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Governing Human Rights: Rendition, Secret Detention and Torture in the 'War on Terror'

Ruth Blakeley and Sam Raphael

In response to the horrors of the two World Wars, considerable effort was made in the latter half of the 20th Century to establish global governance mechanisms aimed at ensuring the universal realisation of human rights. Yet the governance of human rights is hampered considerably by the absence of robust enforcement mechanisms. Therefore, human rights governance has tended to involve the monitoring of human rights by a range of bodies, and the subsequent application of varying degrees of diplomatic pressure on states to improve their human rights performance. Despite the lack of enforcement options, these monitoring processes have gone some considerable way to mitigating some of the most serious abuses of human rights in the modern world, especially by states.

The first part of the chapter will provide an overview of the international human rights regime, and will examine the various human rights governance mechanisms that have been established by the international community. It will then explore the various ways in which human rights monitoring is undertaken, and how pressure is exerted by a variety of agents to bring about improved compliance with human rights. The second half of this chapter explores these themes in more depth, by examining a particular case study: the use by the United States and its allies of rendition, secret detention and torture in the 'War on Terror'. This case demonstrates that, while the US has gone to considerable lengths to circumvent human rights law, at the same time the governance mechanisms in place have allowed for these practices to be challenged, both in the law courts and through exercising diplomatic and popular pressure. So while most would agree that human rights governance structures need strengthening at many levels, the case of rendition and secret detention demonstrates that, if nothing else, the world is a better place with these mechanisms in place.

What is being governed and why?

Human rights, in their modern incarnation, and in the sense of a concept that is governed globally, can be understood as those rights which all people, in every region in the world, share under international law. There are several key principles which underpin this particular notion of human rights. First is the principle of *universality*: the rights enshrined in international law are applicable throughout the world, and reach into all political, cultural and religious systems. This principle has been highly controversial, with some arguing that the framework of universal human rights is not much more than an imposition of Western values. Without doubt, however, universality underpins the framework of human rights, and finds expression in all human rights instruments. Second, human rights as expressed at the global level are *inalienable*. That is, they are 'given' to us as humans by virtue of the fact that we are human, and cannot be taken away from us except, for some rights, in particular contexts which are themselves governed by 'due process' and the rule of law. For example, while all people have the 'right to liberty', this can be curtailed in individual cases through imprisonment, as long as such curtailments are exercised in accordance with due process (including the right for the individual to appeal to a judicial authority). While the notion of

international human rights applies in both peacetime and during times of armed conflict, in practice the *exact* rights laid down for enjoyment during wars are in many cases different from (and less than) those rights enjoyed outside of conflict and times of national emergency. There are, however, some rights which are cast as 'non-derogable'. That is, there are no circumstances whatsoever which would allow for these rights to be curtailed; everyone, for example, is granted the right to life and to be free from torture and slavery, at all times.

Third, and related to the principle of inalienability, human rights are applicable in a completely equal and non-discriminatory manner, regardless of the individual's race, sex, colour, nationality, sexuality, religion and so forth. Last, human rights under international law are conceived as *interdependent and indivisible*: they are not simply a list of separate rights, but come together to form a dense network of rights which are, in many ways, reliant upon each other. The undermining of one particular right would weaken the entire architecture of rights, through the knock-on effect that this weakening would have on interrelated rights.

The notion of human rights has its origin in a broader set of norms based on natural law, with the preceding notion that, by virtue of being human, certain universal moral standards exist in relation to our treatment of each other, and that we all have a duty to adhere to these. However, the contemporary understanding of human rights, and the associated attempt to govern rights at a global level, is a product of a desire to prevent a repeat of the horrors of the Second World War. With the establishment of the United Nations in 1945, the international community attempted to put in place mechanisms (enshrined in the UN Charter) to avoid wars between states. Crucially, given the mass violence delivered by states on both sides against civilians during WW2, the international community through the UN also attempted to define a comprehensive framework of rights which all individuals hold, and which should be respected and protected by all states around the world, in both peacetime and during war. This historical moment was fundamental to the establishment of the contemporary framework, and to the extension and infusion of the notion of rights throughout the international community.

Human rights, initially enshrined in the Universal Declaration of Human Rights (UNDR) in 1948 and the Geneva Conventions in 1949, but added to over subsequent years, are generally articulated in relation to the state. That is, it is states which sign up to international human rights instruments, and which consequently assume obligations in relation to individuals. States are understood to be both the main threat to human rights, and also best positioned to respect, protect and fulfil those rights. In this context, states have several reinforcing obligations: to refrain from curtailing people's rights (the duty to respect); to protect citizens against violations of human rights (the duty to protect); and to take a proactive stance in the promotion and emergence of a society wherein all rights are respected and enjoyed by all people (the duty to fulfil).

The core human rights governed at a global level, and sitting at the centre of International Human Rights Law, are enshrined in the International Bill of Rights. This consists of the Universal Declaration of Human Rights, which sets forth general principles and standards, and two associated Covenants (treaties) which begin to translate these principles into legal concepts. The two Covenants were opened for signature at the same time, in December

1966, and are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

BOX 1 HERE: Core Universal Human Rights

Alongside the core rights enshrined in International Human Rights Law, the postwar era has witnessed a parallel acceleration in the development of human rights applicable in times of armed conflict. Embodied in a second body of international law, known as International Humanitarian Law (IHL), the protections are to be guaranteed by all armed actors (ICRC 2003). The Geneva Conventions and additional protocols, ratified in 1949, fall under IHL. These updated three prior treaties from 1864, 1906, and 1929, concerning the humanitarian treatment of victims of conflict, and added a fourth, which focused on the treatment of prisoners of war and established certain protections for civilians. Of particular note is Common Article 3, present in all four of the Geneva Conventions, which sets out minimum standards to guarantee the humane protection of specific groups caught up in armed conflict, including armed actors that have been detained:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

Common Article 3 then prohibits certain acts at all times and in all places, including:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Under the Geneva Conventions, the International Committee of the Red Cross (ICRC) is mandated to promote the laws that protect victims of war. One of its most important roles is to visit individuals that have been detained during armed conflict. These visits are intended to ensure that the detainees, whatever the reasons for their arrest, are treated with dignity and humanity, in accordance with international norms and standards.

Who are the key actors involved in the governance of human rights and what are the key mechanisms of governance?

The idea that human rights are 'governed' suggests the development of mechanisms for enforcing compliance with human rights norms. Yet there are very few enforcement mechanisms in place internationally. Instead, human rights governance tends to involve the

monitoring of human rights violations by individuals, NGOs, local networks, governments or IGOs, and the subsequent application, to varying degrees, of diplomatic pressure on states to improve their human rights records.

The various rights covered by the UDHR and other declarations are enshrined – and made legally binding for signatory states – in a number of Conventions with global reach. This governance architecture at a global level has been complemented by parallel regional efforts. This is particularly the case in Europe, where the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights, or ECHR) came into force in 1953. All member states of the Council of Europe are party to the ECHR, which codifies many of the rights and duties set out at the UN level. Other regional organisations that have been established with a mandate, among other things, to monitor and ensure compliance with human rights norms include the Organisation of American States and the Organisation of African Unity. Both have their own separate human rights codes and have taken steps to establish Human Rights Courts.

BOX 2 HERE: Major Global Instruments Of Human Rights Law

Accompanying the various Conventions of IHL and IHRL, the major International Organisations (IOs) have established specific bodies to monitor states' compliance with the Conventions. At the UN, these include the Human Rights Committee, the Committee Against Torture and the Committee Against Enforced Disappearances. These Committees are empowered to establish fact-finding missions by special commission where appropriate, and can draw on the expertise of criminal investigators, military analysts or other experts. Reporting of such commissions plays an important role in highlighting non-compliance with human rights conventions. As well as monitoring by the UN and other external actors, the six main treaties of the UN human rights regime include within them mandatory reporting requirements for all signatory states, generally on a 4-5 year cycle, thereby causing states to review their performance in light of their human rights obligations on a regular basis.

Individual states also have their own strategies for monitoring compliance with human rights norms. The US Department of State, for example, produces annual reports on the human rights performance of all states that are members of the UN and all states in receipt of US foreign aid. Similarly, the European Parliament reports on the human rights records of its member states. Often human rights reporting of this nature is used to link benefits such as aid to the fulfilment of human rights obligations. Known as conditionality, this is a strategy that has been favoured by the EU in its efforts to promote human rights, democracy and the rule of law. Conditionality of course depends on the preceding and on-going monitoring mechanisms that have been put in place to evaluate states' compliance with the UDHR and other human rights conventions and treaties.

NGOs increasingly play an important role in holding states to account for their complicity in human rights violations. The 1980s saw a considerable increase in the numbers of human rights organisations that focused on human rights issues. NGOs are permitted to submit complaints to the various UN bodies, and can also report to the UN on compliance of states with human rights norms. Amnesty International and Human Rights Watch are among the most prominent NGOs involved in the systematic reporting of human rights violations.

Self-monitoring by states and external monitoring by IGOs or other external actors helps highlight non-compliance and can result in diplomatic pressure of various kinds being exerted on states whose human rights records fall short of expected standards. Increasingly, political legitimacy is understood and judged with reference to the human rights track record of political agents or states, and it is often argued that socialisation into and normalisation of human rights is an important vehicle for ensuring compliance with human rights. Thus it is argued that varying levels of diplomatic pressure, from gentle encouragement, urging, and advising, to more robust forms of communicating, such as naming and shaming states for their harmful practices, are all important tools in encouraging states to fulfil their human rights obligations.

Human rights violations can also be addressed through international tribunals, such as the International Court of Justice in the Hague, or the International Criminal Court, or regional tribunals, such as the European Court of Human Rights. At the European level, the Parliamentary Assembly can choose to launch investigations into violations of the European Convention on Human Rights by member states. Any person who believes their human rights to be violated under the Convention can take a case to the European Court of Human Rights. Where judgements are made against member states, these judgements are binding.

On very rare occasions states might impose sanctions to try and force a change in state behaviour, as was the case with the imposition of sanctions against South Africa by numerous states, in a quest to force the regime to end apartheid. Even more rarely, states or coalitions of states might take military action to try and prevent human rights violations, or to force a regime change where states may have a notorious human rights record. Such actions are highly controversial; in such cases questions are raised about the motivations of intervening states, and while not the topic of this chapter, it is important to bear in mind that just because a state or coalition claims to be intervening on human rights grounds, this does not always mean this is the only (or even primary) motivation.

Human rights monitoring, and the subsequent pressure that can be put on states, can be effective in bringing about change. Yet the governance of human rights is hampered to a considerable degree by the lack of enforcement mechanisms. Furthermore, questions are regularly raised about the governance systems that are in place. UN processes are seen as overly bureaucratic and time consuming. Only a small fraction of the complaints raised with the UN bodies are investigated. Little air time is given to NGOs to report orally to the UN Commission. In addition, it is often argued that the Global North is quick to scrutinise the Global South, but much more reticent about having its own human rights records questioned.

CASE STUDY: Rendition, Secret Detention and Torture in the 'War on Terror'

In the years after the declaration of the 'War on Terror' in September 2001, the United States Government led the way in constructing a global system of detention outside the law, illegal prisoner transfers between states (rendition), and interrogation and detainee treatment practices that were clearly cruel, inhuman and degrading, and that in some cases involved torture. Less than a week after the 9/11 terrorist attacks, on 17 September 2001, President Bush authorised the Director of the CIA to engage in 'clandestine intelligence

activity' as part of the counterterrorism campaign, including the formation of a 'terrorist detention and interrogation program'. Less than two months later, on 13 November 2001, President Bush issued an Executive Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, providing the Pentagon with the authority to detain *indefinitely* any non-American in the world, in any place in the world, considered to pose a terrorist threat to US interests. Furthermore, within just three months of the second Executive Order, on 7 February 2002, President Bush issued a memo to his senior staff declaring that members of Al Qaeda and the Taliban were 'unlawful combatants', and as such did not qualify as 'prisoners of war' under the Geneva Conventions when detained. As well as denying prisoner of war status to the 'War on Terror' detainees, Bush determined that Common Article 3 of the Geneva Conventions did not apply to Al Qaeda or Taliban detainees. In doing so, he was denying that they should be guaranteed humane treatment in compliance with IHL.

This policy laid the foundations for the development of the global system of rendition and secret detention, as well as the official military detentions in Afghanistan and Guantánamo Bay, Cuba. It also paved the way for subsequent moves by the CIA to secure permission from the US Department of Justice for the use of so-called 'enhanced interrogation techniques', a euphemism for torture, to be used against certain 'High Value Detainees'. These were approved for use on 1 August 2002, in a move which opened the door to a range of aggressive techniques which most experts consider to fall within the definition of torture. What is more, in 2003 the CIA Inspector General was tasked with carrying out an investigation into the use of the so-called 'Enhanced Interrogation Techniques' (CIA 2004). His findings raised serious questions about the use of interrogation by the CIA, as he found that interrogators frequently deviated from the guidelines, using methods that had not been sanctioned, and using those that had been sanctioned in more prolonged and harsher ways than had been permitted (For a full analysis of the CIA Inspector General's investigation, see Blakeley 2011).

BOX 3 HERE: THE 'ENHANCED INTERROGATION TECHNIQUES'

During the Bush administration, the secret detention of terror suspects took place within a complex 'network' of prisons. At its core was a set of US-run facilities, overseen by the Pentagon and CIA. These existed in several locations around the globe, including Iraq, Afghanistan, Thailand, Djibouti, Poland, Romania, Lithuania and Cuba (alongside the official prison at Guantánamo Bay). Supplementing these were a series of pre-existing detention sites, centred in North Africa and the Middle East, which are run by foreign security forces known to regularly use torture, but to which the CIA had direct access. Overall, this system has involved the detention, abuse and torture, in secret, of hundreds of detainees, in scores of detention sites around the world. Multiple and sustained human rights abuses have characterised the system, with violations of rights codified within both International Human Rights Law and International Humanitarian Law.

Such violations have come as a result of US practices, but also with the direct involvement of, or indirect complicity of, many states around the world. There is evidence, for example, that states which hosted US-run secret prisons – such as Poland and Lithuania – knew about what was going on, and provided key logistical assistance and diplomatic cover to facilitate

operations (through, for example, allowing the prisons to be constructed on their soil, and ensuring that aircraft carrying prisoners for detention and abuse were allowed to land without scrutiny). Other states played a key role in the capture of individual detainees, and their transfer to US forces for rendition, secret detention and abuse. These states included Canada, Italy, Macedonia, Sweden, Kenya, Tanzania, Malawi, Zambia, Sudan, Mauritania, The Gambia, Dubai, Yemen, Indonesia, Thailand, and, most importantly, Pakistan. States across the Middle East and North Africa – including Jordan, Syria, Egypt, Libya, and Morocco – have received, detained and interrogated suspects on behalf of the US. Indeed, this form of ‘proxy detention’ is central to the global system of detention outside the law, as the plausible deniability of the US and other Western involvement in torture is easier to maintain. Detainee accounts demonstrate that such proxy detentions often come with a more extreme form of abuse, and that severe beatings, electro-torture, genital mutilation and rape were experienced by those detained on behalf of the US.

Some Western democracies, often held up as key actors in the governance architecture of international human rights, have played a key role in the operation of this global system of detention outside the law, albeit often from an ‘arms-length’ position. Security forces from Canada, Sweden, Italy and the UK have facilitated the capture and transfer of terror suspects into the system of secret detention and torture. This has been either through involvement in the initial ‘arrest’ and handover to US forces, or through the passing of intelligence to friendly security forces to locate suspects and facilitate their capture. Canadian and British intelligence agencies, along with their German and Australian counterparts, have also been accused of direct involvement in the interrogation of suspects in secret prisons, or else being complicit in their mistreatment through sending questions for interrogators and receiving intelligence derived from torture.

Rendition, Secret Detention and Torture as violations of IHL and IHRL

The global rendition system has, at its core, three interrelated practices which violate both International Humanitarian Law and International Human Rights Law. The first is the *secret detention* of terror suspects, where the US and its allies have held people in undisclosed locations around the world. Not all detainees held in the ‘War on Terror’ have been held in secret, but those that have were denied access by third parties (such as lawyers, family members, or the International Committee of the Red Cross/Crescent), with their fate and whereabouts, and even the very fact of their detention, remaining unacknowledged by the detaining authorities. The second is the *rendition* of terror suspects between detention facilities in different parts of the world, where rendition refers to the extra-legal transfer of suspects across state borders. The third involves the cruel, inhuman and degrading treatment of suspects during detention and transfer, including the use by US and allied forces of practices that amount to *torture*. The processes involved in the rendition and secret detention of individuals in the ‘War on Terror’ violate the following laws, as set out in the various human rights conventions:

- the prohibition of arbitrary detention;
- the right to a fair trial; and
- the prohibition of torture and other cruel, inhuman and degrading treatment of punishment.

In addition, under international laws concerning non-refoulement, states have a responsibility to ensure that they are in no way accessories to human rights violations. Indeed they have certain responsibilities to prevent those violations.

The prohibition of arbitrary detention and the right to a fair trial

In the 'War on Terror' the US has arbitrarily detained individuals in a number of ways. This includes secretly holding people in Department of Defense facilities or in secret CIA prisons or 'black sites', detention by proxy, where third party states provide the detention facilities for the detainees, and indefinite non-secret military detention, for example in the Guantánamo Bay detention facility.

Under international law, individuals that are detained during an armed conflict must be formally registered by the detaining authorities, and granted access to the ICRC (and through them to their families). Indeed, one of the most important roles of the ICRC is to visit individuals detained during armed conflict. In the wars in Afghanistan and Iraq, while the majority of prisoners have been registered with the ICRC, many have been held in secret.

Secret detentions occur when detainees are held incommunicado (i.e., when they are not permitted any contact with the outside world, including their families, lawyers, or the ICRC), and when the detaining authorities refuse to acknowledge either the fact of the detention, or the fate and whereabouts of the detainee. The detention site itself does not have to be secret for the detention to be secret. This means that officially recognised detention facilities, and even secret wings within officially recognised detention facilities, can be used for secret detentions.

Those who were held in secret by the US include detainees which the US Government denied it held, or about which it refused to discuss. They also included those which the US Government admitted to holding, where it then refused to disclose their exact whereabouts and their current status of well-being. All of these detainees were fully cut off from the outside world (held incommunicado), with no third party granted access to monitor the detention or speak to the detainee.

The UN Working Group on Arbitrary Detention has defined secret detention as a 'Category I' form of arbitrary detention, where it is 'clearly impossible to involve any legal basis justifying the deprivation of liberty'. The UN Working Group has also directly concluded that detainees held secretly within CIA prisons were victims of Category I arbitrary detention. In this sense, secret detention necessarily violates the rights to liberty and freedom from arbitrary detention guaranteed by Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR). Together, these articles set out the rights of each detainee to a fair trial before the courts.

The Prohibition of Torture

The US is a signatory to the Geneva Conventions, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the ICCPR. Torture and cruel, inhuman or degrading treatment or punishment are all prohibited under each of these Conventions. There is no derogation from this prohibition, even in times of war. Torture is defined by Article 1 of the UN Convention Against Torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Despite this, the rendition and illicit detention of terror suspects in the 'War on Terror' has led to the torture, cruel, inhuman and degrading treatment and punishment of many detainees, either while held and interrogated by the CIA or by US Department of Defense personnel, or by states acting in conjunction with the US. A range of torture methods have been employed to cause pain and suffering, including beatings, mock drowning (waterboarding), mock executions, electrocutions, stress positions, sensory overload and sensory deprivation. In particular, secret detention has been found to be a primary facilitator in the commission of acts of torture and can *itself* constitute an act of cruel, inhuman or degrading treatment – and even in some cases an act of torture. As such, the UN's Human Rights Council have found many such cases to be in violation of Articles 7 and 10 of the International Covenant on Civil and Political Rights (ICCPR).

Non-refoulement

As well as violating various international human rights norms and laws, rendition and secret detention result in important questions about whether states have also violated their obligations to take measures to prevent such human rights violations. For example, under Article 3 of the Convention Against Torture, states have obligations to try to prevent torture by other parties. The transfer of an individual to another state where there is a risk that the individual faces torture is prohibited. The 2010 Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism (UN 2010) found that numerous states had been complicit in a variety of ways in rendition and secret detention.

Despite the myriad violations of human rights as a result of the US-led rendition and torture of terror suspects, the governance architecture of human rights has provided a means by which a range of actors have attempted to hold the US and its allies accountable, and to seek redress for the injustices committed. Those involved in challenging the human rights violations associated with the global rendition system have drawn on IHL and IHRL, and have used the mechanisms established at the national, regional and international levels for seeking redress for human rights violations.

What are the issues that have arisen in relation to the governance of human rights with respect to the global rendition system?

Despite the attempts by the Bush administration to hold detainees beyond the law in the 'War on Terror', legal experts from around the world are overwhelmingly of the opinion that rendition, secret detention and torture, as sanctioned by the Bush administration, are illegal. In some cases they may even constitute 'war crimes' and 'crimes against humanity'. With recourse to IHL and IHRL, and the various national, regional and international mechanisms concerned with upholding human rights, the international human rights community has challenged the Bush administration's attempts to place detainees beyond the law.

Exerting pressure to comply with IHL and IHRL

Various organisations have exerted pressure on the US and allied states to comply with IHL and IHRL. The ICRC has played a significant role in this regard. One of the ICRC's most important remits is to visit those individuals detained during armed conflict. These visits are intended to ensure that the detainees, whatever the reasons for their arrest, are treated with dignity and humanity, in accordance with IHL and IHRL. The ICRC has repeatedly expressed concern at the legal status of the detainees, arguing that the US has placed them beyond the law by refusing to recognise them as prisoners of war. The ICRC does not publish its findings on the compliance of states with IHL and IHRL. Instead, it tends to communicate privately with state officials to point out where IHL and IHRL are not being upheld. However, a confidential report (ICRC 2007), leaked in 2009, was highly critical of the involvement of medical professionals in the torture of detainees, and the systematic nature of the torture inflicted on the so-called 'high value detainees'. The fact that the ICRC rarely makes public its findings, but that a decision was made within the ICRC to leak the 2007 report, illustrates how seriously the ICRC took these human rights violations. It attracted considerable media coverage because it was such an unusual move, and was an important moment in calling the US to account for its illegal actions.

Legal challenges in the US Courts

From February 2002 onwards, dozens of cases were brought before the US District Court for the District of Columbia to claim the habeas corpus rights of the detainees, that is, the right to challenge the basis for detention. Central to these cases was the aim of making explicit the ways in which the Bush administration had sought to curtail human rights through its framing of terror suspects as 'enemy combatants', rather than prisoners of war. Numerous articles of both US and international law have been invoked, including Title 18 of the US Code on Crimes and Criminal Procedure, Title 28 of the US Code on the Judiciary and Judicial Procedure, especially chapter 153 on Habeas Corpus rights, Articles I, II, III and IV and Amendments III, IV, V and VIII of the US Constitution, the UN Convention Against Torture, the Universal Declaration of Human Rights and the Geneva Conventions. The strategy of those representing the detainees was to show how Bush's Executive Orders and

accompanying practices violate the principles at the heart of the US Constitution and international law.

What followed was a complex legal battle between the detainees' lawyers, the courts and the US Government. In June 2004, the Supreme Court held in *Rasul v. Bush* that the 600 Guantánamo Bay detainees had a right to access the US federal courts 'via habeas corpus and otherwise, to challenge their detention and conditions of confinement' (CCR 2008). However, within a week of this ruling the US Government authorised the establishment of the Combatant Status Review Tribunals (CSRTs) at Guantánamo (Wolfowitz 2004). These were deliberately intended to avoid providing Guantánamo detainees any access to the US Courts, despite the ruling of the Supreme Court (CCR 2008). It was up to military officers to review each detainee's enemy combatant status without legal representation for the detainees, evidence was permitted that had been obtained under coercion or torture, and detainees were denied access to classified evidence, which in many cases comprised the majority of the evidence against the detainee (CCR 2008). Numerous challenges were brought in both the District and Supreme Courts to these tribunals, again invoking the habeas corpus rights of the detainees. And in turn, to try and halt these various petitions, the Bush administration and Congress passed the Detainee Treatment Act in December 2005. This purported to strip the US courts of their jurisdiction over the various habeas corpus petitions filed on behalf of the Guantánamo detainees, vesting exclusive review of the final decisions of the CSRTs and military commissions into the District of Columbia Circuit Court.

Yet within the Geneva Conventions themselves, provisions are made to halt states from holding detainees outside of the law. Article 5 of the Third Geneva Convention expressly states that in cases where an individual's status as a prisoner of war is in dispute, 'such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal'. The Commentary on the Fourth Geneva Convention states that 'every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside the law'. Indeed, this was the conclusion reached by the US Supreme Court, which ruled in *Hamdan v. Rumsfeld* in June 2006 that detainees did have the right to pursue habeas corpus cases in civilian courts. Despite this ruling, the Bush administration passed the Military Commission Act in October 2006 (Congress 2006), aimed at bypassing the Supreme Court's judgement through ratifying the severely limited CSRT review process as a substitute for habeas corpus. Further legal battles ensued, with the Supreme Court eventually ruling 5-4 in June 2008, in favour of the detainees, granting the writ of habeas corpus. While this has been a game of cat and mouse, it highlights the importance of the independent judicial systems as mechanisms through which redress can be sought for victims of human rights violations, even when states are determined to circumvent the law.

Official Inquiries

A number of investigations have been undertaken by IOs, as well as by individual states into rendition, secret detention and torture. Alongside the endeavours of human rights organisations and lawyers seeking redress for victims, these have had a significant impact. Two important inquiries into the involvement of European states in the global rendition system have caused a number of individual states to carry out their own investigations, and in one case, this led to charges against a senior official. These inquiries also raised concern among US policymakers about the impact of the global rendition programme on the US' global reputation and its relations with European states. In January 2006, the European Parliament set up a Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners. The purpose of the investigation was to determine whether the CIA or other US or the intelligence agencies of other third countries had carried out rendition, secret detention or torture and other cruel, inhuman and degrading treatment of prisoners on the territory of European Union member states. The interim reports set out the nature of the 'global spider's web' of rendition and secret detention, and provided substantial new evidence of individual rendition operations. The final report found that more than 1200 CIA-operated flights had used European airspace between 2001 and 2005. When the findings were reported by Giovanni Claudio Fava in January 2007, the European Parliament passed two key resolutions as a result, urging member states that had been complicit to act immediately to halt such practices, to investigate them fully, and to compensate victims.

The Fava report had repercussions beyond Europe. It raised considerable concerns in US policy circles, such that in April 2007, two sub-committees of the Committee on Foreign Affairs for the House of Representatives, held a joint hearing to examine the impact of the US-led extraordinary rendition programme on transatlantic relations. Testimony was given by various experts and policy makers, and submissions were received from organisations such as Amnesty International. The transcript of the hearing demonstrates how concerned US officials were by the European Parliament's investigation, particularly as an indicator of the erosion of relations with some of its most important friends in the international community. Indeed, many of those giving testimony called for a reversal of those policies that so flagrantly violate US and international law on human rights, because of the damage that these policies were doing to the US' capacity to cooperate with important allies.

A second official investigation was launched in Europe, following allegations by Human Rights Watch in 2005 that secret CIA prisons were operating on the territory of member states of the Council of Europe. The Parliamentary Assembly for the Council launched the investigation to examine the complicity of its member states. The final report, published in June 2007, concluded there was 'now enough evidence to state that secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular Poland and Romania', and also that governments of these countries were aware and may have authorized the facilities. The impact of this inquiry has been significant. Following publication of the report, Marty confirmed that he had independently verified that a detention facility for rendition victims had operated on Lithuanian soil. This, along with reports in the Lithuanian press, caused the Lithuanian government to launch a confidential investigation into Lithuanian state complicity. It also paved the way for investigations and the subsequent arrest in Poland of the former intelligence chief on charges of allegedly exceeding his powers, depriving prisoners of their freedom and allowing corporal

punishment of individuals detained in a secret prison operated on behalf of the CIA on Polish soil.

Most recently, a high profile investigation was conducted by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, in collaboration with other UN committees. The Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism was published in February 2010. It singled out numerous states for their involvement, either by supplying intelligence that led to renditions and secret detentions, or by seizing suspects, including the UK, Bosnia and Herzegovina, Canada, Croatia, Georgia, Indonesia, Kenya, Macedonia and Pakistan. It also stated that UK intelligence agents had been involved in interrogations of suspects in Pakistan, Afghanistan, Iraq and at Guantánamo Bay. While the UK Foreign Office responded by claiming that it does not solicit, encourage, condone or participate in torture, various MPs called for a judicial inquiry into the UK's role. Such calls continue to be voiced, especially following the emergence of evidence that MI6 officers were involved in the rendition of British residents, Abdel Hakim Belhadj and his pregnant wife, Fatima Bouchar, from Thailand to Libya, where they were illegally detained and mistreated by Colonel Gaddafi's regime. Lawyers acting for the couple have begun legal proceedings against then Foreign Secretary Jack Straw, who allegedly signed off on their rendition. Investigations by IOs thus play an important role in bringing to public attention state complicity. They can also help facilitate subsequent efforts to seek redress against complicit states by human rights organisations and lawyers, on behalf of victims.

There have been some successes in the struggle to reverse the most egregious of human rights violations that stemmed from the establishment of the global rendition system. Indeed, with recourse to IHL and IHRL, the international human rights community has succeeded in exposing many of those states that were secretly involved, and has pushed for states to investigate and where necessary, compensate victims. Struggles on behalf of the Guantánamo detainees have led to the release of the majority of those held, although some 180 remain. And as a result of the pressure from the international human rights community, both the Bush and Obama administrations had to bring an end to the use of secret CIA prisons and torture by CIA agents. Immediately upon entering office in 2009, President Obama passed three Executive Orders which significantly changed the legal parameters within which the US military and intelligence communities could detain and interrogate terror suspects. The CIA was no longer allowed to operate its own detention facilities, and secret detention was outlawed for all detainees in all armed conflicts, who find themselves in US custody. 'Enhanced interrogation techniques' were also prohibited, with US interrogations now constrained by the guidelines found in Army Field Manual 2-22.3. Extraordinary renditions for the purposes of torture were also banned.

These Orders represented the formalisation of shifts in the rendition and secret detention programme witnessed during the final years of the Bush administration. These changes were largely achieved through the struggles in the US Courts during the Bush years, as well as international pressure from IOs and NGOs. The struggles are on-going however, because the Military Commissions Act has enshrined the processes that deny the rights of detainees to habeas corpus review into US law and, without a change to the law, detainees can still be denied their rights. Furthermore, many thousands of detainees in the 'War on Terror' continue to be held beyond the bounds of US and international law. While a message by

CIA Director Leon Panetta in April 2009 confirmed that the black sites had been closed, and that enhanced interrogation techniques were no longer employed, rendition and proxy detention by third party states known to regularly use torture have not been ruled out by the US Government, and may still form a central plank of counterterrorism policy.

Conclusion

Ensuring compliance with the laws intended to protect human rights has always been a challenge. The attempts by the Bush administration to place 'War on Terror' detainees beyond the law were materially different from cases where states simply flout the law. In this case the most powerful state in the world attempted to re-write the law.

While the governance of human rights tends to be based on monitoring and diplomacy, rather than enforcement, such monitoring can help mitigate serious violations of human rights. It is through monitoring the human rights performance of states that those states can be called to account within the international organisations that have a global governance remit. Documenting the abuse of human rights can facilitate those involved in seeking redress for victims. Where cases for redress are brought to the courts, this can have a significant effect on challenging state practices, certainly where there is an independent judiciary prepared to scrutinise the actions of states in light of their human rights obligations. The fact that human rights abuses are still a common occurrence in international affairs underlines the fact that human rights governance structures need strengthening; the world would surely be a bleaker place, however, without such attempts to provide global governance of human rights.

Recommended Reading

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The United Nations Treaty Collection:

<http://treaties.un.org/>

Human Rights Watch World Report 2012:

<http://www.hrw.org/world-report-2012>

US Department of State: Human Rights reports:

<http://www.state.gov/j/drl/rls/hrrpt/>

The Rendition Project:

www.therenditionproject.org.uk

The Rendition Project is led by Dr Ruth Blakeley and Dr Sam Raphael, and was funded by the ESRC. The project examines the ways in which the Bush administration developed a global system of detention sites, linked by the covert transfer of detainees across state borders.

The Rendition Project website is designed to act as a hub for accessing publicly-available data relating to the global system of rendition and secret detention. The website contains:

- A comprehensive timeline of key events;

- Access to the key primary documents made available by those researchers that have worked to uncover the renditions programme, including prisoner lists, flight logs, and land purchase agreements.
- An extensive library of governmental and intergovernmental reports and inquiries in relation to rendition and secret detention, as well as major investigative reports by NGOs and others working in the field.

European Parliament: Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (Fava Investigation):

http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm

Alleged Secret Detentions in Council of Europe Member States (Marty investigation):

<http://www.coe.int/T/E/Com/Files/Events/2006-cia/>

The Torture Archive (National Security Archive, George Washington University):

http://www.gwu.edu/~nsarchiv/torture_archive/index.htm

Reprieve – Secret Prisons and Renditions:

http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm

THE BOXES

Box 1: Core Universal Human Rights

Together, the core documents of the International Bill of Rights lay down a range of rights which are to be enjoyed universally, including (but not limited to):

- The right to life, with no-one's life being deprived arbitrarily
- Freedom from death penalty for children and pregnant women
- Freedom from torture, or cruel, inhuman or degrading treatment or punishment
- Freedom from medical or scientific experimentation without consent
- Freedom from slavery and servitude
- Freedom from forced or compulsory labour (except as part of a punishment under law, or as part of military service)
- The right to liberty and security of the person, with freedom from arbitrary arrest and detention
- Freedom of movement within a territory (if that person is lawfully within the territory)
- The right to equality before the law, the presumption of innocence, and a free and fair trial
- Freedom from arbitrary interference in the family, home or correspondence

- Freedom of thought, conscience and religion
- Freedom of expression
- Freedom of peaceful assembly
- Freedom of association with others, including the formation of trade unions
- The right to form a family, and to marry
- The right to vote, and to stand for election
- The right to a nationality
- The right to work, including fair wages, safe conditions, the opportunity for promotion, and a reasonable limitation of working hours
- The right to strike
- The right to social security
- The right to an adequate standard of living, including adequate food, clothing and housing
- The right to the enjoyment of the highest attainable standard of physical and mental health
- The right to education

Box 2: Major Global Instruments of Human Rights Law (1945-)

[Numbers in brackets = number of State parties, as of July 2012]

International Human Rights Law

- International Convention on the Elimination of All Forms of Racial Discrimination, March 1966. (175)
- International Covenant on Economic, Social and Cultural Rights, December 1966 (160)
- International Covenant on Civil and Political Rights, December 1966 (167)
- International Convention on the Suppression and Punishment of the Crime of Apartheid, November 1973 (108)
- Convention on the Elimination of All Forms of Discrimination against Women, December 1979 (187)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 1984 (150)
- International Convention against Apartheid in Sports, December 1985 (60)
- Convention on the Rights of the Child, November 1989 (193)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, December 1990 (46)
- Convention on the Rights of Persons with Disabilities, December 2006 (117)
- International Convention for the Protection of All Persons from Enforced Disappearance, December 2006 (34)

International Humanitarian Law

- Convention on the Prevention and Punishment of the Crime of Genocide, December 1948 (142)

- Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 1949 (194)
- Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 1949 (194)
- Geneva Convention (III) relative to the Treatment of Prisoners of War, August 1949 (194)
- Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, August 1949 (194)
- Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 1954 (125)
- Convention on the prohibition of military or any other hostile use of environmental modification techniques, December 1976 (76)
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, April 1972 (165)
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, October 1980 (114)
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, January 1993 (188)
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, September 1997 (160)
- Convention on Cluster Munitions, 30 May 2008 (73)

Box 3: The ‘Enhanced Interrogation Techniques’

The ten approved techniques, along with a brief description provided by the CIA to the OLC, were:

The attention grasp

Consists of grasping the detainee with both hands, with one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the detainee is drawn toward the interrogator.

Walling

The detainee is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash.

The facial hold

Used to hold the detainee’s head immobile. The interrogator places an open palm on either side of the detainee’s face and the interrogator’s fingertips are kept well away from the detainee’s eyes.

The facial insult or slap

The fingers are slightly spread apart. The interrogator's hand makes contact with the area between the tip of the detainee's chin and the bottom of the corresponding earlobe.

Cramped confinement

The detainee is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller space lasts no more than two hours and in the larger space it can last up to 18 hours.

Confinement with insects

Involves placing a harmless insect in the box with the detainee

Wall standing

The detainee may stand about 4 to 5 feet from a wall with his feet spread approximately to his shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all of his body weight. The detainee is not allowed to reposition his hands or feet.

Stress positions

May include having the detainee sit on the floor with his legs extended straight out in front of him with his arms raised above his head or kneeling on the floor while leaning back at a 45 degree angle.

Sleep deprivation

Will not exceed 11 days at a time.

Waterboarding

Involves binding the detainee to a bench with his feet elevated above his head. The detainee's head is immobilized and an interrogator places a cloth over the detainee's mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation.

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