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## Guantánamo beyond Guantánamo

### *Toward a Global Detention System*

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On April 10, 2002, Binyam Mohamed was arrested while boarding a flight to Zurich from Karachi Airport in Pakistan. Born in Ethiopia in 1978, Mohamed had been residing in London, England, before traveling to Afghanistan in the spring of 2001. Mohamed says he went to Afghanistan to escape the London street culture and to experience living in a Muslim country. The U.S. government had a different story: that Mohamed received weapons training at an al Qaeda camp in the summer of 2001 and additional training in bomb making before he and American citizen Jose Padilla were tapped by al Qaeda's leadership to travel to the United States to set off a "dirty bomb," a device containing radioactive materials.<sup>1</sup> The government based these suspicions largely on statements obtained from Abu Zubaydah, the suspected al Qaeda agent who was captured in March 2002 and rendered to a secret CIA prison for waterboarding and other torture.<sup>2</sup>

Following his arrest, Binyam Mohamed was taken to a series of local prisons, where he was questioned by Pakistani intelligence, British intelligence, and the FBI. During those interrogations, Mohamed was repeatedly threatened. As one FBI agent told him the first day, "If you don't talk to me, you're going to Jordan. We can't do what we want here; the Pakistanis can't do exactly what we want them to. The Arabs will deal with you."<sup>3</sup> And sure enough, in July 2002 Mohamed was taken by masked CIA agents and flown to Morocco on a CIA-operated Gulfstream jet plane. In Morocco, Mohamed was imprisoned for eighteen months and tortured by a team of eight men and women, who, among other things, beat him, cut his penis with a razor, and threatened him with rape and electrocution. Mohamed never saw a judge or a lawyer. As he later recalled, "I never saw the sun, not even once. I never saw any human being except the guards and my tormentors."<sup>4</sup> Mohamed's captors forced him to repeat information they fed him, including making him admit under threat of torture that he had met

Osama bin Laden and had volunteered to serve as an operations man for al Qaeda.<sup>5</sup>

Binyam Mohamed's journey did not end in Morocco. In January 2004, he was flown on another CIA plane to a secret CIA-run prison in Kabul, Afghanistan, known as the "Dark Prison" because captives there were kept in total blackness for twenty-four hours a day while made to listen to music loud enough to perforate an eardrum. From the Dark Prison, Mohamed was taken in May 2004 to Bagram in Afghanistan, where he was forced to sign a false confession.<sup>6</sup> Three months later, he was flown to Guantánamo and charged before a military commission. He was then held at Guantánamo for more than four years without a trial or a hearing. Finally, after seven years of illegal detention, the government abandoned the allegations that Mohamed was involved in a bomb plot, dropped all charges against him, and returned him to England, where he was released.<sup>7</sup>

The case of Binyam Mohamed's alleged accomplice, American citizen Jose Padilla, took a different path. On May 8, 2002, the FBI arrested Padilla as he was entering the United States at Chicago's O'Hare International Airport. Padilla was initially detained as a material witness in connection with the government's criminal investigation of the 9/11 attacks. Padilla's court-appointed attorney, Donna R. Newman, filed a motion in the district court challenging the warrant and seeking Padilla's release. The district judge, Michael B. Mukasey, scheduled a hearing for the following week. But before the hearing took place, President Bush issued a one-page order on June 9, 2002, declaring Padilla an "enemy combatant" and directing the secretary of defense to take him into custody.<sup>8</sup> The order alleged that Padilla was "closely associated with al Qaeda," had "engaged in conduct that constituted hostile and war-like acts," and represented "a continuing, present, and grave danger" to the United States.<sup>9</sup> Attorney General John Ashcroft publicly announced that Padilla—who the government said had previously met and trained with al Qaeda in Afghanistan—was planning to explode a "dirty bomb" in the United States and that his designation as an "enemy combatant" had "disrupted an unfolding terrorist plot."<sup>10</sup> Ashcroft did not mention that the allegations against Padilla—like those against Binyam Mohamed—were based on statements extracted through torture at a secret U.S. prison. Ashcroft also neglected to mention why Padilla's military detention was necessary to prevent a terrorist attack, since Padilla was already in federal custody and could have been prosecuted under any number of criminal statutes based on what the government alleged. The following day, the lower court proceedings were terminated at the government's request,

and Padilla was transferred to the Consolidated Naval Brig in Charleston, South Carolina, where he would languish in military custody for the next three-and-one-half years in defiance of the Constitution's guarantee of due process and a speedy trial.

Abu Zubaydah, meanwhile, remained in secret CIA detention where he was waterboarded, shackled by his hands and feet for weeks while naked, denied food and water, exposed to extremely cold temperatures, subjected to prolonged sleep deprivation, and threatened with disappearance and death.<sup>11</sup> The CIA later destroyed video recordings of those interrogations, covering up criminal activity by U.S. officials and eliminating evidence that could have helped exonerate the numerous prisoners who were being held based on Zubaydah's coerced statements.<sup>12</sup> Finally, in September 2006, President Bush transferred Zubaydah from secret CIA detention to Guantánamo, along with thirteen other "high-value detainees." Bush, however, not only continued to restrict Zubaydah's access to the courts but even sought to prevent Zubaydah from telling his own lawyers how he had been tortured on the ground that it would reveal classified "sources and methods."

These three cases illustrate how Guantánamo is part of a larger network of prisons that emerged after the attacks of September 11, 2001, an interconnected global detention system used by the United States to facilitate torture and other abusive interrogation methods and to hold individuals without charge, due process, or access to any court. That network included both military detention centers such as Bagram and secret CIA jails or "black sites." It also encompassed practices like "extraordinary rendition," in which prisoners were secretly handed over to other governments for continued imprisonment and torture. These detentions beyond Guantánamo became the breeding ground for some of the worst abuses of the post-9/11 era and underscored the importance of habeas corpus.

Located on a 6.5-square-mile plot in the countryside forty miles north of Kabul, the Bagram Theater Internment Facility at the Bagram Air Base reflects Afghanistan's recent turbulent history. The Soviet Union built Bagram as a base of operations for troops and supplies following its invasion of Afghanistan in 1979. Control of Bagram then changed hands several times during the decades of civil war that followed the Soviets' withdrawal from Afghanistan in 1989. When the United States took over the base in 2001, it remodeled its once cavernous machine shop into a detention center.<sup>13</sup>

After its military invasion of Afghanistan in October 2001, the United States began using Bagram as a temporary center to screen individuals

before taking them to other prisons for further detention and interrogation. The prisoners' journeys to and from Bagram varied: some were taken from Bagram to Guantánamo; others were brought from Guantánamo to Bagram; some came to Bagram from CIA "black sites"; and others were taken from Bagram to CIA custody or rendered to third countries for further interrogation.<sup>14</sup> Over time, Bagram became a permanent facility. Its population rose from about 100 prisoners at the start of 2004 to as many as 600 by the end of 2005.<sup>15</sup> More recent estimates put the number at approximately 700.<sup>16</sup>

Bagram remained a stark and forsaken place under the Bush administration. For years after 9/11, the prison contained an open-plan detention area on the first floor, with six large sixty-foot-long cages separated by wire that held between fifteen and twenty detainees each, and six nine-foot-by-seven-foot isolation cells on the second floor made of plywood walls and chicken wire ceilings. Most of the windows at Bagram were broken and boarded up. Former detainees described sharing cages, which often contained nothing more than a bucket to serve as a toilet for dozens of prisoners. One detainee compared Bagram to a zoo, "where they put animals,"<sup>17</sup> and a former interrogator called it a dungeon, full of "medieval sounds" such as the dragging of leg shackles and shouts of military police.<sup>18</sup>

The ICRC has reported that prisoners held at Bagram were subjected to gross mistreatment in violation of the Geneva Conventions.<sup>19</sup> Former prisoners have described abuses similar to those approved for use at Guantánamo, including being held in solitary confinement for up to eleven months at a time while continuously shackled, subjected to prolonged sleep deprivation, and forced to kneel or stand in painful positions for extended periods. One former Bagram prisoner who later was taken to Guantánamo described his time at Bagram as "the longest days of [his] life."<sup>20</sup>

The most notorious cases of abuse at Bagram occurred in December 2002. Two detainees—a twenty-two-year-old taxi driver known as Dilawar and the brother of a Taliban commander—were both found dead, hanging from the wrists by shackles in isolation cells. (Their stories were later depicted in the Oscar award-winning documentary *Taxi to the Dark Side*.) An Army investigation revealed that the two men had been brutalized by interrogators, deprived of sleep for days, and struck so often in the legs by guards that a coroner compared their injuries to those from being run over by a bus.<sup>21</sup> Army investigators later learned that Dilawar was an innocent man who was in the wrong place at the wrong time.<sup>22</sup> Both deaths were eventually ruled homicides, contradicting the military's initial assertion that the men had died of natural causes.<sup>23</sup>

The Bush administration labeled the detainees at Bagram “enemy combatants,” just as it did at Guantánamo. It also defined “enemy combatant” in sweeping terms. While some prisoners at Bagram were allegedly seized in connection with hostilities in Afghanistan, others were captured in places as distant as Central Africa and Southeast Asia and brought to Bagram.<sup>24</sup> The United States also denied Bagram detainees any legal protections, whether those afforded by the Geneva Conventions or those provided under domestic and human rights law to individuals accused of terrorism or other crimes. Bagram detainees were simultaneously denied access to any U.S. or Afghan court. They were thus imprisoned for years without charge, without trial, and without any meaningful opportunity to challenge the allegations against them.

The sham military process that the Bush administration instituted at Bagram worked as follows: After an initial determination made “at the place of capture,” the detainees’ cases were reviewed after ninety days and then again every year by a panel of five military officers known as an Enemy Combatant Review Board (ECRB).<sup>25</sup> The ECRB suffered from multiple flaws and lacked the safeguards necessary to achieve accurate results. For example, it denied detainees the opportunity to be present at the hearings, to see the evidence against them, and to have the assistance of a lawyer. As one official familiar with the process explained, “The detainee is not involved at all.”<sup>26</sup> In addition, in making its assessments, the ECRB could use statements gained through torture or other coercion. Although the United States claimed that the average length of detention at Bagram was about fifteen months, many detainees were held there for several years and, in some cases, for six years or more.<sup>27</sup>

The United States structured its operations at Bagram to create an American enclave without accountability, much like Guantánamo. Since 2003, the United States has operated Bagram under a series of lease agreements with Afghanistan. The current lease grants the United States complete, exclusive, and permanent control over Bagram, allowing it to occupy the land, rent free, for as long as it wishes and without interference by Afghanistan. The lease even allows the United States to assign possession of Bagram to another nation or organization, a power that even the Guantánamo lease does not provide.<sup>28</sup> By disclaiming formal sovereignty over the base, however, the United States has sought to preserve the fiction that Bagram is not U.S.-controlled territory. Therefore, the United States says, it is not obligated to give detainees there the protections of its laws or Constitution or provide them any access to its courts. At the same time, the detainees at Bagram have

no rights under Afghan law and no access to Afghan courts. The result is a U.S.-run legal black hole.

Despite the similarities between Guantánamo and Bagram, there are differences between the two prisons. As we shall see, over time Guantánamo was subjected to some judicial process. Through federal habeas corpus litigation, attorneys gained the right to visit the detainees there and to seek relief in court. These legal challenges helped undercut the U.S. government's effort to maintain a system of unchecked executive detention at Guantánamo. Ironically, they also caused the government to imprison more people at Bagram, where for a long time detainees remained largely "out of sight" and "out of mind."<sup>29</sup> As a Defense Department official who has visited both facilities put it, "Anyone who has been to Bagram would tell you it's worse."<sup>30</sup>

If overseas military prisons like Guantánamo and Bagram represent one facet of the post-9/11 global detention system, "extraordinary rendition" illustrates another. Extraordinary rendition generally describes the transfer of prisoners to another country for possible torture. Like U.S.-run detention facilities designated to operate outside the law, extraordinary rendition is driven by a desire to incarcerate and interrogate individuals without legal constraint. It also places a premium on secrecy that makes it both more difficult to challenge and more vulnerable to the worst human rights abuses.

The origins of extraordinary rendition date back several decades. The U.S. Marshals Service first coined the phrase to describe the process of kidnapping fugitives abroad and bringing them to the United States.<sup>31</sup> This practice enabled U.S. officials to apprehend wanted individuals in "lawless" states or countries that lacked an extradition treaty with the United States.<sup>32</sup> In 1987, for example, FBI and CIA agents lured a terrorism suspect named Fawaz Yunis into international waters off the coast of Cyprus and arrested him. Yunis was then transferred to the United States, where he was tried and convicted for his role in the hijacking of a Jordanian airliner.<sup>33</sup> This form of rendition became known as "rendition to justice." Rendition to justice has generally been upheld by the courts, which ordinarily focus on whether defendants are provided due process at trial and not what happened to them beforehand.<sup>34</sup>

By mid-1980s, the United States was increasingly using "rendition to justice" for national security purposes. In 1986, President Ronald Reagan reportedly authorized U.S. law enforcement personnel to covertly apprehend suspected terrorists in places where it was thought that the traditional extradition process would not work.<sup>35</sup> President George H. W. Bush authorized

specific rendition procedures, and President Bill Clinton expanded the program, making the return of wanted terrorists “a matter of the highest priority.”<sup>36</sup> Former FBI Director Louis J. Freeh stated that during the 1990s, the United States “successfully returned” thirteen suspected international terrorists to face trial in the United States for plotting or carrying out acts of terrorism against U.S. citizens.<sup>37</sup> Despite these changes, “rendition to justice” remained a law enforcement matter, and suspects were ultimately brought to trial within the civilian justice system, with its guarantees of due process.

By the mid-1990s, however, “rendition to justice” had started to drift further from its original focus of bringing suspects to trial in U.S. courts. Michael Scheuer, the former head of the CIA’s bin Laden unit, estimated that the agency had identified and located al Qaeda leaders but “couldn’t capture them because [it] had nowhere to take them.”<sup>38</sup> The CIA established a rendition branch in its Counter-Terrorism Center and assigned case officers to track down wanted individuals.<sup>39</sup> Several secret orders issued in the late 1990s gave the CIA greater leeway to deal with Osama bin Laden, including the “authority to use foreign proxies to detain Bin Laden lieutenants, without having to transfer them to U.S. custody.”<sup>40</sup>

The 9/11 Commission’s interim staff report on diplomacy described the shift: “If extradition procedures were unavailable or put aside, the United States could seek the local country’s assistance in a rendition, secretly putting the fugitive in a plane back to America or some third country for trial.”<sup>41</sup> The main alternative destination was Egypt, a country known for torturing prisoners and one that had outstanding warrants against several suspected terrorists. The United States rendered at least nine individuals to Egypt, including Talaat Fouad Qassem, who had been sentenced to death in absentia there for his involvement in the plot to assassinate Egypt’s former president, Anwar Sadat. Qassem was arrested in Croatia, where he was questioned by U.S. agents for two days on a ship in the Adriatic Sea before he was sent to Egypt. Qassem has never been seen again.<sup>42</sup> His case illustrates that even before 9/11 the United States had started moving away from “rendition to justice” and toward a new form of rendition, in which a suspect’s transfer and imprisonment occurred entirely outside the U.S. legal system and the focus was not on bringing a suspect to trial in U.S. courts.

But these changes were relatively small compared with those made after 9/11 when, as a former FBI agent put it, the rendition program “really went out of control.”<sup>43</sup> The program not only expanded dramatically in size and scope but also began operating without any legal or bureaucratic constraints. The concept of “rendition to justice” disappeared entirely, as individuals were

placed beyond any form of judicial or legal process. The program became what we know today as “extraordinary rendition.”

Vice President Dick Cheney set the tone five days after September 11, explaining on *Meet the Press* that the United States needed to “work . . . the dark side,” doing things “quietly, without any discussion, using sources and methods that are available to our intelligence agencies.”<sup>44</sup> A classified presidential directive issued on September 17 increased the CIA’s power, including the power to kill, capture, or detain members of al Qaeda anywhere in the world. The directive also dispensed with the previous practice of requiring the CIA’s legal counsel to approve every proposed operation. The focus expanded from a discrete category of individuals—alleged terrorists against whom there were already outstanding arrest warrants—to a broad and vaguely defined class of people suspected of plotting terrorist acts, associating with suspected terrorists, or simply having useful intelligence.<sup>45</sup> The program’s purpose changed, too, from bringing wanted suspects to trial to imprisoning people only to question them and extract information by whatever means deemed necessary. In the process, the outsourcing of torture became the rendition program’s *raison d’être* and driving force.

The documented accounts of extraordinary rendition read like lurid tales from a cold war spy novel: hooded detainees being spirited away in the night and sent in CIA-owned or chartered jets to secret destinations for imprisonment and torture. One of the first known cases involved Muhammad al-Zery and Ahmed Agiza, two Egyptians seeking political asylum in Sweden. The Swedish government bypassed its legally required procedures and ordered both men deported without a hearing at the urging of its security police. The security police were acting at the behest of U.S. officials, who had been planning the men’s clandestine transfer to Egypt. Swedish security officers, accompanied by masked CIA agents, took al-Zery and Agiza into a changing room at Stockholm’s Bromma Airport for what they said was a routine “security check.” The two men’s clothes were cut into pieces, and they were forcibly administered sedatives by suppository, swaddled in diapers, and dressed in orange jumpsuits. Al-Zery and Agiza were then blindfolded, placed in handcuffs and leg irons, and flown to Cairo aboard a Gulfstream jet registered to a front company for the CIA, whose agents operated and manned the flight. Once in Egypt, both men were tortured, including through the application of electric charges to their naked bodies in cold underground rooms.<sup>46</sup>

Agiza was later convicted on terrorism charges and sentenced to twenty-five years in prison. Al-Zery was released after two years without any charges. It turned out that he had been rendered based on the flimsiest of evidence:



his name had been found on the computer of an Egyptian dissident arrested in London two months earlier for his suspected involvement in a suicide bomb attack but subsequently cleared of all charges. Al-Zery and Agiza were just two of the estimated sixty prisoners rendered to Egypt after 9/11.<sup>47</sup>

One of the most infamous rendition cases was that of thirty-six-year-old Canadian citizen Maher Arar. Arar's ordeal began on September 22, 2002, when he was detained and questioned by U.S. officials at New York's John F. Kennedy International Airport during a layover while returning to Montreal from a family vacation in Tunisia. After two days, Arar, a computer engineer by trade, was taken in chains and shackles to a federal jail in Brooklyn, where he was held in solitary confinement and subjected to further interrogation without an attorney. Meanwhile, the Immigration and Naturalization Service commenced removal proceedings based on Arar's alleged ties to al Qaeda. Arar maintained his innocence and asked to be sent to Canada, telling U.S. officials that he would be tortured if he were sent to Syria, a country he had fled as a teenager two decades earlier. The government, however, continued to block Arar's access to his lawyer, thus preventing him from seeking judicial redress and enforcing legal safeguards designed to prevent transfers to likely torture. An immigration judge subsequently ordered Arar's removal to Syria based on secret evidence. On October 8, Arar was flown to Jordan, where local authorities chained and beat him before stuffing him in a van and driving him across the border to Syria.

For the next ten months, Arar was kept in a dark, rat-infested cell resembling a grave. He was beaten on his palms, hips, and lower back with a two-inch-thick electric cable, and was told he would be placed in a spine-breaking "chair," hung upside down in a "tire" for beatings, and given electric shocks. In a desperate effort to end the suffering, Arar falsely confessed to having trained with terrorists in Afghanistan, a country he had never even visited.<sup>48</sup>

Syria released Arar in October 2003 after Canada finally intervened on his behalf. In September 2006, a Canadian commission of inquiry released a three-volume report finding "no evidence to indicate Mr. Arar has committed any offense or that his activities constitute a threat to the security of Canada."<sup>49</sup> The commission also determined that the United States had likely relied on inaccurate and misleading information about Arar's supposed terrorist connections provided by Canadian officials and confirmed that Arar was tortured while in Syria. The Canadian government subsequently issued Arar a formal apology and awarded him more than \$9 million to compensate him for his pain and suffering.<sup>50</sup> The United States, however, refused to apologize for its role in Arar's rendition and sought to block Arar's civil lawsuit

against the responsible U.S. officials, claiming that the suit would jeopardize national security if allowed to go forward. In the face of mounting criticism over the United States' handling of the case, former attorney general Alberto Gonzales admitted that he had not bothered to read the Canadian commission's report and was "not aware" that Arar had been tortured.<sup>51</sup> Meanwhile, the United States—unwilling to admit that it had made a mistake, let alone give Arar any compensation—kept Arar on a terrorist watch-list that prevented him from entering the country.<sup>52</sup>

The renditions of Arar, al-Zery, and Agiza all occurred under the guise of immigration law, which was manipulated and subverted for illegal ends. The rendition of Osama Mustafa Hassan Nasr, also known as "Abu Omar," by contrast, occurred entirely outside any legal framework. The Egyptian-born Abu Omar was living with his family in Milan, Italy, and had been granted political asylum based on his fear of persecution for his membership in a radical Islamic organization. On February 17, 2003, Abu Omar was walking to his local mosque for midday prayers when masked CIA agents kidnapped him less than a mile from his home.

As Abu Omar later related, Italian-speaking men claiming to be police officers sprayed an unknown substance on his mouth and nose before pushing him into a van and driving him to a U.S. air base five hours away. In the van, English- and Italian-speaking individuals gagged Abu Omar and beat him repeatedly while questioning him about his relation to radical Islamists and about recruiting terrorist volunteers to fight in Iraq. Abu Omar's captors then flew him to another military base in Europe before taking him to Egypt. On arrival in Egypt, Abu Omar was immediately brought to the headquarters of the secret police. When Abu Omar refused to work as an informer, Egyptian officials took him to an underground prison and tortured him, including by hanging him upside down and applying electric shocks to his genitals.

The details of Abu Omar's kidnapping were uncovered only by chance. At the time of his abduction, Abu Omar was under investigation for terrorism-related crimes as part of a broader inquiry into Islamic militancy based in Milan. Italian prosecutors, who had originally tapped Abu Omar's phone as part of their investigation, intercepted a call that Abu Omar had made from Egypt to his wife in Italy after fourteen months of captivity there. Egypt had by that time released Abu Omar because of his failing health. During the call, Abu Omar recounted his abduction and rendition to his wife. Egypt subsequently rearrested Abu Omar and continued to hold him under an emergency detention law until February 2007, when it finally released him.<sup>53</sup>

Revelation of Abu Omar's abduction prompted an outcry in Italy and across Europe. Italian prosecutors brought criminal charges against twenty-six CIA agents, including the two top CIA officials in Italy and five Italian secret service agents.<sup>54</sup> An Italian court ultimately convicted more than twenty CIA officers in absentia for their role in Abu Omar's kidnapping. (The United States refused to extradite the defendants, who had fled Italy in advance of the investigation.)<sup>55</sup> In addition to creating political controversy, the abduction undermined the original criminal investigation against Abu Omar and a cell of alleged terrorists in Italy and around Europe while damaging relations with the Muslim community.<sup>56</sup>

These are just a few of the numerous U.S.-directed extraordinary renditions that took place after the September 11 attacks. Logs obtained by the *Sunday Times* of London showed that one Gulfstream jet used in rendition operations flew to forty-nine destinations, including Afghanistan, Egypt, Iraq, Jordan, Libya, Morocco, and Uzbekistan.<sup>57</sup> Estimates of the number of people subjected to "extraordinary rendition" vary from as few as seventy to as many as several thousand.<sup>58</sup> And these estimates cover only the CIA-related renditions. If the Defense Department renditions to Guantánamo and Bagram are included, that number would be significantly higher.

Extraordinary rendition violates the United States' legal obligation not to send people to places where their lives or freedom could be threatened, an obligation known as *non-refoulement* (or non-return). This obligation is set forth in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), a treaty signed by the United States and more than 145 other countries. The Convention against Torture categorically prohibits states from expelling, returning, or extraditing a person to another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>59</sup> The treaty's *non-refoulement* obligation is one of a number of measures designed to prohibit and prevent torture worldwide.<sup>60</sup> The International Covenant on Civil and Political Rights (ICCPR), another human rights treaty to which the United States is also a party, contains an even broader *non-refoulement* obligation. It prohibits exposing individuals to the risk not only of torture but also of cruel, inhuman, or degrading treatment or punishment. While the ICCPR's *non-refoulement* obligation is not explicit, the Human Rights Committee, which monitors the treaty's implementation, has determined that this obligation falls within the treaty's prohibition against torture and other mistreatment and is binding under the treaty's general legal obligations.<sup>61</sup> Furthermore, human rights law supports construing the *non-refoule-*

ment obligation broadly to encompass territories and persons under a state's authority or control.<sup>62</sup>

The Bush administration tried to defend extraordinary rendition as both necessary and legal. To protect the American people, Bush asserted, the United States had “to find those who would do harm to us and get them out of [the] way.”<sup>63</sup> Secretary of State Condoleezza Rice similarly remarked, “Renditions take terrorists out of action, and save lives.” Echoing the administration's earlier refusal to apply the Geneva Conventions to “enemy combatants,” Rice noted that the “war on terrorism” is a “new kind of conflict” that requires new approaches for dealing with “captured terrorists . . . [who] do not fit easily into traditional systems of criminal or military justice.”<sup>64</sup>

The Bush administration sought to justify extraordinary rendition based on the same theories of unchecked executive power that it invoked to justify the detention of prisoners at Guantánamo and Bagram. It argued that the Convention against Torture's *non-refoulement* obligation did not apply extraterritorially and therefore excluded transfers outside the United States. It insisted that the ICCPR also did not apply extraterritorially and that human rights law more generally did not apply to extraordinary renditions because the “war on terrorism” was subject only to the law of war.<sup>65</sup> And the law of war, the administration maintained, did not restrict the transfer of “enemy combatants” to another government, even if that transfer would likely result in their torture.<sup>66</sup>

The Bush administration, however, also tried to have it both ways: to defend the legality of extraordinary rendition while maintaining that U.S. policy was not to transfer prisoners to countries where they faced torture. In January 2005, President Bush told the *New York Times* that “torture is never acceptable, nor do we hand people over to countries that do torture.”<sup>67</sup> But three months later, after more details of the administration's extraordinary rendition program had emerged, Bush explained that the United States only “send[s] people to countries where *they say* they're not going to torture the people.”<sup>68</sup> The administration defended this practice by relying on guarantees from the receiving state—known as “diplomatic assurances”—that those transferred would not be tortured.<sup>69</sup>

Diplomatic assurances were first used in death penalty cases in response to demands by some countries that the United States not execute a fugitive if extradited to the United States to face trial. They translated poorly to the rendition context where compliance is difficult to monitor and where most transfers are to countries with records of official torture.<sup>70</sup> Diplomatic assurances also are not subject to any regulations but are completely informal and

ad hoc. One CIA agent went so far as to call them “a farce.”<sup>71</sup> “No one was kidding anyone here,” Michael Scheuer said of diplomatic assurances. “We knew exactly what that kind of promise was worth.”<sup>72</sup> Or as another official explained, “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”<sup>73</sup>

But not all torture was outsourced. In addition to authorizing the CIA to kill or capture al Qaeda members anywhere in the world, the classified presidential directive that jump-started the post-9/11 extraordinary rendition program also approved the creation of a network of secret CIA-run prisons or “black sites.”<sup>74</sup> These prisons offered something even Guantánamo and Bagram could not: total invisibility. After 9/11, hundreds of prisoners were rendered to these “black sites,” which were located in various countries, including Afghanistan, Thailand, Poland, Romania, and Lithuania.<sup>75</sup> The goal in selecting prisons, one CIA official said, was researching “how to make people disappear.”<sup>76</sup>

Prisoners in CIA custody came to be referred to as “ghost detainees.”<sup>77</sup> Even the ICRC was denied access to them.<sup>78</sup> The CIA “loved that these guys would just disappear off the books, and never be heard of again,” said a former FBI agent. “They were proud of it.”<sup>79</sup> Although more secret than military detentions at Guantánamo and Bagram, CIA “black sites” were predicated on a similar concept: that the detainees were unlawful combatants in the global “war on terrorism” and therefore had no rights or legal protection under domestic or international law.

The Bush administration authorized secret CIA prisons primarily to extract information. The prisons, in turn, served as laboratories for the administration’s most abusive interrogation methods—the “enhanced interrogation techniques” sanctioned by executive branch decisions and legal memoranda gutting the definition of torture and justifying any action taken by the president or his agents in the name of national security. The use of these techniques was closely monitored by CIA lawyers and supervised at the highest levels of the U.S. government. One outside expert familiar with the interrogation protocol described it as “one of the most sophisticated, refined programs of torture ever.”<sup>80</sup>

Cases like Khaled el-Masri’s show how easily people could be mistakenly ensnared in this new, law-free detention system. A German citizen and car salesman, el-Masri was traveling to Macedonia for vacation during the Christmas holiday in 2003. On December 31, his bus stopped at the main border crossing between Serbia and Macedonia. El-Masri was singled out from other tourists. His passport was confiscated, and he was taken to a windowless room where his captors accused him of terrorism. That evening, el-

Masri was brought to a hotel room in Skopje where he was beaten, drugged, and interrogated at gunpoint. After twenty-three days of incommunicado captivity, el-Masri was brought to the airport and turned over to masked CIA agents. Shackled, diapered, and blindfolded, el-Masri was then flown to Afghanistan. Upon arrival, el-Masri was driven to the Salt Pit, the code name for a secret CIA-run interrogation facility located in an abandoned brick factory outside Kabul. There, el-Masri was again held incommunicado and deprived of basic necessities. El-Masri's conditions did not improve until he commenced a hunger strike that caused his captors to fear that he might die. Despite evidence that el-Masri was not a terrorist, the head of the CIA's al Qaeda unit insisted that el-Masri continue to be held based on her "gut feeling" that he was bad.<sup>81</sup> Finally, on May 28, 2004, CIA agents took el-Masri to a roadside hilltop in Albania and deposited him without explanation. When el-Masri returned home after five months' of captivity, his appearance had changed so much that the German border guard who checked his documents could not recognize him from the picture in his passport.<sup>82</sup>

The ordeal of Marwan Jabour provides another chilling account of secret detention. Following his arrest in Lahore, Pakistan, in May 2004, Jabour was taken initially to the local station of Pakistan's Inter-Services Intelligence. Four days later, he was brought to a clandestine prison in Islamabad operated jointly by Pakistanis and Americans. During his detention, Jabour was beaten, denied sleep for days, and kept naked and chained to a wall in a cell while his penis was tied with a string so that he could not urinate. American officials participated in Jabour's interrogations and warned him that he could "be taken away somewhere and would never see his children again." After a month, Jabour was blindfolded, shackled, and taken to an airport along with three other prisoners. The men were then put on a plane by Americans and flown to a secret facility in Afghanistan, where more than thirty other prisoners were being held. All the individuals operating and working at the prison were Americans, with the possible exception of the Arab-speaking translators. Jabour was chained in painful positions, held in prolonged solitary confinement, and prevented from seeing sunlight for a year-and-a-half. Jabour was also denied all contact with the outside world, including the ICRC and his family. Finally, after two years, Jabour was sent to Jordan and then to Israel, which released him to his family in Gaza. During his entire confinement, Jabour was never brought before a judge, charged with a crime, or allowed to see a lawyer.<sup>83</sup>

The U.S. has never acknowledged how many people it detained in secret jails around the world. But that number likely exceeds several hundred,<sup>84</sup> and the location of some of these prisoners still remains unknown.<sup>85</sup>

Guantánamo, Bagram, CIA “black sites,” and extraordinary rendition together demonstrate the emergence of an interconnected global detention system designed to circumvent legal protections and avoid accountability. U.S. detentions in Iraq illustrate a different but related phenomenon. They show how the ideas and impulses behind that system could warp what began as a more traditional military operation, pushing it to operate outside the law by defining it as another front in the global “war on terrorism.”

On March 18, 2003, the United States and United Kingdom invaded Iraq, with the support of smaller contingents from other nations that formed the “Coalition of the Willing.” The invasion’s stated goals were to rid Iraq of weapons of mass destruction, to end Saddam Hussein’s support for terrorism, and to liberate the Iraqi people. Both President Bush and British Prime Minister Tony Blair claimed implicit authorization for the invasion from the United Nations Security Council. Three weeks after the invasion began, U.S. forces formally occupied Baghdad and declared an end to Saddam Hussein’s rule. (Hussein was captured that December.) On May 1, 2003, President Bush landed on the aircraft carrier *USS Abraham Lincoln* and delivered a speech proclaiming the “end of major combat operations” in Iraq, with a banner stating “Mission Accomplished” clearly visible in the background. Five days later Bush appointed L. Paul Bremer III to oversee the reconstruction of Iraq as head of the Coalition Provisional Authority (CPA), which would function as Iraq’s temporary government until a democratically elected civilian government could be established. On June 28, 2004, the CPA transferred power to the newly appointed Iraqi interim government and disbanded, marking a formal end to the United States’ occupation of Iraq. Elections were held, and transitional and permanent governments were formed. But despite these political developments, insurgency and mounting sectarian violence continued in Iraq, and more than 100,000 U.S. troops remained on the ground there. By June 2005, President Bush was calling Iraq “a central front in the war on terror.”<sup>86</sup>

The U.S.-led invasion and occupation of Iraq gave rise to a massive U.S.-run detention system in that country. By 2008, the United States was detaining more than 21,000 individuals in Iraq, nominally under the authority of the Multi-National Force–Iraq (MNF–I), the U.S.-dominated international coalition in postinvasion Iraq.<sup>87</sup> U.S. detention operations, which initially sprawled over five facilities, were ultimately concentrated in two prisons: Camp Bucca in southern Iraq, and Camp Cropper, located near the Baghdad International Airport. In addition to U.S. prisoners, by 2008, more than



23,000 people were being held by the Iraqi government in jails throughout the country.<sup>88</sup>

The legal basis for the MNF-I and for U.S. detention operations in Iraq stemmed primarily from several UN Security Council resolutions. On May 22, 2003, the Security Council passed Resolution 1483, stating that the United States and United Kingdom were occupying powers acting under a unified command and would administer Iraq to restore security and stability in accordance with the UN Charter and relevant international law.<sup>89</sup> Less than five months later, the Security Council passed Resolution 1511, recognizing the MNF-I and authorizing it to take “all necessary measures to contribute to the maintenance of security and stability in Iraq.”<sup>90</sup> Together, Resolutions 1483 and 1511 legitimized the occupation of Iraq under this U.S.-led military force.<sup>91</sup> The subsequent return of formal sovereignty to Iraq in 2004 did not alter the situation, and UN Security Council Resolution 1546 extended the MNF-I’s mandate to continue combat and detention operations in Iraq. In particular, that resolution authorized the MNF-I, acting under the “unified command” of U.S. military officers, to “take all necessary measures” to contribute to the maintenance of security and stability in Iraq,<sup>92</sup> including detaining individuals where “necessary for imperative reasons of security.”<sup>93</sup> The MNF-I’s mandate was subsequently extended through December 2008, after which point Iraq was expected to take over all detention operations in the country.<sup>94</sup> Although the number of prisoners in U.S. custody declined, the United States continued detaining more than five thousand prisoners into 2010.<sup>95</sup>

The United States did not initially claim that it could detain prisoners in Iraq outside any legal framework, as it did at Guantánamo, Bagram, and the CIA “black sites.” In April 2003, the Defense Department announced that it was holding detainees captured in Iraq in accordance with the Geneva Conventions.<sup>96</sup> Before long, however, U.S. detention operations in Iraq started to resemble U.S. detention operations at those other prisons: prolonged security-related imprisonments based on vague suspicions and unverified intelligence rather than reliable evidence, excessive secrecy, torture and other abuse, and a complete denial of judicial review.

Faced with an increasingly aggressive insurgency and a need for better intelligence to combat it, U.S. commanders in Iraq began turning to the same tactics used in the “war on terror.” In May 2003, they introduced a new legal category that did not exist under the Geneva Conventions but was already familiar at Guantánamo: “unlawful combatant.” U.S. commanders subsequently adopted another category that did not exist under the Geneva Con-



ventions: “security detainees.” Within a year, the number of security detainees in Iraq grew to more than 6,300, more than 3,000 of whom were being held at Abu Ghraib, the dusty and decrepit compound outside Baghdad that quickly became the United States’ main detention center in the country. High-level U.S. officials responsible for implementing harsh interrogation measures at Guantánamo and Bagram were brought to Iraq to implement those tactics there.

To denote their “significant intelligence or political value,” a small number of security detainees were labeled “high-value detainees” and held in secret.<sup>97</sup> Meanwhile, the number of detainees held as prisoners of war continued to dwindle.<sup>98</sup> “They are not EPWs [enemy prisoners of war],” remarked one senior military commander about prisoners in U.S. custody in Iraq. “They are terrorists and will be treated as such.”<sup>99</sup> Such statements sowed confusion and sent a message through the ranks that aggressive treatment, even abuse, was permissible. “The gloves are coming off regarding these detainees,” a U.S. intelligence officer said in a widely distributed email message from August 2003.<sup>100</sup> By September 2003, Lieutenant General Ricardo S. Sanchez, the commander of coalition forces in Iraq, had a new policy modeled on Guantánamo that sanctioned interrogation methods such as stress positions, the use of military dogs, sleep and sensory deprivation, and exposure to extreme temperatures.<sup>101</sup> Because detainees in Iraq were “unlawful combatants,” Pentagon officials reasoned, SERE techniques could be reverse-engineered and used against them, just as they were used against detainees at Guantánamo and Bagram.<sup>102</sup>

U.S. officials continued to assert publicly that detentions in Iraq were conducted “in the spirit” of the Geneva Conventions, which require that an occupying power establish a “regular procedure” for the periodic review of the internment of civilians (or nonprisoners of war).<sup>103</sup> But the reviews conducted by the MNF–I failed to meet these requirements and lacked important safeguards.<sup>104</sup> Prisoners were routinely denied any meaningful opportunity to see or confront the evidence against them.<sup>105</sup> They also were refused the chance to be present at their review hearings.<sup>106</sup> The Fourth Geneva Convention permits the detention of civilians only where it is “necessary for imperative reasons of security” or for penal prosecution.<sup>107</sup> But Iraqi civilians picked up in random military sweeps of entire neighborhoods and at highway checkpoints were held for months, or even years, without prosecution and without evidence that their confinement was, in fact, “necessary for imperative reasons of security.”<sup>108</sup> As a United Nations report explained, the MNF–I held detainees “for prolonged periods without judicial review of their

cases,” and based on administrative review procedures that “do not fulfill the requirement to grant detainees due process in accordance with internationally recognized norms.”<sup>109</sup>

The United States also failed to institute an effective system for identifying and tracking detainees. Some prisoners simply got lost in the confusion.<sup>110</sup> Others were deliberately taken off the regular rolls or registered under false names.<sup>111</sup> This practice, known as “ghosting,” violated the Geneva Conventions and human rights law. It allowed the CIA and military intelligence officers to hold prisoners incommunicado and hide them from the ICRC, which regularly inspects prisons to monitor compliance with the Geneva Conventions.<sup>112</sup> Ghosting was also intended to facilitate the CIA’s transfer of detainees from Iraq to other countries for interrogation—a grave breach of the Geneva Conventions subject to prosecution as a war crime.<sup>113</sup> One U.S. Army general speculated that there may have been as many as one hundred “ghost detainees” in Iraq.<sup>114</sup>

U.S. officials argued that the normal rules did not apply to the war against terrorism. Due process, they insisted, “is a human rights concept generally associated with criminal arrests and trials” and does not apply to security-related detentions in Iraq.<sup>115</sup> This argument was not only wrong but had devastating consequences.

On April 28, 2004, *60 Minutes II* broadcast pictures from Abu Ghraib prison showing the torture and gross mistreatment of detainees by U.S. forces. The pictures quickly spread across the globe through print media and the Internet.<sup>116</sup> They showed U.S. troops subjecting detainees to mock executions, sexual humiliation, beatings, and other mistreatment. One photograph depicted a hooded man standing on a box with electrical wires attached to his hands. Another showed the bloodied body of a prisoner, wrapped in cellophane and packed in ice. Other pictures displayed American soldiers using dogs to terrify prisoners, force prisoners into painful positions, and sexually humiliate them.<sup>117</sup> A U.S. army investigation into the abuses at Abu Ghraib headed by Major General Antonio M. Taguba found numerous instances of “sadistic, blatant, and wanton criminal abuses,” including breaking chemical lights and pouring the phosphoric liquids on detainees, pouring cold water on naked detainees, and beating detainees with a broom handle and a chair.<sup>118</sup> These abuses, Taguba’s report concluded, stemmed from routine violations of U.S. Army regulations and the Geneva Conventions.<sup>119</sup>

The impact of the Abu Ghraib photographs cannot be overstated. Although written descriptions of prisoner mistreatment already existed, there was no widespread public outcry until these images of American soldiers torment-

ing Iraqi prisoners were published.<sup>120</sup> As Susan Sontag explained, images of atrocities can incite the public in ways that words alone cannot.<sup>121</sup> The Abu Ghraib photographs did precisely that. They exposed the Bush administration's lie that the United States was treating prisoners humanely and showed why courts and legislators could not blindly trust the president in matters of national security. The photographs also illustrated how the administration's effort to circumvent legal rules and court review could lead to horrific abuse, damaging America's reputation and undermining human rights protections throughout the world.<sup>122</sup>

The abuses were not limited to Abu Ghraib but occurred at other prisons in Iraq, including the infamous Camp Nama. Located just off a dusty road near the Baghdad International Airport, Camp Nama had previously served as a torture chamber for Saddam Hussein's regime. When the Iraqi insurgency intensified in 2004, a U.S. Special Operations unit remade it into an interrogation center. Camp Nama quickly became a black hole for prisoners who were denied access to lawyers, courts, relatives, and the world outside. Prisoners were interrogated in a windowless cell known as the Black Room, where the eighteen-inch hooks hanging from the ceiling served as a reminder of the torture inflicted under Saddam Hussein. Members of a military unit known as Task Force 6-26—a unit closely related to the task force that had so grossly mistreated prisoners at Abu Ghraib—were assigned responsibility for extracting information about Iraq's most-wanted terrorist, Abu Musab al-Zarqawi. But the task force ended up using the brutal techniques intended for “the worst of the worst” on ordinary Iraqi civilians.<sup>123</sup> Soldiers, for example, beat prisoners with rifle butts and yelled and spit in their faces. “The reality is, there were no rules,” commented one Pentagon official.<sup>124</sup> When some interrogators at Camp Nama raised questions, military lawyers arrived at the base within hours to give a PowerPoint presentation defending the treatment and techniques on the ground that the detainees were not prisoners of war but “security detainees” or “enemy combatants.”<sup>125</sup> Abuses continued even after warnings from an army investigator and American law enforcement officials. More than thirty-four members of Task Force 6-26 were ultimately disciplined in some way for abusing detainees and three members were convicted of physical assault. In the end, Camp Nama yielded little information to help capture insurgents or save American lives. Instead, it succeeded only in alienating ordinary Iraqis and undermining the United States' mission in that country and its counterterrorism efforts generally.<sup>126</sup>

These abuses may be attributed partly to the tremendous stress placed on American soldiers battling an insurgency that continued to grow in strength.

But they also flowed directly from the Bush administration's decision to circumvent legal rules and embrace torture and detention without due process. "Shit started to go bad right away," remarked one infantry team leader, looking back at detainee operations during the United States' first crucial months in Iraq.<sup>127</sup> The decision to operate outside the Geneva Conventions facilitated the migration of aggressive interrogation techniques from Guantánamo and Afghanistan to Iraq. Major General Geoffrey D. Miller, in particular, sought to "Gitmoize" interrogations in Iraq, where he supervised all U.S.-run prisons, by adopting strategies and techniques honed while previously serving as Guantánamo's commander.<sup>128</sup> Meanwhile, Department of Justice lawyer John Yoo's March 2003 memo legitimizing brutal interrogation methods in the name of national security helped provide legal cover for Miller and others to make detention operations in Iraq "an enabler for interrogation" and helped pave the way for many of the human rights violations that followed.<sup>129</sup>

America's failure to implement adequate screening procedures and its evasion of the Geneva Conventions' prohibition against mistreating prisoners fed off each other. Detainees who presented no threat and who had little or no intelligence value swelled the population of Abu Ghraib and other prisons in Iraq.<sup>130</sup> Detainees were often held for long periods of time based on superficial examinations and screening statements that encouraged the use of abusive interrogation methods.<sup>131</sup> In many cases, the United States failed to notify family members that their loved ones had been seized and imprisoned. Individuals were removed from their homes in the middle of the night with bags over their heads and without explanation. When families asked where their loved ones were being taken, they were told to shut up.<sup>132</sup> Sometimes U.S. troops arrested all adult males present in a house, including elderly, handicapped, and sick people. Iraqi men were pushed around, insulted, and kicked and struck with rifles.<sup>133</sup> All told, approximately thirty thousand to forty thousand Iraqis passed through U.S. detention facilities in the first eighteen months of the occupation.<sup>134</sup>

The United States also resisted releasing even those prisoners who were clearly innocent. As a military intelligence officer explained:

People were afraid to take personal responsibility [for] recommending release of detainees, even when obviously innocent, and often this would lead to condemning statements such as "the detainee told the same story seven times but is lying because he should know such and such information and was therefore uncooperative. Recommend detainee be held in U.S. custody for the duration of hostilities."<sup>135</sup>

Major General Taguba's report noted that more than 60 percent of the civilian inmates at Abu Ghraib had been deemed not to present any threat. Yet many continued to languish in jail.<sup>136</sup> As one army intelligence official later told investigators, the prevailing attitude of U.S. commanders was, "We wouldn't have detained them if we wanted them released."<sup>137</sup> Holding people without charge, without access to a court, or without any other meaningful process helped lead to the prolonged confinement of innocent people, the glutting of jails, and the growing reliance on aggressive interrogation measures, particularly as the insurgency gained strength.<sup>138</sup> It also undermined the United States' operations in Iraq by fueling the same insurgency the United States was trying to quell.

The case of American citizen Donald Vance highlights the United States' "haphazard system of detention and prosecution" in Iraq.<sup>139</sup> A navy veteran from Chicago, Vance went to Iraq in 2004 to work as a security contractor. When he discovered that the company he was working for had a growing cache of weapons that it was selling to suspicious customers with ties to violent militias and death squads, Vance informed the FBI and the U.S. embassy in Baghdad. In return, Vance was arrested and imprisoned by the U.S. military in Camp Cropper as a security detainee for having associated with the very people he had tried to expose. Vance was confined to a tiny cell, where he and other prisoners slept on concrete slabs and where the temperature was only 50 degrees Fahrenheit. During interrogations, officials shackled Vance's hands and feet, covered his eyes, placed towels over his head, and put him in a wheelchair.<sup>140</sup> Vance kept track of the days by making hash marks on the wall of his cell. Vance was denied the assistance of a lawyer at his military review hearings and was prevented from seeing the evidence against him. The only reason Vance was even allowed to be present at those hearings was because he was an American citizen—an opportunity denied to Iraqis and detainees from other countries. Vance was finally released, but only after three months of illegal imprisonment. Of the ten letters that Vance had sent to his fiancée in the United States pleading for help while he was imprisoned, only one arrived, and that letter did not arrive until after Vance had already returned home.<sup>141</sup>

Despite these problems, and despite the fact that more than one hundred people reportedly died in U.S. custody in Iraq and Afghanistan, U.S. detentions in Iraq received relatively little attention aside from scandals like Abu Ghraib. Far more is known about the several hundred detainees at Guantánamo than about the tens of thousands of prisoners in Iraq. The sheer number of detainees in Iraq, the proximity to ongoing combat operations,

and the fact that the United States paid lip service to the Geneva Conventions all contributed to a tendency to view Iraq separately from the larger post-9/11 detention system. Yet, Iraq presents an important aspect of that system. It illustrates how the theories and impulses behind the “war on terrorism” could lead U.S. officials to circumvent established rules and spawn a massive detention dragnet without adequate checks against arbitrary imprisonment and abuse. It also shows how fears of terrorism could prompt overreaction and a disregard for legal rules, leading to widespread human rights violations and undercutting the United States’ ability to counter insurgency. Iraq, in short, shows how a military operation that was originally supposed to comply with the Geneva Conventions and U.S. law could become “in effect, another Guantánamo.”<sup>142</sup> Like Guantánamo, Bagram, and CIA “black sites,” Iraq highlights the dangers of extrajudicial detention and the importance of habeas corpus.