

EXTRAORDINARY RENDITION AND DISAPPEARANCES IN THE
“WAR ON TERROR”

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Since September 11, 2001, the U.S. government has used the discourse and authorizing rules of the laws of war while simultaneously flouting many of the limiting and protective rules of that regime, at times labeling them “quaint” and irrelevant.¹ Simultaneously, the Administration insists that the due process rights guaranteed by human rights law are not applicable to this new “war,” arguing alternatively that the relevant norms do not apply to extraterritorial conduct and that human rights law does not apply in situations of armed conflict.² As to those standards it does concede applicability – such as the prohibition on torture – the Administration has attempted to define away the rule.³ The effect is to take many U.S. actions in the “War on Terror” outside of both frameworks, dealing a blow to the rule of law.

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1. For an example of the former, see Alberto Gonzales, Memorandum for the President: Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban, (January 25, 2002), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 118-119 (Greenberg & Dratel eds., 2005) [hereinafter “THE TORTURE PAPERS”] (“In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning and renders quaint some of its provisions. . .”); for an example of the latter, see President George Bush, Humane Treatment of al Qaeda and Taliban Detainees, reprinted in THE TORTURE PAPERS, *supra*, at 134 (determining that “none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world . . .”).

2. See United States, Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba (March 10, 2006), at 25-30 (norms not applicable extraterritorially) and 22-24 (international humanitarian law as *lex specialis*), available at <http://www.asil.org/pdfs/ilib0603212.pdf>.

3. The now notorious “torture memos” have been exhaustively analyzed, and have been reprinted in THE TORTURE PAPERS, *supra*. For a very helpful discussion, see Marty Lederman, *Understanding the OLC Torture Memos*, (Jan. 7, 2005) on the Balkinization Blog, available at <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html>.

Among U.S. strategies are practices aimed at avoiding the due process rules included both in the Geneva Conventions and in human rights treaties to which the U.S. is a party. Through extraordinary renditions⁴ and secret detentions⁵, the U.S. attempts to avoid norms concerning due process by avoiding any process at all. Instead, it opts for procedures in which individuals are unilaterally and secretly determined to be a danger to the U.S. On the basis of this determination, the U.S. sends individuals to countries where they may be interrogated under torture by other governments, places them in secret detention, or ships them to Bagram air base, where it presumably believes U.S. courts may not exercise jurisdiction. In the process, our government is rejecting not only the human rights norms against prolonged incommunicado detention, *non-refoulement*, and the prohibition on torture; it is also rejecting the framework of international justice that insists on accountability and the rule of law.

“Extraordinary rendition” is not a legal term; it describes the perverted form of a practice already defined by its informality. Used by the U.S. since the Reagan era, rendition involves the extra-legal transfer of an individual from one state to another.⁶ While originally used to bring suspected terrorists into the United States so they could stand trial before federal courts, it morphed during the Clinton presidency into a procedure through which the U.S. would affect the transfer of suspects from one country to another where they were expected to stand trial.⁷ After September 11, the process apparently took on a new purpose: intelligence-gathering. Instead of focusing on suspects with pending charges, the U.S. sent detainees to States known to “employ interrogation techniques that will enable them to obtain the requisite information,” as one alarmed F.B.I. agent explained.⁸ These were States that the U.S. had itself accused of widespread and systematic torture, including Syria, Egypt, and Morocco. Rendition to justice had become rendition to torture, or extraordinary rendition.

4. For accounts of the practice, as well as a definition and discussion of the norms governing “extraordinary rendition,” see ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & NYU CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, *TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITION,”* (2004), available at <http://www.nyuhr.org/docs/TortureByProxy.pdf>.

5. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, *The Wash. Post*, Nov. 2, 2005, at A1.

6. For a discussion of the shift from “rendition to justice” to extraordinary rendition, see Margaret Satterthwaite & Angelina Fisher, *Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law*, 6 *THE LONG TERM VIEW* 4, 52-71 (2006).

7. *Id.*

8. See Michael Isikoff, *Exclusive: Secret Memo – Send to be Tortured*, *NEWSWEEK*, Aug. 8, 2005 (discussing memo available at <http://balkin.blogspot.com/rendition.fbi.memo.pdf>) (discussing memo from FBI agent concerning proposed extraordinary rendition of a Guantánamo detainee).

The story of Maher Arar is illustrative.⁹ Arar was detained by U.S. authorities as he tried to change planes at JFK airport in New York in September 2002. A Canadian citizen born in Syria, Arar was returning to Canada following a family vacation in Tunisia. Arar was repeatedly questioned by U.S. agents about alleged links to Al Qaeda. Denying that he had any such links, Arar requested the assistance of a lawyer; his requests were denied, and he was placed in detention. After several days, Arar was allowed to see his lawyer for a brief consultation. He repeatedly said he was afraid that he would be tortured were he sent to Syria. Two days later, U.S. officials told him that he had been authorized for “expedited removal.” Without allowing him access to his lawyer, U.S. agents placed him on a small jet and flew him—not to his home in Canada—but to Jordan via Rome. From there, Arar was taken by van to Syria and placed in the notorious “Far Falestin” branch of the Syrian military intelligence prison. There, he was detained for ten months in a tiny cell, beaten, tortured, and forced to sign a false confession. On October 5, 2003, Arar was released from prison and flown back to Canada. The Canadian government has launched an inquiry into the rendition of Maher Arar, but his attempts to obtain redress through U.S. courts have thus far been unsuccessful. On February 16, 2006, the federal judge presiding over Arar’s claims against U.S. officials dismissed the case on the basis that the case involved unreviewable issues of national security and foreign relations.¹⁰

Unlike extraordinary rendition, secret detention does not have clear predecessors in U.S. history. Instead, it appears to be a new practice for the U.S., in which individuals are held in “black sites” run entirely off the radar of normal civilian or military procedures.¹¹ Such detentions are not monitored by the International Committee of the Red Cross, and they apparently involve transfers of prisoners from site to site to evade detection.¹² Thus far, no one has argued that unacknowledged incommunicado detention by U.S. agents was authorized by presidents of a bygone era, or that the practice has long been an essential tool in the fight against terrorism. This is not surprising – clear norms exist to proscribe

9. For more information about Maher Arar and his transfer to Syria, see www.ararcommission.ca; see also <http://www.maherarar.ca/index.php>. Unless otherwise noted, the facts in this account are drawn from those sites.

10. See *Arar v. Ashcroft et al.*, Civil Action No. CV-04-0249 (DGT) (Memorandum and Order, Feb. 16, 2006), available at http://www.ccrny.org/v2/legal/september_11th/docs/Arar_Order_21606.pdf. This case is now on appeal.

11. See Priest, *supra* note 6.

12. See Brian Ross & Richard Esposito, *Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons: 10 Out of 11 High-Value Terror Leaders Subjected to ‘Enhanced Interrogation Techniques,’* ABC NEWS, Dec. 5, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1375123>.

secret detentions under international human rights law.¹³ In the European¹⁴, Inter-American¹⁵, and United Nations¹⁶ human rights systems, a deep jurisprudence has developed against this practice – based on the lessons of Latin America’s “dirty war” – a practice more properly called enforced disappearance.

Under international human rights law, an enforced disappearance has occurred whenever individuals are deprived of their liberty by state agents and the state fails to provide information about their fate or whereabouts, placing the detainees outside the protection of law.¹⁷ Despite this relatively simple definition, a variety of terms are routinely used by the media, human rights organizations, and governments to describe the U.S. practice of “disappearing” individuals in the “War on Terror.” Terms such as “ghost detainees,” “secret prisoners,” and references to “detainees in black sites” are common and may seem interchangeable. In fact, they describe a variety of practices that the U.S. is using that amount to “disappearances” under international law. The use of secret black sites is only one of those practices.

13. The most recent codification of these norms is contained in the *Draft International Convention for the Protection of All Persons from Enforced Disappearances*, which was completed in September 2005. See U.N. Comm’n. H.R., *Report of the Intersessional Open-Ended Working Group to elaborate a legally binding normative instrument for the protection of all persons from enforced disappearance*, U.N. Doc. E/CN.4/2006/57 (2 February 2006). See also U.N.G.A., *Declaration on the Protection of All Persons from Enforced Disappearance*, U.N. Doc. A/RES/47/133 (1992) (“Deeply concerned that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law”).

14. See, e.g., *Kurt v. Turkey*, 27 Eur. Ct. H.R. 373 (1998); *Cakici v. Turkey*, 31 Eur. Ct. H.R. 5 (1999); *Akdeniz et al. v. Turkey*, App. No. 23954/94, 854 Eur. Ct. H.R. 254 (1994); *Nesibe Haran v. Turkey*, App. No. 28299/95 (2005); *McCann v. U.K.*, 21 Eur. Ct. H.R. 97 (1995); <http://www.echr.coe.int/echr>.

15. See, e.g., *Velasquez-Rodriguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988); *Blake Case*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 36 (January 24, 1998).

16. See, e.g., U.N. H.R. Comm., *Mojica v. Dominican Republic*, Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994); *Laureano v. Peru*, U.N. Doc. CCPR/C/56/D/540/1993 (1996); *Bleier v. Uruguay*, Communication No. R.7/30, U.N. Doc. A/37/40 (1982).

17. See *Draft International Convention for the Protection of All Persons from Enforced Disappearances*, *supra* note 14, at art. 2 (defining “enforced disappearance” as follows: “[T]he arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”).

The story of Abu Faraj al-Libbi may provide a helpful illustration. According to media accounts, al-Libbi was suspected of being an important Al Qaeda operative. He was apprehended in Pakistan on May 2005 by Pakistani intelligence agents, apparently aided by U.S. intelligence personnel.¹⁸ Al-Libbi's arrest was announced in Pakistan several days later. Although it has been impossible to verify the details, the press has reported that al-Libbi was taken by air to Islamabad; there, U.S. and Pakistani agents interrogated him. Amnesty International later reported the following:

On 6 June the Pakistani authorities confirmed that Abu Faraj al-Libbi had been handed over to U.S. custody in response to a request from the U.S. authorities, saying that he had been taken out of Pakistan on a plane by U.S. officials and sent to an unknown destination at the beginning of June. One Pakistani intelligence official said he did not know where al-Libbi had been taken, while another said that he would be taken to a U.S. detention facility where other suspects are held so that interrogators could 'verify very quickly' information he had given the Pakistani authorities.¹⁹

It is impossible to know where al-Libbi was taken. Media stories have speculated, based on unnamed intelligence sources, that he may have been taken to Morocco, Jordan, or Afghanistan, and that he is among those "high-value detainees" who are being held in secret CIA "black sites."²⁰

The practice of enforced disappearance and extraordinary rendition illustrate an important shift taking place in the U.S. "war on terror." In the past, individuals suspected of involvement in terrorism would be arrested and brought to trial. Now, they are often handed over to intelligence agents who seek to keep them outside the purview of criminal law, as well as basic human rights guarantees. If core rights, such as due process and the right to be free from torture, are to have any real meaning, they must apply to the actions of those we have often thought of as operating "outside" the law. Intelligence services have been asked to take on new and expanded roles in this untraditional "war": they are detectives, investigating crimes and

18. Unless otherwise noted, the facts in this summary are drawn from NYU CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, WHEREABOUTS UNKNOWN: DETAINEES IN THE "WAR ON TERROR," (2005), available at <http://www.nyuhr.org/docs/Whereabouts%20Unknown%20Final.pdf>.

19. Amnesty International, *Pakistan/USA: Further information on: Incommunicado detention / Fear of 'disappearance' / Fear of torture or ill-treatment / Fear of forcible transfer*, July 5, 2005, available at <http://web.amnesty.org/library/Index/ENGASA330182005?open&of=ENG-USA>.

20. *Id.*

collecting evidence, and they are jailers, holding keys to a realm that we hear about only in shadowy bits, leaked information or the testimony of a former “disappeared” or rendered person like Maher Arar. If democracies like ours do not exercise oversight and regulate these activities through enforceable laws, intelligence agencies will become judge and jury as well.

One of the greatest lessons of Nuremberg was that even the most heinous criminals must be afforded due process. As Justice Jackson said in his opening statement at Nuremberg: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”²¹

If our government is allowed to render and secretly detain individuals – even those suspected of horrible acts – we will be lifting the poisoned chalice to our lips.

21. Prosecutor Justice Robert H. Jackson’s Address to International Military Tribunal (Nov. 21, 1945), 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98, 101 (1947).