Detention and Rendition in the “War on Terror”

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Extraordinary Rendition and the Retreat of International Society

Jason Ralph

I’m going to focus my remarks on what the new administration in the US has been doing in this area; and in that respect this conference could not have been better timed, because of course we’ve had this past few months an avalanche of information on US practices. So, for example, on

- **March 2** - The release of 9 memoranda from the Office of the Legal Counsel including a March 13, 2002 memo that dealt specifically with the legal regime that governed the transfer of captured terrorists to the custody of foreign nations.
- **April 9** - The release of the November 2007 ICRC report based on testimony of those interrogated. This report was unambiguous in its assessment that the methods used amounted to torture.
- **April 16** - The release of four memoranda from the Office of Legal Counsel to the CIA on the Interrogation of al Qaeda Operatives.
- **April 22** – The release of a declassified narrative by the Senate Select Committee on Intelligence, which gives details on when the administration was briefed by the CIA about its interrogation tactics
- **April 23** - The release of a report of the Senate Armed Service Committee, which charts the migration of interrogation techniques from the GTMO to Iraq and concluded: ‘The abuse of detainees in U.S. custody cannot simply be attributed to the actions of "a few bad apples" acting on their own.’’

Now, trying to keep on top of this information and the discussion surrounding it would have been impossible without the help of my research assistant Dominika Svarc who is doing an excellent job helping to collate and explain what’s going on; and I would also acknowledge the support of the ESRC here, which is providing the funding for this project.

So, against this background I want to focus my remarks on four points:

1. I want to say something about how we define ‘extraordinary rendition’ and what this means for how we understand the numbers involved in the CIA led programme.
2. I then want to discuss something about the legal arguments used by the Office of Legal Counsel as they appear in the memos that have been released.

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1 There is a audio recording of this presentation and subsequent discussion, but LSE have not yet podcast it via their website. In the meantime, these are the comments I used for my presentation.
3. I will then draw some implications from this, which will speak to the IR students in the audience, particularly those who may be familiar with John Vincent’s conception of a solidarist international society.

4. Then finally, I’ll say something about President Obama’s response to this question.

So firstly, some definitions. What we’re talking about here of course is the transfer of terrorist suspects between jurisdictions. But what makes it “extraordinary” is that it is neither the normal process of extradition – which involves the lawful transfer of suspects to face trial – nor is it rendition – which involves the potentially unlawful transfer of suspects to face trial. Rather extraordinary rendition involves the unlawful transfer of terrorist suspects for the purpose of interrogation and an assumption that the interrogation techniques used will be ones that the US would prefer not to use.

So, my working definition of extraordinary rendition is the transfer of suspected terrorists by the US to foreign states ‘in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment’ NYU 2006

Now, there are a couple of points to mention here.

Firstly, that it’s now widely known that the US had a rendition programme before 9-11 and indeed during the Clinton administration. This might not be “extraordinary”, however, because it is said to have had a law enforcement objective. So for instance, terrorist suspects were kidnapped – and there are of course human rights implications involved there – but they were rendered to other states such as Egypt where they had either been convicted in abstentia or faced trial. The implication is that because counter-terrorism policy was still guided by a law enforcement paradigm it kept the numbers down. After 9-11, as Michael Scheuer – the CIA counter-terrorism expert put it – “the gloves came off”. Rendition was extraordinary because US policy was conceived in a war rather than a law enforcement setting and it because it was interested in intelligence and not evidence. As a result, the numbers increased and the character of the renditions changed.

The second point to make is that not all the 759 detainees transferred to GTMO are part of the extraordinary rendition programme. What we’re talking about here involves a territory other than the battlefields in Afghanistan and Iraq, and detention facilities other than Bagram and GTMO. Extraordinary rendition involves therefore the arrest in (and transfer to) another state e.g. Pakistan, Egypt, Morocco, Thailand etc etc – the list is familiar. With this qualification, the numbers involved are reduced but of course we don’t know exactly how many are involved. The recently released 2005 OLC memo states that 94 detainees were in CIA custody and of these 28 detainees had been subjected to enhanced interrogation techniques.

Now, the arguments put forward to defend the use of these techniques tend to fall into two categories. The first has to do with the definition of torture. The second has to do with where the interrogations are conducted. I want to draw my implications for the study of International Relations from the second set of arguments. But before I do that, I want to say something about the OLC’s definition of torture.
The focus here is on Section 2340 of the US Code, which defines torture as

an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control; (2) "severe mental pain or suffering" means the prolonged mental harm

Now the OLC memos focus in on the words severe and prolonged, as well as the phrase specifically intended; and essentially it argues that the interrogation methods proposed by the CIA do not amount to torture either individually or in combination. The main evidence they present for this is the fact that the techniques are drawn from a US Navy’s training programme and that the recruits who had been through this programme had not suffered severe or prolonged harm. The fact that medical staff were also on site is also said to be proof that the interrogators did not intend to cause severe or prolonged harm. The conclusion follows for the OLC that Section 2340 posed no obstacle to the CIA.

The obvious point to say about this of course is that the contexts (a training programme and the war on terror) are completely different. Moreover, as Mark Danner pointed out in his New York Review of Books article on the ICRC report, the Navy selected these techniques under the assumption that they would be illegal if they were used for real. So, it’s hard to accept that a training programme can be used as evidence that the enhanced interrogations were legal.

As I said, I want to draw an IR argument from the second set of arguments used by the OLC. These tend to argue that the location of the interrogations matter and that the law could not restrain the CIA if the interrogations took place outside of ‘any territory under its jurisdiction’. So for instance, the rendition memo deals with Article 3 of the Convention Against Torture, which insists that states do no not ‘…expel, return or extradite where there are substantial grounds for believing’ that torture will result. To the OLC, however, each of these terms involves the presence the suspect on US territory. It ‘makes no sense’, they argue, when considering “the transfer of a prisoner held outside the US in another country’.

The memo uses a similar argument with regard to Article 16 of the Convention against torture. This states that ‘each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment’. Here the OLC defines ‘territory under its jurisdiction’ to mean “at least de facto authority as the government”. In this sense, the Convention again does not apply to prisoners rendered outside the US. Finally, the OLC takes a definition of cruel, inhuman and degrading treatment that centres on the US constitutional jurisprudence and notes that the bill of rights do not apply to aliens outside the US.

Now this reading is by no means accepted in the legal literature. For instance, Margaret Satterthwaite argues that Article 3 applies to a state party, regardless of where it is acting. Besides, she notes how the UN Committee Against Torture has developed an interpretation of ‘territory under its jurisdiction’ which includes effective control over an individual as well as effective control over territory. This is called the personal control test and it would, she concludes, extend to cover all
extraordinary rendition cases carried out by the United States, no matter where they originate.

I’m not going to argue one way or the other here. Rather, my purpose is to draw some implications for International Relations and is understanding of international society. The OLCs vision of international relations is quite clearly one that is ordered by territorial conception of sovereignty and responsibility. From this perspective, the US government has a duty to prevent torture on its own territory, but beyond that, it has little or no legal obligation. The question of whether to use enhanced interrogation techniques, or the question of whether to send an individual to a state that is known to use these techniques, is purely a political question. The OLC lawyers one might say are the organic intellectuals that help to construct what IR scholars call anarchy.

Now having said that, if one notices the geography of the rendition programme I would argue that the US has acted politically, but in a way that still tries to maintain the idea that there is an international society. So for instance, CIA interrogation sites not only existed outside the US, they existed outside what might be called a zone of established liberal democracies. The terrorist suspects in effect crossed a line that separated this torture free zone from a zone of exception where different rules applied. They went from Italy to Egypt, the US to Syria, the UK to Morocco etc etc.

Rather than a globally inclusive international society based on human rights therefore, extraordinary rendition operates on the assumption that there is an inside and an outside. In this respect, I suggest it symbolises a retreat of international society. Not a full blown retreat to the anarchy of the realist world view, but a retreat to a world order of a previous age, one that was characterised by the discourses of civilisation and barbarism.

Now, it is in this context that I think we should understand the question of prosecutions and the various lawsuits filed by the victims of the extraordinary rendition programme. Obama is I think trying to walk a very thin line here. He has of course said that he wishes to move forward and some have interpreted this as a preference for immunity. I’m not certain that this is the case. If he was this way inclined he could have given the pardon that Bush couldn’t give, because in Bush’s eyes US officials had done nothing wrong. I think Obama’s apparent lack of enthusiasm for prosecutions is an important means of depoliticising what could easily be seen in party political terms. The problem with not prosecuting of course is that it simply turns torture into a political rather than a legal matter, and it potentially consolidates the image of a divided world that I have outlined.

I’ll end by noting that criminal prosecutions are not the only means of redress. As you’re no doubt aware Binyam Mohammed and others have filed a lawsuit against Jeppersen Dataplan, the company accused of assisting the CIA in the running of its extraordinary rendition programme. He is allowed to do this under Alien Tort Statute, which is part of the 1789 Judiciary Act. I don’t have time to go into its history, and if anyone is interested I’ve written about this elsewhere and happy to give the reference. It is worth mentioning, however, that when Dolly Filartiga used this statute to successfully sue the torturer of their son in a New York Court, John Vincent called it ‘a glimpse of a solidarist world order of the future.’ If that vision is to survive the
recent onslaught, then it is surely right that Mohammed and others have their day in court.