
Ensuring Accountability: International Law and Post 9/11 U.S. Detention Policy

by Priti Patel

SINCE SEPTEMBER 11, 2001, THE UNITED STATES has established a worldwide military and intelligence detention system primarily for interrogation purposes. In the past three and a half years, the United States military has detained at least 50,000 individuals in Afghanistan, Iraq, and at the Guantanamo Bay Naval Base in Cuba. This number does not include individuals detained in undisclosed detention locations by the military, nor does it include the numbers of detainees held and interrogated by the CIA in unknown locations. The newly envisioned worldwide military and intelligence detention system, holding individuals captured within the context of the U.S.-led campaign against terror, operates predominantly in secrecy. In some cases, there is no official acknowledgement of the existence of detention facilities; in other instances, the actual fact of detention is shrouded in secrecy.

Both international human rights law and international humanitarian law, or the law of war, have recognized the importance of transparency in detention, acknowledging that a lack of oversight and transparency in detention will lead to torture and mistreatment. Unfortunately, the Executive Branch of the United States in recent years has repeatedly evaded oversight from other governmental branches and non-governmental organizations. It was widely reported that the emergence of a detention facility on Guantanamo Bay Naval Base was an attempt by the U.S. government to avoid scrutiny by U.S. courts. In addition, recently released investigations indicate that individual detainees were, and continue to be, hidden from International Committee of the Red Cross (ICRC) officials during visits to detention facilities. These reports point to the continuing U.S. government policy of denying full oversight and transparency, even as the revelations of abuse in Iraq, Afghanistan, and Guantanamo Bay continue to emerge.

Current U.S. policy regarding detentions by the U.S. military and intelligence agencies violates the United States' obligations under international law. This article begins by describing the nature of the current detention system—where individuals are being held, how many are in detention, and what we know regarding their treatment. The discussion then turns to the international law on secrecy and mistreatment and later to the United States' obligations under international treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture). Following an examination of the international law on disappearances, the article analyzes the United States' obligations under international humanitarian law, specifically the Geneva Conventions.

THE NATURE OF THE MILITARY AND INTELLIGENCE DETENTION SYSTEM

DUE TO THE SECRECY SURROUNDING THESE DETENTIONS, the breadth of the military and intelligence detention system created in

the aftermath of 9/11 is unknown. Piecing together information recently discovered by the media and human rights groups, however, depicts a troubling picture.

There are acknowledged military detention centers in Iraq, Afghanistan, and Guantanamo Bay Naval Base, Cuba. We know perhaps the most about the detention facility and the treatment of detainees at Guantanamo Bay. As of December 2004, according to the U.S. government, there were around 550 detainees being held at Guantanamo Bay. This number excludes the approximately 200 released detainees—some freed and others sent back to their country for continued detention. It is important to note that many prisoners in Guantanamo Bay Naval Base were not captured on the battlefield in Afghanistan during the war. Some were captured in far flung locations, including the Gambia and Bosnia, and brought to Guantanamo Bay through extra-legal means. In other cases, individuals were captured outside of Afghanistan after the end of the international armed conflict with the instatement of the interim Karzai government in Afghanistan and transferred to Guantanamo Bay, where they were held as “enemy combatants.”

Despite limited ICRC access to prisoners, limited Congressional oversight, and the positive involvement of U.S. courts, the U.S. treatment of detainees and detention conditions at Guantanamo remain troubling. Recently released detainees

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recount mistreatment, including placement in solitary confinement, severe beatings, and sleep and sensory deprivation. Salim Ahmed Hamdan, a Guantanamo prisoner on trial before the military commissions, was held in solitary confinement for almost a year. Families of detainees also remain unaware of the state of their loved one's health, as communication between families and detainees is unreliable.

In Afghanistan, the number and treatment of detainees is even harder to decipher. Despite the independent election of Hamid Karzai in October 2004 and recent reports of the diminishing num-

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bers of detainees held in Afghanistan, the number of detainees held as of January 2005 by U.S. forces in Afghanistan has actually increased about 40 percent in the last six months. The United States continues to operate over 20 detention facilities across Afghanistan. It remains unclear what legal protections detainees in Afghanistan are entitled to under the U.S. administration's analysis. Although the ICRC has limited access to the main detention facilities in Afghanistan, namely the Bagram Air Force Base and Kandahar Airport, the ICRC has not visited detainees at "firebases"—temporary detention facilities close to points of capture. Human rights groups indicate an increase in abuse at these temporary facilities.

What is known is that many detainees released from U.S. custody in Afghanistan tell harrowing tales of abuse and mistreatment. There have been at least eight reported deaths in U.S. cus-



Courtesy of Project Kuwaiti Freedom

The family of Fawzi al-Odah, a detainee at Guantanamo Bay Naval Base, looks through his childhood photographs.

tody in Afghanistan. As recently as September 2004, U.S. soldiers raided the house of the family of Sher Mohammed Khan and took him and his cousin into custody. Khan's brother was reportedly killed during the raid. Khan was later found dead at a U.S. firebase in eastern Afghanistan. According to U.S. military personnel, Khan died in U.S. custody of natural causes. But his family reported seeing bruises consistent with abuse on his body. The whereabouts of his cousin remain unknown.

In Iraq, where the pictures of torture and abuse have led to numerous internal investigations, certain detainees have been hidden from oversight bodies, including the ICRC, while they are interrogated by the CIA. In these cases, the place of detention is publicly known, but specific individuals are left off of official detainee registers. These prisoners have come to be known as "ghost detainees." According to one Army official, the number of ghost detainees in Iraq could be up to one hundred. Another Army official put the number of ghost detainees in Iraq at approximately two dozen. More recently, a legal memorandum by Assistant Attorney General Jack Goldsmith allowed the CIA to transfer detainees to locations outside of Iraq for interrogation. Since March 2004, the United States has transferred at least one dozen individuals out of Iraq for the purpose of interrogation by the CIA. This policy directly contravenes the United States' obligations under Article 49 of the Geneva Convention, as discussed below.

The detention locations discussed above are those that are acknowledged by the U.S. government. There remains an entire set of locations and prisoners that are officially unaccounted for. There have been numerous news reports indicating possible military detention facilities in Pakistan and CIA-run facilities in Diego Garcia, Afghanistan, Guantanamo, Jordan, and on U.S. ships. It is believed that the CIA is holding almost three dozen detainees in facilities around the world. Some of the detainees held by the CIA have been acknowledged by the government, including alleged 9/11 mastermind Khalid Sheik Mohammed and alleged Bali bomber Riduan Isamuddin (also known as Hambali). Despite attempts by the ICRC, human rights groups, and the media to ascertain further information on detention conditions and the health and treatment of detainees in these locations, the U.S. government refuses to acknowledge even the existence of these facilities, the location of numerous high level prisoners, or the state of the detainees' mental and physical health.

INTERNATIONAL LAW ON SECRECY AND MISTREATMENT IN DETENTION

THE UNITED STATES IS OBLIGATED UNDER INTERNATIONAL LAW not only to provide a full accounting of detainees to oversight bodies, such as the ICRC, but also to provide detainees access to an independent judicial body. The Human Rights Committee (HRC), the UN body tasked with monitoring compliance with and interpreting obligations under the ICCPR, recognized that to

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ensure effective protection of individuals in detention, States should hold detainees in officially recognized detention centers and provide comprehensive registers of all persons in detention to family and friends because prisoners are especially vulnerable to mistreatment. In particular, the HRC stated:

To guarantee effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present

and this information should also be available for purposes of judicial or administrative proceedings.

The HRC has further tasked States Parties with making provisions “against incommunicado detention” and recognized the importance of contact with the outside world and in particular with family. Communication between detainees and their family members is critical for informing family members that their loved ones are still alive and healthy. For example, Khalid al-Odah, father of Fawzi al-Odah, a detainee at Guantanamo Bay Naval Base, stated that the messages from their son gave them “an indication that [their] son is still alive.”

Courts and international treaty bodies have long recognized the importance of transparency and oversight in detention to min-



Courtesy of Project Kuwaiti Freedom

Family members of Kuwaiti detainees at Guantanamo Bay protest in London.

imize risks of torture and mistreatment. The HRC, having decided upon scores of individual cases relating to torture, mistreatment, and arbitrary detention, reflected in a particular case that it “feels confident to conclude that the disappearance of persons is inseparably linked to treatment that amounts to a violation” of the prohibition on torture and cruel, inhuman, and degrading treatment. The UN Special Rapporteur on Torture has indicated that “the maintenance of secret places of detention should be abolished under law,” and that officials who hold detainees in secret detention locations should be punished under the law. In the annual State Department Country Reports on human rights compliance, the United States itself has condemned other countries for holding prisoners in secret detention locations.

INTERNATIONAL TREATIES: THE ICCPR AND CONVENTION AGAINST TORTURE

The ICCPR, ratified by the United States in 1992, protects prisoners from arbitrary deprivation of liberty and security as well as from torture and cruel, inhuman, and degrading treatment. The Convention against Torture, ratified by the United States and entered into force in 1994, also prohibits torture in Article 1 and cruel, inhuman, and degrading treatment in Article 16. Additionally, the ICCPR requires all States Parties proactively to minimize risks of torture and other forms of mistreatment. Article 7 specifically prohibits States Parties from subjecting anyone to “torture or cruel, inhuman or degrading treatment.” Article 9 grants all individuals the “right to liberty and security of the person” and prohibits the arbitrary arrest or detention of any individual.

The HRC, in applying the ICCPR to individual cases, has repeatedly found violations of Articles 7 and 9 in cases where individuals were held in secret detention locations or where the fact of the individual being detained was unconfirmed by the detaining authority. For example, in the case of *El-Megreisi v. Libya*, Youssef El-Megreisi was a Libyan national detained by the Libyan security police. For three years, his family remained unaware of his whereabouts and feared he had been killed. He was then allowed one visit from his wife, but remained in detention until the HRC decided his case in 1994. In reaching its finding that the Libyan government arbitrarily detained El-Megreisi, the HRC noted that he had never been charged with a crime nor brought to trial. In addition, the HRC found that his incommunicado detention itself, apart from the one visit from his wife, constituted torture and cruel, inhuman, and degrading treatment in violation of Article 7 of the ICCPR.

The current U.S. policy of denying detainees held in U.S. custody access to U.S. courts to challenge the legality of their detention, the lack of official family notification policies, and restrictions on family visitations in cases where the family is aware of the detention, violate the United States’ obligations under international legal treaties.

INTERNATIONAL LAW RELATING TO FORCED DISAPPEARANCES

THE INTERNATIONAL LEGAL CONCEPT OF DISAPPEARANCES applies to the current U.S. policy on the detention of individuals within the context of the campaign against terror. A comprehensive, accepted definition of disappearances had long evaded the international community. An emerging definition of enforced disappearance in international and regional instruments, including the UN Declaration of Enforced Disappearances, the Inter-American Convention on Forced Disappearance of Persons, and the Rome Statute of the International Criminal Court, points to four necessary elements: deprivation of an individual’s liberty against one’s will; government involvement; failure to disclose the fate and whereabouts of the detainee to family or failure to acknowledge the fact of detention; and failure to grant the detainee access to judicial bodies. Many of the detainees held within this worldwide detention system fall within this accepted definition of “disappeared.”

Though declarations do not create legally binding obligations, they are critical in informing other binding international legal obligations and shed much needed light on appropriate actions for states. The UN Declaration on the Protection of all Persons from Enforced Disappearance, passed by the UN General Assembly in 1992, finds that enforced disappearances violate the rights to recognition as a person before the law, to liberty and security of the person, and not to be subjected to torture or cruel, inhuman, and degrading treatment. The declaration unequivocally states that no “circumstances whatsoever...may be invoked to justify” disappearances. The declaration further requires that all detained persons be held in “an officially recognized place of detention” and “be brought before a judicial authority promptly after detention.” The Inter-American Convention on Forced Disappearance of Persons, adopted by the Organization of American States, a regional system of which the United States is a member, provides similar norms to the UN Declaration.

Many detainees in U.S. military and intelligence custody meet all four prongs of the definition of disappearances. In many

cases, families are not notified of the fate or whereabouts of the detainee; in other instances, the United States denies the actual fact of the detention. In all cases, the U.S. government has failed to adequately provide detainees access to judicial bodies.

INTERNATIONAL HUMANITARIAN LAW

THE THIRD AND FOURTH GENEVA CONVENTIONS, dealing with prisoners of war and civilians respectively, address the issue of transparency in detention in a myriad of ways. The U.S. administration has clearly stated that the Geneva Conventions apply to all prisoners in Iraq during the war and occupation. Recent statements, however, suggest that the administration finds that non-Iraqis captured in Iraq are not entitled to protections under the Geneva Conventions. As of January 2005, there were approximately 330 foreign detainees held in Iraq. In the case of Afghanistan, Guantanamo Bay, and other undisclosed locations, the administration's position has been less than clear. Under President Bush's February 7, 2002, order outlining the treatment of Al-Qaeda and Taliban detainees, the Taliban are entitled to Geneva Convention protections, but not as prisoners of war. Members of Al-Qaeda, on the other hand, are not protected under any Geneva Convention. The debate regarding whether the Geneva Conventions apply to particular sets of prisoners has been the subject of much writing both in and out of U.S. courts and is not the focus of this article. What is critical is the emphasis on transparency and accounting of detainees provided for in the Geneva Conventions to ensure that prisoners, whether civilians or combatants, are free from arbitrary detention, torture, and mistreatment.

Recognizing the importance of an outside body to ensure that prisoners are being treated appropriately, the Geneva Conventions require that the ICRC have access to all detention locations and all prisoners. This requirement applies to both civilian detainees and prisoners of war. The ICRC interviews with prisoners are to be conducted without any witnesses to ensure the safety of prisoners who voice concerns regarding their treatment. This access can be limited for "reasons of imperative military necessity," but only for a limited period of time.

The Geneva Conventions also provide a number of accounting mechanisms to ensure that mistreatment in detention will be detected and corrected as quickly as possible. Under the Third and Fourth Geneva Conventions, family members and the prisoner's country of origin are to be notified of the location and health conditions of prisoners of war and civilians. Article 70 of the Third Geneva Convention requires the detaining country to enable the prisoner of war to write to his or her family within one week of capture. Civilian detainees are granted similar protections under the Fourth Geneva Convention. Additionally, prisoners of war and civilians are to be documented to ensure that prisoners are not held in *incommunicado* detention. Detaining authorities are to fill out capture cards almost immediately upon capture of an individual. The capture cards provide critical detainee information, including the prisoner's name, state of health, and location of detention. The ICRC frequently uses capture cards to alert family members of the detention of their loved ones.

The Fourth Geneva Convention provides additional protection to civilians against unlawful deportation, transfer, and unlawful confinement. This provision was enacted in light of the secret-ing out of detainees by the Nazi forces in occupied Europe to Germany in the dead of night. It was promulgated to restrict the

disappearances of individuals during occupation. During a period of occupation, the occupying power is restricted from transferring any civilians outside of the occupied territory. The United States, until June 2004, was an occupying power in Iraq. The provision allows for transfers in extremely limited circumstances, for security or imperative military reasons. These limitations are temporal in nature, and the occupying power is obligated to inform the ICRC of any such transfers. The transfer of at least a dozen detainees out of Iraq for interrogations since March 2004 contravenes this provision of the Geneva Conventions.

The ICRC, charged with overseeing the implementation of the Geneva Conventions, has repeatedly voiced concerns to the United States of the fate of detainees held in undisclosed locations throughout the world. The ICRC has said in a public statement that "obtaining information on [detainees held in undisclosed locations] and access to them is an important humanitarian priority." It has taken the step of formally asking the U.S. government for access to those prisoners, but has yet to visit these detainees.

CONCLUSION

THE CURRENT U.S. POLICY on military and intelligence detentions contravenes international human rights and humanitarian law by failing to provide appropriate oversight and openness. Official accounting to oversight bodies and transparency in detention policies is critical to safeguarding against torture, mistreatment, and arbitrary detention. In addition, legal rules and regulations provide essential guidance to military personnel and intelligence interrogators on the boundaries of their conduct.

The U.S. government has played an essential role in ensuring that countries abide by international human rights norms and laws. The detention policies implemented by the U.S. government in the past three years have undermined the U.S. government's credibility and ability to influence other countries to abide by international laws. In light of the recently revealed information on the torture and mistreatment in known detention facilities, it is critical for the United States to end the secrecy involved in its detention policy and fully account for all detainees and detention locations in an effort to prevent further abuse.

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