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Washington's "War Against Terrorism" and Human Rights

The View from Abroad

By Doug Cassel

Editor's Note: This article, with extensive notes and citations to source materials, can be found online at www.abanet.org/irr/hr/winter06.home.html.

When it comes to human rights, there is no greater leader than the United States of America," White House spokesman Scott McClellan has said.

The view from abroad is less kind. A recent resolution of the European Parliament, for example, "condemns" our government's treatment of prisoners at Guantanamo. It urges Washington to guarantee all prisoners "minimum human rights in accordance with international human rights law and fair trial procedures" and to "immediately clarify the situation of the prisoners." European objections run so deep that a *New York Times* account finds a "high level of anger in Europe at reports that American interrogators have tortured prisoners in Iraq, Guantanamo Bay, Cuba, and other places."

Throughout 2005, anger mounted among Europeans as they came to realize that the Central Intelligence Agency (CIA), clandestinely cooperating with their own intelligence services, may have made them complicit in torture. Reports revealed secret CIA prisons in Europe, CIA flights spirit-



Associated Press, AP

Khaled al-Masri, a German citizen of Lebanese descent, attended a March 2006 European Parliament meeting investigating claims of U.S. secret prisons and flights in Europe. He said CIA agents took him from Macedonia to Afghanistan, abused him for several months, and then released him in Albania.

ing prisoners through Europe, and CIA kidnappings of terrorist suspects in Europe for delivery to other countries known to engage in torture.

Increasing Ire: Ghost Prisons and Torture

The CIA long has been known to run "ghost prisons" for high-level terrorist suspects. Despite references to them as "black sites" in classified government documents, the existence of such prisons is not officially confirmed, their locations are secret, and their prisoners are held incommunicado. Not even the Red Cross knows the locations or identities of their prisoners.

However, in late 2005 Europeans learned of a new twist: the *Washington Post* revealed that the CIA had at times located such prisons in "several democracies in Eastern Europe." Ac-

cording to the *Post*, the very purpose of the secret prisons is to evade the law—any law at all. They are located overseas because they would be illegal in America. A black site at Guantanamo, separate from the military prison, was closed in 2004 when it appeared that the U.S. Supreme Court might rule—as in fact it did—that U.S. courts have jurisdiction over Guantanamo. Secret CIA prisons are illegal in Europe as well. Before the enactment of the Detainee Treatment Act of 2005, their prisoners, in the view of the U.S. government, had "no recognized legal rights."

Before that act was passed in December 2005, the Bush administration's position was that foreign citizens detained by the United States overseas had no rights under the U.S. Constitution or other laws or treaties—

including the right not to be tortured. Although the administration averred that the United States refrained from torture as a matter of policy, CIA guidelines allowed prisoners in black sites to be subjected to lesser, but still unlawful, “cruel, inhuman, and degrading treatment,” some of which arguably amounted to torture. CIA interrogators, reported the *Post* as late as November 2005, were “permitted to use the CIA’s approved ‘Enhanced Interrogation Techniques,’ some of which are prohibited by the U.N. Convention [Against Torture] and by U.S. military law. They include tactics such as ‘waterboarding,’ in which a prisoner is made to believe he or she is drowning.”

Honoring a request by the U.S. government, the *Post* declined to say which European countries host secret CIA prisons. However, Human Rights Watch reported that evidence, albeit inconclusive, pointed to Poland and Romania.

Soon after the *Post* story, *The New York Times* reported that aircraft “known to be operated by CIA companies” had landed in Europe more than 300 times since September 2001, mainly in Germany, Britain, Ireland, Portugal, Spain, and the Czech Republic. These revelations alarmed Europeans. Had their airports and air space been used to transport suspects to CIA prisons in Eastern Europe and to other countries known to engage in torture? A January 2006 Council of Europe preliminary inquiry found no evidence of CIA prisons in Europe but enough “indications” to justify continuing the investigation.

Kidnapping and Extraordinary Rendition

Two cases that came to light in 2005 revealed that the CIA had kidnapped terrorist suspects in Europe and flown them to Egypt and Afghanistan, where they were allegedly tortured. Both illustrate a CIA practice known as “extraordinary rendition,” by which prisoners are transferred to other countries without formal legal process for purposes of interrogation, not prosecution.

In one case, a suspect under surveil-

lance by Italian antiterrorism police in Milan, Hassan Mustafa Osama Nasr, suddenly disappeared. Months later, he turned up in Egypt, claiming to have been kidnapped on the streets of Milan and flown to Egypt, where he was tortured. Cell phone records and other information led straight to the CIA. In an unprecedented development, Italian prosecutors have charged twenty-two alleged CIA operatives with kidnapping and related charges and have asked Italy’s government to request their extradition from the United States.

Meanwhile German prosecutors are investigating claims by a German citizen, Khaled al-Masri, that he was kidnapped by the CIA in Macedonia, flown to Afghanistan, where he was tortured, then dropped off in Albania. The *Post* reports that the U.S. ambassador had informed Germany’s interior minister in 2004 that the CIA had wrongfully imprisoned al-Masri and had asked that the matter be kept secret. A CIA official reportedly had acted on a “hunch”—which proved to be mistaken—that al-Masri was someone else. Al-Masri now has filed suit in the United States against former CIA Director George Tenet and three companies alleged to have provided flights for the CIA.

Europe Asks, Washington Answers

By November 2005, the flurry of revelations prompted a formal diplomatic inquiry. “[P]arliamentary and public concerns” led the European Union, through British Foreign Secretary Jack Straw, to ask U.S. Secretary of State Condoleezza Rice for clarification, “following media reports suggesting violations of international law in the alleged U.S. detention or transportation of terrorist suspects in or through E.U. member states.” Rice responded that the United States does not torture prisoners or knowingly send them elsewhere to be tortured. When this response failed to quell European protest, she added that the United States also does not engage in cruel, inhuman, or degrading treatment of prisoners. But her denial was ambiguous. “As a matter of policy,” she stated, “the Unit-

ed States obligations under the Convention Against Torture, which prohibits, of course, cruel and inhuman and degrading treatment, . . . extend to U.S. personnel wherever they are, . . . in . . . or outside of the United States.”

But does this “policy” apply to foreign citizens imprisoned outside the United States? She did not explicitly say. And is the U.S. policy to meet its treaty obligations still limited by the formal “reservation” to the treaty that the United States made when it ratified the UN Convention Against Torture in 1994? That reservation accepts the ban on cruel, inhuman, or degrading treatment only insofar as such conduct is prohibited by the Fifth, Eighth, or Fourteenth Amendments to the U.S. Constitution, which administration lawyers maintain do not protect foreign citizens outside the United States.

After returning from Europe, Rice seemed to retreat from any suggestion that U.S. policy is more protective than the law. The United States, she stated, “should be prepared to do anything that is legal to prevent another terrorist attack.”

European foreign ministers, anxious to mend fences with the United States, did not formally press the matter when they met with Rice at North Atlantic Treaty Organization headquarters in December 2005. But most Europeans remain skeptical; the exposés of 2005 deeply eroded U.S. credibility on human rights.

Exporting Human Rights Laxity

Equally troubling, Rice signaled that the United States will continue to press other democracies to relax human rights safeguards. “The captured terrorists of the twenty-first century,” she insisted, “do not fit easily into traditional systems of criminal or military justice We have to adapt.”

Adapt how? By keeping prisoners with no rights? Her statement comes right out of the John Yoo playbook. In 2002, when Yoo was working in the U.S. Department of Justice Office of Legal Counsel, “adapting” to terrorism led him to a highly restrictive defini-

tion of torture, to legalistic evasions of laws against torture, and to assertions that the U.S. president, as commander in chief, can authorize torture, notwithstanding any statutory or treaty prohibition. Although Yoo's now infamous August 2002 memo expressing these

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provisions was withdrawn after the exposure of prisoner abuse at Abu Ghraib, the Justice Department memo replacing it expressly declines to address Yoo's earlier assertion of presidential authority to authorize torture.

The tone of Rice's statement also may lead to continued strain. She warned that it is up to European "governments and their citizens to decide if they wish to work with us to prevent terrorist attacks . . . They have a sovereign right to make that choice." In other words, take it or leave it.

If Europeans choose to take it, what sorts of U.S. tactics must they accept?

Notably, Rice did not renounce ghost prisons. In early December, following requests by the Red Cross for confidential access to all prisoners in the "war against terrorism," the United States reiterated that it would continue to deny access to a "very small, limited number" of prisoners.

Nor did Rice renounce extraordinary renditions. Instead, she repeated the standard U.S. defense that, before sending prisoners to countries like Egypt or Syria, we obtain assurances that they will not be tortured. Yet formerly "rendered" prisoners—Osama Nasr and Masri, among others—credibly allege that they were, in fact, tortured by the intelligence services into whose hands we delivered them. Continuing this practice will further diminish our legal and moral stature in the world. As pointed out by Council of Europe Human Rights Ombudsman Alvaro Gil Robles of Spain, extraordinary renditions are "so far beyond anything that the rule of law permits that they are completely unacceptable."

Congress Steps In

Fortunately, during the fall of 2005, Senator John McCain (R-AZ) led a successful legislative campaign for a global ban on cruel, inhuman, or degrading treatment of any prisoner in U.S. custody or physical control. Enacted last December as part of the Detainee Treatment Act of 2005, the McCain amendment rejects administration efforts to deny rights to foreign citizens detained overseas. It bans abuse of any U.S. prisoner, "regardless of nationality or physical location," and without any "geographical limitation."

Even so, the administration did its best to snatch defeat from the jaws of this victory for America's image. Europeans took note during the congressional debate as Vice President Dick Cheney pressed McCain to exempt CIA interrogations overseas from the ban. In the words of Austrian human rights expert and UN special rapporteur on torture Manfred Nowak, "This is undermining the reputation of the United States as a democratic country based on the rule of law."

In signing the law, the president tried to write in a CIA exemption by interpretation. The executive branch, he said, would "construe" the ban on abusive techniques "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power . . ." Although purporting to be mere construction rather than open defiance of the law, the president's statement echoed the theory debated in the Yoo memo: no statute or treaty can constitutionally bar the commander in chief from authorizing torture, if he deems it necessary to conduct a war. In 2006, the same claim—the assertedly untouchable power of the commander in chief—was trotted out by Attorney General Alberto Gonzales to defend National Security Agency wiretapping of Americans, in violation of the Foreign Intelligence Surveillance Act.

If the world remains skeptical, not only of American policy but even of our laws, the administration has no one but itself to blame.

Detentions at Guantanamo

Kidnapping, extraordinary renditions, torture, and abuse of prisoners were not the first American counterterrorism measures to prompt European objections. Since 2002, the word "Guantanamo" has become an epithet in international legal circles, a symbol of zealous power unchecked by law. Until rebuffed by the Supreme Court in 2004, the administration claimed the right to imprison terror suspects indefinitely—until the "war on terrorism" ends—on the basis of secret intelligence information unknown to anyone outside the executive branch, without criminal charges, and with no access to lawyers or courts.

This breathtaking claim, amounting to an executive prerogative to impose what could be a life sentence of imprisonment with no due process of law, astounded legal observers around the world. Those who share our common-law heritage of habeas corpus were especially distressed. In 2002, a British

appeals court, even while rejecting a lawsuit to compel the British government to take diplomatic action on behalf of a prisoner at Guantanamo, “made clear our deep concern that, in apparent contravention of fundamental principles of law, [the prisoner] may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.” Guantanamo, observed the court, was a “legal black hole.”

The following year Lord Steyn, a senior British law lord, made an extraordinary public denunciation of the detentions at Guantanamo as a “monstrous failure of justice.” The very purpose of imprisoning people at Guantanamo, he objected, was “to put them beyond the rule of law.”

In an amicus brief before the U.S. Supreme Court, the Commonwealth Lawyers Association, consisting of all law societies and bar associations in the fifty-three Commonwealth member countries, advised that “if it were the United Kingdom and not the United States which controlled Guantanamo . . . English courts . . . would assume jurisdiction to issue writs of habeas corpus . . . We believe that the same position would also apply in the courts of . . . any other Commonwealth state.”

Even after the Supreme Court ruled that U.S. courts have jurisdiction to hear habeas corpus petitions from Guantanamo, another law lord was at pains to distance British practice from Guantanamo. Joining a ruling that struck down a less restrictive British detention regime for suspected terrorists at Belmarsh prison, Baroness Hale made clear, “Belmarsh is not the British Guantanamo Bay.”

Repudiation of indefinite detentions at Guantanamo has not been limited to common-law countries. In a 2004 opinion lamenting the hemispheric erosion of human rights protections in criminal procedure, the distinguished Mexican jurist Sergio García Ramírez, then judge and now president of the Inter-American Court of Human Rights,

protested the “Guantanamoización” of the criminal process.

In November 2005, in response to a long-standing request by special rapporteur Nowak, the Pentagon finally agreed to let him visit Guantanamo, but only on condition that he not speak with prisoners. Concerned both for the credibility of his own reports and for the crippling precedent such a restriction would set for UN human rights investigations, Nowak declined the invitation.

In December, Congress intervened on this issue, too, but not necessarily in a helpful way. An amendment sponsored by Senators Lindsey Graham (R-SC) and Carl Levin (D-MI), and included in the Detainee Protection Act, bars habeas corpus petitions by prisoners at Guantanamo, substituting instead a more limited judicial review by the U.S. Court of Appeals for the District of Columbia. Review now will be confined to whether combatant-status review tribunals—that is, administrative boards established by the military—comply with Pentagon procedures and whether those procedures comply with the U.S. Constitution and laws. Issues of whether prisoners have been tortured in violation of the Convention Against Torture, for example, may be ruled outside the permissible scope of judicial review.

Whether the new act will force the dismissal of the scores of pending habeas petitions, as the government now insists, remains to be seen.

Military Commission Trials

Most of the 500 or more prisoners at Guantanamo are held without criminal charge or trial. However, by mid-January 2006, the Pentagon had referred ten prisoners for trial by military commission. Such commissions have not been used since the World War II era. Among other questionable procedures, they deny the accused and his civilian defense counsel (if any) access to classified prosecution evidence and, until recently, barred any appeal to the courts. Because of ongoing challenges in U.S. courts, no military commission trials had been conducted by the end of 2005.

During 2004, the Pentagon proposed to prosecute several British prisoners at Guantanamo before military commissions. Calling such trials “unacceptable,” British Attorney General Peter Goldsmith declared that “there are certain principles on which there can be no compromise. Fair trial is one of those.” Throughout months of negotiations with the Americans, Goldsmith reportedly “would not budge from a basic demand: that verdicts of military commissions be reviewed by civilian courts.” Finally, the United States relented. By early 2004, all nine British prisoners at Guantanamo were returned to Britain, where they were released without being charged or tried.

Here, too, Congress acted in December 2005. A second prong of the Graham-Levin amendment provides for judicial review, but only after a military commission trial has been conducted. The government then asked the Supreme Court to drop its pretrial review of the first military commission case and to defer any potential review until after the trial and all military reviews have been completed.

A Weakened American Voice

The cumulative effect of U.S. excesses in responding to terrorism has been to diminish American stature in the world.

Executive excess has been curbed only partly and belatedly by the courts and Congress. Ominously, in reluctantly signing the Detainee Treatment Act of 2005, President Bush implied that neither Congress nor the courts can restrict his alleged powers to do whatever he deems necessary in the “war against terrorism.”

Our government has also pressed our democratic allies to follow our lead in watering down hard-won safeguards for human rights.

Authoritarian regimes take comfort from our negative example. Among many others, Malaysia’s law minister defends detaining militants without

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sion of our troops serving in prisons and the field.

I therefore have further proposed simply codifying what is current policy and reaffirming what was assumed to be existing law for years. In light of the administration's stated commitment, it should require no change in our current interrogation and detention practices. What it would do is restore clarity on a simple and fundamental question: *Does America treat people inhumanely?* My answer is no, and from all I have seen, America's answer has always been no.

Let me note that I hold no brief for the prisoners. I do hold a brief for the reputation of the United States of America. We are Americans, and we hold ourselves to humane standards of treatment of people, no matter how evil or terrible they may be. To do otherwise undermines our security. It also undermines our greatness as a nation. We are not any other country. We stand for something more in the world—a moral mission, one of freedom and democracy and human rights at home and abroad. We are better than these terrorists, and we will win. The enemy we fight has no respect for human life or human rights. They do not deserve our sympathy. But this is not about who they are. This is about who we are. These are the values that distinguish us from our enemies.

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trial in his country as "just like the process in Guantanamo Bay." In Africa, Guantanamo "helps create a free license for tyranny."

The resulting damage to American foreign policy was eloquently articulated by a group of former U.S. diplomats in an amicus brief in the Guantanamo case. The administration position "that

Law, Language, and Principle in the "War on Terror"

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international standards of human rights and the rule of law.

In the fight against terrorism, forceful measures are necessary. Military action, when needed, must always be coordinated with law enforcement and judicial measures as well as political, diplomatic, economic, and social responses.

We call upon every State to exercise its right and fulfill its duty to protect its citizens. Governments, individually and collectively, should prevent and combat terrorist acts. International institutions, governments, and civil society should also address the underlying risk factors that provide terrorists with support and recruits.

It was really very encouraging that this agenda could be adopted, for these are not easy times. We are all a little shaken by the attacks in London and by the fact that the perpetrators were British citizens who had benefited from living in a society where they were able to avail themselves of the opportunities it afforded. Why did

the executive branch may imprison whom it will and do so beyond the reach of due process of law," they counsel, "demeans and weakens this nation's voice abroad." They do not doubt American power. "But values count, too . . . democracy, the rule of law, human rights, and due process. To the extent we are perceived as compromising those values, to that extent will our efforts to promote our interests in the wider world be prejudiced."

Administration efforts to bypass the rule of law in countering terrorism undermine our image and credibility in

they feel alienated? Why did they feel marginalized? These are big issues, not just for British society, but for all our democracies.

And so, the larger point I would like to leave with you is that there are costs to using war terminology in countering terrorism, and those costs can be severe—particularly to credibility and legitimacy in trying to foster democracy and freedom in the world. The International Commission of Jurists has set up a panel of eminent jurists on which I have agreed to participate. We will examine, in various countries—including the United States in September 2006—the practical effect of the so-called "global war on terror" and the erosion of international standards of civil liberties. What we really need to bring home is that we must combat acts of terrorism, we must prevent these acts of terrorism, and we must bring to justice the perpetrators of acts of terrorism, but it is not helpful to use the language of war.

And so I suppose I am challenging the ABA. You need to get these issues across. You have a responsibility to continue this discussion.

Mary Robinson is chair and executive director of the Ethical Globalization Initiative and chancellor of the University of Dublin.

the world while threatening to erode human rights protections worldwide. A more modest respect for the collective wisdom of the democratic experience, as reflected in the fundamental norms of international law and of our allies—and, at least until recently, of our own republic—might go far to make America's response to terrorism one worthy of emulation, not repudiation.

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