on Foreign Relations, United States Senate, 101st Cong., 2d Sess., Jan. 30, 1990, at 8 (Sofaer Statement), at 8 (describing involvement of the ABA and Amnesty International).

⁹⁴ *See* SEN. EXEC. REP. 101-30, 101st Cong., 2d Sess., at 2, 4 ("commenting that the RUD's, "in number and substance, created the impression that the United States was not serious in its commitment to end torture worldwide"), as reprinted in 13983 U.S. Congressional Serial Set, Senate Executive Reports Nos. 19-35.

⁹⁵ Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to Sen. Claiborne Pell, Dec. 10, 1989 (enclosure), as reprinted in Sen. Exec. Rep. 101-30, *supra* note 94, at 36.

⁹⁶ *See* SEN. HRG. 101-718, *supra* note 93.

⁹⁷ *See* Sloss, *supra* note 82, at 162-65.

⁹⁸ Sofaer Statement, *supra* note 93, at 12.

⁹⁹ *Id.* at 8. *See also id.* at 41 (responding to questions from Senator Helms concerning the impact of CAT with respect to a hypothetical case of torture within the United States, Judge Sofaer stated without explanation that CAT would apply in that scenario).

¹⁰⁰ *Id.* at 42.

¹⁰¹ *Id.* at 12.

testimony that “[u]nder our existing law, the competent authorities for ensuring the execution of this obligation are the Secretary of State for extradition and the Attorney General for deportation.”¹⁰²

These statements imply that even with the non-self-execution declaration in place, the obligations imposed by Article 3 would operate directly on executive officials with responsibility for international transfer decisions. This does not mean, however, that Sofaer and Richards understood the obligations to be *judicially* enforceable. On the contrary, Richards emphasized that “Article 3 does *not* require that such determinations be made subject to judicial review. The determiners and *the degree of review, if any*, are left by the Convention to *internal domestic law*.”¹⁰³

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

3. Implementing Article 3

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

a. Implementation by Regulation

Implementation of Article 3 occurred uneasily. Indeed, the prevailing view initially was that most CAT obligations merely reflected existing U.S. law and that only Article 5 (requiring states to exercise extraterritorial jurisdiction to prosecute torturers) called for implementing legislation.¹⁰⁴ Thus no effort was made to implement

¹⁰² SEN. HRG. 101-718, *supra* note 93, at 15 (Statement of Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

¹⁰³ *See id.* at 18 (emphasis added).

¹⁰⁴ *See, e.g.*, Sen. Exec. Rep. 101-30, *supra* note 94, at 10 (report of the Senate Foreign Relations Committee stating that “the majority of the obligations to be undertaken by the United States pursuant to the Convention are already covered by existing law,” and that “additional implementing legislation will be needed only with respect to article 5, dealing with areas of criminal jurisdiction” providing punishment for acts of torture occurring outside the U.S.). Indeed, according to Judge Sofaer, the Bush Administration did not intend to deposit the instrument of ratification for CAT until after Congress enacted legislation implementing that particular obligation. *See* Sofaer Statement, *supra* note 93 at 12. This is, in fact, what actually happened; the U.S. instrument of ratification was not

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

By 1995 some legislators realized their mistake, and efforts to enact implementing legislation for Article 3 began.¹⁰⁵ The precise form that the legislation should take was the subject of disagreement, however. In 1997, the Senate passed a bill with strong language that would have imposed a straightforward statutory prohibition against *refoulement*, applicable to the United States government as a whole.¹⁰⁶ But the House version of the legislation merely included hortatory language purporting to establish *non-refoulement* as the “policy” of the United States.¹⁰⁷ During the conference to resolve these and other differences, the conferees reconciled the competing approaches by combining the House’s policy statement with a watered-down version of the Senate’s prohibitory language pursuant to which “appropriate agencies” would be obliged to enact “regulations to implement” Article 3.¹⁰⁸

This language became law in 1998 in the form of § 2242 of the Foreign Affairs Reform and Restructuring Act, Fiscal Years 1998 and 1999 (“FARRA”).¹⁰⁹ Section 2242(a) is the policy statement:

deposited until 1994, after Congress enacted implementing legislation specific to Article 5. See 18 U.S.C. §§ 2340-2340B.

¹⁰⁵ See, e.g., H.R. 1561, § 2662, 104th Cong., 1st Sess., 141 Cong. Rec. H5191-02 (May 17, 1995) (funding prohibiting); H. REPT. 104-478, 104th Cong., 2nd Sess., 142 Cong. Rec. H1987-06 (Mar. 8, 1996) (explaining that H. Res. 1561 would “partly implement” CAT); H.R. 1416, 104th Cong., 1st Sess., (Apr. 15, 1995) (direct ban on refoulement); S. 1058, § 2, 104th Cong., 1st Sess., (July 21, 1995) (recognizing lack of implementation); *id.* § 4 (direct ban on *refoulement*).

¹⁰⁶ See S. 903, § 1606, 105th Cong., 1st Sess., June 17, 1997, 143 Cong. Rec. S5738-02, available at 1997 WL 328991 (providing that the “United States shall not expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are *reasonable* grounds for believing the person would be in danger of subjection to torture”) (emphasis added). By using the words “reasonable grounds,” in fact, S. 903 would have been more demanding than the more-likely-than-not standard of Article 3-as-ratified.

¹⁰⁷ See H. R. 1757, § 1702, 105th Cong., 1st Sess., June 4, 1997, 143 Cong. Rec. H3291-02, available at 1997 WL 297810 (stating that “[i]t shall be the *policy* of the United States that the United States shall not expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing that the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States”) (emphasis added).

¹⁰⁸ See Conf. Rep. on H.R. 1757, Foreign Affairs Reform and Restructuring Act, 105th Cong., 2nd Sess., March 10, 1998, 144 Cong. Rec. H956-01, available at 1998 WL 101413. The language adopted by the conferees actually had been adopted by the Senate previously, in November 1997, in connection with amendments to H.Res. 2607, an omnibus authorization package. See 143 Cong. Rec. S12315-02, Nov. 9, 1997, available at 1997 WL 696153. When the House disagreed with these amendments, the Senate receded and the package became law without reference to the Article 3 issue. See Pub. L. 105-100.

¹⁰⁹ FARRA appears as Title XXII to the 1998 omnibus emergency appropriations bill enacted as Pub. L. 105-277. See Pub. L. 105-277, div. G, subdiv. B, title XXII, §§ 2001

“[i]t shall be the *policy* of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”¹¹⁰

Section 2242(b) is the regulatory mandate:

“Not later than 120 days after the date of enactment of this Act [Oct. 21, 1998], the heads of the *appropriate agencies shall* prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.”¹¹¹

b. Pentagon Regulations?

In response to the regulatory mandate of § 2242(b), the Justice Department promulgated regulations implementing the *non-refoulement* rule in connection with removal proceedings¹¹² and the State Department did the same with respect to extradition proceedings.¹¹³ There is no evidence that anyone at the time thought that other government agencies

et seq., Oct. 21, 1998, 112 Stat. 2681–822. It is codified in the notes following 8 U.S.C. § 1231.

¹¹⁰ Section 2242(a) (emphasis added). As a mere statement of “policy,” § 2242(a) cannot be construed as creating enforceable rights. *See Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 455 (finding no intent to create judicially-enforceable rights in 42 U.S.C. § 1996, which purported to establish a “policy of the United States to protect and preserve for American Indians” certain expressive and religious rights).

¹¹¹ Section 2242(b) (emphasis added).

¹¹² *See* 8 C.F.R. §§ 208.16-208.18 (implementing *non-refoulement* safeguards in the context of removal proceedings under the immigration laws, for purposes of the Department of Homeland Security); 8 C.F.R. §§ 1208.16-1208.18 (same, for purposes of the Executive Office of Immigration Review at the Justice Department). For ease of reference, I will continue to refer simply to the Justice Department despite the partial transfer of immigration law responsibilities to the Department of Homeland Security. For an overview of immigration law practice under the CAT regulations, see James Feroli, *Trends in Decisions Under the Convention Against Torture*, IMMIGRATION BRIEFINGS, No.05-5 (May 2005).

¹¹³ *See* 22 C.F.R. §§ 95.1-95.4 (same, for purposes of State Department determinations in the context of extradition proceedings).

ought to do likewise, still less that the Defense Department should.¹¹⁴ But Congress had not limited the mandate of § 2242(b) to the removal and extradition scenarios. Rather, § 2242(b) applies to all “appropriate agencies” of the government without reference to the particular mechanism of international transfer involved.¹¹⁵ In this respect, § 2242(b) tracks Article 3, which concerns the actions of the government as a whole rather than any particular instrumentality thereof.

Of course, the fact that the Pentagon did not respond to § 2242(b) by promulgating regulations is understandable. Particularly in light of the views discussed above concerning non-extraterritoriality, it does not seem that anyone in the 1990s anticipated a scenario in which the military would become involved in international transfers of persons from territory over which the U.S. exercised sufficient control to implicate CAT obligations.¹¹⁶ Post-9/11 developments such as *Rasul*, however, have led to precisely that situation at GTMO. The Defense Department thus may not have been an “appropriate agency” at the time § 2242(b) became law, but it has unwittingly become one since.¹¹⁷

If this is correct, what does it mean for the detainees? It may mean that they have the right under the Administrative Procedure Act (“APA”) to compel the Defense Department to meet its regulatory obligations under § 2242(b).¹¹⁸

APA § 706(1) provides that a reviewing court may “compel agency action unlawfully withheld or unreasonably delayed.”¹¹⁹ APA §

¹¹⁴ *But see* Executive Order 13107, Implementation of Human Rights Treaties § 4 (establishing the Interagency Working Group on Human Rights (including representatives of the Defense Department and the Joint Chiefs of Staff) to facilitate compliance with obligations under treaties including CAT).

¹¹⁵ FARRA § 2242(b).

¹¹⁶ This explains the statement by Professor Yoo in his article on transfers – written before the Supreme Court ruled in *Rasul* – to the effect that CAT “does not apply extraterritorially” and “[t]hus, the Department of Defense was not required to promulgate regulations with respect to military transfers.” *Supra* note 7, at 1231 n. 207.

¹¹⁷ The *Charming Betsy* canon of statutory interpretation provides additional support, albeit perhaps a bit indirect, for this conclusion. The *Charming Betsy* canon suggests that courts should “construe acts of Congress to avoid violations of international law whenever possible.” Wuerth, *supra* note 3, at 298. Here, the relevant international law provision is the Article 3 *non-refoulement* obligation, which at least as a matter of international law applies to the U.S. government as a whole. Construing § 2242(b) to refer only to a subset of U.S. government agencies involved in international transfers arguably would not necessarily violate the treaty, but it would be in tension with it. *Cf. Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1014 (9th Cir. 2000) (invoking *Charming Betsy* canon in the course of construing § 2242(b) as imposing a non-discretionary duty on the Secretary of State in extradition proceedings).

¹¹⁸ *See* 5 U.S.C. §§ 551-559, 701-706. It is important to grasp that the existence of this APA claim does not turn in any way on the question of whether CAT has been implemented; it is simply a question of the APA implications of a federal statute that mandates government agencies to promulgate regulations.

¹¹⁹ APA § 706.

702 clarifies that a “person suffering legal wrong because of agency action [defined to include the ‘failure to act’]¹²⁰, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to seek judicial relief thereof.”¹²¹ Thus, assuming that the detainees have a cognizable interest in the promulgation of regulations to implement the *non-refoulement* rule, § 702 establishes a cause of action to present a § 706(1) claim. Under APA § 703, moreover, detainees also may use habeas corpus as a procedural vehicle for asserting such a claim.¹²²

The Defense Department might respond by citing provisions of APA § 701 and § 702 which state that the APA does not override prohibitions on judicial review imposed by other statutes.¹²³ After all, as discussed in more detail below, FARRA § 2242 contains language purporting to limit judicial review of *refoulement* decisions in certain contexts, and also precludes review of the regulations that agencies do promulgate.¹²⁴ But the careful phrasing of these limitations does not extend to an agency’s failure to promulgate regulations in the first place,¹²⁵ and thus it appears that detainees could in fact mount an APA challenge.

Whether they would succeed in such a challenge is another matter. “Section 706(1) is rarely used successfully,” one treatise observes, because of the difficulty in determining when agency delay is unreasonable in light of the complexity associated with “an agency’s process of setting its agenda and allocating its resources among competing tasks.”¹²⁶ In an effort to come to grips with that complexity and thus identify undue delay, the D.C. Circuit employs a multifactor

¹²⁰ APA § 551(13).

¹²¹ APA § 702.

¹²² APA § 703.

¹²³ See APA § 701(a)(1) (judicial review not available if barred by statute in issue); § 702 (stating that “nothing herein . . . affects other limits on judicial review”). The government might also contend that APA § 551(1) excludes certain activities from the definition of “agency,” including: “(F) courts martial and military commissions;” and “(G) military authority exercised in the field in time of war or in occupied territory.” Clearly § 551(1)(F) applies to APA challenges directed at the military commission process. But the transfer issue of course is distinct from that process. So the question is whether § 551(1)(G) applies. Because GTMO is not occupied territory, the specific issue is whether GTMO transfers take place under the rubric of “[1] military authority [2] exercised in the field [3] in time of war”. Elements [1] and [3] may be met, but not [2]; decisions made with respect to GTMO transfers are not made “in the field.” Accordingly, the Defense Department is an “agency” within the meaning of the APA for purposes of the GTMO transfer issue.

¹²⁴ See § 2242(d), discussed *infra*.

¹²⁵ It also is probable that § 2242(d) fails to exclude habeas corpus review, as discussed in more detail below.

¹²⁶ RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* (4th ed.2004), at 224-25.

balancing test.¹²⁷ Relevant considerations include: whether the amount of delay comports with a “rule of reason”; whether Congress has specified a timetable for action; whether the interests at stake involve “human health or welfare”; whether compulsory action might prejudice a “higher or competing priority”; and the nature of the interests that would be prejudiced by delay.¹²⁸

Applied to the *non-refoulement* issue presented at GTMO, it appears that these factors tilt the balance somewhat in the direction of the detainees. Two considerations stand out. First, the individual interests here at stake, associated with potential physical and mental harm, are highly significant. Second, perhaps in recognition of the magnitude of these interests, Congress imposed a tight 120-day deadline on promulgation of regulations when it first enacted FARRA § 2242(b). For the reasons noted above, it is wholly understandable that the Defense Department initially did not view itself as subject to this obligation, and so it would not be fair to suggest that the Pentagon is *years* behind in complying with its obligation. At the same time, however, it has been apparent at the very least since early 2005 – when the first wave of GTMO transfer litigation began – that transfers present *non-refoulement* questions. It thus seems that a § 706(1) claim might result in a court order confirming the Defense Department’s responsibility to promptly promulgate regulations pursuant to FARRA § 2242(b).

Would such an order make any practical difference? It might. APA § 705 specifies that “to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process . . . to preserve status or rights pending conclusion of the review proceedings.”¹²⁹ If a reviewing court were to conclude that the Defense Department has an obligation to promulgate *non-refoulement* regulations under § 2242(b), it might act under § 705 to ensure that in the interim detainees are not transferred in violation of the more-likely-than-not standard. Then again, as I discuss in Part II.B.4 below, the military already requires compliance with the more-likely-than-not standard as a matter of policy with respect to GTMO transfers, and thus a court might conclude instead that the government may continue as before so long as it adheres to this policy.

At the end of the day, it seems, the more important question is not whether the military is carrying out transfers pursuant to policy or regulation, but whether the resulting decisions fairly reflect the more-likely-than-not standard. And that raises the issue of whether and to what extent judges may review these determinations.

¹²⁷ *Id.* at 225 (citing Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (hereinafter “TRAC”).

¹²⁸ TRAC, 750 F.2d at 79-80. Additionally, there is no requirement of “impropriety lurking behind agency lassitude” in order to find unreasonable delay. *Id.*

¹²⁹ APA § 705.

c. Precluding Judicial Review

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

“nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).”¹³⁰

Relying on this language, courts initially declined to review *non-refoulement* determinations outside the specified context of final orders for removal.¹³¹ A difficult question soon arose, however, with respect to whether the language of § 2242(d), express as it was, sufficed to preclude individuals from raising *non-refoulement* issues via habeas corpus.

In 2000, a divided Ninth Circuit panel held in an extradition case, *Cornejo-Barreto v. Seifert* (“*Cornejo-Barreto I*”), that § 2242(d) did not preclude habeas review of the Secretary of State’s Article 3 determination because the statute lacks a sufficiently clear statement of Congressional intent to preclude such review.¹³² After all, the language in § 2242 preventing review of CAT regulations (i.e., “no court shall have jurisdiction”) speaks broadly in terms of jurisdiction-*stripping*, whereas the language regarding review of the actual *non-refoulement* determination itself (i.e., “nothing in this section shall be construed as providing any court jurisdiction”) speaks more narrowly in terms of not *creating* jurisdiction. The next year, moreover, this view received indirect but substantial support from the Supreme Court, which held in

¹³⁰ FARRA § 2242(d). *See also* Conf. Rep. on H.R. 1757, *supra* note 98 (stating that “[t]he provision agreed to by the conferees does not permit for judicial review of the regulations or of most claims under the Convention”).

¹³¹ *See, e.g., Akhtar*, 123 F. Supp.2d at 196-97 (discussing the limited nature of judicial review under FARRA § 2242); *Sandhu v. Burke*, No. 97 Civ. 4608 (JGK), 2000 U.S. Dist. Lexis 3584 at *32 (S.D.N.Y. Feb. 10, 2000) (holding that “nothing in [FARRA] confers authority upon the judiciary to enforce [CAT’s] provisions . . . nothing in the policy makes Article 3 of the Convention enforceable in Court”).

¹³² *See* 218 F.3d 1004, 1015-16 & n.13 (9th Cir. 2000); *id.* at 1017 (Kozinski, *J.*) (disagreeing with this conclusion).

*INS v. St. Cyr*¹³³ that statutes must provide “a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas,” at least where pure questions of law are concerned.¹³⁴ *St. Cyr* dealt with immigration law provisions rather than FARRA § 2242(d), but the decision had clear implications for the latter statute, particularly since the relevant language in § 2242(d) is nearly identical to the immigration law provisions found to be insufficient to preclude habeas review in *St. Cyr*.¹³⁵ Since *St. Cyr*, moreover, five circuits (though not the D.C. Circuit) have had occasion to consider whether § 2242(d) precludes habeas corpus jurisdiction in connection with immigration proceedings other than a final order of removal.¹³⁶ Citing *St. Cyr*, all have held that it does not, and that litigants may rely on habeas to challenge *non-refoulement* determinations in that context.¹³⁷

Do these *St. Cyr*-inspired cases set forth a rule that reaches beyond the immigration law context? Several courts have grappled with this issue in the parallel context of extradition proceedings, with mixed results.¹³⁸ *Cornejo-Barreto I*, discussed above, was an extradition case in which the court found habeas available notwithstanding § 2242(d).¹³⁹ Because the Secretary of State had not yet made an Article 3

¹³³ See 533 U.S. 289 (2001) (examining whether a resident alien could use habeas to challenge the Attorney General’s interpretation of discretionary withholding of deportation, notwithstanding statutory language barring judicial review).

¹³⁴ See *id.* at 314 & n.38. See also Stephen I. Vladeck, *Non-Self-Executing Treaties and the Suspension Clause after St. Cyr*, 113 Yale L. J. 2007 (2004) (anticipating the broad significance of *St. Cyr* for the non-self-execution debate).

¹³⁵ See *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 212-13 & n. 12 (3d Cir. 2003) (side-by-side comparison).

¹³⁶ See *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005) (recognizing habeas jurisdiction to review BIA removal determination with respect to CAT); *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004); *Singh v. Ashcroft*, 351 F.3d 435 (9th Cir. 2003); *Ogbudimkpa*, 342 F.3d 207; *Saint Fort v. Ashcroft*, 329 F.3d 191 (1st Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003).

¹³⁷ Since then, Congress has enacted the REAL ID Act, which among other things amends the immigration laws so as to more clearly consolidate judicial review of removal decisions in most instances to a single petition brought directly to the Circuit Court. See REAL ID Act § 106 (8 U.S.C. §§ 1252(a)(4) & (5)). The impact of these changes on habeas review of CAT determinations currently is the subject of current litigation. See *Malm v. Gonzalez*, No. 01-cf-3159 (D. Md.) (appellant’s brief) (on file with author). See also *Feroli*, *supra* note 112, at 13 (describing potential impact of REAL ID on habeas review of CAT issues in the immigration context).

¹³⁸ Compare *Cornejo-Barreto I*, 218 F.3d at 1015-16, with *Cornejo-Barreto II*, 379 F.3d 1075. See also *Hoxha v. Levi*, 371 F. Supp.2d 651 (E.D. Pa. 2005) (refusing to consider Article 3 claim on habeas in extradition context on ground that Secretary exercises unreviewable discretion in this area).

¹³⁹ *Cornejo-Barreto* sought to use habeas to assert a claim under APA § 704, which permits judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. Under APA § 706, such a decision may be set aside by the reviewing court if it finds that the decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(a).

determination in that case, the court in *Cornejo-Barreto I* ultimately dismissed the petition without prejudice to refiling after that decision was made. Eventually, the Secretary of State did determine that Cornejo-Barreto could be extradited consistent with Article 3. At that point, Cornejo-Barreto re-filed his petition, and ultimately ended up back before the Ninth Circuit. In *Cornejo-Barreto II*,¹⁴⁰ a different Ninth Circuit panel acknowledged the ruling in *St. Cyr* and the various circuit court decisions that applied its superclear-statement requirement to § 2242(d) in the context of immigration proceedings, but found them all distinguishable on the ground that in the extradition context, the “rule of non-inquiry” traditionally ensured that the Secretary would have sole discretion to determine whether humanitarian considerations (such as the risk of abuse at the hands of the receiving state) warranted denial of an extradition request. In the view of the panel in *Cornejo-Barreto II*, nothing in FARRA altered this traditional rule, and in fact the language of § 2242(d) suggested a congressional intent *not* to change it.¹⁴¹

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

Assuming that the same logic applies by extension in the GTMO transfer context¹⁴² – and surely review in that context would be at least as deferential, if not more so – the next issue concerns the nature and scope of the review that results.¹⁴³ *St. Cyr* had emphasized that habeas in that instance was being used merely to enable a court to adjudicate a pure

¹⁴⁰ 379 F.3d 1075 (9th Cir. 2004), *vacated as moot*, 389 F.3d 1307 (2004).

¹⁴¹ 379 F.3d at 1088-89.

¹⁴² The diplomatic concerns identified by the government during the first wave of GTMO transfer litigation are similar in kind, albeit greater in magnitude, to those involved in the rule of non-inquiry. *See infra*.

¹⁴³ *See, e.g.,* Mironescu v. Costner, 345 F. Supp.2d 538, 549-50 (M.D.N.C. 2004) (describing uncertainty concerning the scope of habeas review in FARRA context); Abra Edwards, *Cornejo-Barreto Revisited: The Availability of a Writ of Habeas Corpus to Provide Relief from Extradition under the Torture Convention*, 43 VA. J. INT’L L. 889, 906 (2003) (same).

question of law (i.e., whether changes to the immigration laws in 1996 should be applied retroactively). The subsequent decisions applying *St. Cyr* in the context of *non-refoulement* issues raised in immigration proceedings, however, appear to go a step further. These cases involved noncitizens whose CAT arguments did not succeed with the Board of Immigration Appeals (“BIA”), and who were attempting to use habeas to persuade the courts to review the BIA’s determination that they had failed to meet the more-likely-than-not standard. In each of these cases the court was careful to deny that it would be proper to reevaluate a fact-finding, characterizing its role instead as a review of the application of law to the facts.¹⁴⁴ That said, in each case the court approached the review deferentially, and ultimately concluded that the BIA had not erred in its determination.¹⁴⁵

If the same approach is employed during habeas review of a *non-refoulement* determination in the GTMO transfer context, what result might follow? I address this question in the next section.¹⁴⁶

4. Habeas Review & Diplomatic Assurances

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

¹⁴⁴ See, e.g., *Auguste*, 395 F.3d at 138 (stating that habeas review “is limited to constitutional issues and errors of law, including both statutory interpretations and application of law to undisputed facts or adjudicated facts, but does not include review of administrative fact findings or the exercise of discretion”); *id.* at 150 (same).

¹⁴⁵ See *supra* note 136.

¹⁴⁶ A question might also arise with respect to FARRA § 2242(c), which states that in promulgating regulations, the agencies “shall exclude” those “aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act,” to “maximum extent consistent with the obligations of the United States” under CAT. The referenced language refers to, among other things, aliens whom the Attorney General reasonably believes to pose a security threat. See 8 U.S.C. § 1231(b)(3)(B)(iv). Naturally, the Defense Department might view this as excluding GMTO detainees from the implementation of Article 3. Such an argument most likely would not be consistent with Article 3, however, given that Article 3 contains no such exclusions. By expressly requiring agencies to remain consistent with Article 3 when promulgating regulations, Congress in § 2242(c) effectively precluded the agencies from overriding the *non-refoulement* rule despite the reference to INA § 241(b)(3)(B). This may explain why the extradition regulations do not take up the invitation of § 2242(c), and why the removal regulations do so only in the sense that they provide deferral of removal – i.e., continued incarceration pending an opportunity to remove consistent with *non-refoulement* – for such aliens. See 8 C.F.R. § 208.17; 8 C.F.R. § 1208.17. The Justice Department approach to reconciling the tension inherent in § 2242(c) most likely marks the outer boundary of what the Defense Department can achieve under that subsection if and when it implements its own CAT regulations.

a. Current Defense Department Policy

Although the Defense Department does not necessarily accept that as a matter of domestic law it is bound by Article 3 and § 2242(b) in the sense described above, it nonetheless has stated that “it is the *policy* of the United States, consistent with Article 3 of [CAT], not to repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured.”¹⁴⁷ Indeed, it has refused to repatriate a group of Chinese and Uzbek Uighur detainees at GTMO, despite determining that the men are no longer enemy combatants, on the ground that the men cannot be repatriated consistent with this policy; as of October 2005, the men remain at GTMO while the State Department seeks a third country willing to take them.¹⁴⁸ Given that the U.S. has repatriated other detainees to states with poor human rights records, however, questions do arise about the nature of the current *non-refoulement* policy.

We have some insight into the specifics of that policy, thanks to a pair of declarations submitted by government officials in connection with the first wave of GTMO transfer litigation. According to Deputy Assistant Secretary of Defense Matthew C. Waxman, the decision to transfer a GTMO detainee ultimately is made by the Secretary of Defense or his designee after “appropriate assurances regarding the detainee’s treatment are sought from the country to whom the transfer of the detainee is proposed.”¹⁴⁹ That process, in turn, is described in detail by the State Department’s Ambassador-at-Large for War Crimes Issues, Pierre-Richard Prosper.¹⁵⁰

Upon request from the Defense Department, Prosper explains, “my office would initiate transfer discussions with the foreign

¹⁴⁷ See, e.g., *Abdah v. Bush*, No. 04-1254 (HHK) (D.D.C. Mar. 8, 2005) (docket # 116) (declaration of Deputy Assistant Secretary of Defense Matthew Waxman), para. 3; Letter from State Department Legal Adviser William H. Taft IV to Mr. Christopher Girod, ICRC, May 11, 2004 (stating that the the United States operates under a law of war framework regarding GTMO detainees, but that U.S. policy is not to transfer where it is more likely than not that the individual will be tortured). Identical declarations by Mr. Waxman have been filed in most, if not all, of the GTMO transfer cases. See Table A, *supra* note 19. The existence of a policy-based procedure does not render moot the APA argument for promulgation of regulations, described above. First, so long as the procedure is a mere product of policy, the Executive branch as the option of opting out of the policy in a particular case or even abandoning it altogether. Second, establishing that the Defense Department falls within the § 2242(b) mandate, at least in this context, provides the basis for habeas review of decisions in particular cases.

¹⁴⁸ See Wright & White, *supra* note 18; Northam, *supra* note 20.

¹⁴⁹ Waxman Dec., *supra* note 147, at 3.

¹⁵⁰ See Prosper Dec., *Abdah v. Bush*, No. 04-1254 (HHK) (D.D.C.), Mar. 8, 2005. Identical Prosper declarations also have been filed in most if not all transfer cases. See Table A, *supra* note 19.

government concerned.”¹⁵¹ The purpose of these discussions is two-fold: “to learn what measure the receiving government is likely to take to ensure that the detainee will not pose a continuing threat to the United States or its allies and to obtain appropriate transfer assurances.”¹⁵² Although the particular assurances sought depend on the situation, “assurance of humane treatment” and of compliance with “international obligations” are sought “in every transfer case in which continued detention by the government concerned is foreseen.”¹⁵³ Where the receiving state is not a party to CAT, or where “other circumstances warrant,” the State Department “pursues more specific assurances.”¹⁵⁴

According to Prosper, the “essential question in evaluating foreign government assurances is whether the competent Department of State officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred.”¹⁵⁵ This determination is made “at senior levels through a process involving Department officials most familiar with international legal standards and obligations and the conditions in the countries concerned.”¹⁵⁶ The offices involved include the Office of War Crimes Issues, the Office of the Legal Adviser, the Bureau of Democracy, Human Rights, and Labor, and the “relevant regional bureau,” country desk, or embassy.¹⁵⁷ The inquiry considers “matters such as human rights, prison conditions, and prisoners’ access to counsel,” both “in general and as they may apply to a particular case.”¹⁵⁸

When “evaluating the adequacy of any assurances,” the State Department considers a range of factors. First, officials “consider the identity, position, or other information concerning the official relaying the assurances.”¹⁵⁹ Second, officials take into account “political and legal developments in the foreign country” in order to “provide context for the assurances provided.”¹⁶⁰ Third, “officials may also consider U.S. diplomatic relations with the country concerned,” a factor that would include the “foreign government’s incentives and capacities to fulfill its assurances to the United States, including the importance to the government concerned of maintaining good relations and cooperation

¹⁵¹ *Id.* at 3.

¹⁵² *Id.* at 3-4.

¹⁵³ *Id.* at 4.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 5.

¹⁵⁶ *Id.* at 4.

¹⁵⁷ *Id.* at 4-5.

¹⁵⁸ *Id.* at 4.

¹⁵⁹ *Id.* at 5.

¹⁶⁰ *Id.*

with the United States.”¹⁶¹ Fourth, officials in some instances consider whether to seek “assurance of access by governmental or non-governmental entities in the country concerned to monitor the condition of the individual, or of U.S. Government access to the individual for such purposes.”¹⁶² If in light of these considerations concerns “cannot be resolved satisfactorily, we have in the past and would in the future recommend against transfer.”¹⁶³

One may assume that if the Defense Department were to be obliged to promulgate regulations pursuant to § 2242(b), it might simply codify these procedures. In all likelihood, therefore, a decision to transfer a GTMO detainee notwithstanding fear-of-torture concerns would in at least some instances depend on the use of diplomatic assurances.¹⁶⁴

b. Diplomatic Assurances

The practice of relying on diplomatic assurances to allay torture concerns did not originate with GTMO transfers. On the contrary, diplomatic assurances have long been available to overcome Article 3 objections in both the extradition and removal contexts.¹⁶⁵ Indeed, the

¹⁶¹ *Id.* Prosper does not mention the possibility that this same consideration could run the other direction, in the sense that the U.S. may likewise have incentives related to the need for continued cooperation in other spheres.

¹⁶² *Id.* at 6.

¹⁶³ *Id.* See also Waxman Dec., *supra* note 147, at 4 (stating that “[c]ircumstances have arisen in the past where the Department of Defense elected not to transfer detainees to their country of origin because of torture concerns”).

¹⁶⁴ See also Second Periodic Report of the United States of America to the Committee Against Torture, Annex I, Part 1(2)(E), (May 6, 2005) (stating that “[i]f a case were to arise in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government unless the concerns were satisfactorily resolved,” and that “[c]ircumstances have arisen in the past where the Department of Defense elected not to transfer detainees to their country of origin because of torture concerns”), available at <http://www.state.gov/g/drl/rls/45738.htm>; Letter from William J. Haynes II to Senator Patrick Leahy (June 25, 2003) (stating that U.S. “policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country”), available at <http://hrw.org/press/2003/06/letter-to-leahy.pdf>; Letter from William J. Haynes II to Kenneth Roth, Executive Director of Human Rights Watch (Apr. 2, 2003) (same), available at <http://www.hrw.org/press/2003/04/dodltr040203.pdf>.

¹⁶⁵ The extradition regulations do not mention diplomatic assurances, but then again they mention almost nothing about required procedures. See 22 C.F.R. §§ 95.1-95.4. The use of diplomatic assurances in the extradition context has been described, however, by a State Department attorney during litigation of a CAT issue. See *Cornejo-Barreto v. Seifert*, No. 01-cv-662 (AHS) (Declaration of Samuel M. Witten, Assistant Legal Adviser for Law Enforcement and Intelligence, Office of the Legal Adviser, Dep’t of State) (hereinafter “Witten Dec.”), available at <http://www.state.gov/documents/organization/16513.pdf>. According to the federal public

removal regulations specifically provide for their use: “The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.”¹⁶⁶ In such a case, the Attorney General is then to consult with the Secretary of State in order to determine “whether the assurances are sufficiently reliable to allow the alien’s removal to that country consistent with Article 3 of [CAT].”¹⁶⁷

At the time this language was adopted in 1999, the concept of seeking diplomatic assurances in the removal context to assuage Article 3 concerns was thought by at least some senior immigration officials to be a significant step forward for human rights protections.¹⁶⁸ Particularly in the wake of revelations about the CIA’s extraordinary rendition program, however, critics today contend that diplomatic assurances at least in some contexts are mere formalities designed to enable both the transferring and receiving state to maintain a pose of support for human rights without actually interfering with international transfers.¹⁶⁹

Human Rights Watch (“HRW”), for example, has published a pair of lengthy reports that summarize the fundamental criticisms of diplomatic assurances.¹⁷⁰ These criticisms boil down to the following

defender involved in that case, the government did not actually assert at any point in that litigation that it in fact had obtained such assurances. *See* Telephone conversation with Craig M. Wilke, Federal Public Defender, Central District of California, Aug. 10, 2005. Notably, the Witten Declaration is almost identical, in relevant passages, to the declaration Ambassador Prosper provided in connection with the GTMO transfer litigation.

¹⁶⁶ 8 C.F.R. § 208.18(c)(1); 8 C.F.R. § 1208.18(c)(1).

¹⁶⁷ *Id.* § 208.18(c)(2). The regulations permit delegation to the Deputy Attorney General or Commissioner, Immigration and Naturalization Service, but nothing further. *See id.*

¹⁶⁸ Conversation between the author and Bo Cooper, former General Counsel of the INS, 1999 to 2003.

¹⁶⁹ *See, e.g.*, Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005; Human Rights Watch, “Empty Promises:” *Diplomatic Assurances No Safeguard against Torture*, Apr. 24, 2004; Hawkins, *supra* note 29; Testimony of Wendy Patten, U.S. Advocacy Director for Human Rights Watch, to the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, May 17, 2005.

¹⁷⁰ *See* *Still at Risk*, *supra* note 169. HRW’s *Still at Risk* report cites several other prominent critics, including Alvaro Gil-Robles, the Council of Europe’s Commissioner for Human Rights, *see* Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, Apr. 21-23, 2004, Council of Europe, CommDH(2004) 13, July 8, 2004 (arguing that diplomatic assurances should not be accepted from a state that condones torture), *available at* [http://www.coe.int/T/E/Commissioner_H_R/Communication_Unit/Documents/pdf.CommDH\(2004\)13_E.pdf](http://www.coe.int/T/E/Commissioner_H_R/Communication_Unit/Documents/pdf.CommDH(2004)13_E.pdf); Theo van Boven, Report of the Special Rapporteur on Torture to the General Assembly, Aug. 23, 2004 (same) [**cite may be: (A/59/324)**]; Interview with Manfred Nowak, BBC Radio 4, *Today Programme*, Mar. 4 (same), *available at* http://www.bbc.co.uk/radio4/today/listenagain/zfriday_20050304.shtml; Robert K.

considerations. First, assuming that the receiving state makes systematic use of torture in violation of its international obligations, there is substantial reason to doubt that the state will feel obliged to abide by promises made in the context of mere diplomatic assurances.¹⁷¹ Second, there also is substantial reason to doubt that compliance-monitoring mechanisms – such as arranging for periodic visits to the detainee by the ICRC or diplomats – will succeed in detecting abuse.¹⁷² Detainees understandably may be reluctant to reveal such abuse for fear of retaliation, and non-experts in some instances will be unable to detect signs of abuse.¹⁷³ Third, even in the event that non-compliance is detected, there are no mechanisms in place to impose accountability.¹⁷⁴ Enforcement would depend on the U.S. deciding to take retaliatory action in another context, a step which in many instances the U.S. may be reluctant to take because of offsetting concerns in the relationship with the receiving state.¹⁷⁵ The HRW reports reinforce these concerns, moreover, with detailed accounts of the torture allegedly suffered by individuals who were transferred on the basis of diplomatic assurances, with a particular emphasis on the much-reported case of Maher Arar.¹⁷⁶ HRW thus concludes that “countries that rely on such assurances are either engaging in wishful thinking or using the assurances as a figleaf to cover their complicity in torture and their role in the erosion of the international norm against torture.”¹⁷⁷

c. Reviewing Diplomatic Assurances

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

The answer to the first question appears to be no. CAT itself has little to say about the mechanics of determining whether a person is likely to be tortured if transferred, and does not speak at all to the diplomatic assurances issue, let alone forbid their use. Article 3(2)

Goldman, U.N. Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, E/CN.4/2005/103, Feb. 7, 2005, at 19 (criticizing reliance on diplomatic assurances on numerous grounds), available at

<http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.103.pdf>.

¹⁷¹ See Still at Risk, *supra* note 169, at 5.

¹⁷² *Id.* See also Goldman, *supra* note 170, at para. 56-57.

¹⁷³ See Still at Risk, *supra* note 169, at 5. See also Goldman, *supra* note 170, at 56-57.

¹⁷⁴ See Still at Risk, *supra* note 169, at 6.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* at 33-36.

¹⁷⁷ *Id.* at 3.

begins with a cursory statement to the effect that the *non-refoulement* decision is to be made by “competent authorities.”¹⁷⁸ After articulating the uncontroversial proposition that the decisionmaker should “take into account all relevant considerations,” Article 3(2) concludes by simply noting that these considerations need not all be specific to the individual but may include “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”¹⁷⁹ Beyond these bare-bones specifications, the logistics of the *non-refoulement* determination are left by CAT to be developed by domestic law.¹⁸⁰ FARRA takes up this invitation, but adds nothing that would prohibit a government agency from considering diplomatic assurances as part of the *non-refoulement* determination. Thus, as even some critics have conceded,¹⁸¹ it appears that as a general rule the Defense Department would be free to rely on diplomatic assurances in connection with *non-refoulement* determinations.¹⁸²

¹⁷⁸ CAT Art. 3(2). Reflecting the then-prevailing view that Article 3 issues would tend to arise in the context of extradition and removal proceedings, the Reagan Administration initially proposed a declaration to the effect that “competent authorities” refers to the Secretary of State in cases of extradition and the Attorney General in cases of deportation. *See supra* note 46, at 7 (emphasis added). The Bush Administration subsequently dropped this proposal on the ground that it was unnecessary since Article 3(2) left the issue in the hands of domestic law. *See Exec. Rep. No. 101-30, supra* note 94.

¹⁷⁹ CAT Art. 3(2).

¹⁸⁰ The United States is far from alone in relying on diplomatic assurances to deflect fear-of-torture concerns. The HRW report described previously relates examples of this practice also by Canada, Sweden, the United Kingdom, the Netherlands, Austria, and Turkey. *See Still at Risk, supra* note 169, at 47-79. This extensive state practice precludes any argument that there may be a customary international law norm against reliance on diplomatic assurances in the context of *non-refoulement*. *See also* Alan Travis, “Clarke Confronts Judges on Terror Law,” *The Guardian*, Sep. 7, 2005 (describing UK’s reliance on diplomatic assurances – in the form of a “memorandum of understanding” – to facilitate deportation of noncitizens on incitement-to-terrorism grounds), available at <http://politics.guardian.co.uk/terrorism/story/0,15935,1564186,00.html>.

¹⁸¹ *See, e.g., id.* at 40 (observing that “current U.S. law” permits reliance “on the simplest and vaguest of promises from governments that routinely violate the law”). *Cf.* U.N. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Report of the Sub-Commission Under Commission on Human Rights Resolution 8 (XXIII), E/CN.4/Sub.2/2005/L.12 (Aug. 4, 2005) (accepting the use of diplomatic assurances to assuage torture concerns, but urging that the assurances provide for periodic visits to the transferee, with the possibility of medical exams and private interviews).

¹⁸² *Cf. Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. No. CAT/C/34/D/233/2003 (2005), available at www1.umn.edu/humanrts/cat/decisions/233-2003.html (opinion by the U.N. Committee Against Torture arguing that diplomatic assurances do “not suffice to protect against” an otherwise-existing risk of torture where the assurances do not include a “mechanism for their enforcement”). It bears noting that Representative Ed Markey has introduced a bill that would prohibit reliance on diplomatic assurances to assuage fear-of-torture concerns, at least in some circumstances.

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

Unless and until Congress elects to become involved in this area,¹⁸³ the contours of such review are not likely to please either the detainees or the government. On one hand, habeas review of CAT issues in more conventional contexts such as removal already involves considerable deference to Executive branch decisionmakers, and when the same issue arises in the GTMO transfer context – involving much more sensitive issues of foreign policy and diplomacy – the case for deference is stronger.

On the other hand, individualized review would be meaningless if the court did not take into account the particulars of the assurances provided with respect to a detainee. Generalized descriptions of the diplomatic assurance process as a whole, such as that provided by Ambassador Prosper in connection with the first wave of GTMO transfer litigation, provide little if any basis for determining whether the *non-refoulement* standard has been met in a specific case.¹⁸⁴ In this respect, it should be noted that in connection with ongoing habeas litigation on behalf of the Chinese and Uzbek Uighur detainees mentioned earlier, the district judge has required the government (in the person of Ambassador Prosper) to provide *in camera* briefings regarding the specific details of diplomatic negotiations regarding the prospect of a transfer.¹⁸⁵ Meaningful review of a GTMO Article 3 determination, even if highly deferential, would seem to require the same degree of individualized inquiry.

In light of the foregoing discussion, it appears that CAT Article 3 does apply with respect to GTMO transfers, and that there is a role, however limited, for federal judges to play in reviewing how the *non-*

See H.R. 952; Press Release, Congress Says No to Torture But Still Needs to End the Use of Diplomatic Assurances (June 21, 2005).

¹⁸³ For some preliminary thoughts on useful reforms, see *infra* Part VI.

¹⁸⁴ Ambassador Prosper identifies a range of harms that might follow from “public” disclosure of the details of diplomatic assurances in particular cases, as might follow from an examination of the issue in open court. *See* Prosper Dec., *supra* note 150. It is far from clear, however, that this aspect of the review would have to be conducted so publicly. Insofar as classified information is concerned, for example, the reviewing court might follow the procedures employed in connection with such information during proceedings in the prosecution of Zacarias Moussaoui.

¹⁸⁵ *See* Qassim v. Bush, No. 05-0497 (JR) (D.D.C. Aug. 19, 2005) (order), available at <http://www.dcd.uscourts.gov/opinions/2005/Robertson/2005-CV-497~15:4:20~8-19-2005-a.pdf>; *see also id.* (Aug. 25, 2005) (transcript indicating that an *in camera* briefing would take place after the hearing “at the level of detail that [the government attorney had] been authorized to talk about”) (on file with author).

refoulement obligation is carried out.¹⁸⁶ But is this analysis entirely misplaced in light of the fact that it arises against the backdrop of armed conflict? Some have contended that it is.¹⁸⁷ I turn to that issue now.

III. WHEN IHRL AND IHL BOTH APPLY

The detainees are held at GTMO under color of the President's Article II war powers and the Authorization for Use of Military Force ("AUMF") issued by Congress on September 18, 2001. This implicates the law of war,¹⁸⁸ also known as international humanitarian law ("IHL").¹⁸⁹ And it also raises a question concerning the status of U.S. obligations under CAT in this context. Does the relevance of IHL displace CAT or otherwise alter its impact?

A wartime context might alter international human rights treaty obligations in two distinct ways. First, some treaties have derogation

¹⁸⁶ The International Covenant on Civil and Political Rights ("ICCPR") does not contain an express *non-refoulement* provision comparable to CAT Article 3. Nonetheless, the U.N. Human Rights Committee has on occasion pressed the argument that a *non-refoulement* rule may be gleaned from either Article 2 (addressing the general obligations of parties to ICCPR)¹⁸⁶ or Article 7 (prohibiting torture and cruel, inhuman or degrading treatment or punishment). See General Comment No. 20, 1992. These views are not authoritative. In any event, ICCPR is non-self-executing and its particular provisions have not been implemented by statute. See, e.g., *Sosa v. Alvarez-Machain*, 124 S. Ct. 2767 (2004); but see Halberstam, *supra* note 77 (criticizing this conclusion). Article 33(1) of the 1951 Convention Relating to the Status of Refugees (as amended by the 1967 Protocol Relating to the Status of Refugees) does contain *non-refoulement* language, but the obligation is qualified by an express national security exception. See Convention Relating to the Status of Refugees, Art. 33 (prohibiting return of refugees "where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion"). Even assuming that a GTMO detainee might otherwise qualify for refugee status and thus the benefits of Article 33(1), Article 33(2) states that the "benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is"

¹⁸⁷ See Yoo, *supra* note 7, at 1230-31.

¹⁸⁸ The context of armed conflict implicates the law of war in two ways. With respect to the international obligations of the United States, military operations in the context of armed conflict are governed by the law of war. Simultaneously, in the domestic sphere, the meaning of the President's Article II powers and the AUMF are informed at least to an extent by the law of war. See *Hamdi*, 542 U.S. 507. See also Bradley & Goldsmith, *supra* note 3.

¹⁸⁹ The terms law of war, law of armed conflict (LOAC), and international humanitarian law ("IHL") have come to be used interchangeably in recent years to refer to that body of international law that attempts to regulate armed conflict. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. I. L. 239, 239 (2000) ("Although the term 'international humanitarian law' initially referred to the four 1949 Geneva Conventions, it is now increasingly used to signify the entire law of armed conflict."); Robert Cryer, *Book Review: Anthony P.V. Rogers, Law on the Battlefield*, 10 J. Conflict & Sec. Law 121 (2005) (commenting on the distinct viewpoints frequently implied from the use of the varying terms). Some critics deny that

clauses that permit states to opt-out of their obligations during emergencies.¹⁹⁰ Second, some contend that where both an international human rights treaty and IHL address a particular topic, the potential clash between the competing norms should be resolved in favor of IHL. While the U.S. has not invoked the former argument in connection with Article 3,¹⁹¹ there is reason to believe that it may subscribe to the latter position.¹⁹²

Generally speaking, the relationship of IHL to international human rights law (“IHRL”) is the subject of considerable debate and uncertainty.¹⁹³ Some have advanced the view that the two bodies of law

¹⁹⁰ See, e.g., ICCPR Art. 4 (permitting derogation from selected articles during proclaimed emergency threatening the “life of the nation”); Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 Den. J. Int’l L. & Pol. 58 (2002) (discussing ICCPR derogation).

¹⁹¹ CAT Article 2 contains a non-derogation clause specifically forbidding states from derogating from the torture prohibition even during war. Article 3 contains no such clause, but conventional wisdom nonetheless holds that the *non-refoulement* rule also is non-derogable. See, e.g., Robert K. Goldman, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, E/CN.4/2005/103, Feb. 7, 2005, at para. 52; Theo van Boven, Report of the Special Rapporteur on Torture to the General Assembly, Aug. 23, 2004; *Tapia Paez v. Sweden*, U.N. Committee Against Torture, Communication No. 39/1996, views adopted on 28 April 1997, para. 6 (stating that the “nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention”).

¹⁹² See Dennis, *supra* note 60, at 136 (2005) (observing that the United States has contended in litigation that it is the law of war that “covers the detainees,” not international human rights law instruments such as the ICCPR) (citing Appellees’ Brief, *Coalition of Clergy, Lawyers & Professors v. Bush*, No. 02-55367 (9th Cir. 2002), at 45-46); Working Group Memo, *supra* note 72, at 290 (stating that the ICCPR “does not apply to operations of the military during an international armed conflict”). Cf. Yoo, *supra* note 7, at 1230-31 (observing that application of CAT to the “extraterritorial detention of prisoners of war would create an unacceptable conflict with the GPW”). It is unclear whether Professor Yoo would take the same view regarding a detainee clearly within U.S. territory (e.g., Jose Padilla or Ali Saleh al-Marri, both of whom are held as enemy combatants within the U.S. itself). His views may be worthy of particular attention, however, in light of the possibility that his 2004 article reflects the contents of an as-yet unreleased March 13, 2002 memorandum to William J. Haynes, General Counsel, Defense Department, from Jay S. Bybee, Assistant Atty. Gen., Office of Legal Counsel, titled “The President’s Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations (March 13, 2002).” See Letter from Sen. Leahy to Hon. Alberto Gonzalez, Jan. 4, 2005 (describing the March 13 memo), available at <http://leahy.senate.gov/press/200501/010405.html>.

¹⁹³ See, e.g., Dennis, *supra* note 60, at 133 (stating that “there is no clear understanding concerning the precise manner in which the obligations assumed by states under international human rights treaties interact with the *lex specialis* of international humanitarian law”); Memorandum by the Secretariat, International Law Commission, “The Effect of Armed Conflict on Treaties: An Examination of Practice and Doctrine,” A/CN.4/550, Feb. 1, 2005, at 22-24 & n.114 (surveying the literature); Ian Brownlie, Special Rapporteur on the Effects of Armed Conflict on Treaties, International Law Commission, “First Report on the Effects of Armed Conflicts on Treaties,” A/CN.4/552*, Apr. 21, 2005, at 28-29.

are mutually incompatible, that in the context of armed conflict IHL in effect occupies the field and negates obligations imposed by human rights instruments regardless of whether they permit derogation by their own terms.¹⁹⁴ Conversely, some have contended that the restraints imposed by human rights instruments not only apply at all times but also should supersede more permissive restraints imposed by IHL.¹⁹⁵ To the extent that there is a prevailing view, however, it may lie between these extremes.

It helps to begin with a brief discussion of the concept of *lex specialis derogate lex generali*. *Lex specialis* addresses the situation in which two different rules apply to the same subject-matter (without respect to whether the competing rules derive from different sources or a common origin). In such cases, a choice may have to be made as to the priority of the competing rules. Where one rule is more specific than the other, the *lex specialis* rule provides that the more specific rule controls.¹⁹⁶ This can be understood as the specific rule outright displacing the general one, or instead as the two rules being harmonized (in the direction of the more specific rule) through interpretation.¹⁹⁷

¹⁹⁴ See, e.g., Second Periodic Report of the State of Israel to the U.N. Human Rights Committee, CCPR/C/ISR/2001/2, at para. 8 (citing the “well-established distinction between human rights and humanitarian law under international law” and concluding that the Committee’s mandate (tied as it is to the scope of Israel’s ICCPR obligations) “cannot relate to events in the West Bank and Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights”), available at

[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/2cc0a33c394919e0c1256be9002e1188/\\$FILE/G0146480.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/2cc0a33c394919e0c1256be9002e1188/$FILE/G0146480.pdf). Israel also contends that its ICCPR

obligations do not extend to the West Bank and Gaza Strip on non-extraterritoriality grounds. See *id.* But see Concluding Observations of the Human Rights Committee: Israel 21/08/2003, CCPR/CO/78/ISR, at para. 11 (disagreeing with both propositions).

¹⁹⁵ See, e.g., David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 HARV. INT’L L.J. 231, 259-63 (2005) (arguing that the Law of War and IHRL are “fundamentally incompatible with each other,” and that IHRL could just as well be viewed as the *lex specialis* relative to the *lex generalis* of the Law of War); Goldman, *supra* note 170, at para. 22-24 (suggesting that IHRL and the Law of War apply “cumulatively” and “should be interpreted and applied as a whole so as to accord individuals during armed conflicts the most favorable standards of protection”); Summary Report, XXVIIth Round Table on Current Problems of International Humanitarian Law, “International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence,” Nov. 2003, at 9 (noting view of some participants, “strongly criticized” by others, that the rule providing the “highest protection” to the individual should apply in the event of inconsistency).

¹⁹⁶ See Martii Koskeniemi, International Law Commission, Study Group on Fragmentation, “Topic (a): The Function and Scope of the *Lex Specialis* Rule and the Question of ‘Self-Contained Regimes’: An Outline,” at 4, available at http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf. See also International Law Commission, Study Group on Fragmentation Report, at 285 (describing the *lex specialis* rule as “widely accepted” and providing policy arguments in support of it).

¹⁹⁷ Fragmentation Group Report at 287 (asserting that the distinction is not significant).

Famously, the *lex specialis* rule played a critical role when the International Court of Justice considered the relationship of IHL and human rights law in the course of its 1996 advisory opinion *The Legality of the Threat or Use of Nuclear Weapons*.¹⁹⁸ The ICJ first observed that the right against arbitrary deprivation of life found in human rights law was non-derogable even in the context of armed conflict. But that did not make IHL provisions addressing the same issue irrelevant. On the contrary, the ICJ used those IHL concepts to flesh out the meaning of the IHRL standard – arbitrariness – in that context.¹⁹⁹ In short, the ICJ relied on *lex specialis* not to displace a non-derogable human rights norm but, instead, to interpret that norm to conform to the more particular provisions of IHL.²⁰⁰ The same approach also was employed by the Inter-American Court of Human Rights in another much-discussed case, *Abella v. Argentina*.²⁰¹ And although uncertainty remains with respect to whether the *lex specialis* rule applies equally in the converse situation in which the relevant IHL provision is less specific than the relevant human rights law provision,²⁰² some degree of consensus has emerged that harmonization via *lex specialis* is the preferable approach to reconciling the tensions raised when IHL and human rights regimes apply simultaneously.²⁰³

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

IHL does in fact contain a number of rules that limit international detainee transfers in certain circumstances, including rules specifically concerned with potential abuse of detainees on the part of the

¹⁹⁸ International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 257 (July 8, 1996).

¹⁹⁹ See *id.* at para. 25.

²⁰⁰ See *id.*

²⁰¹ Case 11.137, Juan Carlos Abella, et al. v. Argentina (Nov. 18, 1997), Report No. 55/97, reprinted in the Annual Report of the Inter-American Commission on Human Rights (1997), OEA/Ser.L./V/II.98 doc. 6 rev. 13 April 1998, Chapter III.2.E.c., at 161 (relying on the law of war to inform the meaning of arbitrary deprivation of life), available at <http://www.cidh.oas.org/annualrep/97eng/TOC.htm>.

²⁰² See Summary Report, *supra* note 195, at 9 (describing "lively debate" on this topic).

²⁰³ See *id.* (describing the "great majority of the participants" as invoking the approach taken by the ICJ in *Nuclear Weapons*); U.N. Human Rights Committee, General Comment No.31, (2004) (accepting that "more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of [ICCPR] rights") (citing U.N. Human Rights Committee, General Comment No. 29, A/56/40, Annex 6, at para. 3 (July 24, 2001) (similar)); See also Goldman, *supra* note 170, at para. 29-31 (surveying authorities and concluding that they are consistent with the ICJ's approach).

receiving state. A careful examination of these rules that fully accounts for the significant variation in the circumstances of the GTMO detainees suggests, however, that none of these particular rules actually apply to these individuals.²⁰⁴ As a result, the substantive meaning of CAT Article 3 remains unaffected by the wartime context notwithstanding the *lex specialis* rule. I turn now to a discussion of these IHL rules.

IV. IHL AND INTERNATIONAL DETAINEE TRANSFERS

Assuming that GTMO detainees are proper subjects of IHL, it is Geneva Law – governing the treatment of persons who are not combatants and those who once were but who have since become *hors de combat* – that concerns them. The phrase Geneva Law refers to the four Geneva Conventions of 1949, the two 1977 Additional Protocols to these treaties, and related principles of customary international law.²⁰⁵ While the U.S. is not a party to the Additional Protocols of 1977 and does not accept that all their provisions reflect customary international law,²⁰⁶ it is a party to all four of the Geneva Conventions of 1949.²⁰⁷

A. Regarding International Detainee Transfers

The Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949 (“GPW”) contains a provision that speaks directly to the transfer issue. GPW Article 12 prohibits all international transfers of prisoners of war except where two conditions are met: (i) the receiving state also is a party to the Geneva Conventions

²⁰⁴ Whether and to what extent detainees should receive the benefit of other IHL protections is beyond the scope of this article.

²⁰⁵ See, e.g., Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick In Armed Forces in the Field of August 12, 1949, Geneva (“GWS”); Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, Geneva (“GWS Sea”); Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949, Geneva (“GPW”); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Geneva (“GC”).

²⁰⁶ See, e.g., Michael Matheson, 2 AM. U. J. INT’L L & POL. 419 (1987) (statement by State Department Legal Adviser identifying which Protocol I provisions are accepted as customary international law by the U.S.); Memorandum from W. Hays Parks, et al., to Defense Department Assistant General Counsel John H. McNeill, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications, May 8, 1986 (same).

²⁰⁷ In discussing certain Geneva provisions in the pages that follow, I do not take a position on the contested question of whether these provisions may be directly enforced in habeas litigation. See, e.g., *Hamdan*, 415 F.3d at 40 (answering “no” to that question). Because CAT Article 3 protections are enforceable on habeas, and because the meaning of those protections may be impacted by the meaning of comparable IHL provisions pursuant to *lex specialis*, the transfer-rules of the Geneva Conventions have relevance even if not enforceable in and of themselves.

and (ii) the transferring state is satisfied that the receiving state will actually apply the conventions in its dealings with the transferred prisoner. The first prong of Article 12 has no practical impact, as all but one state – Nauru – are parties to the Geneva Conventions and there is no reason to think that transfers to Nauru are in the offing. The second prong of GPW Article 12 has more bite. GPW expressly prohibits torture and abuse of detainees,²⁰⁸ and Article 12 requires the transferring state to determine that the receiving state will not violate those prohibitions with respect to a transferred POW.²⁰⁹ Because the mechanics of this determination are left up to the transferring party,²¹⁰ however, it is not clear that Article 12 protections would impose as much of a restraint as would CAT Article 3’s more-likely-than-not standard.

In contrast to GPW, the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (“GC”) (dealing with certain persons who do not qualify as prisoners of war under the terms of GPW) contains two transfer-related provisions that at the very least match the protections of CAT Article 3. The first is located in Article 45, a provision that appears in the section of GC addressing the rights of protected persons who are aliens located in enemy territory (i.e., persons located in the territory of a state with which their *own* state is at war, such as an Iraqi student in the United States during the 1991 Gulf War or an American journalist in Baghdad during Operation Iraqi Freedom). GC Article 45 not only duplicates the protections of GPW Article 12, but also adds that “[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”²¹¹ The “reason to fear” language of Article 45

²⁰⁸ Prisoner of war benefits include protection from “acts of violence or intimidation and against insults,” *see* GPW Art. 13, and also freedom from “physical or mental torture . . . [and] any other form of coercion . . . to secure from them information of any kind whatever,” *see* GPW Art. 17. With respect to most (though not all) non-POW’s, GCIV Articles 27, 31, and 32 prohibit all “measures of brutality whether applied by civilian or military agents,” and specify that “[n]o physical or mental coercion shall be exercised against protected persons . . . to obtain information from them or from third parties.” *Cf.* Derek Jinks, *The Declining Significance of POW Status*, 45 Harv. Int’l L. J. 367 (2004) (arguing that non-POW detainees nonetheless receive substantial IHL protections pursuant to GC, Common Article 3, and Article 75 of Additional Protocol I).

²⁰⁹ Article 12 also requires the transferring state to attempt to reacquire custody should it learn that the receiving state is not in fact complying with its convention obligations, but does not specify the nature or amount of evidence required to trigger this obligation. *See* GPW Art. 12.

²¹⁰ *See* Art. 12 (referring to the transferor satisfying “itself”); *cf.* Commentary, Geneva Convention (III) Relative to the Treatment of Prisoners of War (Jean Pictet, ed.), 136 (arguing that “the future Protecting Power” of the detainee “would seem to be the best qualified authority to effect such an investigation”).

²¹¹ GC Art. 45. This language is similar to that found in the Refugee Convention, but unlike that convention it does not contain a security exception.

arguably connotes a more forgiving standard of proof than the more-likely-than-not rule for CAT Article 3.

GC Article 49 contains even stronger transfer-related language. This article appears in the section of GC addressing the rights of protected persons who are located in occupied territory. It provides that such persons may not be transferred out of that territory for any reason other than protection from encroaching hostilities or “imperative military reasons;” even then, they must be “transferred back to their homes as soon as hostilities in the areas in question have ceased.”²¹²

This mix of potential protections generates interesting possibilities. If GPW Article 12 applies to GTMO detainees, then pursuant to *lex specialis* there would be an argument for harmonizing CAT Article 3 protections *down* to the GPW Article 12 level; at the very least, application of GPW Article 12 would not lead to greater protections than those already afforded in this context by CAT. On the other hand, if GC Articles 45 or 49 apply, they might exceed the protections afforded by CAT. A careful examination of the circumstances of the GTMO detainees *vis-à-vis* these particular rules, however, suggests that none of them apply, mooted the IHL issue altogether with respect to risk-of-torture concerns.²¹³

B. Do the Conventions Apply to GTMO Detainees?

The protections afforded by the Geneva Conventions are not equally applicable to all persons in all armed conflicts.²¹⁴ On the contrary, a series of questions must be answered affirmatively before concluding that a given treaty provision applies in a particular case. The professors at the U.S. Army Judge Advocate General’s Legal Center and School refer to this “as the ‘Right Kind of Conflict/Right Kind of Person’ Inquiry”:²¹⁵ First, one must examine the type of armed conflict in issue to determine which aspects of the Geneva Conventions it implicates. Second, one must also determine whether the category of person in issue

²¹² GCIV, Art. 49.

²¹³ Chairman of the Joint Chiefs of Staff Instruction 5810.01B (Mar. 25, 2002), applicable to all military personnel, establishes as a matter of policy that “[t]he Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the US Armed Forces will comply with the principles and spirit of the law of war during all other operations.” *Id.* at 4(a). This leaves open the question, of course, as to what the law of war requires (even if applicable) in a particular context.

²¹⁴ That said, it bears emphasis that the general thrust of the Geneva Conventions was to expand the range of protections afforded by international humanitarian law.

²¹⁵ Lt. Col. Paul E. Kantwill & Maj. Sean Watts, *Hostile Protected Persons or ‘Extra-Conventional Persons’*: How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders, 28 *FORD. INT’L L. J.* 681, 722 (2005).

qualifies for protected status under one of the conventions. These questions have proven particularly difficult with respect to persons captured in Afghanistan in connection with Operation Enduring Freedom and elsewhere around the world in connection with counterterrorism operations,²¹⁶ and the Bush Administration's resolution of them has been the subject of considerable criticism.²¹⁷ In the pages that follow, I offer an analysis that concurs in some aspects of the Administration's approach while disagreeing with others.

1. The Right Kind of Conflict?

The starting point for categorizing an armed conflict²¹⁸ by type is "Common Article 2" of the Geneva Conventions, so-called because it appears in identical format in all four conventions. Common Article 2 functions as a jurisdictional prerequisite, stating that the protections of the Conventions "shall apply to all cases of declared war or of any other armed conflict which may arise *between two or more of the High Contracting Parties . . .*"²¹⁹ Put simply, Common Article 2 requires that there must be at least one party to the conventions fighting on each side in order to categorize the conflict as "international" in character and thus make possible consideration of the full range of Geneva Convention protections.²²⁰

On February 7, 2002, President Bush resolved months of uncertainty²²¹ and internal debate²²² within his administration by

²¹⁶ "The legal issues associated with detainee operations in Afghanistan were initially unsettled. . . . As the U.S. began detaining personnel, the most difficult issue was the status of Taliban and al Qaeda detainees." Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 to 1 May 2003) (Center for Law and Military Operations, the Judge Advocate General's Legal Center and School), at 51, 53.

²¹⁷ See, e.g., Kantwill & Watts, *supra* note 215 .

²¹⁸ Some deny that there is an "armed conflict," at least with respect to the relationship between the United States and al Qaeda. See, e.g., Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the Law of War*, 28 *Yale J. Int'l L.* 325, 326-28 (2003); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 *MICH. J. INT'L L.* 1, 8 n.16 (2001). For the contrary argument, see Bradley & Goldsmith, *supra* note 3, at 2066-72.

²¹⁹ See GPW, Art. 2 (emphasis added). Common Article 2 also is triggered by case of "partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." *Id.*

²²⁰ GPW Article 2 specifically contemplates the possibility that non-parties may also be involved in the armed conflict. See *id.* (stating that in such a case, the parties remain bound vis-à-vis one another, and even are bound in their relations to the non-party "if the latter accepts and applies" the conventions).

²²¹ "The legal issues associated with detainee operations in Afghanistan were initially unsettled. . . . As the U.S. began detaining personnel, the most difficult issue was the status of Taliban and al Qaeda detainees." Lessons Learned, *supra* note 216, at 51, 53.

determining that Common Article 2 has been triggered with respect to the Taliban, but not with respect to al Qaeda.²²³ It is unclear that either determination is entirely correct.

a. Armed Conflict with the Taliban

Both the United States and Afghanistan were High Contracting Parties to the Geneva Conventions at the time combat operations began on October 7, 2001, and thus, insofar as the Taliban had sufficient de facto authority to exercise belligerent rights on Afghanistan's behalf, the conflict between the United States and the Taliban was a Common Article 2 conflict as of that date.²²⁴ The President's order thus was correct with respect to the Taliban, at least in retrospect.²²⁵ But by the time the President's order issued in February 2002, much had changed. Most notably, the Taliban had been deposed as the de facto government of Afghanistan. On December 7, remaining members of the Taliban regime had fled Kabul,²²⁶ and on December 22, 2001, the Afghan Interim Authority – a provisional government headed by Hamid Karzai – had taken office.²²⁷ With the Taliban removed from power and a

²²² Detainee status issues were the subject of intense interagency dispute, with the State Department resisting positions taken by the Justice Department Office of Legal Counsel in a series of memoranda that preceded that President's February 7, 2002, order. *See* Memorandum from John Yoo and Robert J. Delahunty to William J. Haynes II, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Jan. 9, 2002 (draft) (arguing that the Geneva Conventions did not apply to either group); Memorandum from John Yoo and Robert Delahunty to William H. Taft, Jan. 14, 2002 (responding to a January 11th memo from Taft commenting on their January 9th draft), available at <http://www.cartoonbank.com/newyorker/slideshows/02yootaft.pdf>; Memorandum from Alberto R. Gonzales to the President, Jan. 25, 2002 (stating that the President determined on January 18, 2002, that the Geneva Conventions do not apply to al Qaeda and the Taliban, and describing and advising against State Department request for reconsideration); Memorandum from Colin L. Powell to Alberto R. Gonzales and Condoleeza Rice, Jan. 26, 2002 (seeking reconsideration of the Jan. 9 OLC memo); Memorandum from William H. Taft, IV to Alberto R. Gonzales, Feb. 2, 2002 (criticizing the Jan. 9 OLC memo).

²²³ A copy of the President's order is posted at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>

²²⁴ *Cf.* GCIV, Art. 6 ("The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2."). Prior to Operation Enduring Freedom, an internal armed conflict within the meaning of Common Article 3 existed in Afghanistan, between the Taliban and the Northern Alliance.

²²⁵ Lessons Learned, *supra* note 216, at 14 (identifying December 17, 2001, as the close of the "first phase"). Notably, the President reached this conclusion notwithstanding advice from the Office of Legal Counsel that Afghanistan was a "failed state" whose status as a High Contracting Party had lapsed, and that the Taliban in any event exercised insufficient authority to act on Afghanistan's behalf.

²²⁶ *Id.* at 14.

²²⁷ The Afghan Interim Authority (as well as the Loya Jirga and Transitional Authority that followed it) was the product of a U.N.-sponsored conference of representatives from various Afghan factions who met in Bonn, Germany in December 2001. *See* Agreement

friendly government thus in place in Kabul, the United States and its allies at that point no longer were in conflict with a High Contracting Party to the conventions.²²⁸ Nonetheless, the Bush Administration takes the view that hostilities in Afghanistan retained – and continue to retain – their Common Article 2 character.

Can this be correct? The question matters a great deal, given that some detainees were captured before and others after the downfall of the Taliban regime.²²⁹ Some have questioned the administration's view, suggesting that the conflict in Afghanistan has become an internal armed conflict in which the U.S. participates at the invitation of the Karzai Administration.²³⁰ There is a substantial argument, however, to support the view that the conflict with the Taliban continues to satisfy the Common Article 2 trigger.

Common Article 2 does not itself purport to describe the circumstances that bring a covered conflict to an end. Other provisions, however, do provide at least indirect support to the Bush Administration's perspective. Most notably, GC Article 6 specifies that "[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations."²³¹ According to Pictet's Commentaries, the *rapporteur* of the committee that drafted this language understood it to refer to the moment "when the last shot has been fired."²³² Pictet adds that the general close may be identified by "an armistice, a capitulation or simply [a] 'debellatio,'" i.e., "the occupation of the whole of the enemy's territory and the cessation of all hostilities, without a legal instrument of any kind."²³³ Pictet concludes that "[i]t must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those

on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, 41 I.L.M. 1032 (Jan. 4, 2002), available at <http://www.uno.de/frieden/afghanistan/talks/agreement.htm>.

²²⁸ Common Article 3 arguably came into play at that point – hostilities continued but no longer had an "international" character within the meaning of Common Article 2 – but for present purposes that issue is moot, as none of the provisions of the "mini-convention" speak to the transfer issue.

²²⁹ Note that the issue of whether the conflict with the Taliban continues to have Common Article 2 status is distinct from the issue of when the conflict itself comes to an end. For discussions relating to the latter issue, see Bradley & Goldsmith, *supra* note 3, at 2123-27; Stephan I. Vladeck, *When Wars Don't End*, J. NAT'L SEC. L. & POL. (forthcoming, manuscript on file with author).

²³⁰ See W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 507 (2003) (stating that the case for treating the conflict in Afghanistan as an internal conflict has become "absolute"); cf. Jennifer Elsea, *Treatment of 'Battlefield Detainees' in the War on Terrorism*, CRS Report for Congress, RL31367 (updated Jan. 13, 2005), at 13 (noting this possibility).

²³¹ GCIV, Art. 6.

²³² Pictet's Commentaries, GCIV, Art. 6 (quoting Final Record of the Diplomatic Conference of Geneva of 1949, vol. II-A, p. 815) (internal quotation marks omitted).

²³³ *Id.* at 62 & n.6.

concerned.”²³⁴ To reinforce the point, he notes that “the armistice which ended the struggle between France and Germany in 1940 did not represent the general close of military operations in the sense in which the phrase is used in the Convention we are discussing.”²³⁵

Although there is no parallel provision in the other Conventions – each contains language to the effect that protected persons are to continue to receive convention benefits until repatriated – the relatively clear statement in GC Article 6 provides considerable support for the view that an armed conflict may retain its Common Article 2 character, formally even if not functionally, even after the hostile regime of the opposing High Contracting Party loses its authority.²³⁶ The question is an ambiguous one, but the Administration at least arguably is justified in its characterization of the ongoing conflict with the Taliban.²³⁷ The conflict thus both was – and is – of the “right type” insofar as Taliban detainees are concerned.

b. Armed Conflict with al Qaeda

The situation with respect to al Qaeda is more complicated. President Bush, in his February 2002 order, drew a sharp distinction between the armed conflict with al Qaeda and the armed conflict with the Taliban. Whereas he found the latter to be a Common Article 2 conflict, he determined that the former was not, at least in part because al Qaeda is not and cannot be a High Contracting Party to the Conventions.²³⁸ The D.C. Circuit, moreover, has recently held that the President is entitled to deference in making this “political-military decision.”²³⁹

It certainly is true that al Qaeda is not and cannot be a party to the conventions. And if it is proper to segregate the entirety of the conflict with al Qaeda from that with the Taliban for purposes of the Geneva analysis, then it does follow that Common Article 2 does not apply. But it is not entirely clear that all aspects of the conflict with al Qaeda can be so cleanly carved off from the conflict with the Taliban. It is difficult to square that approach with the fact that a key component of the conflict between the U.S. and al Qaeda took place in Afghanistan in

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ The relevance of GCIV Article 6 decreases somewhat if one takes the view that GCIV protections apply only in two geographic contexts: a belligerent state’s own territory and foreign territory that has been formally occupied. *See infra*. Even if that interpretation is correct, however, Article 6 still demonstrates that the functional benefits of Common Article 2 status continue to exist (even if limited in geographic scope) beyond the formal collapse of the opposing regime.

²³⁷ Similar uncertainty surrounds the status of the armed conflict in Iraq.

²³⁸ *See supra* note 202.

²³⁹ *Hamdan*, 415 F.3d at 42 (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

circumstances intimately intertwined with (indeed, justifying) the Common Article 2 conflict with the Taliban.²⁴⁰ One might therefore argue that the conflict with al Qaeda, though not a Common Article 2 conflict standing alone, becomes part of one insofar as combat in Afghanistan is concerned.

Assume for the moment that this is correct.²⁴¹ It would follow that the conflict is of the “right type” as to some al Qaeda detainees (those captured in Afghanistan) but not others (those captured elsewhere). A careful reconstruction of the publicly available information about the location and circumstances of capture of GTMO detainees suggests that there are substantial numbers of detainees in both categories.²⁴² With respect to those captured outside Afghanistan, the Common Article 2 trigger is not satisfied and the aforementioned transfer provisions cannot apply. With respect to those captured in Afghanistan, however, it is at least arguable that the trigger is satisfied. As to that subset of al Qaeda detainees, as with the Taliban detainees mentioned above, the analysis must continue.

2. The Right Kind of Person?

The next question is whether any of these detainees (those held as Taliban members and those held as al Qaeda members captured in Afghanistan)²⁴³ qualify for protected status under either convention, or if

²⁴⁰ The same conclusion may apply to the activities of al Qaeda in Iraq, which the Administration also considers to be a Common Article 2 conflict.

²⁴¹ If it is not correct – i.e., if the correct view is that expressed by the majority of the panel in *Hamdan v. Bush*, that the conflict with al Qaeda is not in any respect an international armed conflict within the meaning of Common Article 2 – then a question arises as to whether the conflict necessarily should be classified as a Common Article 3 conflict or, instead, as a conflict to which the Conventions simply do not speak. The Geneva Conventions each contain an identical Article 3, known as Common Article 3 or the “mini-convention,” designed to provide a set of baseline protections for persons involved in at least some armed conflicts that do not satisfy the Common Article 2 requirement. The textual trigger for application of Common Article 3 is the existence of an armed conflict “not of an international character,” language which could be read in either of two ways. First, it could refer to any conflict not between two states, a reading which draws strength from the Common Article 2 definition of an international armed conflict as a conflict between two or more High Contracting Parties (i.e., state parties to the Convention). Second, it could be read in a narrow geographic sense to refer to conflicts confined within one state’s border (i.e., civil war). The Bush Administration endorses the geographic view, *see, e.g.*, Yoo & Delahunty, *supra* note 222, and this position recently was upheld by a divided panel of the D.C. Circuit in *Hamdan*, 415 F.3d at 42. *But see* *Hamdan*, 415 F.3d at 44 (Williams, *J.*, concurring) (arguing that Common Article 3 does apply). The merits of that important dispute are beyond the scope of this article, however, as Common Article 3 contains no provisions specific to the issue of detainee transfers and thus has no impact of the risk-of-torture issue even if applicable.

²⁴² *See* Online Appendix Table B, *supra* note 19.

²⁴³ The following discussion assumes for the sake of argument that the detainees are in fact Taliban or al Qaeda members. Many if not most of the detainees, of course, claim

instead they are “extra-conventional” persons who fall into supposed gaps in the conventions’ coverage.

a. Prisoner of War Status

GPW provides its protections (including the Article 12 transfer rule) only to those persons who qualify as a prisoner of war (“POW”). The requirements for obtaining such status are specified in GPW Article 4, the first section of which lists a number of categories that qualify a person for POW treatment. We are concerned here primarily with the first three of these categories.²⁴⁴

- Article 4(A)(1) confers POW status on the members of a High Contracting Party’s “armed forces” (including militias and volunteer groups that are part of the state’s armed forces).²⁴⁵
- Article 4(A)(2) confers POW status on the members of militias or volunteer groups (including “organized resistance movements”) that, although not part of a state’s armed forces, “belong to a Party to the conflict.”²⁴⁶ Article 4(A)(2) also expressly requires, however, that such a group must satisfy four conditions: (i) it has a commander with responsibility for subordinates, (ii) its members wear fixed insignia visible at a distance, (iii) its members carry arms openly, and (iv) it conducts itself “in accordance with the laws and customs of war.”²⁴⁷

that they are not members of the Taliban or al Qaeda at all, but instead are innocent civilians held by mistake. For discussions of the issues associated with the factual debates regarding classification of detainees, compare Bradley & Goldsmith, *supra* note 3, at 2107-16, with Ryan Goodman & Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654-58 (2005).

²⁴⁴ POW status also applies to civilians who “accompany the armed forces without actually being members thereof” (such as war correspondents and civilian contractors), Art. 4(A)(4), merchant marine and civilian aircraft crew who are not entitled to more favorable treatment on other grounds, Art. 4(A)(5), and “[i]nhabitants of a non-occupied territory, who upon the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war,” Art. 4(A)(6). Attorneys for Salim Ahmed Hamdan, a GTMO detainee who has been designated for trial before a military commission, have suggested – however improbably – that Hamdan might qualify for POW status under GPW Art. 4(A)(4). See *Hamdan*, Pet. for Cert. at 26-27.

²⁴⁵ GPW Art. 4(A)(1).

²⁴⁶ GPW Art. 4(A)(2).

²⁴⁷ GPW Art. 4(A)(2).

- Article 4(A)(3) confers POW status on the members of “regular²⁴⁸ armed forces” that “profess allegiance to a government or an authority not recognized by the Detaining Power.”²⁴⁹

These three scenarios reflect the range of realistic possibilities for Taliban and al Qaeda detainees seeking to establish POW status. Article 4(A)(1) extends that status to the regular armed forces of a state, including incorporated militia. Article 4(A)(3) applies the same “regular armed forces” rule to the situation in which one belligerent does not recognize the government of another state. Article 4(A)(2), on the other hand, extends POW status in limited circumstances to armed groups that do *not* constitute part of the regular armed forces. Because the U.S. did not recognize the Taliban as the legitimate government of Afghanistan, then, the most relevant provisions would seem to be Articles 4(A)(2) and (3). Just how these provisions should apply to Taliban and al Qaeda members, unfortunately, is subject to considerable uncertainty.²⁵⁰

(i) Taliban Members

Should any members of the Taliban have POW status in light of these provisions? President Bush in his February 7, 2002, order determined that they may not, although he did not specify the grounds for this determination other than to say that the Taliban are “unlawful combatants” according to facts supplied by the Defense Department and advice supplied by the Justice Department.²⁵¹ Office of Legal Counsel memoranda from January 9 and January 22, 2002, however, describe the basis for this conclusion.²⁵²

In light of the fact that the United States and its allies did not recognize the Taliban as the legitimate government of Afghanistan, OLC’s treatment of this issue began by considering whether Taliban members could qualify under Article 4(A)(3), which extends POW status

²⁴⁸ Professor Levie concludes that the reference to “armed forces” in Article 4(A)(1) and to “regular armed forces” in Article 4(A)(3) merely reflects “bad draftsmanship, the intent of the draftsmen having been the same in both cases.” Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 Naval War College Int’l Law Studies (1979) 36 n. 138.

²⁴⁹ GPW Art. 4(A)(3).

²⁵⁰ Cf. Levie, *supra* note 248, at 34 (observing that Article 4 “contains a number of seeds of controversy”).

²⁵¹ Order, *supra* note 223. For the contrary view, see Testimony of Harold Hongju Koh, Senate Judiciary Committee (Jan. 6, 2005) (stating that the “Taliban . . . were acting as, essentially, the army of Afghanistan, and I believe that they should have been given POW status”).

²⁵² See Memorandum from John Yoo & Robert J. Delahunty to William J. Haynes II, Jan. 9, 2002, *supra* note 222. See also Memorandum from Jay S. Bybee to Alberto R. Gonzales, Jan. 22, 2002, reprinted in *The Torture Papers*, *supra* note 70, at 81.

to “members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detainee Power.” According to the memo, the Taliban failed this test for several reasons.

First, OLC questioned whether the Taliban itself could qualify as a “government or an authority” within the meaning of Article 4(A)(3), in light of the fact that no other state in the world recognized the Taliban as the government of Afghanistan once Pakistan had withdrawn its recognition.²⁵³ At first blush, this argument appears to conflict with the manifest purpose of Article 4(A)(3) to eliminate lack of diplomatic recognition as a grounds for denying POW status. It finds direct support, however, in Pictet’s commentary on Article 4(A)(3). Pictet recognized the potential for Article 4(A)(3) to be abused by self-recognized armed bands such as the unaffiliated “great companies” that plagued 14th-Century France during the 100 Years’ War.²⁵⁴ He also observed that Article 4(A)(3) was a direct response to the status issues that arose during the Second World War with respect to members of the Free French Forces and, also, certain Italian forces that fought against Germany from late 1943 onward.²⁵⁵ Synthesizing these concerns, Pictet viewed a third-party recognition requirement as an implicit component of Article 4(A)(3): “It is not expressly stated that this Government or authority must, as a minimum requirement, be recognized by third States, but this condition is consistent with the spirit of the provision, which was founded on the specific case of the forces of General de Gaulle.”²⁵⁶

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

It does not follow, however, that the Taliban’s armed members receive the benefit of Article 4(A)(3). In fact, the OLC memo argues in the alternative that Taliban fighters cannot so qualify, apparently taking the view that the four conditions expressly stated in Article 4(A)(2) (i.e., having a command hierarchy; wearing of fixed insignia; carrying arms

²⁵³ Yoo & Delahunty, *supra* note 222, at 25.

²⁵⁴ Pictet’s Commentaries, GPW, Art. 4.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

openly; and complying with the laws of war) should be read into Article 4(A)(3) as well.²⁵⁷

There is significant support for this view, notwithstanding the awkward fact that the four conditions are enumerated in GPW's text *only* with respect to Article 4(A)(2), not also 4(A)(1) or (3). The International Committee of the Red Cross ("ICRC"), for example, contends in its recently published study of IHL that the "idea underlying these definitions is that the regular armed forces fulfill these four conditions *per se* and, as a result, they are not explicitly enumerated with respect to them."²⁵⁸ The ICRC concludes that the four requirements reflect customary international law, and Professor Yoo has concurred.²⁵⁹

There is a problem with this line of argument, however: The drafters of GPW Article 4 specifically considered and rejected it.

²⁵⁷ See Yoo and Delahunty, *supra* note 222, at 90 (stating that the Article 4(A)(2) requirements "also apply to any regular armed force under other treaties governing the laws of armed conflict"). In support of that statement, the OLC memo cites the 1907 Hague Convention, relevant portions of which are discussed *infra* at 54-55. See also Erik Saar, Inside the Wire (2005) 161-62 (describing presentation given to GTMO personnel on the detainee status issue, during which the presenter emphasized without distinguishing between al Qaeda and the Taliban the detainees' lack of a command structure, their failure to comply with IHL, and their failure to wear uniforms). Many commentators have observed that two additional criteria are implicit additions to the list of four criteria in Article 4(A)(2): that the group be organized and that it be subordinate to a government of a State involved in the armed conflict. See, e.g., See G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, in REFLECTIONS ON LAW AND ARMED CONFLICT: THE SELECTED WORKS ON THE LAW OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE (Michael A. Meyer and Hilaire McCoubrey, eds., 1998) 217. For ease of reference in this article, however, I will continue to refer to the "four" conditions of lawful belligerency.

²⁵⁸ ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, v. I (Rules) (Jean-Marie Henckaerts and Louise Doswald-Beck, eds.) (2005) 15.

²⁵⁹ See John C. Yoo and James C. Ho, *Status of Terrorists*, 44 VA. J. INT'L L. 207, 219-21 (2003). See also YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2004) 36 (stating that "regular forces are not absolved from meeting the cumulative conditions binding irregular forces," and that there is a "presumption that regular forces would, by their very nature, meet those conditions"); Remarks of Professor W. T. Mallison, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U. J. INT'L L. & POL'Y 415, 531 (1987) (arguing that Article 4(A) "insufficiently emphasizes that the criteria for regular combatants are identical with the criteria for irregular combatants"); UNITED KINGDOM WAR OFFICE, MANUAL OF MILITARY LAW (1914) 240 ("It is taken for granted that all members of the army as a matter of course will comply with the four conditions; should they, however, fail in this respect they are liable to lose their special privileges of armed forces."); Bin Haji Mohamed Ali v. Public Prosecutor (1968), [1969] AC 430, 449 (Privy Council ruling to the effect that the four conditions apply also to members of the regular armed forces) (citing, *inter alia*, the 1958 revision of the UK Military Manual, which in Part III paragraph 96 states that "[s]hould regular combatants fail to comply with these four conditions, they may in certain cases become unprivileged belligerents"). *But see* Paust, *supra* note 230, 28 YALE J. INT'L L. at 329-30.

With respect to POW status issues, the drafters were working against the backdrop of the 1907 Hague Convention.²⁶⁰ Article 1 of that convention provided:

“[t]he laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: . . . [listing the four conditions].”²⁶¹

During the Diplomatic Conference of 1949 that ultimately produced the Geneva Conventions, the *rapporteur* of the committee charged with drafting the provisions relevant to the definition of POW status produced the following language, which closely tracked Hague Article 1 but made subtle, yet critical, adjustments:

“Members of armed forces who are in the service of an adverse belligerent, as well as members of militia or volunteer corps belonging to such belligerent, *and* fulfilling the following conditions: . . . [listing the four conditions.]”²⁶²

When provided to the committee, this draft language drew an objection from the Soviet delegation, which seized on the additional comma and the word “and” to draw the conclusion that the proposed language would impose the four conditions requirement not only on the militia and volunteer corps mentioned in the article, but also on the regular armed forces themselves. The Soviets argued that this would mark a significant break with past practice.²⁶³

It does not appear that anyone on the committee at the time objected to the premise that the existing Hague rule did not require the four conditions to be imposed on regular armed forces (or on incorporated groups). On the contrary, several delegates instead responded that the draft Geneva language should not be read as supporting a departure from the Hague rule as the Soviets had described it, and on that basis the decision was made to redraft the language to eliminate this possible construction.²⁶⁴ The working group assigned to carry out this task responded with language substantially similar to that which we now find in Article 4 – listing the four conditions only with respect to unincorporated militia. No one objected to the revision.²⁶⁵

²⁶⁰ FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, vol. II-A, at 466.

²⁶¹ Regulations Respecting the Laws and Customs of War on Land, Hague, Art. 1, 1907.

²⁶² See FINAL RECORD, *supra* note 260, at 465 (reprinting text of the draft produced by the Committee’s Rapporteur) (emphasis added).

²⁶³ *Id.* at 467.

²⁶⁴ *Id.* at 466-67. The UK delegate, for example, proposed substitute language that made clear that the four conditions

²⁶⁵ *Id.* at 479-80. Prior commentary on this drafting history fails to do it justice. Writing of these events, Professor Levie noted merely that “the Delegate of the Soviet Union . . .

Accordingly, although significant policy arguments militate in favor of tethering POW status to compliance with the four conditions for all categories of combatants,²⁶⁶ there is a strong argument that GPW Article 4(A)(1) or (3) cannot fairly be read to achieve this end.²⁶⁷

And yet the matter cannot come comfortably to rest there. Even if members of the “armed forces” may obtain POW status without complying with all of the four criteria, it does not follow that just any armed group counts as part of the “armed forces.” In order for a line to exist between groups that constitute part of the armed forces and those that do not – and the very existence of Article 4(A)(2) in addition to Article 4(A)(1) and (3) establishes that there is indeed such a line – there must be some criteria to draw this distinction. When is a militia part of the armed forces within the meaning of Articles 4(A)(1) and (3), and when is a militia instead left to seek status via Article 4(A)(2)?

appeared to argue that none of the four requirements was applicable to members of the armed forces,” but concluded that “it is believed that the interpretation here given [that the four requirements apply to all categories under Article 4] is more appropriate and much more widely accepted.” *Supra* note 248, at 37 n. 142. This brief account, by suggesting that the narrow construction was supported only by the Soviets, understates the historical record, which as noted above strongly suggests a consensus in favor of the Soviets’ reading. Similarly, Professor W. T. Mallison has written that “it was proposed on the floor of the conference that the four criteria for irregulars in article 4(A)(2) be amended and specified as applying to regulars under article 4(A)(3),” and that the “response was that it was so well-known that these same four criteria applied to regular combatants that it was actually not necessary to specify it at all.” *Supra* note 259, at 532-33.

²⁶⁶ See Yoo & Ho, *supra* note 259, at 221 (emphasizing that he “four conditions under customary law play an essential role in enforcing the fundamental distinction between civilians and combatants. The second and third conditions are practical provisions to help soldiers recognize the distinction between members of enemy forces and civilians during the conduct of military operations. The first and fourth conditions help ensure that the substantive rules of conduct respecting this fundamental distinction, such as the prohibition on targeting of civilians and the requirement of distinguishing oneself as a combatant, are effectively enforced.”)

²⁶⁷ Cf. Draper, *The Legal Classification of Belligerent Individuals*, in REFLECTIONS, *supra* note 257, at 196, 203 (observing that “[r]egular soldiers who systematically conduct their operations contrary to the law of war . . . are still entitled to POW status upon capture although they may be tried, as POW, for their war criminality before capture,” in contrast to “fighters who are not soldiers” who must comply with the four factors). Nor does it appear that since 1949 state practice reflecting a sense of legal obligation has established a norm of customary international law imposing compliance with the four conditions as prerequisites to POW status. This is not to suggest, of course, that members of armed forces have no obligation to obey the laws of war. On the contrary, whether granted POW status or not, violations of the laws of war may result in criminal prosecution. See Draper, *supra* note 257, at 213. Cf. Levie, *supra* note 248, at 37 n. 144 (drawing a distinction “between a conventional war crime” the commission of which does not deprive the person of POW status, at least until conviction, and “other types of offenses such as acting as a spy or saboteur while wearing civilian clothes”).

The relevant criteria are unclear. Professor Levie states that the issue is “strictly a matter of national law.”²⁶⁸ But while this solution may work with respect to states with fulsome legislation on the topic, such as the U.S., it is relatively unhelpful with respect to the ad-hoc attributes of a Potemkin state such as Taliban-era Afghanistan.

One possible source of additional guidance is the definition of “armed force” contained in Article 43 of Additional Protocol I to the Geneva Conventions.²⁶⁹ Article 43 explains that the “armed forces” consist of all units “under a command responsible to that Party for the conduct of its subordinates,” so long as such units are “subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.”²⁷⁰ On this theory, the line is drawn with respect to two group-level characteristics: the existence of a disciplinary structure in the armed organization, and the use of that structure to ensure at least some degree of compliance with IHL. Put another way, the need to distinguish the “armed forces” subject to Articles 4(A)(1) and (3) from the armed groups subject to Article 4(A)(2) requires reading into the former some but not all aspects of the four criteria after all.²⁷¹

²⁶⁸ Levie, *supra* note 248, at 36.

²⁶⁹ As noted previously, the United States is not a party to API. The President choose not to send API to the Senate for consent, noting in his message accompanying APII (which was submitted) that API was plagued by problems that could not be cured by RUDs. *See* S. Treaty Doc. 100-2, 100th Cong., 1st Sess. Among other things, the President explained, API included a “provision [that] would grant combatant status to irregular forces even if they did not satisfy the traditional requirements [memorialized in GPW Article 4(A)(2)] to distinguish themselves from the civilian population and otherwise comply with the laws of war.” *Id.* at IV. This is a reference to Article 44, which extends combatant status to persons who distinguish themselves from civilians only while engaged in or preparatory to an attack. *See* API, Art. 44(3). The United States has made clear its view that Article 44 does not reflect customary international law; it is unclear, in contrast, what the U.S. view respecting Article 43 is. *See* Parks, *supra* note 206 (not listing Article 43 among provisions said to reflect CIL or as being “supportable for inclusion” as CIL); Matheson, *supra* note 206 (not listing Article 43 as consistent or inconsistent with CIL). Notably, Professor Levie cites Article 43 with seeming approval, regarding this very issue, in his treatise. *See* Levie, *supra* note 248, at 36 n. 138.

²⁷⁰ API, Art. 43(1).

²⁷¹ *See, e.g.*, UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004) 143-44 (describing the four conditions as prerequisites to POW status under Article 4(A)(2), but only the conditions of command responsibility and adherence to a disciplinary system enforcing IHL with respect to “armed forces”). Notably, Alberto Gonzales stated during his confirmation hearing that the President determined that the Taliban as a group failed to qualify for POW status “because of the way the Taliban have fought against the United States.” Testimony of Alberto Gonzales, Senate Judiciary Committee, Jan. 6, 2005. More recently, moreover, the Solicitor General has argued in connection with litigation arising out of GTMO that “the term ‘armed forces’ in Articles 4A(1) and (4) is properly read as limited to armed forces that comply with the criteria set out in Article 4A(2).” *See* Hamdan v. Rumsfeld, No. 05-184, Brief for the Respondent in Opposition to Certiorari, Sep. 7, 2005, at 26 n.14 (citing

How does the Taliban fare under this standard? It is important to be frank about how indeterminate this inquiry actually is. Precisely how many IHL violations must occur before one can conclude that a force lacks systemic adherence? How recent must they have been? How serious in magnitude? Does it matter if the particular individual involved has strictly adhered to IHL, even if the group has not? There simply are no clearly dispositive legal answers to these questions.²⁷²

The U.S. government position is that the Taliban – as a group – failed to sufficiently adhere to IHL to warrant “armed forces” status. The OLC’s January 22, 2002, memorandum refers to a “series of ‘fact sheets’ issued [by the State Department] during the [Afghan] campaign,” providing descriptions of “atrocities committed by the Taliban and al Qaeda before and during the United States’ military operations.”²⁷³ With respect to the Taliban, these dispatches assert that Taliban forces had executed POW’s, hid military personnel and equipment in civilian areas (including mosques), and intentionally attacked civilian populations.²⁷⁴ From this, OLC concluded that “the Taliban militia regularly refused to follow the laws of armed conflict”²⁷⁵ On this basis, it appears that the government has concluded that the Taliban’s forces were not “regular armed forces” within the meaning of Articles 4(A)(1) or (3) for lack of systemic adherence to IHL principles.²⁷⁶ Given the indeterminacy of the

Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War 62-63 (Red Cross 1952).

²⁷² See Col. K. W. Watkin, *Combatants, Unprivileged Belligerents and Conflicts in the 21st Century*, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, June 27-29, 2003, at 9 (stating, with respect to both GPW and Additional Protocol I, that there “appears to be no firm consensus as to which of the conditions are collective and which are individual”).

²⁷³ See *supra* note 222, at 100.

²⁷⁴ See *id.* It is unclear, however, what particular events support these claims.

²⁷⁵ *Id.* OLC made this assertion in support of the claim that the President could “suspend” the Conventions as to the Taliban, or alternatively, that the Taliban’s Afghanistan was a “failed state” ineligible to claim High Contracting Party Status. See *id.* Regardless of those arguments, the assertion speaks directly to the Article 4(A)(3) issue.

²⁷⁶ See Daniel Dell’Orto, Principal Deputy General Counsel, Defense Department, Senate Armed Service Committee, Personnel Subcommittee, July 14, 2005, 2005 WL 165390, at 29 (stating in response to a question from Senator McCain that the decision was made to deny status to the Taliban on the ground that “across the board” they failed to comply with IHL). Cf. Lessons Learned, *supra* note 216, at 54 n.144 (observing that “much of the legal analysis underlying the presidential decisions remains classified,” but also citing a memorandum from the Office of the Staff Judge Advocate stating that the Taliban “do not possess the attributes of regular armed forces, which requires distinguishing themselves from the civilian population and conducting their operations in accordance with [the] laws and customs of war”). This line of argument is not without risks. While the U.S. military clearly satisfies the requirements of having an internal disciplinary system and use of that system to require compliance with IHL, there nonetheless is a risk that opponents may seize on alleged IHL violations by the U.S. as grounds for denying POW status to some or all captured U.S. personnel.

quantitative issues associated with this determination, it is difficult to say that the government's conclusion is wrong as a legal matter.²⁷⁷

Assuming that the government is correct, the next question is whether the Taliban can qualify for POW status instead under Article 4(A)(2) as an unincorporated militia. Here, there is no dispute that the four conditions would apply as a prerequisite to POW status. On the other hand, as noted above, there is considerable uncertainty regarding the proper means of applying those factors. Should the inquiry be limited as much as possible to the activities of the particular detainee in issue, or should the conduct of the overall group be taken into account as much as possible?²⁷⁸ It is not difficult to imagine, after all, a situation in which an individual can demonstrate that he wore a fixed insignia, bore his arms openly, and personally complied with the laws of war, while at the same time many or even most members of the group did not do so. Is such a person disqualified from POW status because of the faults of his organization?

The answer may be yes,²⁷⁹ although the law on this point is somewhat indeterminate.²⁸⁰ The text of Article 4(A)(2) suggests a group-oriented inquiry. Rather than asking how the individual detainee behaved, Article 4(A)(2) asks whether "such militias or volunteer corps .

²⁷⁷ Colonel Watkin concludes that, "[w]hile it is not without controversy it is open to a state to deny all the members of a group combatant status if that group does not 'enforce compliance with the rules of international law applicable to armed conflict.'" See Watkin, *supra* note 272, at 10 (citing, *inter alia*, the Commentary to Additional Protocol I, at para. 1688 (stating that "armed forces as such must submit to the rules of international law applicable in armed conflict, this being a constitutive condition for the recognition of such force, within the meaning of Article 43")). See also THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 271, at 39 n.13 ("The decision to deny an armed group the status of 'armed force' under international law is not one for the commander in the field and must be taken at governmental level.").

²⁷⁸ Applying a group-oriented standard is not necessarily inconsistent with the existence of the Article 5 tribunal process under GPW. Article 5 provides that "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4," they shall be given POW status until a contrary status is "determined by a competent tribunal." GPW Art. 5. At first blush, this language appears to contemplate an individualized interpretation. And certainly it is true that the question of whether a particular detainee is in fact associated with an enemy force such as al Qaeda or the Taliban must be determined on an individual basis. It is less clear, however, that the existence of the Article 5 process compels the conclusion that particular prerequisites for members of an enemy force to obtain POW status cannot be determined with reference to at least some group characteristics.

²⁷⁹ See Written Testimony of William P. Barr, Senate Armed Services Committee, July 14, 2005, at 3 (stating that the status determination is a "'group' decision, not an individualized decision").

²⁸⁰ Writing on this point in 1973, Professor Draper stated that "[i]t is not possible to say with confidence that any one view is accepted as representing an established and accepted legal position." See Draper, *supra* note 257, at 217.

. . fulfill” the four conditions.²⁸¹ Similarly, Article 4(A)(2)(d) refers not to the *individual* acting in accordance with the Laws of War, but to the *group* “conducting *their* operations in accordance with the laws and customs of war.”²⁸² Pictet’s commentary does not shed further light on this point, nor does the drafting history. Some commentators have suggested that the best view is that not only must the group satisfy all criteria, but in addition, the individual also must satisfy the requirements of bearing arms openly, wearing a distinctive sign, and complying with the law of war.²⁸³

Accordingly, it is at least possible that the Article 4(A)(2) inquiry will be heavily influenced by the characteristics of the armed group of which the detainee is a member.²⁸⁴ Some commentators have argued that in conducting the group-focused inquiry, the key question is the behavior of most, not just some, of the group’s members, and that “state officials should not lightly reach the conclusion that most of the members of an irregular group do not comply with one of the last three criteria.”²⁸⁵ Under this approach, members of the Taliban quite possibly would be denied POW status under Article 4(A)(2), at the very least, on the same ground that they would be denied such status under Article 4(A)(3): failure to adhere to the laws of war.²⁸⁶

(ii) al Qaeda Members

It is comparatively easy to resolve the status of al Qaeda members detained in Afghanistan.²⁸⁷ Al Qaeda does not constitute part of the regular armed forces of Afghanistan, meaning that neither Article 4(A)(1) or (3) have application. On the other hand, al Qaeda did provide

²⁸¹ GPW Art. 4(A)(2).

²⁸² GPW Art. 4(A)(2)(d) (emphasis added).

²⁸³ See W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 CASE W. RES. J. INT’L L. 39, 62 (1977); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, in SELECTED WORKS, *supra* note 257, at 223-24. The Mallisons argue that it is unnecessarily harsh to deny POW status to a compliant individual on the ground of group non-compliance. See *id.* at 63.

²⁸⁴ The U.S. has a strong interest in denying adversaries the ability to cite alleged war crimes by unrelated U.S. forces as grounds for denying POW status to captured U.S. personnel, as occurred in Vietnam. Insofar as the four conditions are not a prerequisite to POW status for members of the regular armed forces, however, U.S. personnel should not be subject to this claim.

²⁸⁵ Mallison & Mallison, *supra* note 283, at 62-63.

²⁸⁶ See also *United States v. Lindh*, 212 F. Supp.2d 541, 558 (E.D. Va. 2002) (rejecting “lawful combatant” defense on ground that Lindh had failed to carry burden of proof with respect to application of three of the four criteria with respect to Taliban forces).

²⁸⁷ Cf. Watkin, *supra* note 72, at 10 (observing that “[e]xclusion of a group from combatant status is perhaps most easily applied in respect of terrorist organizations that by definition do not respect the fundamental distinction between combatants and civilians in their actions and sometimes overtly reject any requirement to do so”).

personnel to fight alongside the Taliban²⁸⁸ and to protect its senior leadership, suggesting the possibility that an al Qaeda member captured in Afghanistan might claim POW status under Article 4(A)(2), which extends that status to certain militias and volunteer groups that “belong[] to a Party” but which are not incorporated into the Party’s regular armed forces.²⁸⁹ Any such argument, however, is certain to fail because of the four conditions requirement.²⁹⁰ Given that al Qaeda as an organization²⁹¹ affirmatively rejects the core precept of the Law of War – the principle of distinction between lawful and unlawful targets – there is little prospect for satisfying Article 4(A)(2).²⁹² Al Qaeda members thus would not receive POW status even if captured in the context of an international armed conflict.²⁹³

In the final analysis, therefore, neither al Qaeda nor Taliban²⁹⁴ members qualify for POW treatment. Ironically, from the detainees’ perspective this conclusion has a silver lining with respect to the transfer issue; if the detainees are not POWs, then GPW Article 12 does not apply to them, and thus there is no ground for using *lex specialis* to harmonize the CAT Article 3 standard down to the arguably more permissive standard implicit in GPW Article 12.

²⁸⁸ The Taliban’s “elite” 55th Brigade may have been an al Qaeda unit. Cf. Anne Scott Tyson, *Strikes Inflict Little Harm on Terrorist Group*, CHRISTIAN SCIENCE MONITOR, Oct. 29, 2001, available at <http://www.csmonitor.com/2001/1029/p2s1-usmi.html> (questioning whether the 55th Brigade should be viewed as an al Qaeda unit).

²⁸⁹ GPW Art. 4(A)(2). OLC contended in the January 22, 2002, memo, that no al Qaeda member could possibly invoke Article 4(A)(2) because the conflict with al Qaeda is not an international armed conflict in the first place. See *supra* note 252, at 89-90. This argument conflates the right-kind-of-conflict and right-kind-of-person inquiries.

²⁹⁰ Bradley & Goldsmith assert that “it is unlikely that al Qaeda ‘belongs to’ Afghanistan (which is a party to the conflict)” and thus that “one need not even reach the issue of whether it has satisfied the four traditional criteria.” See Curtis A. Bradley and Jack L. Goldsmith, *Rejoinder: The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 Harv. L. Rev. 2683, 2691 n. 48 (2005). Cf. Levie, *supra* note 248, at 40-43 (discussing uncertainty associated with the “belonging to” requirement).

²⁹¹ Throughout this article I have referred to the al Qaeda “organization.” Whether al Qaeda is best understood as a discrete organization or instead as a network of groups and individuals with varying degrees of affiliation has been the subject of much debate since 9/11. Adding to the confusion, the answer to that question may vary depending on the point in time at which one asks it, as it probably is accurate to say that al Qaeda in late 2001 had more of an organizational structure than it does in the fall of 2005.

²⁹² See Art. 4(A)(2)(d). Al Qaeda also violates the requirements of bearing arms openly and wearing a fixed insignia visible at a distance with respect to its terrorist operations outside the context of the ground war in Afghanistan, although a question might arise as to whether those actions should enter into the Article 4 analysis within the context of OEF.

²⁹³ Cf. Bradley & Goldsmith, *supra* note 290, at 2691 n.48 (observing that al Qaeda “almost certainly has not” satisfied the criteria); Goodman & Jinks, *supra* note 243, at 2657 (“Although militant groups could satisfy these criteria in theory, it is unlikely that many, if any, will do so in fact.”).

²⁹⁴ The case concededly is much less clear with respect to the Taliban.

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

b. Protected Persons Status under GC

If a person detained in an international armed conflict does *not* qualify as a POW under GPW, it does not follow automatically that he or she receives no protection under the Geneva Conventions; on the contrary, in *most instances* such persons will qualify as “protected persons” within the meaning of GC.²⁹⁵ Remarkably, though, neither the President’s February 7, 2002, order nor the underlying legal memoranda giving rise to it provide any discussion of this issue en route to the conclusion that Taliban and al Qaeda members are, in effect, “extra-conventional” persons.²⁹⁶

The scope of “protected person” status under GC is described in Article 4, which begins by defining the category in broad terms: “Persons protected by the Convention are those who . . . find themselves . . . in the hands of a Party to the conflict or occupation . . . of which they are not nationals.”²⁹⁷ Article 4 then goes on to carve out three situations in which such persons will not receive protected person status. Two of these exceptions are inapplicable here: First, status will be denied to those who qualify as a POW under GPW (a situation not implicated by the GTMO detainees, for the reasons stated above).²⁹⁸ Second, status also will be denied to persons who are nationals of a state not bound by the Geneva Conventions (a situation applicable only in the unlikely event of a detainee from Nauru).

The remaining exception, in contrast, is quite meaningful when applied to Taliban detainees and al Qaeda members captured in Afghanistan: so long as the detainee’s government “has normal diplomatic representation” with the detaining state, GC Article 4 denies protected person status to citizens of neutral states “who find themselves

²⁹⁵ See Kantwill & Watts, *supra* note 215. See also Goldman Report, *supra* note 170, at paras. 19-21 (stating that persons captured in Afghanistan should be classified either as POWs or protected persons). Cf. Jinks, *supra* note 208 (emphasizing protections afforded to non-POW detainees under GC, Common Article 3, and Article 75 of Additional Protocol I).

²⁹⁶ See Kantwill & Watts, *supra* note 215, at 705-08 (making this point, and discussing possible explanations for the omission). As Kantwill and Watts explain, the term “extra-conventional” indicates the view that a person is not within the categories of persons who benefit from treaty protections. See *id.* at 681 n.1 (citing, *inter alia*, Jinks, *supra* note 208, at 367-68).

²⁹⁷ GC Art. 4.

²⁹⁸ U.S. Army Field Manual 27-10 states that GC IV protections extend to “all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war.” *Id.* para. 247.

in the territory of a belligerent state,” and to citizens of a co-belligerent regardless of the location of capture (which in this case would include British citizens, for example).²⁹⁹ In a traditional armed conflict between states, these exclusions would have little impact. It is the peculiar nature of the conflict with al Qaeda – lacking an “enemy” foreign sovereign, other than the defunct Taliban – that gives this exclusion such bite.

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

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

A literal reading of the Article 4 language suggests that the answer to that question must be yes. Afghanistan, after all, is a belligerent state insofar as the Common Article 2 conflict there is concerned. But an argument exists that the language “territory of a belligerent State” should be understood narrowly to refer only to the territory of the *detaining* belligerent state, which in this case would mean only the territory of the United States.³⁰⁰

The plain text of Article 4 does not clearly mandate one construction or the other. But Pictet’s Commentaries on Article 4, although far from dispositive, weigh in favor of the more expansive reading. The Commentaries state that “nationals of a neutral State in the territory of a Party to the conflict are only protected persons if their State has no normal diplomatic representation in the State in whose hand they are.”³⁰¹ The general thrust of the commentary is that where the ordinary

²⁹⁹ *See id.*

³⁰⁰ *See, e.g.,* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Trans. L. 811, 819 n. 28 and 851 n. 149 (2005) (arguing that the exception applies only to neutral-state citizens found in the U.S. itself). On this theory, the only person excluded from GC protected person status by the “neutral state” aspect of Article 4 would be the Qatari citizen Ali Saleh Kahlah al-Marri, who was arrested in the U.S. and is now held as an enemy combatant, though not at GTMO.

³⁰¹ Pictet, *supra* note ___, at 48.

diplomatic process for protection of the interests of nationals is available, it must be relied upon.³⁰²

Understood in this way,³⁰³ the only GTMO detainees arguably qualifying for protected person status would be the Afghan citizens among the detainees (presumably including most or all Taliban detainees) and any detainees who are citizens of states lacking ordinary diplomatic relations with the U.S., such as Iran, Iraq, Libya, or – least likely – North Korea.³⁰⁴ With ordinary diplomatic relations now having resumed between the U.S. and both Iraq and Afghanistan (as indicated, for example, in the actual ongoing negotiations with the Karzai government regarding repatriation of these very individuals), moreover, there is an argument that those detainees too should not be considered protected persons under GC.

This would leave only Iranian, Libyan, and North Korean citizens captured in Afghanistan as potentially qualifying for protected person status. Do any GTMO detainees fit this description? It appears that one or two may, although the vast majority do not.³⁰⁵ As to these select few (or as to a larger group, should the subsequent resumption of diplomatic relations with Afghanistan not “count” for this purpose, or a still larger group, should the neutral-state rule only apply to persons captured in the U.S.), the next question is whether their status as “protected persons” under GC triggers either or both of Articles 45 and 49. Remarkably, the answer appears to be no.

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

Both Articles 45 and 49 appear in Part III of GC, which describes the benefits owed to protected persons.³⁰⁶ But Part III itself is divided into three subsections. One deals with protected persons who are located in occupied territory, another addresses protected persons who are aliens located in the territory of their state’s enemy, and a third

³⁰² See *id.* at 48-49.

³⁰³ For the same conclusion, see Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 Va. J. Int’l L. 1025, 1070 (2004).

³⁰⁴ The fact that most detainees are precluded from protected person status by the diplomatic relations exception does not mean that they are wholly unprotected by IHL. Derek Jinks has argued, for example, that the protections of Common Article 3 and Article 75 of Additional Protocol I apply in this scenario. See Jinks, *supra* note 208, at 399-413. See also Parks, *supra* note 206 (identifying Article 75’s fundamental guarantees as a reflection of customary international law); Matheson, *supra* note 206 (same). Even assuming that this is correct, however, neither provision contains a transfer-related rule.

³⁰⁵ See Table B, *supra* note 19 (listing countries of origin and indicating one Iranian detainee).

³⁰⁶ Part II of GCIV describes the benefits afforded to whole populations, while Part IV governs the process on internment.

provides rules that apply in both scenarios (or perhaps in all circumstances). Notably, Article 45 is located in the enemy territory subsection, while Article 49 is found in the subsection concerned with occupied territory.

Arguably, this format introduces geographic limitations to the benefits afforded by GC to protected persons.³⁰⁷ If so – and it is hard to see what point the subsection structure has if not – then GTMO detainees captured in Afghanistan are not covered by GC’s transfer-related provisions even if they qualify as protected persons. These individuals were not aliens located in the territory of their state’s enemy, nor were they located in occupied territory. They were, instead, located in what might be called contested territory – the territory of a non-detaining belligerent state, not yet under occupation – a scenario to which Articles 45 and 49 simply do not apply on this reading of GC.³⁰⁸

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

³⁰⁷ See Kantwill & Watts, *supra* note 215, at 729-30 (noting that GC Part III “seems to overlook protections for hostile protected persons in their own territory”). Rejection of this interpretation, notably, opens up other complications. Unlike GPW, GC contains a derogation clause that enables the detaining state to deprive protected persons of convention benefits under certain conditions. That clause – Article 5 – actually contains two derogation provisions, both of which are defined with reference to the same geographic criteria described above. If the geographic limits imposed by the subdivisions of Part III are disregarded, this might support an argument to disregard the comparable limits imposed on the derogation option as well. In this respect, it is worth bearing in mind that the U.S. Army Field Manual on the Law of Land Warfare already asserts a right to derogate from GC protections where neither of the geographic conditions (occupied or enemy territory) are met, notwithstanding lack of support in the text of GC Article 5 for this proposition. See FM 27-10, para. 248b; Letter from Gen. Janis Karpinski to ICRC Protection Coordinator Eva Svoboda, Dec. 24, 2003 (on file with author) (writing in connection with Abu Ghraib that “as you will have noted, while the armed conflict continues, and where ‘absolute military security so requires’ security internees will not obtain full GC protection as recognized in GCIV/5, although such protection will be afforded as soon as the security situation in Iraq allows it.” Cf. Kantwill & Watts, *supra* note 215, at 731 (commenting that the Field Manual position implies a belief that protected persons can exist outside the contexts of enemy and occupied territory).

³⁰⁸ Cf. Callen, *supra* note 303, *passim*. (arguing that most GC protections do not apply to persons captured in the zone of combat operations unless an occupation is underway). Significantly, if one were to read the “enemy territory” limitation in a broad way so as to provide GC Part III protections to person’s captured *outside* the territory of the detaining state, it would then become all the more difficult to reject taking a similarly broad approach to the interpretation of the neutral-citizen aspect of the diplomatic-relations exception from protected person status under Article 4.

additional source of law pertaining to the transfer issue that requires discussion.

V. CONSTITUTIONAL CONSTRAINTS

When the U.S. began transferring detainees from Afghanistan to GTMO in January 2002, it certainly was not with the expectation that by doing so the detainees would thereby be invested with federal constitutional rights. But in light of the Supreme Court's 2004 decision in *Rasul* concerning the nature and extent of U.S. control over GTMO, one court has held that this is precisely what has happened and that, as a result, detainees at the very least have fundamental rights such as due process.³⁰⁹ The issue is currently on appeal before the D.C. Circuit, and no doubt will in turn be litigated before the Supreme Court. In the interim, assuming for the sake of argument that GTMO detainees do have due process rights under the federal constitution,³¹⁰ the question arises whether due process provides protection relevant to the issue of *non-refoulement* and, if so, whether that protection exceeds the protections afforded by CAT Article 3.³¹¹ Put in practical terms, the

³⁰⁹ Judge Leon and Senior Judge Green disagreed on this issue in their conflicting opinions *Khalid v. Bush* and *In re Guantanamo Detainees*. For Judge Leon, the *Rasul* decision means only that federal habeas jurisdiction extends to GTMO, not that non-citizens detained there are endowed with any constitutional rights by virtue of their location. See *Khalid v. Bush*, 355 F. Supp.2d 311, 322-23 (D.D.C. 2005). In his view, noncitizens at GTMO are no more able to invoke constitutional rights than noncitizens seized by U.S. personnel anywhere else overseas. See *id.* Senior Judge Green held otherwise, on two grounds. First, she reasoned that the Supreme Court in *Rasul* did not intend to extend a meaningless formality to the detainees when it granted them access to the federal courts. See *In re Guantanamo Detainees*, 355 F. Supp.2d 443, 453-64 (D.D.C. 2005). Second, she found that the degree of control exercised by the U.S. at GTMO made that location analogous to other U.S.-controlled territories in which mere presence endows noncitizens with "fundamental" constitutional rights. See *id.*

³¹⁰ See, e.g., Kermit Roosevelt, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017 (2005). Cf. Margaret Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1660 n.43 (1997) (describing the *Knauff/Mezei* doctrine that non-citizens who have not "entered" the U.S. lack due process rights even if physically in U.S. territory, and discussing possible impact of statutory reforms on this doctrine); *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, 1341 (2d Cir. 1992) (affirming determination of a serious question on the merits as to whether Haitian would-be immigrants found on the high seas en route to the U.S. and taken to GTMO obtain due process rights by virtue of their presence there), *vacated as moot sub nom. Sale v. Haitian Centers Council, Inc.*, 509 U.S. 918 (1993).

³¹¹ OLC clearly anticipated a result along these lines when it vetted GTMO back in December 2001, warning that "[i]f a federal district court were to take jurisdiction over a habeas petition, it could review the constitutionality of the detention and the use of a military commission . . ." Memorandum, *supra* note 11, at 1. See also *id.* at 8 ("We are aware of no basis on which a federal court would grant different litigant rights to a habeas petitioner simply because he is an enemy alien, other than to deny him habeas jurisdiction

issue is whether a due process analysis would require a more exacting standard for measuring the risk of torture than the more-likely-than-not test of CAT Article 3 (or whether a reviewing court relying on due process grounds would be less deferential to the Executive than a court considering a CAT Article 3 argument).

The applicability of due process protections in this context can be understood most usefully through the lens of substantive due process.³¹² Substantive due process prohibits the government from depriving a person of certain protected interests without regard to the procedural safeguards involved, in at least some circumstances. Although the precise scope of the interests protected by substantive due process is unclear, it is uncontroversial that the doctrine at least protects a person's interest in freedom from physical harm. Substantive due process thus imposes categorical restraints on the ability of government agents to inflict such harm themselves. But does it also restrain the government's ability to place a person in a situation that poses a risk that third parties will harm them?

A. The State-Created Danger Rule

Not surprisingly, there is no precedent exactly on point with respect to the situation in which a military detainee of the federal government argues that substantive due process precludes transferring him to the custody of a foreign government that might torture him. There is, however, a substantial body of caselaw addressing somewhat analogous situations in which individuals have argued that the government is responsible, albeit indirectly, for harms inflicted by private actors.³¹³

in the first place.”). If true, then by the same token a court could review the constitutionality of a detainee transfer.

³¹² I do not provide a separate discussion of the potential impact of a *procedural* due process challenge because, on close inspection, such an argument simply collapses back into the substantive due process analysis presented below (in the sense that the substantive due process argument ultimately turns on the fact that the government relies on a process – diplomatic assurances – to overcome fear-of-torture concerns). For a discussion of procedural due process in the post-9/11 context, see *Hamdi*, 542 U.S. 507. Cf. *Sayne v. Shipley*, 418 F.2d 679, 686 (5th Cir. 1969) (opportunity for habeas review of an administrative habeas determination satisfied procedural due process).

³¹³ This caselaw arises in the context of lawsuits under 42 U.S.C. § 1983, which provides a statutory vehicle to seek civil damages for violations of constitutional rights occurring under color of state law. Although the § 1983 context concededly introduces many wrinkles that have no relevance for the situation of the GTMO detainees (in particular, concerns about constitutionalizing state tort law), the actual content of substantive due process protections should not vary depending on whether the issue arises in the § 1983 or habeas corpus contexts). For a general overview of § 1983 litigation in this area, see Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1139 (2005).

The leading case in this area is the Supreme Court's 1989 decision in *DeShaney v. Winnebago County Dep't Soc. Services*. *DeShaney* dealt with a substantive due process claim asserted on behalf of a boy who had been badly beaten by his father. The boy and his mother alleged that state officials were aware for some time that the father was abusive, and that the government's failure to remove the boy from the home despite this knowledge constituted a deprivation of his interest in freedom from bodily harm. The Court rejected this argument, concluding "[a]s a general matter . . . that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."³¹⁴ But the Court did not entirely foreclose the possibility of state responsibility for third-party violence.

First, the Court acknowledged that a different rule might apply in the situation in which the State "takes a person into its custody" and "renders him unable to care for himself."³¹⁵ In that case, an "affirmative duty to protect" the individual "arises . . . from the limitation which [the State] has imposed on his freedom to act on his own behalf."³¹⁶ This caveat is sometimes referred to as the "custody exception."³¹⁷ Second, the Court also implied that the result might have been different in *DeShaney* had the State "played [a] part in [the] creation" of the threatened harms, or if it had done "anything to render [the victim] any more vulnerable to them."³¹⁸ This exception has become known as the "state-created danger" rule.³¹⁹

Any uncertainty about the status of the state-created danger rule³²⁰ was put to rest after every single circuit court adopted it as a potential basis for finding a substantive due process violation.³²¹ The last circuit to do so – the D.C. Circuit – has particular relevance for purposes of the GTMO transfer cases. Fortunately, when the D.C. Circuit adopted the state-created danger rule in 2001 in *Butera v. District of Columbia*, it went to great lengths to clarify the analytical framework associated with the rule.

³¹⁴ *Id.* at 197. See also *Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (holding that respondent lacked cognizable interest in police enforcement of a protective order).

³¹⁵ *Id.* at 199, 200.

³¹⁶ *Id.* at 200 (citing, *inter alia*, *Youngberg v. Romeo*, 457 U.S. 307 (1982)).

³¹⁷ See *Butera v. District of Columbia*, 235 F.3d 637, 648 (D.C. Cir. 2001).

³¹⁸ *DeShaney*, 489 U.S. at 201. It had not done so in *DeShaney*, despite the fact that the State at one point had custody of the boy before returning him to his father, because this "placed [Joshua DeShaney] in no worse position than he would have been had it not acted at all." *Id.*

³¹⁹ *Butera*, 235 F.3d at 647.

³²⁰ The concept of state-created danger as grounds for a substantive due process violation in the context of privately-inflicted violence actually pre-dated *DeShaney*, see *Butera*, 235 F.3d at 649 n.11 (describing circuit precedent predating *DeShaney*), but the reference to it in *DeShaney* was quite oblique and, in any event, dicta.

³²¹ See *Butera*, 235 F.3d at 649 n.10 (listing cases).

B. The Analytical Framework for State-Created Danger Claims

The fundamental prerequisite for a state-created danger argument, according to *Butera*, is that the government must engage in “affirmative conduct . . . to increase or create the danger that results in harm to the individual.”³²² Not all such risk-increasing conduct violates due process, of course. The Supreme Court’s 1998 opinion in *County of Sacramento v. Lewis*³²³ held that a substantive due process challenge to executive action is never actionable unless it concerns conduct that is “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”³²⁴

In practical terms, this threshold requirement means that a substantive due process claim can never be premised on government *negligence* with respect to the risk of harm.³²⁵ On the other hand, government action *intended* to cause harm clearly can satisfy the shocks-the-conscience test.³²⁶ This leaves open the question of whether an intermediate level of culpability also could satisfy the shocks-the-conscience threshold inquiry.³²⁷ In particular, can a litigant satisfy this

³²² *Butera*, 235 F.3d at 650. See also *id.* at 651 (holding that “an individual can assert a substantive due process right to protection . . . from third-party violence when . . . officials affirmatively act to increase or create the danger that ultimately results in the individual’s harm”). The language in *Butera* is retrospective, as one would expect given that most § 1983 litigation arises in the aftermath of the harm. If a state-created danger claim were to arise concerning GTMO transfers, in contrast, the claim would be prospective in nature.

³²³ 523 U.S. 833.

³²⁴ *Id.* at 847 n.8. For an overview of the impact of *Lewis* on substantive due process analysis generally, see Robert M. Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYR. L. REV. 981, 981-86 (2000).

³²⁵ See *Butera*, 235 F.3d at 651 (citing *Lewis*, 523 U.S. at 848-49 (stating that negligent government action is “categorically beneath the threshold of constitutional due process”).

³²⁶ *Butera*, 235 F.3d at 651.

³²⁷ It is worth emphasizing that the shocks-the-conscience test is *not* the end of the inquiry. Its purpose is merely to screen out claims that are not sufficiently serious to warrant further constitutional scrutiny. According to *Lewis*, actions that are found to shock-the-conscience then should be examined using a fundamental rights framework. See Chesney, *supra* note 283, at 981-86. The *Lewis* approach has been called into question to a degree, however, by the Court’s subsequent decision in *Chavez v. Martinez*, 538 U.S. 760 (2003) (addressing aggressive police interrogation of severely wounded suspect). See John Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after Chavez v. Martinez*, 39 GA. L. REV. 733 (2005) (discussing impact of *Chavez* on the *Lewis* approach). Justice Thomas, writing for four justices including himself, described the shocks-the-conscience test as an alternative to the fundamental rights approach. Justice Souter (the author of *Lewis*) wrote an opinion for the majority on this issue that did not contest Thomas’s description but instead simply remanded the case for further consideration of the substantive due process issue. See *id.* On remand, notably, the Ninth Circuit appears to have followed the Thomas formulation, although the brief opinion is far from clear. See *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th

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

The answer is yes, but only in the limited circumstance “where the State has a heightened obligation toward the individual.”³²⁸ Such special circumstances arise, to give a pertinent example, when the government (i) has custody of the individual (thus reconnecting the state-created danger exception with the “custody exception” mentioned above) and (ii) has leisure to make an “unhurried judgment upon the chance for repeated reflection.”³²⁹

How might this framework apply to a substantive due process claim by GTMO detainees objecting to transfer on fear-of-torture grounds? The detainees, obviously, are held in government custody, creating the requisite special relationship with the individuals involved. And in light of the pace and methods through which transfer decisions have been made in the past, it seems probable that the time-for-deliberation factor also would be satisfied. Detainees accordingly would not have to show that the government *intended* to subject them to physical harm (at the hands of the receiving state), but could instead argue that the government has deliberately disregarded the *prospect* of such harm.

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

The D.C. Circuit has not spoken directly to this issue of the meaning of “deliberate indifference.” Other circuits have, however, in the context of claims brought on behalf of children injured or killed after the state placed them with abusive foster families. Two formulations have emerged from these cases. The Fifth Circuit, for example, has stated that deliberate indifference requires that the relevant decision-maker “must [have been] both aware of facts from which the inference could be drawn that a *substantial risk of serious harm* exists, and he must also [have] draw[n] that inference.”³³⁰ The Seventh Circuit, on the other

Cir. 2003) (finding that the interrogation both shocked the conscience and that the investigating officer deprived the suspect of a fundamental right).

³²⁸ 235 F.3d at 651 (citing *Lewis*, 523 U.S. at 849).

³²⁹ *Butera*, 235 F.3d at 651-52 (quoting *Lewis*, 523 U.S. at 853). See also *Fraternal Order of Police v. Williams*, 375 F.3d 1141, 1145-46 (D.C. Cir. 2004) (holding that the deliberate indifference standard could not be invoked by prison guards objecting to city decision to increase prisoner-to-guard ratios, although officials had leisure to deliberate in making the decision, because no special relationship existed).

³³⁰ *Hernandez v. Tex. Dep’t Protective and Reg. Services*, 380 F.3d 872, 880 (5th Cir. 2004) (quoting *Smith v. Brenoetsy*, 158 F.3d 908, 912 (5th Cir. 1998) (quoting *Farmer v.*

hand, has simply stated that the individual must establish that the officials involved “knew or suspected that abuse was occurring or likely.”³³¹

It is not clear whether either formulation rises to the level of a more-likely-than-not standard, although both are capable of being read as consistent with that approach. Even assuming that one or both formulations refers to a less-demanding standard, however, it does not necessarily follow that a court would apply the same approach if the state-created danger issue were to arise in the quite distinct context of a GTMO transfer. True, the foster home abuse scenario does have significant parallels with the GTMO scenario; in both cases the government compels an individual into the hands of a potentially abusive custodian in circumstances where the government may have reason to anticipate abuse. But the GTMO scenario introduces constitutionally-significant considerations wholly lacking in the foster placement scenario, including in particular the deference afforded to the Executive Branch with respect to foreign relations.³³² Accordingly, it is doubtful that a court would adopt anything less than a more-likely-than-not standard of deliberate indifference in the context of a substantive due process argument by a GTMO detainee hoping to avoid custodial repatriation.

Assuming that the risk-of-torture judgments thus required by both due process and CAT Article 3 involve the same substantive standard,³³³ there is little to recommend one approach over the other from the point of view of the government or the detainees.³³⁴ Most notably, with respect to the most critical issue – i.e., the permissibility of relying on diplomatic assurances – there is no reason to believe that the requirements of substantive due process would be any more or less forgiving than those of CAT.

VI. CONCLUDING THOUGHTS

Brennan, 511 U.S. 825, 837 (1994)) (emphasis added). In this passage, the court is borrowing definitional concepts from the parallel area of 8th Amendment doctrine.

³³¹ *Lewis v. Anderson*, 308 F.3d 768, 776 (7th Cir. 2002) (emphasis added).

³³² *See, e.g.*, *Prosper Dec.*, *supra* note 139.

³³³ Technically, the “shocks-the-conscious” standard for substantive due process challenges is only the first step in the analysis, with the litigant next being obliged to demonstrate the existence (and violation of) a fundamental right. *See supra* note 286. Presumably this would not present an obstacle in the event that the litigant succeeded in the deliberate indifference inquiry.

³³⁴ From the point of view of a court considering an attempt by a detainee to assert both kinds of arguments, of course, the existence of equivalent options under substantive due process and CAT present an opportunity for declining to engage the issues presented by one or the other.

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

As with so much else related to the conflict with al Qaeda since 9/11, the legal aspects of this development are in significant respects unprecedented. They cannot be resolved simply by reference to familiar legal frameworks such as formal extradition, on one hand, or the traditional rights of belligerents, on the other. Instead, ascertaining the law of international detainee transfers requires a patient and nuanced examination of a host of issues, some esoteric and most freighted with implications for other factual scenarios.

It is unclear, for now, whether and to what extent the courts will come to grips with these difficulties. The initial stage of GTMO transfer litigation was not much more than a brief foray into uncharted territory. Because none of the dozens of motions involved an actual attempt to transfer a detainee, the issue was framed in case after case in terms of prophylactic relief designed merely to ensure that the underlying substantive issues could be raised if the need were to arise; the courts were not obliged in this first wave to explore the full range of arguments and issues related to *non-refoulement*, and did not come anywhere close to doing so. But the time will come when a court will have no choice but to decide whether or not to regulate or perhaps even prohibit a particular transfer on risk-of-torture grounds.

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

Many of the topics explored in this Article call for further discussion, including in particular the scope of habeas review in connection with *non-refoulement* where diplomatic assurances are in issue (as they almost always will be). It is readily apparent that the use of diplomatic assurances can lead to abuse, yet it is equally apparent that

some form of assurances is a necessary part of international cooperation in the current conflict. In any event, there does not appear to be any ground in current law for precluding their use.

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

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

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