Shattering the Nuremberg Consensus: U.S. Rendition Policy and International Criminal Law

BY LEILA NADYA SADAT

The Problem of Extraordinary Rendition

It is well known that the atrocities of September 11th, 2001 resulted in a catastrophic loss of life, billions of dollars of economic damage, and shattered the American psyche. But their potential effect on the international legal order was just as profound, even if less obvious. For the so-called “Global War on Terror” (GWOT) has not only been a military offensive against international terrorism, but a campaign against the laws of war themselves, and even the most fundamental norms of the U. N. Charter; an effort to reshape U.S. participation radically in the international organizations and regimes that emerged from the aftermath of the Second World War. One of the practices that epitomizes the extent to which the U.S. government has been willing to embrace rough tactics as a response to the 9/11 attacks is the use of extraordinary rendition and torture against prisoners captured as part of the GWOT. While not a legal term imbued with precise meaning, “extraordinary rendition” generally involves the seizure of a person from either U.S. or foreign soil, and his or her transport abroad to a foreign or U.S. detention facility. The seizures invariably take place in secret, without notice to the suspect or their families, and outside normal legal channels, such as deportation or criminal proceedings. The individuals captured in this manner have no means to challenge either their arrest or detention and are held incommunicado. They are imprisoned and typically interrogated using techniques that amount to torture and other mistreatment. Sometimes they are tried by foreign governments, and sometimes they are executed. Indeed, the stories of the individuals “outsourced” as a result of the U.S. rendition program are the stuff of nightmarish Hollywood movies, involving hooded and shackled detainees spirited away in the dead of night to remote countries where they suffer torture and other maltreatment. “Ghost prisoners,” held in so-called “black site” secret prisons without record by

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U.S. jailers\textsuperscript{2} fare little better according to reports that have trickled out from victims like Laid Saidi, whose story appeared in The New York Times. Arrested in Tanzania, he was ultimately shackled and flown to Afghanistan where he was tortured, he says, by Americans. He was held for 16 months before his U.S. captors realized their error and released him.\textsuperscript{3} Although the use of extraordinary rendition as an investigative tool did not originate with the Bush administration, there is no doubt that the advent of the GWOT brought with it a significant expansion of the practice. Indeed, rendition appears to be part and parcel of the government’s response to the threat of terrorism, a way, it seems, of “terrorizing the terrorists” so as to bend them to the American will. Moreover, the emphasis has shifted from obtaining suspects for prosecution, to transferring them for interrogation. A recent investigation by the European Parliament concluded that there exists a “widespread, methodical practice of extraordinary rendition following precise rules carried out by certain U.S. secret services.”\textsuperscript{4} Estimates of how many prisoners are involved range from a few dozen to hundreds, and renditions have occurred from Europe, the United States and even Occupied Iraq. Yet there is little doubt that extraordinary renditions implicate multiple human rights abuses including arbitrary arrest, irregular trials, torture or cruel, inhuman or degrading treatment, deprivation of life and liberty, and often death. They may also constitute torture, war crimes or crimes against humanity if committed with the requisite criminal intent. Thus the government’s failure to repudiate the practice of rendition (which President Bush admitted was U.S. policy in September 2006)\textsuperscript{5} is a radical retreat from the Nuremberg precedent; a resort to state violence that is deeply problematic, and potentially unlawful under international criminal law.

Shattering the Nuremberg Consensus

Following the Second World War, the United States promoted the view that criminal trials of the Nazi leaders should be held and the Nuremberg trials were the result. The so-called Nuremberg principles that resulted from the Charter of the Nuremberg Tribunal and its judgment were adopted by the General Assembly immediately upon the establishment of the United Nations. They eschew collective responsibility in favor of individual criminal responsibility; provide that no human being (even a head of state or other responsible government official) is above the law with respect to the most serious crimes of concern to humanity as a whole: war crimes, crimes against humanity, and the crime of aggressive war; and that reliance upon internal law is no defense to a crime for which an individual may have responsibility under international law.\textsuperscript{6} The corollary to the notion that individuals may have duties under international law is that they have rights thereunder.
Thus, the Nuremberg principles provided a foundation for the emergence of international human rights law. The Nuremberg principles also became the basis for the codification of international criminal law following the war, beginning with the Genocide Convention of 1948 and the Geneva Conventions of 1949. Indeed, the four Geneva Conventions of 1949 have become the gold standard regarding the capture, detention, treatment, and trial of prisoners of war and civilian internees. They enjoy unparalleled support among states, having been ratified by every country in the world, and are, without a doubt, part of the customary laws of war.\textsuperscript{7} Geneva law, as it has come to be called, requires that prisoners be treated humanely, forbids secret detention sites, and appoints the International Committee of the Red Cross as the international monitor for Geneva compliance. Of particular importance is the grave breaches regime of the four conventions, whereby certain acts are explicitly deemed war crimes and each country is required to criminalize those actions and search for persons alleged to have committed them. Additionally, each state is required to bring such suspects before their own courts, or hand them over to another country for trial.

Early in the GWOT, over the objections of U.S. Secretary of State, Colin Powell, and the State Department’s Legal Advisor, William H. Taft, IV,\textsuperscript{8} lawyers in the U.S. Department of Justice argued that the United States should abandon the provisions of the Geneva Conventions in favor of a de novo legal regime for the detention, treatment and trial of enemy prisoners, whether captured in the U.S. or abroad. Then Counsel to the President, Alberto Gonzales, famously opined that portions of the conventions were “quaint” and “obsolete,”\textsuperscript{9} ultimately persuading the president to deny the applicability of Geneva law to either al-Qaeda or Taliban detainees in U.S. custody. A diplomatic and legal furor ensued, particularly after the transfer of prisoners from Afghanistan to Guantanamo Bay, Cuba, where bound prisoners were initially held in outdoor cages, pursuant to an emergency presidential order issued on November 13, 2001.\textsuperscript{10} The extremely negative international reaction generated by the creation and operation of the U.S. prison at Guantanamo Bay, is summarized by the words of Amnesty International, which suggested that the U.S. detention center at Guantanamo Bay had become the “gulag of our times.”\textsuperscript{11}
Ironically, however, it is not as if lawyers were excluded from policy making by the Bush administration. Instead, they were relied upon to provide theories and memos supporting these Bush administration initiatives and dictates. Government lawyers and “conservative” academics penned an extraordinary number of memoranda and articles arguing either for the inapplicability of particular norms of international law or for interpreting particular norms so that they have little or no effect on U.S. activity. This penchant for narrowing (or writing out of existence) international constraints on U.S. action has been combined in much of this legal corpus with a theory of an powerful, almost omnipotent, president; largely unconstrained so long as he is acting as the Commander in Chief during a war. Clever lawyering notwithstanding, two subsets of general international law remain applicable to U.S. action abroad during the war on terror: international human rights law and international humanitarian law. Extraordinary rendition and torture are illegal under both.

Extraordinary Rendition as a Crime Against Humanity

As both the Committee Against Torture and the Human Rights Committee have found, extraordinary rendition violates several provisions of the Convention Against Torture and the International Covenant on Civil and Political Rights, treaties to which the United States is a party.

Although the U.S. government has argued to the Torture Committee that the Convention’s application was suspended by the GWOT, this assertion was categorically rejected in the Committee’s Report of May 18, 2006, which noted that the “Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction.” The Torture Committee also condemned the holding of “ghost” detainees who were unregistered in a particular prison under U.S. jurisdiction outside the United States, and the establishment of secret detention facilities under de facto effective control. In the Committee’s words, “Detaining persons in such conditions constitutes, per se, a violation of the Convention.” The Human Rights Committee has concurred, finding that “the [United States] should immediately cease its practice of secret detention and close all secret detention facilities.”

To the extent that the practice of extraordinary rendition results in the violation of the human rights treaties referred to above, and represents official U.S. policy, it violates international law, and the state responsibility of the United States government is engaged. In addition, those who planned, aided or abetted or carried out the renditions may incur individual criminal responsibility under a variety of international treaties and national laws, assuming
jurisdiction is present and they acted with the requisite criminal intent. The renditions themselves may constitute torture or cruel, inhuman and degrading treatment, by subjecting the rendee to severe pain and extreme physical and psychological stress. Rendition to torture also violates the nonrefoulement provisions of the Torture Convention, to which the United States is a party, and although the U.S. government disputes both the applicability and the nature of America’s obligations under the CAT to detainees in the GWOT,\textsuperscript{15} it is probable that at least some renditions may violate U.S. federal law, and are potentially criminal in the United States and abroad.\textsuperscript{16}

Finally, under the Rome Statute for the International Criminal Court, several of the human rights abuses that rendition entails, including imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (Article 7(1)(e)), torture (Article 7(1)(f)), and enforced disappearance of persons (Article 7(1)(i)) are prohibited if committed as part of a widespread or systematic attack against any civilian population. (A new U.N. Treaty on Enforced Disappearances has a similar provision)\textsuperscript{17}. The ICC would, of course, be unlikely to exercise its jurisdiction in cases of extraordinary rendition given that the United States is not a party to the Court’s Statute and the U.S. rendition program, as problematic as it is, is unlikely to rise to the level of gravity required by Article 17 of the Rome Statute for the admissibility of a case. Nonetheless, the idea that U.S. officials would be promoting or engaging in actions that the international community views to be among the most serious offenses should at least give government decision makers pause.

**Extraordinary Rendition as a War Crime**

The U.S. government’s position with regard to extraordinary rendition is that rendition victims have no rights either under U.S. or international law because the U.S. is in a state of “war” with international terrorists, who nonetheless cannot benefit from the laws of war because their “terrorist” status renders them “unlawful” combatants. Since they are “combatants”, they cannot be the victims of a crime against humanity, which protects only civilians; and cannot be the victim of a war crime either, due to their “unlawful combatant” status. This leaves them completely bereft of any legal protection at all. This position is fiercely contested by most international lawyers and other governments, and was partially invalidated by the United States Supreme Court.\textsuperscript{18} Nonetheless, this apparently continues to remain the U.S. position as regards prisoners taken in the Afghan conflict.

Prisoners in the Iraq conflict, however, presumably benefit from the protection of international humanitarian law, including the grave breaches regime
of the Geneva Conventions. There is no real dispute that U.S. (and U.K.) Coalition Forces in Iraq were subject to international humanitarian law at the time of their invasion of that country, and the occupying powers never disputed this. Moreover, Security Council Resolution 1483 called upon all states to observe their obligations under the Geneva Conventions of 1949.\textsuperscript{19} As General Taguba noted in his report on conditions at Abu Ghraib prison, all prisoners of war and civilian internees held at the prison should receive the “full protection of the Geneva Conventions, unless the denial of these protections is due to specifically articulated military necessity . . .”\textsuperscript{20} As for civilian detainees, who apparently comprised as much as 70 to 90 percent of all those arrested in Iraq, according to the ICRC,\textsuperscript{21} they are protected from rendition or transfer outside of Iraq by Article 49 of the Fourth Geneva Convention, which provides that “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory are prohibited regardless of their motive.”\textsuperscript{22} The ICRC Commentary to article 49 states that the “prohibition is absolute and allows of no exceptions…”\textsuperscript{23}

On March 19, 2004, a draft opinion by Harvard Law Professor Jack Goldsmith, III, then at the U.S. Department of Justice Office of Legal Counsel (OLC)\textsuperscript{24} was issued, apparently at the CIA’s request, concluding that article 49 permits the deportation and transfer of both aliens (on a permanent basis) and Iraqis (on a temporary basis to “facilitate interrogation”) out of the occupied zone. Yet rendition, and particularly an extraordinary rendition combined with aggressive interrogation techniques, is most certainly a war crime under the Geneva Conventions. Indeed, the CIA’s request for advice is bewildering, given the sharp criticism by the ICRC and General Taguba of the CIA’s practice of not reporting “ghost detainees” to the ICRC. In the words of General Taguba “[t]his maneuver was deceptive, contrary to Army Doctrine, and in violation of international law.”\textsuperscript{25} Surely secret renditions to prisons outside of Iraq are equally problematic. These individuals would presumably be hidden from the ICRC (in violation of the Third and Fourth Geneva Conventions) in order to permit the use of “enhanced” interrogation techniques that would not be acceptable under either conventional or customary international law. Moreover, violation of Article 49 is one of the most serious offenses that can be perpetrated under the Geneva Conventions, and is condemned in Article 147 as a “grave breach,” which must be suppressed and punished.\textsuperscript{26} Indeed, the final footnote (14)
of the OLC Rendition Memorandum tacitly admits as much but nonetheless recommends “case-by-case” evaluation of potential relocations of “protected persons” from Iraq under the guidance of OLC itself!

I have extensively analyzed Professor Goldsmith’s arguments on these issues elsewhere, and will only briefly touch upon those points here. Although the rendition memorandum was apparently not included in later Bush administration legal opinions justifying rendition from Occupied Iraq, it has been reported that it was relied upon in the case of at least a dozen prisoners who were transferred out of Iraq during the U.S. occupation of that country. Yet a careful analysis of the text suggests that the memorandum is deficient in three respects: in its approach to the text and spirit of the Geneva Convention itself, in its highly selective approach to the applicable legal authorities combined with reliance upon inapposite legal authority and appeals to “common sense” and in its misapprehension of the historical context that gave rise to the prohibition embodied in Article 49.

Indeed, the rendition memo does not directly dispute the ICRC’s position: it ignores it. Most of the argument relies upon linguistic ploys directly contradicted by the text of the Geneva Convention itself, and there is an aura of subterfuge about the intended purpose. How can the transfer of an Iraqi to a secret prison outside Iraq “facilitate interrogation” except by removing him from the watchful eye of the ICRC? The Convention requires that the ICRC be notified of all transfers, including ones within the occupied territory or temporary ones. The rendition memo does not remind the CIA of that obligation. Moreover, it is not surprising that OLC’s approach has little or no acceptance in international law and practice given the historical background against which the deliberations at Geneva took place in 1949. Recall that German, particularly Jewish, nationals fled Germany for other parts of Europe that were subsequently occupied, and many would have been “illegal aliens” (to use the Goldsmith’s term) in their countries of refuge. Indeed, Anne Frank and her family were Germans living in Holland, who, by the time of their arrest and deportation to Auschwitz, probably did not have legal papers. Refugees were a major target of Nazi deportations, and the inclusion of Article 49 and other provisions in the 1949 Geneva Conventions was a direct response.

Jack Goldsmith, the memo’s author, has written that he does not know whether the request for advice was “associated with a broader rendition program,” and has suggested that he believes that it was never relied upon to take anyone outside of Iraq, a proposition others have disputed. At the same time, he opines that the opinion “reached the right conclusions,” an
assertion difficult to sustain if one examines the opinion carefully. Indeed, the rendition memo suffers from the same legal deficiencies as the torture memos Goldsmith critiques in his recent book, and is difficult to accept on moral or legal grounds.

The Ineffectiveness of U.S. Rendition Policy

Proponents of rendition, torture and the establishment of secret overseas prisons no doubt sincerely believe that these actions are justified. Yet as I hope this essay has demonstrated, they were surely not “legal” as that term is customarily understood at the time when they were carried out, although lawyers were employed to pen justifications in their defense. Nor do they appear to have been particularly effective. International terrorism continues unabated, Osama bin Laden remains at large, Iraq teeters on the edge of civil war, and well-seasoned interrogators have questioned the efficacy of torture and cruel-treatment in obtaining useful and reliable evidence from prisoners.32 Opinion polls show international respect for the United States has been falling steadily over the past few years, as human rights abuses in the GWOT and detainee mistreatment have become public. U.S. actions have been scrutinized and condemned by international bodies all over the world: the Committee Against Torture, the Human Rights Committee, the Inter-American Commission, the Parliament of the European Union, several national parliaments and the Council of Europe. Lawsuits have been filed against U.S. government officials in U.S. courts and in foreign courts, and the United States was unable to join most other Western nations in support of a new United Nations treaty against forced disappearances that was opened for signature last year.

International human rights instruments specifically permit governments to derogate from certain of their provisions during times of emergency, as the United Kingdom did, for example, after September 11th, 2001, but which the United States has not done. If the administration is sincere in its claim that new international legal paradigms must be adopted in order to successfully combat the scourge of international terrorism, new multilateral discussions, perhaps of a new treaty instrument, would be the appropriate vehicle to do so, not creative “reinterpretations” of the law that are patently inconsistent with prior U.S. and international understandings.

Goldsmith’s Rendition Memorandum, like many of the other memos issued to cover GWOT policies, raises very troubling human rights concerns. It departs from existing and conventional interpretations of the law (both domestic and international), and instead promotes novel, de novo, and often
misleading legal arguments: without highlighting the radical departure adopting them represents, or the costs that may be entailed in following the rendition, torture, and the establishment of secret overseas prisons were not legal, nor do they appear to have been effective.

The theories articulated in these documents have each enhanced Executive branch authority, often leaving detainees in U.S. custody few, if any, opportunities to challenge either the legality of their detention, or the treatment they have received.

The Detainee Treatment Act of 2005, adopted by an indignant Congress in response to the growing evidence that torture and cruel, inhuman and degrading treatment were becoming institutionalized aspects of U.S. prisoner of war treatment appeared to reverse the trend for a time. However, the Military Commissions Act of 2006 codified many of the Bush Administration’s policies as a matter of federal law, including the absolute authority of the president to classify individuals as “unlawful enemy combatants,” thereby stripping them of the protection of the Geneva Conventions and the U.S. Uniform Code of Military Justice. It also deprives the federal courts, for the most part, of authority to review claims of detainees of abuse or wrongful detention (although the Supreme Court will decide the legality of the habeas stripping provisions of the act later this year), and attempts to retroactively amend the War Crimes Act to prevent prosecution of individuals who might otherwise be accused of war crimes as part of the rendition program.

This is particularly troubling given that most of those presently held in U.S. detention facilities appear not to be terrorists at all. Recall that the catalog of abuses at Abu Ghraib prison included physical violence, videotaping and photographing naked male and female detainees, posing detainees in various sexually explicit positions for photographing, forcing detainees to remove their clothing and remain naked for several days at a time, and using dogs without muzzles to intimidate and frighten detainees. Yet in 2004 the Red Cross suggested that between 70 and 90 percent of the thousands of prisoners
held at Abu Ghraib prison by the United States may have been brought there by mistake.34 Recent releases of prisoners at Guantanamo Bay also suggest that many of those “high value” detainees in fact had very little information to share, or at the very least, were not terribly dangerous after all. Such is the case with the release of Yasser Hamdi, the accused Taliban fighter who was held in Guantanamo for nearly three years without charges. There have also been mistakes in those transferred under the extraordinary rendition program, as demonstrated by the situation of Maher Arar, who was hung upside-down, subjected to electric shock treatments, and put into a “grave-like cell.”35 A Canadian omission of inquiry cleared Arar of any connections to terrorism or terrorist crimes, and found that both the U.S. and Canadian governments were complicit in his rendition to Syria.

Many experts, such as Robert Pape in his superb study of the logic of suicide terrorism, have applied themselves to an understanding of the deeper logic of terrorism and its causes, which is not our subject here. However, those studies in no way suggest that the human rights abuses that currently taint the conduct of the GWOT are necessary for a better outcome. Secret prisons, secret prisoners, indefinite detention and the use of torture and cruel, inhuman and degrading treatment, all in violation of international human rights law and international humanitarian law should be uniformly and categorically rejected, particularly by lawyers, who understand the complexities of the law and its central role in holding a society together when tested by adversity.

Conclusion

The Nuremberg principles, with their emphasis on individual criminal responsibility rather than collective punishment of entire nations or ethnic groups suggests an alternative vision of the GWOT: one that would permit the United States to retain both legal and moral clarity as it combats the very deadly scourge of international terrorist attacks. Indeed, following the September 11th attacks, the United Nations Security Council adopted a series of resolutions building upon the Nuremberg precedent by mandating, for all nations, that the crime of international terrorism be treated as other jus cogens crimes, such as genocide and war crimes, over which all states may exercise universal jurisdiction. The Resolutions emphasized the duty of all states to prevent as well as to punish acts of international terrorism, and set out a framework for the continued elaboration of international norms and prosecutions of international terrorist crimes. Whatever qualms one might have about the Security Council adopting this kind of international “legislation,” undoubtedly the September 11th attacks themselves were so horrifying
in scale that they finally unified states’ desire to make progress regarding the definition of terrorism, and the prosecution of major international terrorist figures. Many commentators suggested the need for international terrorist courts, not a new idea (an international terrorism convention, complete with a court, was elaborated in 1937 although it never came into force), but one worth seriously considering, particularly given the desire of many states to see the International Criminal Court eventually assume such a task. The Bush administration’s approach has appeared hypocritical and confused, attempting on the one hand to extricate the “war” on terror from the application of international humanitarian law, while arguing on the other hand, as a matter of domestic law, that because terrorism is a problem of war, not crime, the president may establish military commissions, detain individuals indefinitely without charges, and eliminate the possibility of federal court supervision.

The Bush administration’s approach also appears to have been remarkably short-sighted. Most international terrorists do not live in the United States or even in countries whose citizens are favorably disposed towards the U.S. government. Intergovernmental cooperation is essential for the apprehension of terrorist suspects, and getting other nations to prevent and punish international terrorists will assist the United States considerably in its efforts. The kind of “universal jurisdiction by treaty” regimes, found in the thirteen antiterrorism treaties that have elaborated to date, require all contracting states to try or to extradite suspected terrorists. The Security Council resolutions adopted after September 11th suggest that they may, in addition, be enforceable as a matter of customary international law against non-party (or uncooperative) states by the Security Council. However, the use of secret prisons, the holding of “ghost prisoners,” and the endemic use of torture and cruel, inhuman and degrading treatment against detainees in U.S. custody give states political cover for refusing to cooperate with the U.S. when they might otherwise have done so, even relatively quietly.

American leadership at Nuremberg showed the formerly warring states of Europe a new way to conceptualize international relations and to instill the rule of law. The administration has cited no evidence that Geneva and the other treaties elaborated at that time are obsolete; rather the government has made what is, at best, a tenuous case that they are inconvenient. Shattering the consensus that produced them has serious consequences not only for the conduct of the GWOT but the stability of all the institutions established under U.S. leadership after the Second World War. International law, like domestic law, is a system whose component parts are deeply intertwined. Unraveling portions of the legal fabric has unintended consequences for the
whole. The war that was launched from the nightmare of September 11th has produced the nightmare of Guantanamo, the horror of Abu Ghraib, the broken lives of the U.S. soldiers killed or wounded in Iraq and Afghanistan, the deaths of tens, maybe hundreds of thousands of Afghan and Iraqi civilians, and the shattered psyche’s of America’s torture and rendition victims. If severe enough, some of these renditions may not only be characterized as war crimes under the Geneva Conventions, but as crimes against humanity. Surely any cost-benefit analysis of U.S. rendition practice needs to account for the high cost associated with any credible accusation that these crimes have been committed by U.S. officials or persons working on behalf of the U.S. government. The real “war” against international terrorism is far from over, as recent events in Afghanistan, Iraq and Pakistan have demonstrated. To win what is likely to be a long, slow and difficult struggle, the United States needs to be perceived as credible, fair and a supporter of the rule of law. Ending the practice of extraordinary rendition immediately would nudge U.S. detention policies in the right direction. Congress should now pursue such a policy actively, and any presidential candidate who would prove that he or she is worthy of becoming the next “leader of the free world” should do so as well.

-Dianna English served as lead editor for this article.

NOTES

1 In this way, extraordinary rendition is akin to an “enforced disappearance,” defined in the International Convention for the Protection of All Persons from Enforced Disappearance as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.” International Convention for the Protection of All Persons from Enforced Disappearance, art. 2, adopted by the General Assembly on Dec. 20, 2006, opened for signature Feb. 6, 2007.

2 The term was employed by the U.S. Army in Iraq and relayed in the report of Major General Antonio M. Taguba, on alleged abuse of prisoners by members of the 800th Military Police Brigade at the Abu Ghraib Prison in Baghdad, Iraq, dated Feb. 26, 2004, at p. 18.


4 Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, Eur. Parl. Doc. PE 380.593v04-00 4 (2006). The report of the European Parliament, which deplores the passivity of some Member States as well as the lack of co-operation from the EU Council of Ministers, was approved by a vote of 382-256, with 74 abstentions. The final report, dated Jan. 30, 2007, can be found at Eur. Parl. Doc. PE 382.246v02-00 (A6-0020/2007).


10 “Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against
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13 Ibid.


16 Cognizant of this potential liability, the Military Commissions Act of 2006 contains various retroactive provisions attempting to establish an effective amnesty for offenses that might have been charged under the war crimes act of 1996 as amended. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 at 6(b)(2). Moreover, as recently as last summer, President Bush signed an executive order that arguably required the CIA to comply with the Geneva Conventions but which, at the same time, was touted as permitting the CIA to move suspects in U.S. custody into an “enhanced interrogation” program, involving the use of techniques going beyond those used by the military. Karen DeYoung, “Bush Approves New CIA Methods.” Washington Post, July 21, 2007.

17 Convention for the Protection of All Persons from Enforced Disappearance, supra note 1.


20 Taguba Report, supra note 2, at pp. 7-8 (summarizing report of MG Ryder).


24 Dated Mar. 19, 2004, the memo was entitled “A Permissibility of Relocating Certain ‘Protected Persons’ from Occupied Iraq.” authored by then Assistant Attorney General Jack L. Goldsmith III and directed to Alberto R. Gonzales, then Counsel to the President, reprinted in The Torture Papers, supra note 8 at 366 [hereinafter Goldsmith Memorandum].

25 Taguba Report, supra note 2, at 27, para. 33.

26 GC IV, art. 147. This may violate the Convention’s prohibition on unlawful confinement, as well. Indeed, the detention and rendition for purposes of interrogation of individuals from Occupied Iraq, and particularly Iraqis, constitutes a violation of article 8(2)(a)(vii) of the Rome Statute’s provisions on unlawful deportation or transfer and unlawful confinement. See also GC IV, arts. 27, 42, 78.


29 Goldsmith Memorandum, supra note 24, at 372.

30 Anne Frank, The Diary of a Young Girl: The Definitive Edition. Otto H. Frank & Miriam Pressler, eds., Bantam, 1991, pp 6-8. I am particularly indebted to Detlev Vagts for bringing the example of Anne Frank to my attention. As he notes, Anne and her family could not have gone to the local police to renew their residency permits, and by the time of their capture were undoubtedly without lawful papers.


33 Taguba report, supra note 2, at Findings of Fact, #6.
