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De-Torturing the Logic: The Contribution of CAT General Comment 2 to the Debate over Extraordinary Rendition Remarks

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**DE-TORTURING THE LOGIC:
THE CONTRIBUTION OF CAT GENERAL
COMMENT 2 TO THE DEBATE OVER
EXTRAORDINARY RENDITION**

*Margaret L. Satterthwaite**

I. THE EXTRAORDINARY RENDITION AND
SECRET DETENTION PROGRAM

Shortly after the attacks of 9/11, President George W. Bush gave the CIA authorization to set up a secret program aimed at taking terrorism suspects “off the streets.”¹ The resulting extraordinary rendition and secret detention program (“the Program”) reportedly involves the covert approval of “kill, capture or detain” (“K-C-D”) orders for specific individuals.² As the name implies, such K-C-D orders purport to allow U.S. agents—secretly and without warning to those targeted—to apprehend, imprison, and even target for death those individuals who are determined to be eligible for the Program. What this has meant in practice is that certain individuals are apprehended and transferred to the custody of foreign governments for interrogation, others are apprehended and sent to secret prisons—so-called CIA “black sites,” and others may have been summarily killed.

The U.S. government has not released comprehensive infor-

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¹ Press Release, Office of the Press Sec’y, President Discusses Creation of Military Tribunals to Try Suspected Terrorists (Sept. 6, 2006), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>.

² See Eur. Consult. Ass., *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, Doc. No. 11302 rev. (June 11, 2007) [hereinafter *Council of Europe June 2007 Report*], *available at* <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>.

mation about the Program; still unknown are the exact number and identities of people subject to K-C-D orders, the number and identities of people rendered to third countries for interrogation, the number and identities of individuals held in secret CIA “black sites,” and the number killed through operation of a K-C-D order. Concerning transfers to foreign governments, the estimates range from about 100 to several thousand. The best guess for “black sites” is that about three dozen individuals have been held in such facilities.³ The number of people who have been summarily killed is unknown.

Despite this secrecy, we know a significant amount about the Program through selective government disclosures⁴ and the stories of those who have emerged from it. We know about extraordinary rendition through Maher Arar, a Canadian citizen wrongly identified as an al Qaeda member, who was transferred from New York to Syria where he was detained and tortured for about a year before being released. We know about the secret detention program through Khaled El-Masri, a German citizen who was wrongly accused of being an al Qaeda member, abducted in Macedonia and sent to a secret CIA prison in Afghanistan, where he was held for five months and subjected to coercive interrogation.⁵

In contrast with the government’s attempts to keep secret certain facts about the Program, the United States has not been quiet about its legal justifications. Indeed, the U.S. government has actively made a series of legal arguments aimed at justifying the Program. Although those who defend the Program do not explicitly support the use of informal transfer due to a risk of torture, prolonged incommunicado detention, or targeted killings, defenders of the Program imply that it is legal by pointing to what they claim are lacunae in the relevant legal frameworks.⁶ The administration suggests that where lacunae are found, prohibitions give way to permission; territories outside the United States are conceptual-

³ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01.

⁴ For a thorough account of government disclosures concerning secret detention and extraordinary rendition, see CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, ON THE RECORD: U.S. DISCLOSURES ON RENDITION, SECRET DETENTION, AND COERCIVE INTERROGATION (2008) [hereinafter CHRGJ], available at <http://www.chrgj.org/projects/docs/ontherecord.pdf>.

⁵ Linda Greenhouse, *Justices Turn Aside Case of Man Accusing C.I.A. of Torture*, N.Y. TIMES, Oct. 10, 2007, at A20.

⁶ Jason Leopold, *The Bush Team’s Geneva Hypocrisy*, THE PUB. RECORD, Apr. 24, 2008, 1, available at <http://www.consortiumnews.com/2008/042508a.html> (last visited Feb. 12, 2009).

ized as locations where the United States may act as it pleases,⁷ informal promises between countries replace the absolute prohibition of certain transfers,⁸ and the war paradigm is used to deprive individuals of the protection of the law.⁹

I will not attempt to explore all of these arguments in my brief remarks today. Instead, I will focus my comments on the very significant contributions that the U.N. Committee Against Torture's General Comment 2 makes to closing the loopholes that the United States has tried to claim and exploit. I will focus on the two most well-known elements of the Program: extraordinary rendition and secret detention. Targeted killings will be left for another day.

II. CAT STANDARDS RELEVANT TO THE EXTRAORDINARY RENDITION AND SECRET DETENTION PROGRAM

Although there have been vigorous debates in the United States about the legality of the extraordinary rendition and secret detention Program, intergovernmental organizations such as the Council of Europe,¹⁰ the European Parliament,¹¹ the Human Rights Committee,¹² and the Committee Against Torture ("CAT")¹³ have stated unequivocally that the Program contravenes international human rights law binding on the United States.

⁷ Neil A. Lewis & Eric Schmitt, *The Reach Of War: Legal Opinions; Lawyers Decided Bans On Torture Didn't Bind Bush*, N.Y. TIMES, June 8, 2004, at A1.

⁸ Human Rights Watch, THE "STAMP OF GUANTANAMO" THE STORY OF SEVEN MEN BETRAYED BY RUSSIA'S DIPLOMATIC ASSURANCES TO THE UNITED STATES (Vol. 19 No. 2(D)) (2007), available at <http://www.hrw.org/en/reports/2007/03/28/stamp-guantanamo-0>.

⁹ Liliana Segura, *The Bush Era's Dark Legacy of Torture*, ALTERNET, Oct. 27, 2007, <http://www.alternet.org/rights/66270> (last visited Sept. 9, 2008).

¹⁰ Council of Europe June 2007 Report, *supra* note 2; Temp. Comm. on the Alleged Use of European Countries by the CIA for the Transp. and Illegal Det. of Prisoners [TDIP], *Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, EUR. PARL. Doc. A6-0213/2006 (June 15, 2006), available at [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_depotes/rapports/2006/0213/P6_A\(2006\)0213_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_depotes/rapports/2006/0213/P6_A(2006)0213_EN.pdf).

¹¹ TDIP, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, EUR. PARL. Doc. A6-0020/2007 (Jan. 30, 2007), available at <http://www.europarl.europa.eu/RegWeb/application/registre/simpleSearch.faces> (search "Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners").

¹² U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

¹³ U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Second Periodic Reports of States Parties Due in 1999, Addendum, United States of America*, ¶ 5, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005) [hereinafter *U.S. Second Periodic Report to Committee Against Torture*] (considering U.S. report submitted May 6, 2005).

The relevant human rights norms protecting against extraordinary rendition and secret detention include the following: the prohibition of *refoulement*, which proscribes transfers of people to places where they will likely be subjected to torture; the prohibition of enforced disappearances, which proscribes the concealment of the fate and whereabouts of individuals deprived of their liberty; and the norm against torture and cruel, inhuman or degrading treatment.¹⁴ I will briefly summarize these norms in the context of the extraordinary rendition and secret detention program.

The prohibition of *refoulement* is set out in a wide variety of human rights instruments. Most relevant today is the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment (“Torture Convention” or “the Convention”). *CAT Article 3 prohibits the transfer of individuals to States where they may be in danger of torture*. “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.”¹⁵

This article has been interpreted to apply to all forms of inter-State transfer of individuals, and therefore applies to informal transfers such as rendition, in which a person is abducted and forcibly transferred without any recourse to review procedures. When extraordinary rendition involves transfer to a country where an individual is at real risk of torture or cruel, inhuman or degrading treatment, the transfer is prohibited by binding international human rights law.¹⁶

¹⁴ Also relevant but not addressed here are, among others, rights against arbitrary detention, rights to consular access, and due process rights.

¹⁵ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 2, ¶ 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984) [hereinafter Convention].

¹⁶ As the CAT Committee has explained: “The Committee is concerned that the State party considers that the *non-refoulement* obligation, under Article 3 of the Convention, does not extend to a person detained outside its territory. The Committee is also concerned by the State party’s rendition of suspects, without any judicial procedure, to States where they face a real risk of torture (art. 3). The State party should apply the *non-refoulement* guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention. The State party should always ensure that suspects have the possibility to challenge decisions of *refoulement*.” Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture*, United States of America, ¶ 20, U.N. Doc. CAT/C/USA/C/2, (May 19, 2006) [hereinafter Recommendations of the CAT] (emphasis added).

Transfers to secret detention are likewise prohibited, in part because prolonged incommunicado detention like that which detainees experience in CIA “black sites” has itself been found to constitute—at minimum—cruel and inhuman treatment.¹⁷ When combined with coercive interrogation techniques, this kind of secret detention regime is more properly identified as one that entails torture. In addition, there is no doubt that secret detention is—in itself—unlawful under international human rights law. The U.N. Committee Against Torture has found that secret detention is a *per se* violation of the Torture Convention.¹⁸ Further, when carried out in the manner used in the Program, secret detention amounts to enforced disappearance,¹⁹ which is unlawful under customary international law.²⁰

III. THE CONTRIBUTIONS OF GENERAL COMMENT 2 TO CLOSING U.S. “LOOPHOLES”

The U.S. government has focused a great deal of energy in the last several years on efforts to carve out legal space for its actions in the “war on terror.” Instead of simply acting as a scofflaw, the United States has systematically produced legal arguments, pursuant to both international and domestic law, to support its actions.²¹ In relation to the extraordinary rendition and secret detention Program, the strategy has been to try to clear a space for actions

¹⁷ *Velasquez-Rodriguez v. Honduras*, Case 7920, Inter-Am. C.H.R., Report No. 4/88, OEA/Ser.L./V/III.19, doc. 13 ¶ 156 (1988).

¹⁸ Recommendations of the CAT, *supra* note 16.

¹⁹ The recently-concluded International Convention for the Protection of All Persons from Enforced Disappearance (adopted by the General Assembly in December 2006) defines enforced disappearance as:

[T]he 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, G.A. Res. 61/177, art. 2, U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

²⁰ While the United States has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance, it is bound by the customary international law norm prohibiting enforced disappearance. *See, e.g.*, Lucien J. Dhooge, *Lohengrin Revealed: The Implications of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. L.A. INT’L & COMP. L. REV. 393, 465 (2006).

²¹ *See* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007) (discussing at length the legal arguments made by Bush Administration in support of the extraordinary rendition program).

free of international legal constraints. General Comment 2 speaks directly to several of the main arguments the United States has made, revealing them to be contrary to international human rights law.

A. *Clarification of the Scope of Application of the Torture Convention*

The first argument the United States advances in support of its rendition program is that human rights law only applies within the territory of a ratifying State—in other words, that human rights norms do not apply extraterritorially. In its reports to the United Nations treaty bodies monitoring the implementation of human rights treaties, the United States has consistently maintained that, unless explicitly specified otherwise, the United States is bound by human rights treaties only in activities it conducts within U.S. territory.²² In other words, if you are outside the United States but under the control of the U.S. government, you are unprotected by human rights norms. Thus, the United States asserts, it is not bound by Article 3 of the Convention when acting outside its territory.

General Comment 2 clarifies the scope of application of the Torture Convention, affirming that the phrase “any territory under its jurisdiction,” used in a number of key provisions in the Convention, refers to any territory, facility, or person under the de jure or de facto control of a State party.²³ This is a crucial clarification in the law.

The U.S. argument that the *non-refoulement* rule does not apply outside of its territory was unconvincing even before the promulgation of General Comment 2—in part because Article 3 does not specify a territorial scope at all. Instead, it states a clear obligation of States: not to transfer a person to another State where he is at risk of torture.²⁴ Many have argued that this plainly applies to any individual under the de facto control of a State party, to no avail.²⁵

Now that the Committee has made clear that even those arti-

²² Human Rights Comm., *Initial Reports of States Parties Due in 1993: United States of America*, ¶¶ 12-25, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994); see also Comm. Against Torture, *United States of America, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, ¶¶ 183-88, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000).

²³ Recommendations of the CAT, *supra* note 18.

²⁴ Convention, *supra* note 15.

²⁵ See, e.g., Barbara Cochrane Alexander, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*, 15 AM. U. INT'L L. REV. 895 (2000); Satterthwaite, *supra* note 21.

cles that do specify a territorial scope of application apply to any location or person under the effective control of a State party, the U.S. position vis-à-vis Article 3 is even weaker. It would be absurd to say that even though a U.S. detention facility on foreign territory is covered by the obligation to prevent cruel, inhuman or degrading treatment set out in Article 16, the prohibition of *non-refoulement* set out in Article 3 does not apply to someone that U.S. agents abduct in Jordan because that person is not in U.S. territory. Indeed, such an argument appears incoherent.

This clarification about territoriality is extremely relevant to the destination for many individuals subject to the extraordinary rendition program: so-called CIA “black sites,” where “enhanced interrogation techniques” or “alternative procedures” such as sleep deprivation, sensory manipulation, and even waterboarding have been authorized and used.²⁶ For many years, however, the United States has interpreted Article 16—requiring States to prohibit cruel, inhuman and degrading treatment—to apply only to the U.S. territory. This interpretation, while not overtly argued, was plainly relied upon by the CIA in designing the “enhanced interrogation techniques,” which would only be used in “black sites” far from U.S. territory. Indeed, when the U.S. Supreme Court made clear that Common Article 3 of the Geneva Conventions applied to those apprehended and detained in connection with the “war on terror,” the CIA moved to shut down the secret detention program, and CIA agents began to buy personal liability insurance.²⁷ It was thus clear that the CIA feared that the interrogation techniques used in secret detention were violations of Common Article 3’s prohibition on inhumane treatment. Had the United States accepted that the Convention’s Article 16 applied to these facilities from the outset of the “war on terror,” the “alternative procedures”—which plainly amount at least to cruel, inhuman or degrading treatment prohibited by the Torture Convention—perhaps would never have been approved.

B. *The Non-Derogable Nature of the Prohibition of Torture*

Another crucial contribution of General Comment 2 is that it emphasizes the non-derogability of the prohibition on torture. The General Comment underlines that no circumstances whatsoever—including “threat of terrorist acts” or either international or

²⁶ See, e.g., Priest, *supra* note 3; CHRJ, ON THE RECORD, *supra* note 4.

²⁷ R. Jeffrey Smith, *Worried CIA Officers Buy Legal Insurance; Plans Fund Defense In Anti-Terror Cases*, WASH. POST, Sept. 11, 2006, at A01; see also CHRJ, *supra* note 4.

non-international armed conflict—may be invoked to avoid or dilute the obligations set out in the Convention.²⁸

This clarification is badly needed in light of U.S. legal arguments that treat international humanitarian law as the only relevant law applicable to the “war on terror.” Extraordinary rendition and secret detention often take place far from any traditional battlefield. Whether these operations qualify as part of an armed conflict governed by humanitarian law—either its authorizing norms or its limiting rules—is hotly contested.²⁹ Of course, humanitarian law authorizes—or at least accepts—the use of lethal force by privileged combatants (armies and militias that follow the rules of war), and limits the use of force and coercion in relation to protected persons (including prisoners of war, civilians, and those placed *hors de combat* because of injury or sickness).³⁰ In relation to extraordinary rendition, the question is what law applies to the transfer and the secret detention of individuals the United States asserts are unlawful combatants in a new kind of war.

In this new kind of war, the United States claims that it is engaged in an armed conflict against al Qaeda—or more broadly, against terrorism³¹—in which the entire world is literally a battle-

²⁸ Recommendations of the CAT, *supra* note 16.

²⁹ In launching its attacks on Afghanistan, the Administration declared that it was engaged in an international armed conflict. At first, this approach was largely accepted by the international community: the magnitude of the attacks on the World Trade Center and the Pentagon were deemed sufficient to trigger the inherent right of self-defense, and few countries argued that it was unlawful or inappropriate to target the Taliban as well as al Qaeda in response. The controversy began when the United States declared that detainees picked up on the battlefield in Afghanistan were not entitled to protection under the Geneva Conventions—neither the Third Geneva Convention (which protects prisoners of war) nor the Fourth Convention (which protects civilians). *See, e.g.*, Memorandum from Alberto R. Gonzales on Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban to the President (Jan. 25, 2002), *reprinted in* KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS* 118, 119 (2005) (“In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions . . .”).

³⁰ *See, e.g.*, Gabor Rona, *International Law Under Fire: Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER F. WORLD AFF. 55 (2003).

³¹ As Marco Sassòli explains:

Astonishingly . . . the administration proceeded to declare that it was engaged in a single worldwide international armed conflict against a non-State actor (Al-Qaeda) or perhaps also against a social or criminal phenomenon (terrorism) if not a moral category (evil). This worldwide conflict started—without the United States characterizing it as such at that time—at some point in the 1990s and will continue until victory.

Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 LAW & INEQ. 195, 197–98 (2004).

field where unlawful combatants are subject to being killed, captured or detained without notice (hence the potential to issue K-C-D orders).³² This argument is aimed at legitimating the Administration's use of military or military-like techniques against a non-State enemy, while insulating its actions against that enemy from assessment under international humanitarian or human rights law.

In its interactions with United Nations human rights bodies, the United States has asserted that it is engaged in a "war on terror" that is governed exclusively by the laws of armed conflict.³³ In making this assertion, the United States has argued that international humanitarian law is the applicable *lex specialis*,³⁴ i.e. that it provides the relevant specialized, substantive rules regarding the treatment of individuals in the "war on terror." In combination, the Administration's reference to the *lex specialis* rule and its argument that it can "render" suspected terrorists as part of its "war on terror," seem to indicate that no law applies to protect individuals against such transfers. The legal vacuum is constructed as follows: since the transfers occur as part of an armed conflict, we must look to humanitarian law for any relevant rules concerning transfers. Al Qaeda members, however, are unprivileged combatants, and thus unprotected by rules found in the Geneva Conventions concerning the transfer of prisoners of war or other protected persons.³⁵ Finally, the argument concludes, the rules of human rights law do

³² The President determined that the Geneva Conventions applied to the "present conflict with the Taliban," but found that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under article 4 of [the Third] Geneva [Convention]." Memorandum from President George W. Bush on Humane Treatment of al Qaeda and Taliban Detainees to the Vice President (Feb. 7, 2002), reprinted in KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS* 134 (2005) ("none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world . . ."). This decision was based on a series of memos prepared by Bush Administration officials, the State Department, and the military concerning the proper interpretation of several technical provisions of the Third Geneva Convention. See generally Memorandum from Assistant Attorney General Jay S. Bybee to the White House Counsel on the Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 to Counsel to the President Alberto R. Gonzales, reprinted in KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS* 138-43 (2005).

³³ See REPLY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO THE REPORT OF THE FIVE UNHCR SPECIAL RAPPORTEURS ON DETAINEES IN GUANTANAMO BAY, CUBA, 16 (2006), available at <http://www.asil.org/pdfs/ilib0603212.pdf> ("The United States is engaged in a continuing armed conflict against Al Qaida, and customary law of war applies to the conduct of that war and related detention operations.").

³⁴ *Id.* at 22.

³⁵ Memorandum from the White House on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), available at http://www.pegc.us/archive/White_House/bush.memo.20020207.pdf.

not apply either, since humanitarian law operates as *lex specialis* to oust such rules from application.³⁶ For this reason, suspected terrorists may be informally transferred from place to place without those transfers being unlawful, since no law applies.³⁷

A similar—though more textual—argument has been made in relation to secret detention. In the few instances in which the United States has defended the practice, it has alleged that certain individuals who pose a threat to security are not protected by the Geneva Conventions' provisions concerning access by the International Committee of the Red Cross ("ICRC") to detainees.³⁸ Simultaneously, the United States implies that the Geneva Conventions are the only relevant source of any obligations to allow access to detainees or to disclose the location of such detainees held in the context of armed conflict. In other words, the United States indicates that because they are not covered by the Convention provisions concerning access to detainees, such individuals are not protected against secret detention.³⁹ The ICRC has repeatedly sought access to detainees held in secret locations, and has expressed concern publicly about the practice.⁴⁰

In the context of extraordinary rendition and secret detention, this has allowed the United States to argue that human rights law does not apply to actions aimed at "capturing and detaining" suspected terrorists, and that those actions are not therefore subject to the *non-refoulement* rule since the United States can locate no

³⁶ Marko Milanovic, The Interplay Between Human Rights and Humanitarian Law, *Opinio Juris* (May 10, 2007), <http://www.opiniojuris.org/2007/05/10/the-interplay-between-human-rights-and-humanitarian-law/> (last visited Sept. 2, 2008).

³⁷ For a thorough critique of this approach, see Satterthwaite, *Rendered Meaningless*, *supra* note 21.

³⁸ See, e.g., Steven R. Weisman, *U.S. Rebuffs Red Cross Request for Access to Detainees Held in Secret*, N.Y. TIMES, Dec. 10, 2005, at A10.

³⁹ See, e.g., Sean McCormack, Department of State Daily Press Briefing, (May 12, 2006) ("Look, there are—under the Geneva Conventions there is a certain category of individual, and this is allowed for under the Geneva Conventions, individuals who forfeit their rights under Geneva Convention protections, and they do this through a variety of different actions. So there are a group of—there are allowances in the Geneva Convention for individuals who would not be covered by that convention and, therefore the party holding them would not be subject to the Geneva Conventions in providing access to those individuals.")

⁴⁰ See INT'L COMM. OF THE RED CROSS, US DETENTION RELATED TO THE EVENTS OF 11 SEPTEMBER 2001 AND ITS AFTERMATH—THE ROLE OF THE ICRC, May 14, 2004, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5yyh5x?opendocument> (noting that the ICRC has "repeatedly appealed to the American authorities for access to people detained in undisclosed locations. . . . Beyond Bagram and Guantánamo Bay, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations.") (last visited Sept. 2, 2008).

explicit *non-refoulement* rule in the International Humanitarian Law that governs non-international armed conflicts. General Comment 2 closes this argument down by making clear that the prohibition on both torture and cruel, inhuman, or degrading treatment operates at all times, and that the *non-refoulement* rule, as a measure aimed at preventing torture and ill-treatment, must also continue to apply.⁴¹

C. *Those Accused of Terrorist Crimes are at Risk of Torture*

General Comment 2 calls attention to the fact that individuals accused of terrorist acts are especially at risk of torture.⁴² This clarification calls attention to the special vulnerability of detainees accused of terrorist crimes to torture and cruel, inhuman or degrading treatment. This vulnerability stems from the abhorrence with which society rightly regards acts of violence that deliberately target civilians. And it is just this rightful abhorrence that should also lead States to interpose safeguards to ensure that even those who society despises are not tortured or subjected to ill-treatment. This is crucial to upholding society's values, and like international humanitarian law, which is designed precisely to protect detainees against the often-legitimate anger of their enemy jailers, measures to prevent ill-treatment of terrorism suspects should be systematically implemented.

The United States has intentionally avoided clarifying that even legitimate anger cannot be expressed as torture and ill-treatment. Instead, the U.S. government has exploited the anger that the American public has experienced to argue that terrorism suspects are *not* legally protected against ill treatment. These arguments—often in the background of public discourse—have led to the tacit acceptance of policies and practices like those revealed in the Abu Ghraib scandal. The General Comment reminds us that the prohibition on torture and ill-treatment is absolute, and that States must be especially vigilant when dealing with those individuals who their agents may despise.

⁴¹ See Recommendations of the CAT, *supra* note 18; see also Convention, *supra* note 15.

⁴² See U.N. Office of the High Comm'n on Human Rights [OHCHR], Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, General Comment No. 2: Implementation of Article 2 by States Parties*, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter *General Comment No. 2*].

D. *The Interdependence of Measures to Prevent Torture and Cruel, Inhuman or Degrading Treatment or Punishment*

General Comment 2 underscores the interdependence between the prevention of cruel, inhuman and degrading treatment and the prevention of torture. This clarification is relevant to both extraordinary rendition and to secret detention. In relation to extraordinary rendition, emphasizing that obligations to prevent torture and obligations to prevent cruel, inhuman or degrading treatment are “interdependent, indivisible, and interrelated” is crucial. The U.S. government has exploited the distinction between the two types of ill-treatment in the *non-refoulement* context, by arguing that Article 3 of the Convention applies only to torture, and not to cruel, inhuman or degrading treatment.⁴³ This has meant that the United States takes a very cramped view of prohibited conduct—it believes that nothing prohibits it from transferring an individual to a risk of ill-treatment. The General Comment suggests that the obligation to prevent torture means that States may not transfer individuals to a risk of cruel, inhuman or degrading treatment or punishment.

IV. CONCLUSION

The U.S. government continues to argue that its secret program is not prohibited by human rights law. Recently, another individual was transferred to Guantánamo out of CIA custody, demonstrating that the “black sites” are still in operation. While even the most brilliantly written General Comment may not convince American leaders to reverse course, clear statements of the law do act as a check on the proliferation of such arguments. By clarifying that the Convention extends to the extraterritorial actions of ratifying States, that the duty to prevent torture and cruel, inhuman or degrading treatment continues to be in effect even during armed conflict, and that States must actively ensure that those most vulnerable to abuse—including those suspected of terrible crimes—are protected against torture and ill-treatment, General Comment 2 makes a very significant contribution.

⁴³ Dawn J. Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 303 (2003).