

## **Vanishing points: Law, violence and exception in the global war prison<sup>†</sup>**

**Derek Gregory**

‘When one hears about another person’s physical pain, the events happening within the interior of that person’s body may seem to have the remote character of some deep subterranean fact, belonging to an invisible geography that, however portentous, has no reality because it has not yet manifested itself on the visible surface of the earth’

Elaine Scarry, *The body in pain: the making and unmaking of the world*

### **Power, space and visibility**

The ‘vanishing points’ that I seek to identify in this essay can be brought into preliminary view through three figures and two sites. The three figures are a hooded man, a masked philosopher and an outlaw president, none of whom is quite what he seems. The two sites are the US Naval Station at Guantánamo Bay and Abu Ghraib prison in Iraq: and neither of these is quite what it seems either.

### **A hooded man, a masked philosopher and an outlaw president**

In the middle of October 2003 Haj Ali al-Qaisi, the former *Mukhtar* – community leader – of al Madifai, a district west of Baghdad, was arrested by US troops on his way to work. He was hooded, handcuffed, and taken to Abu Ghraib prison, where he was asked about Saddam Hussein, Osama bin Laden and the insurgency. ‘They wanted me to become their eyes in the region,’ he said. But he protested that he knew nothing, and he

---

<sup>†</sup> I am grateful to Matthew Farish, David Nally and Matthew Sparke for helpful comments,

was left to kick his heels in a large tent compound. Ten days later he was taken to Cage 49 in Cellblock 1. There he was interrogated daily, and frequently made to spend the night hanging by his handcuffs from the crosspiece of the bars in his cage. Finally, he was told that he had exhausted the patience of his captors. Forced up on a box, electrodes were attached to his fingers. Again he was asked for names of insurgents, and again he protested that he did not know any. Silence. He could see the flashes of cameras through the rough hood. Then he felt the first electrical shocks: ‘My eyes felt like fire, my whole body shook; I lost feeling in my tongue and bit it. I fell down; my tongue was bleeding. They took the hood from my face and a doctor came to me. He opened my mouth with his foot and put some water in my mouth and said, “He is OK. Shock him some more.”’ He endured two more sessions before being returned to the tent compound. He says he vomited when he saw the sun. He was released in January 2004 and told that it had all been ‘a mistake’. For some considerable time Al Qaisi was believed to be the hooded man in the iconic photograph from Abu Ghraib, but it now seems that this was another prisoner who was subjected to similar treatment. According to a terse deposition from Abdou Hussain Saad Faleh, he was forced to stand on a box ‘with no clothing, except a blanket. Then a tall soldier came and put electrical wires on my fingers and toes and on my penis, and I had a bag over my head. Then he was saying, “Which switch is for electricity?”’<sup>1</sup>

Some commentators have exploited the uncertain identification of ‘the hooded man’ to discredit Al Qaisi’s testimony and his work for the Association of the Victims of American Occupation Prisoners, while Faleh’s testimony – like that of other victims – is shuffled off into an appendix to one of the official investigations. But their voices need to be heard, for the fact remains that the war prison described by victims like these is a far cry from the modern carceral regime described by ‘the masked philosopher’, Michel

---

<sup>1</sup> Paola Coppola, ‘The man beneath the hood speaks out’, *Guardian* 21 September 2005; Donovan Webster, ‘The man in the hood’, *Vanity Fair* February 2005; Kate Zernike, ‘Cited as symbol of Abu Ghraib, man admits he is not in photo’, *New York Times* 18 March 2006; ‘Translation of statement provided by Detainee 18470’, Karen J. Greenberg and Joshua L. Dratel (eds), *The Torture Papers: the road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) p. 526.

Foucault. It is a strange hybrid. It is not a prisoner of war camp, since its central operation is the continued interrogation of prisoners taken during the ‘war on terror’, most of whom are denied the status of prisoners of war; yet many of its sites are inspected by the International Committee of the Red Cross which is required to visit all prisoners held as a result of armed conflict or military violence. Neither is it an ordinary prison, since its inmates have been captured by security forces and placed outside the normal legal process, and the regime to which they are subjected is not an intrinsically correctional one; yet they are subject to stringent surveillance and moved through a hierarchy of spaces depending on their co-operation with their captors. In what follows I suggest that the war prison (like the ‘war on terror’ more generally) can be understood as a dispersed series of sites where sovereign power and bio-power coincide.<sup>2</sup>

It was Foucault who distinguished these two modalities of power, but Italian philosopher Giorgio Agamben claims that Foucault failed to locate the ‘vanishing point’ to which these ‘perspectival lines’ converged, ‘a hidden point of intersection between the juridical-institutional and the bio-political models of power.’ In fact, however, Foucault was acutely aware of their contradictory combination, and argued that they coincided within the paroxysmal space of the Third Reich. This is the same constellation identified by Agamben, who describes the point of intersection between the two as the production of bare life – ‘life exposed to death’ – and treats the concentration camp in general and Auschwitz in particular as the paradigmatic space of political modernity.<sup>3</sup> Here I treat the global war prison as neither a paroxysmal nor a paradigmatic but a potential space of political modernity, which is given form and force through a profoundly colonial

---

<sup>2</sup> Cf. Julian Reid, ‘The biopolitics of the War on Terror’, *Third World Quarterly* 26 (2005) pp. 237-52: 241.

<sup>3</sup> The central texts are Michel Foucault, *Discipline and punish: the birth of the prison* (London: Penguin, 1977); idem, *The history of sexuality: an introduction* (London: Penguin, 1978); idem, “Society must be defended”: *Lectures at the Collège de France 1975-1976* (New York: Picador, 2003) p. 260; Giorgio Agamben, *Homo sacer: sovereign power and bare life* (Stanford: Stanford University Press, 1998) p.6; idem, *Remnants of Auschwitz: the witness and the archive* (New York: Zone Books, 1999); *State of exception* (Chicago: University of Chicago Press, 2005).

apparatus of power that the metropolitan preoccupations of Foucault and Agamben more or less erase.

One of the crucial differences between these philosophical projects is that Foucault focused on strategies through which the normal order contains and confines ‘the outside’ (the sick, the mad, the criminal) whereas Agamben focuses on strategies through which ‘the outside’ is included ‘by the suspension of the juridical order’s validity – by letting the juridical order withdraw from the exception and abandon it.’ This ‘space of the exception’, Agamben argues, is produced through martial law and a state of emergency, which then become the ground through which sovereign power constitutes and extends itself. It is here that we encounter ‘the outlaw president’. Three days after the terrorist attacks on the Pentagon and the World Trade Center on 11 September 2001 President George W. Bush declared a National Emergency ‘by reason of [those] attacks and the continuing and immediate threat of further attacks on the United States.’ This was followed by a further declaration on 23 September 2001 to deal with ‘the unusual and extraordinary threat to the national security, foreign policy and economy of the United States’ by ‘grave acts of terrorism and threats of terrorism committed by foreign terrorists.’ The emergency has been renewed in each subsequent year, and Agamben suggests that Bush ‘is attempting to produce a situation in which the emergency becomes the rule’: in which ‘provisional and exceptional measures’ are transformed into ‘a technique of government’. The cascade of national emergencies did not begin with Bush; he has continued seven previous National Emergencies and declared eight others.<sup>4</sup> But what attracts Agamben’s attention, and what distinguishes the double emergencies declared in September 2001, is their proximity to a supposedly new kind of war (the ‘war on terror’) and the legal formularies that have been mobilized around it.<sup>5</sup> Although it has become a commonplace to describe this as a ‘war on law’, however, I seek to show that it is also a war fought through the law (‘law as tactic’, as Foucault might say). While the Bush administration shows manifest disdain for domestic and international laws, it

---

<sup>4</sup> Harold Relyea, ‘National Emergency Powers’, Congressional Research Service, The Library of Congress, Washington DC, 15 September 2005.

<sup>5</sup> Agamben, *Homo sacer*; State of exception, pp. 2, 22.

neither dismisses nor disregards them.<sup>6</sup> This matters because it means that law is a site of political struggle not only in its suspension *but also in its formulation, interpretation and application.*

### **Guantánamo and Abu Ghraib**

The Bush administration produced two different ‘exceptional’ geographies to account for – and prise apart – its operations at Guantánamo Bay and Abu Ghraib. In the first case, Guantánamo was construed as a legally constituted space of the exception. It was selected because the Department of Justice believed that the location of the Naval Station – as ‘foreign territory, not subject to US sovereignty’ – would militate against any attempt to use federal courts to obtain a writ of *habeas corpus* on behalf of enemy aliens held prisoner there. Other legal protections were withdrawn when the President determined that neither al-Qaeda nor Taliban prisoners qualified as prisoners of war under the Geneva Conventions. In the second case, in contrast, Abu Ghraib was declared a crime scene, the incidents there held to be offences against both US military and international law, and official inquiries were conducted that issued in reprimands, disciplinary actions and (in the case of enlisted soldiers) courts-martial. What happened at Abu Ghraib was glossed as unacceptable but un-American, appalling but an aberration, inexcusable but an exception.

The different meanings of exception that were invoked depend on the articulation of two different space-times. ‘Guantánamo’ signifies not only an ambiguous space – a grey zone over which the United States claims jurisdiction but not sovereignty – but also a place of indeterminate time: ‘As a territory held by the United States in perpetuity over which sovereignty is indefinitely deferred, the temporal dimensions of Guantánamo’s

---

<sup>6</sup> Indeed, both neo-liberalism and neo-conservatism work to disparage existing laws and juridical practices (the insistence on the supreme power of the ‘unitary executive’, the assault on ‘activist judges’, the drive to ‘de-regulation’) and also to introduce new ones that restrict democratic politics, roll back human rights and reify the market.

location make it a chillingly appropriate place for the indefinite detention of unnamed enemies in what the administration calls a perpetual war against terror.’<sup>7</sup> Conversely, ‘Abu Ghraib’ is made to appear as a precise punctuation in time and space: the abuse of prisoners was supposedly confined to Tier 1A of the so-called ‘Hard Site’ of the Baghdad Central Correctional Facility, and it occurred in a number of isolated incidents during the night shift from October through December 2003. One is produced as an exception by being located beyond the law; the other is produced as an exception by being localised within the law.

I want to contest all these partitions by showing that ‘Guantánamo’ and ‘Abu Ghraib’ are connected by the intersections of sovereign power and bio-power that are realized through a series of spaces that fold in and out of them.

### **Agamben and Auschwitz**

In describing these connections as ‘foldings’ I am using Agamben’s topological vocabulary, but my mapping is guided by two critical considerations. One concerns the state of exception and extra-territorialization – the volatile geographies produced through geopolitics and international law – and the other concerns witnessing and the apparatus of violence. Both arise from Agamben’s reflections on Auschwitz, and while I do not seek to collapse ‘American Empire’ into the Third Reich I do want to urge recognition of its proto-fascist potentialities.

### **Exception and extra-territorialization**

Agamben’s description of sovereign power and the state of exception is almost always framed by a single state. His brief history of the state of exception in Europe and the United States is shaped by the exigencies of war, but the emphasis is on suspensions of national law during states of emergency declared by France, Germany, Italy, Britain

---

<sup>7</sup> Amy Kaplan, ‘Where is Guantánamo?’ *American Quarterly* 57 (2005) 831-858: 837.

and the United States.<sup>8</sup> In treating the camp as the exemplary locus of the modern space of exception, Agamben notes that concentration camps first emerged in colonial spaces of exception in Cuba and South Africa, but he passes over these to focus on Nazi concentration camps and, in particular, Auschwitz. Yet Auschwitz, like the other five extermination camps that were dedicated to the horrifying production of what Agamben calls the ‘German biopolitical body’, *was within Nazi-occupied Poland*. Agamben has drawn parallels between the legal status of prisoners in these camps and prisoners in Guantánamo: their situations, so he says, are formally – ‘paradigmatically’ – equivalent. To adjudicate such a claim, however, and to connect the metaphysics of power to its material inscriptions, it is necessary to ask how the state of exception is mediated by the connections between war, military occupation and *international law*.

Agamben is silent on this question, whereas one of his principal provocations, the German jurist Carl Schmitt, wrote passionately about war, military occupation and international law. He saw an intimate connection between the state of exception within a state’s territory and belligerent occupation where, in practice, ‘the occupied population is subject to the holder of undifferentiated power without even the protection afforded to it indirectly by pure international law, for it is not a legal subject.’<sup>9</sup> He knew what he was talking about, given his own complicity with the Nazi regime, but his argument raises a question that is central to any critical analysis of the ‘war on terror’. If the *state* of exception is also a *space* of exception, as Agamben insists, then in these situations surely the exception depends on the articulation of *multiple* spaces of political-juridical violence and an ex-ception, a ‘taking outside’, through the *extra-territorial* inscriptions of colonizing power?

International law is no stranger to the inflections of colonialism and imperialism, and it is scarcely surprising that the perverse and paradoxical spatiality that Agamben attributes to the exception should be compounded by the spatialities of international law. International law is decentred, without a unitary sovereign to ground or guarantee its

---

<sup>8</sup> Agamben, *State of exception*, pp. 11-22.

<sup>9</sup> Peter Stirk, ‘Carl Schmitt, the law of occupation and the Iraq war’, *Constellations* 11 (4) (2004) 527-36: 530.

powers; its provisions are distributed through a congeries of conventions, treaties, and organizations. For this reason, nineteenth-century legal philosopher John Austin famously declared that international law is not really law at all: laws could only be ‘properly so called’ if they were ‘commands of a sovereign’, which made international law merely ‘law by close analogy’.<sup>10</sup> After the Second World War one of Schmitt’s sharpest interlocutors extended this view (though to different ends) to suggest that ‘if international law is at the vanishing point of law, the law of war is perhaps even more conspicuously at the vanishing point of international law’. And more recently, Lieutenant-Colonel William Lietzau, Special Adviser to the General Counsel of the US Department of Defense, extended even that view to propose that ‘the global war on terror’ is at ‘the vanishing point of the law of war.’<sup>11</sup> Taken in sequence, these three telescoping perspectives direct the politico-legal gaze through an extended series of vanishing points towards ‘non-places’ for ‘non-people’: sites like Guantánamo and Abu Ghraib.

### **Witnessing and the apparatus of violence**

Those visual metaphors raise a second set of questions: what happens when those sites become sights? The question is raised most powerfully by the images from Abu Ghraib, but despite the iconic status of both Guantánamo and Abu Ghraib – or, rather, because of it – we need to remember that these are spaces of both constructed and *constricted* visibility and that most of what happens there continues to be shielded from the public gaze. The images that entered public cultures around the world multiplied with extraordinary speed. They attracted the attention of cartoonists, graphic designers, sculptors and artists, and in the fall and winter of 2004 many of the photographs from

---

<sup>10</sup> John Austin, *The province of jurisprudence determined* (edited by Wilfred E. Rumble) (Cambridge: Cambridge University Press, 1995; first published in 1832) p. 254. It would not be difficult to argue that the United States now seeks to arrogate to itself precisely that sovereign role.

<sup>11</sup> Hersch Lauterpacht, “The Problem of the Revision of the Law of War”, *British Yearbook of International Law* 29 (1952) pp. 360-82: 382; William K. Lietzau, ‘Combating terrorism: law enforcement or war?’ in *Terrorism and International Law: challenges and responses*, International Institute of Humanitarian Law (2002) 75-84: 79.

Abu Ghraib were displayed at the International Center of Photography in New York and the Andy Warhol Museum in Pittsburgh.

What are we to make of this image-frenzy? Cultural critics have raised myriad questions about the connections between the images and other photographic regimes in the United States but the most urgent centred on the complex affiliations between aesthetics and politics.<sup>12</sup> In this case these are complicated by the fact that both sides in the ‘war on terror’ deploy images as strategic devices, and by the strong supposition that, had it not been for the minimalist release of the Abu Ghraib images, neither the Pentagon nor the White House would have taken much notice of reports of prisoner abuse and torture. That the images have been aestheticized seems beyond doubt, then, but in many cases and contexts it seems no less clear that they also carry a political charge. And yet: I have come to agree with Mark Danner when he suggests that the photographs eventually came to stand in the way of an adequate understanding of what happened. The public gaze was directed towards the images not the process and policy behind them. Critical attention was focused on acts isolated as a series of stills and frames rather than on the apparatus that produced them.<sup>13</sup>

These concerns intersect with Agamben’s reflections on Auschwitz and the ethics of bearing witness. He distinguishes two senses of ‘witness’: one is juridical, and concerns third-party testimony to establish the facts of the matter in a trial, whereas the other derives from first-hand experience that radically estranges its testimony from law that ‘is solely directed toward judgement, independent of truth and justice.’ This distinction opens into a lacuna, because those who survived Auschwitz are witnesses in neither sense. They were scarcely third-party observers, but neither can they substitute for the first-hand testimony of those millions who died in the camps. Agamben confronts the absence – ‘the untestifiable, that to which no one has borne witness’ – through the

---

<sup>12</sup> Susan Sontag, ‘Regarding the torture of others’, *New York Times Magazine*, 23 May 2004; W.J.T. Mitchell, ‘The unspeakable and the unimaginable: word and image in a time of terror’, *English literary history* 72 (2005) pp. 291-308.

<sup>13</sup> Mark Danner, *Torture and truth: America, Abu Ghraib and the war on terror* (New York: New York Review of Books, 2004) pp. xiii, 9, 40, 47.

figure of the *Muselmann* ('the Muslim'), the abject prisoner who moved in the indeterminate shadows of life and death, in a space where 'humanity and non-humanity' constantly passed through each other. He thus reads the *Muselmann* as a 'perfect cipher' for the camp itself, the bearer of its secret performative geography.<sup>14</sup>

In a passionate commentary, however, Jay Bernstein suggests that what is lost from view, as a constitutive moment in Agamben's itinerary of reductions to bare life, is the complex of institutions, practices and people through which human beings were transformed into *Muselmänner*: the gas-chambers, the guards, the huts, the watchtowers, the railways, the police, the roundups, in short the whole apparatus of violence of the Reich itself.

'At no point does [Agamben's] account veer off from the space of impossible sight to the wider terrain: from the victim to the executioners, to the nature of the camps, to the ethical dispositions of those set upon reducing the human to the inhuman. Just the inhuman itself fills Agamben's gaze, and hence ours; such is the *pure* desire to bear witness.'

Bernstein's concern is that Agamben transforms the act of witnessing into an aesthetic act that re-stages what he calls 'the pornography of horror' through its abstraction. For Bernstein, this aestheticization betrays 'one of the deepest strains in Agamben's thought' by 'suppressing the very ethical space it means to elaborate.' If this is so, then what are we left with? What remains? Bernstein's answer:

'Not the chambers or Auschwitz, not a place or set of practices, not the apotheosis of a complex historical trajectory, just the result of it all. With this we can hear the shutter of Agamben's philosophic camera snap open and closed. Click!'<sup>15</sup>

---

<sup>14</sup> Agamben, *Remnants*, pp. 17-18, 41, 47.

<sup>15</sup> J.M. Bernstein, 'Bare life, bearing witness: Auschwitz and the pornography of horror', *parallax* 10 (1) (2004) pp. 2-16: 3, 7, 14. See also Catherine Mills, 'Linguistic survival

In order to pre-empt the closure that Bernstein so acutely identifies – ‘Click!’ – it is vitally important to recover the lines of sight (flight?) that converge on these ‘vanishing points’ and to reconstruct the spaces that fold in and out of the sites of their captivity. ‘Torture’ derives from the Latin *torquere* meaning ‘to twist’, and under the sign of our colonial modernity torture not only twists bodies – piling them on top of one another, shackling them to bed frames, standing them on boxes – but also twists space and time. To explicate this requires in turn the topology of sovereign power, and hence of the state of exception, to be understood as a performance, a doing. Only in this way do I think it possible to show (first) how ‘Guantanamo’ has been produced through a series of juridical divisions, a sort of parsing of legal sentences, and (second) how ‘Guantanamo’ and other spaces were folded into ‘Abu Ghraib’ and beyond. I have briefly reintroduced the scare-quotes to emphasize that neither is reducible to a single space: both are prisons but their cages and bars are not able to contain the practices that are inscribed through them. In explaining why this is the case, I also hope to show that law and violence are not opposed but hold each other in a deadly embrace.<sup>16</sup>

### **Guantánamo Bay**

Critics have described the Bush administration as waging a ‘war on law’, and the President has provided them with substantial evidence. ‘International law?’ he responded to a reporter in December 2003. ‘I’d better call my lawyer. I don’t know what you’re

---

and ethicality: biopolitics, subjectification and testimony in *Remnants of Auschwitz*, in Norris (ed) *Politics, metaphysics and death op. cit.*, pp. 198-221: 218 note 4.

<sup>16</sup> Cf. ‘The sovereign is the point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence’: Agamben, *Remnants*, p. 32. This does not exhaust my reservations about Agamben’s project. I also want to emphasize the multiple ways in which the reductions of people to bare life are contested: in this case, by the prisoners themselves, and by a host of other actors inside and outside the Bush administration and inside and outside the United States.

talking about by international law.’<sup>17</sup> More particularly, it has become common to treat the US prison complex at Guantánamo Bay as a ‘lawless place’ that is ‘beyond the reach of national and international law’; a place where sovereign power has been mobilized ‘outside the rule of law’; a wild zone subject to ‘a lawless and prerogatory power’, where ‘the law is effectively suspended in both its national and international forms’ and where sovereign power is extended ‘in excess of the law’. Agamben himself describes the state of exception as ‘a kenomatic state’, a vacant space limned by the ‘emptiness of law’.<sup>18</sup> I want to change the landscape these claims bring into view by rattling the chain that yokes colonialism, violence and the law at Guantánamo and then tracing the legal and paralegal production of Guantánamo as a staging-post for the ‘war on terror’. En route, it will become clear that Bush does indeed know what ‘international law’ is about – and that he has repeatedly called his lawyers.

### **Colonialism, violence and the law**

Colonialism frequently operates under the imprimatur of law, both in the past and the present, and its violent assaults on land, liberty and life are regularly authorized and articulated through legal formularies. The legislative and interpretive fields, the actions of rulers and judges, are thus suffused with violence. If their metropolitan operation ‘takes place in a field of pain and death’, as Robert Cover once presciently observed, then how much more anguished is their colonial mode of address; if their normal powers are ‘realized in the flesh’, as he also remarked, then how much more painful is their emergency invocation.<sup>19</sup>

---

<sup>17</sup> Philippe Sands, *Lawless world: America and the making and breaking of global rules* (London: Allen Lane, 2005) p. xii; ‘President discusses year-end accomplishments in Cabinet meeting’, at <http://www.whitehouse.gov/news/releases>, 11 December 2003.

<sup>18</sup> Amy Kaplan, ‘Homeland insecurities: reflections on language and space,’ *Radical History Review* 85 (2003) pp. 82-93: 91-2; idem, ‘Where is Guantánamo?’ p. 832; Judith Butler, ‘Indefinite detention’, in her *Precarious life: the powers of mourning and violence* (London and New York: Verso, 2004) pp. 51, 56, 64; Agamben, *State of exception op. cit.*, pp. 6, 86.

<sup>19</sup> Robert Cover, ‘Violence and the word’, *Yale Law Journal* 95 (1986) pp. 1601-1629; Nasser Hussain, ‘Towards a jurisprudence of emergency: colonialism and the rule of

Guantánamo Bay bears the marks of these ligatures between colonialism, violence and the law. Its modern history has been shaped by military encounters between three imperial powers – Spain, the United States and the Soviet Union – and by enduring military occupation. Cubans rose against their Spanish occupiers in 1868-78, 1879-80 and 1895-98. Alarmed by the success of the revolutionaries in the final War of Independence, the Spanish military governor sought to cut off their popular support through a policy of *reconcentración*. Hundreds of thousands of peasants were forcibly relocated into concentration camps, where many of them were left to starve to death. American public opinion was inflamed by these atrocities, but the desire for military intervention was also motivated by thoroughly instrumental economic and strategic interests. In fact the United States had made repeated attempts to purchase Cuba from Spain in the closing decades of the nineteenth century, and it was only after the last of these offers had been rejected in 1897 that Washington, buoyed by the rising tide of public opinion, found a pretext and in 1898 declared war on Spain. This too was an image war. Photographs of the effects of Spain's counter-insurgency operations heightened public condemnation of its oppressive colonial regime. And, as Daniel Ross wryly observes, 'the American prize for its outrage at Spanish concentration camps in Cuba has become the right to run its own camp on the same territory.'<sup>20</sup>

When peace was concluded later that year Spain relinquished all its overseas possessions, but Cuba remained under American military occupation for three more years. In 1901 the United States stipulated its conditions for Cuban independence through provisions set out in the Platt Amendment to the appropriations bill in Congress that authorized the continued financing of the occupation. These reserved to the United States the right to intervene in the future 'for the preservation of Cuban independence'

---

law', *Law and critique* 10 (1999) pp. 93-115; idem, *The jurisprudence of emergency: colonialism and the rule of law* (Ann Arbor: University of Michigan Press, 2003).

<sup>20</sup> Louis Pérez, *Cuba between empires, 1878-1902* (Pittsburgh: University of Pittsburgh Press, 1983) pp. 55-6; Ada Ferrer, *Insurgent Cuba: race, nation and revolution 1868-1898* (Chapel Hill: University of North Carolina Press, 1999); Daniel Ross, *Violent democracy* (Cambridge: Cambridge University Press, 2004) p. 128.

and, to that end, required Cuba to sell or lease to the United States ‘lands necessary for coaling or naval stations’.<sup>21</sup> Accordingly Guantánamo Bay was leased from Cuba in February 1903 ‘for the time required for the purposes of coaling and naval stations’ and the United States was permitted ‘to do any and all things necessary to fit the premises for use as coaling and naval stations only, and for no other purpose’. The lease could only be terminated with the consent of both parties or through the unilateral abandonment of the base by the United States. Its central provision read thus:

‘While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.’

The language, as Kaplan argues, imposes a hierarchy between recognition and consent, ‘rendering Cuban sovereignty over Guantánamo Bay contingent on the acknowledgment of the United States, in exchange for which Cuba agrees to cede sovereignty over part of the territory it never controlled.’ The lease also locates Guantánamo in an ambiguous space between the ‘ultimate sovereignty’ of Cuba and the ‘complete jurisdiction’ of the United States.<sup>22</sup>

In 1959, following the revolution, the government of Cuba tried unsuccessfully to terminate the lease, and since then it has maintained that the presence of American armed forces on Cuban soil is an illegal occupation. At the height of the Cuban missile crisis in October 1962, President John F. Kennedy rejected Secretary of Defense Robert

---

<sup>21</sup> The Platt Amendment was abrogated in 1934, when a new treaty was signed between the US and Cuba, but this did not affect the lease of Guantánamo.

<sup>22</sup> Louis Pérez, *Cuba under the Platt Amendment, 1902-1934* (Pittsburgh: University of Pittsburgh Press, 1986); Alfred de Zayas, ‘The status of Guantánamo and the status of the detainees’, Douglas Mc.K. Brown Lecture, University of British Columbia, November 2003; Kaplan, ‘Where is Guantánamo?’ p. 836

McNamara's proposal that the US should offer to withdraw from Guantánamo as a *quid pro quo* for the removal of Soviet medium-range missiles and bombers from the island. On the contrary, the base's perimeter was strengthened as a symbolic frontier between capitalism and communism, and Guantánamo remained under American occupation. In subsequent years the base provided logistical support for US military interventions in the Caribbean and Central America. From 1991 to 1994 detention camps were constructed there for 36,000 refugees from the military coup in Haiti who were denied entry to the United States, and again in 1994-5 21,000 Cubans seeking asylum in the United States were imprisoned there. The construction of the camps violated the terms of the lease, which allowed the land to be used only as a coaling or naval station. A prison camp is at best an extra-legal appendix to the original agreement, and yet it became the central mission of the base.

When Kaplan describes Guantánamo as 'haunted by the ghosts of empire', then, she is surely correct. She also suggests that its history reveals 'a logic grounded in imperialism, whereby coercive state power has been routinely mobilized beyond the sovereignty of national territory and outside the rule of law.' Much of that is accurate too; but the base has also emerged through a long process of legal argument, and it subsists through legal formularies – bundles of memoranda and minutes, acts and amendments, treaties and the terms of the lease itself – that, taken together, have produced a legal impasse: a stand-off between the United States (which insists it has a legal right to occupy Guantánamo) and Cuba (which has declared the continued occupation illegal). For this reason it seems necessary to add that the space of Guantánamo also derives from law at a standstill. It is a zone of indistinction where the legalized and the extra-legal cross over into one another.<sup>23</sup>

### **Producing Guantánamo**

---

<sup>23</sup> Kaplan, 'Where is Guantánamo?' pp. 832, 836; cf. Agamben, *State of exception*, p. 48, who describes the state of exception as both 'an emptiness *and standstill* of law' (my emphasis).

The Bush administration has made much of the presumptive novelty of the ‘war on terror’, but the selection of Guantánamo as a prison camp, the designation of its inmates as ‘unlawful combatants’, and the delineation of a regime of interrogation do not depart from the templates that shaped the base’s colonial history and their mobilization of legal protocols. In particular, Fleur Johns argues that:

‘The plight of the Guantánamo detainees is less an outcome of law’s suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities. The detention camps are above all works of legal representation and classification. They are spaces where law and liberal proceduralism speak and operate *in excess*.’<sup>24</sup>

For far from the reactivation of the prison camps at Guantánamo signalling the retreat of law from the field of battle, there was a vigorous debate between the Departments of Defense and Justice and the State Department over the prosecution of the ‘war on terror’.

The immediate objective was to place selected prisoners taken during the war in Afghanistan beyond the reach of any federal district court that might entertain a *habeas corpus* petition.<sup>25</sup> Here the ambiguous status of Guantánamo conferred a distinct advantage over other sites that were considered like the US bases on Midway and Wake, which were included within the federal district of Hawaii. For Guantánamo was ‘neither part of the United States nor a possession or territory of the United States’ and yet the United States exercised ‘complete jurisdiction’ over the base. The reactivation of Guantánamo thus produced precisely the space envisaged in the President’s Military Order of 13 November 2001, in which it would possible to detain and try suspects ‘for violation of the laws of war and other applicable laws’ while simultaneously suspending ‘the principles of law and rules of evidence generally recognised in the trial of criminal

---

<sup>24</sup> Fleur Johns, ‘Guantánamo Bay and the annihilation of the exception’, *European journal of international law* 16 (2005) pp. 613-35: 614.

<sup>25</sup> A writ of *habeas corpus* orders a prisoner to be brought before a court to determine whether s/he has been imprisoned lawfully. Congress granted all federal courts jurisdiction under title 28 of the United States Code to issue such writs to release from custody prisoners held by state or federal agencies in violation of the Constitution.

cases in the United States district courts'.<sup>26</sup> These provisions, elaborated through a series of detailed memoranda, allowed a convergence between sovereign power and governmentality through what Judith Butler describes as 'a law that is no law, a court that is no court, a process that is no process.' She sees this as an instrumental, expedient, paralegal tactic, in which both detention and trial are determined by discretionary judgements that 'function within a manufactured law or that manufacture law as they are performed.'<sup>27</sup>

The imperative of indefinite detention, extending the emergency *ad infinitum*, jibed against a second objective that interrupted its limbo through the counter-imperative of speed.<sup>28</sup> This is where battle was joined between the Departments of Defense and Justice on one side and the State Department on the other. The first group argued that the 'war on terror' had inaugurated a new paradigm that required interrogators 'to quickly obtain information from captured terrorists and their sponsors', and in their view this rendered 'obsolete [the] Geneva [Convention]'s strict limitations on questioning of enemy prisoners'. That being so – and law officers in the State Department protested that it was not so – interrogations would have to be conducted beyond the prosecutorial reach of both the federal War Crimes Act and the Geneva Conventions. Accepting the advice of Defense and Justice, Bush declared that none of the provisions of the Geneva

---

<sup>26</sup> Greenberg and Dratel (eds), *Torture Papers*, pp. 25-28; 29-37. In June 2004, however, the Supreme Court ruled that it had jurisdiction over Guantánamo to hear *habeas corpus* petitions from those imprisoned there. This landmark ruling was subsequently challenged by the Detainee Treatment Act (2005) that, *inter alia*, limited jurisdiction to the validity of the decision to detain a non-citizen as an 'enemy combatant'; see below, p. 00. It also reaffirmed that 'For the purposes of this section, the term "United States", when used in a geographic sense, ... does not include the United States Naval Station, Guantánamo Bay, Cuba.'

<sup>27</sup> Butler, 'Indefinite detention', pp. 58, 62; Johns, 'Guantánamo Bay' radicalizes this interpretation: for her, Guantánamo Bay is 'more cogently read as the jurisdictional outcome of attempts to *domesticate* the political possibilities occasioned by the experience of exceptionalism.' The regime at Guantánamo Bay, so she suggests, 'is dedicated to producing experiences of having no option, no doubt and no responsibility'.

<sup>28</sup> Butler says much less about this second imperative, though she does acknowledge that the withdrawal of legal protections from the prisoners and their indefinite detention are effected through their constitution as 'less than human': pp. 75-6, 98. Johns is silent on the question.

Conventions applied to al-Qaeda prisoners. He also accepted that he had the authority ‘under the Constitution to suspend [the] Geneva [Conventions] as between the United States and Afghanistan’, and his favoured legal advisers outlined several ways in which he might do so. But Bush preferred the simpler expedient of deeming Taliban prisoners to be ‘unlawful combatants’ who did not qualify as prisoners of war under the Geneva Conventions.<sup>29</sup> There are established procedures to determine the status of prisoners taken during armed conflict, but the White House insisted that these were only to be invoked where there was doubt. And in the view of the President’s inner circle, there could never be any doubt.<sup>30</sup>

Here was sovereign power at its most naked, and when the first prisoners arrived at Guantánamo Bay in January 2002, it was equally clear that they were to be reduced to bare life. All legal protections had been visibly withdrawn from them. Photographs of their transportation and incarceration at once displayed and reinforced their reduction to something less than human. They seem to have been published ‘to make known that a certain vanquishing had taken place, the reversal of national humiliation, a sign of successful vindication.’<sup>31</sup> The prisoners had been chained, gloved, ear-muffled and masked throughout their twenty-seven hour flight, and arrived soaked in their own bodily waste. Otherwise, the chairman of the Joint Chiefs of Staff explained, they would ‘gnaw through hydraulic lines at the back of a C-17 to bring it down’. As they slowly shuffled down the ramp in their jumpsuits, one reporter wrote: ‘[They] don’t look natural. They look like giant bright orange flies.’ Then were led off to their makeshift steel-mesh cages at Camp X-Ray.<sup>32</sup>

---

<sup>29</sup>Greenberg and Dratel (eds) *Torture Papers*, pp. 38-79: 67, 69; pp. 81-117: 102; 129; 134.

<sup>30</sup> Kenneth Watkins, ‘Warriors without rights? Combatants, unprivileged belligerents and the struggle over legitimacy’, Occasional Paper, Program on Humanitarian Policy and Conflict Research, Harvard University, Winter 2005; de Zayas, ‘The status of Guantánamo’; G.H. Aldrich, ‘The Taliban, Al Qaeda and the determination of illegal combatants’, *American journal of international law* 96 (2002) pp. 891-898.

<sup>31</sup> Butler, ‘Indefinite detention’, p. 77.

<sup>32</sup> See David Rose, *Guantánamo: America’s war on human rights* (London: Faber and Faber, 2004); Derek Gregory, *The colonial present: Afghanistan, Palestine, Iraq* (Oxford: Blackwell, 2004) p. 66.

A senior CIA analyst concluded that fewer than 10 per cent of the prisoners who were transferred to Guantánamo were ‘high-value’ terrorists. Most of them were minor players or indeed wholly innocent people who had been turned in to settle old scores or to receive bounties of thousands of dollars.<sup>33</sup> Yet our horror ought not to be measured by the innocence or guilt of the prisoners – which is a matter for the very judicial process denied to them – but by the calculated withdrawal of subjecthood from all of them. The legal determinations of the location of Guantánamo Bay worked in concert with the imaginative geographies of the ‘war on terror’ to produce what Butler calls ‘a zone of uninhabitability’:

‘The exclusionary matrix by which subjects are formed requires the simultaneous production of a domain of abject beings.... The abject designates here precisely those “unlivable” and “uninhabitable” zones of social life which are nevertheless densely populated by those who do not enjoy the status of the subject, but whose living under the sign of the “unlivable” is required to circumscribe the domain of the subject. This zone of uninhabitability will constitute the defining limit of the subject’s domain.’<sup>34</sup>

If the prisoners were ‘bodies that mattered’, to continue to speak with Butler, then in Washington measures were being contemplated to ensure that they mattered *only* as

---

<sup>33</sup> Tim Golden, Dan Van Natta Jr, ‘US said to overstate value of Guantánamo detainees’, *New York Times* 21 June 2004; Michelle Faul, ‘Gitmo detainees say they were sold’, *Associated Press* 31 May 2005; Kim Sengupta, ‘Voices from Guantánamo’, *Independent* 6 March 2006; Tim Golden, ‘Voices baffled, brash and irate in Guantánamo’, *New York Times* 6 March 2006. A detailed independent review revealed that most prisoners at Guantánamo were arrested neither in Afghanistan nor by US troops but were seized in Pakistan by Pakistani authorities. The Bush administration has dismissed their claims of innocence by characterising them as well-trained liars but, as Corine Hegland observes, ‘if a well-trained liar looks like an innocent man, what does an innocent man look like if not a well-trained liar?’ See her ‘Who is at Guantánamo Bay?’, ‘Guantánamo grip’, and ‘Empty evidence’, all in *National Journal* 3 February 2006.

<sup>34</sup> Judith Butler, *Bodies that matter: on the discursive limits of “sex”* (New York: Routledge, 1993) p. 3.

bodies: as biopoliticized bare life. Throughout the discussion that follows, it needs to be remembered that the Bush administration repeatedly insisted that prisoners would be treated in a manner ‘consistent with’ the Geneva Conventions. Such a claim relegates the treatment of prisoners to a matter of policy not law; it is not an acknowledgement that the actions of the United States are *subject to* the Geneva Conventions, and this lexical slippage creates a space of executive discretion (Schmitt’s ‘decision’) that would otherwise be (and as a matter of fact *is*) closed by international law.<sup>35</sup>

In fact, as Corine Hegland remarks, ‘even as the CIA was deciding that most of the prisoners at Guantánamo didn’t have much to say, Pentagon officials were getting frustrated with how little the detainees were saying.’<sup>36</sup> In the summer of 2002 Alberto Gonzales, then Counsel to the President and now Attorney-General, was busily considering advice from the Department of Justice about the bearing of international Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by title 18 (Part I, Chapter 113C) of the United States Code on the conduct of interrogations outside the United States. Under §2340A of the Code ‘whoever *outside* the United States commits or attempts to commit torture’ or conspires to commit torture is guilty of a criminal offence (my emphasis). This presented the White House with a real prisoner’s dilemma, of course, because Guantánamo had been selected as a site of indefinite detention because it was *outside* the United States. But the Department of Justice pointed out that the relevant provisions of the Code defined the United States as ‘all areas under the jurisdiction of the United States’, including all places and waters ‘continental or insular’. And according to the lease the United States exercised ‘complete jurisdiction’ over the base. Through this contorted legal geographing, Guantánamo was *outside* the United States in order to foreclose *habeas corpus* petitions from prisoners held there and *inside* the United States in order to forestall prosecutions for torturing them. As Voltaire put it: ‘Those who can make you believe absurdities can make you commit atrocities.’

---

<sup>35</sup> Nigel Rodley, ‘Looking-glass war’, *Index on Censorship* (2005) pp. 54-61: 55; Butler, *Precarious life*, pp. 80-1.

<sup>36</sup> Hegland, ‘Guantánamo’ *op. cit.*

The memorandum also provided an intricate parsing of definitions of ‘torture’ which not only raised the bar at which the conjunction of violence and pain turned into torture but made this threshold the property of the torturer. First, ‘only the most extreme forms of physical or mental harm’ would constitute torture: severe pain that would ‘ordinarily’ be associated with ‘death, organ failure or serious impairment of bodily functions’, or severe mental suffering that produced ‘prolonged mental harm’. This allowed ‘a significant range of acts that though they might constitute cruel, inhuman or degrading treatment fail to rise to the level of torture.’ Second, a defendant could only be convicted if these consequences were a known and intended outcome of his or her actions: ‘Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct.’ If these sophistries were not enough, Gonzales was assured that ‘criminal statutes’ could not infringe on the President’s ‘complete’ and ‘ultimate’ authority as Commander-in-Chief over the conduct of war, including the interrogation of prisoners.<sup>37</sup>

This memorandum had been prepared with CIA rather than military interrogations in mind, but the lines were already becoming blurred. In October 2002 the Joint Chiefs of Staff were presented with recommendations from the Joint Task Force charged with conducting ‘Department of Defense/Interagency’ interrogations at Guantánamo to allow a graduated series of increasingly ‘aggressive’ techniques to be used against prisoners who had ‘tenaciously resisted’ current methods. Category I techniques involved direct questioning, yelling and deception; Category II techniques involved the use of stress positions, hooding, removal of clothing and forced shaving, and the induction of stress through aversion (‘such as fear of dogs’); Category III techniques involved convincing the prisoner that death or severe pain were imminent for him and/or his family, ‘exposure

---

<sup>37</sup> Greenberg and Dratel (eds) *Torture Papers*, pp. 172-217, 218-222: 202-3. On this basis you wonder how Saddam Hussein could ever be brought to trial for war crimes. For a devastating critique of these and related claims by Bush’s lawyers, see Jordan J. Paust, ‘Executive plans and authorizations to violate international law concerning treatment and interrogation of detainees’, *Columbia journal of transnational law* 43 (2005) pp. 811-863.

to cold weather or water’, and ‘use of a wet towel and dripping water to induce the misperception of suffocation.’ The Department of Defense authorized the first two categories and noted that while all the techniques in the third category may be ‘legally available’ their approval was not warranted ‘at this time’.

If the skeletal list of approved techniques seems unremarkable, even banal, this is the result of two strategic omissions. First, the list contained no *limits* on the use of these techniques, and in a remarkably pointed exchange the General Counsel for the Navy, Alberto Mora, urged William Haynes, the General Counsel for the Department of Defense, ‘to think about the techniques more closely.’

‘What did “deprivation of light and auditory stimuli” mean? Could a detainee be locked in a completely dark cell? And for how long? A month? Longer? What precisely did the authority to exploit phobias permit? Could a detainee be held in a coffin? Could phobias be applied until madness set in?’

Seen thus, Mora insisted, there was no clear line between the approved techniques and torture.<sup>38</sup> Second, the list was concerned entirely with instruments and provided no consideration of their *effects*. Since the end of the Second World War the United States has developed a consistent interrogation protocol that centres on sensory deprivation and self-inflicted pain. According to historian Alfred McCoy, ‘the method relies on simple, even banal procedures – isolation, standing, heat and cold, light and dark, noise and silence – for a systematic attack on all human senses.’ Early experiments showed that subjects could stand only two or three days of being goggled, gloved and muffled in a lighted cubicle, while forced standing for 18-24 hours produced ‘excruciating pain’ as ankles swelled, blisters erupted, heart rates soared and kidneys shut down. These ‘no-touch’ techniques leave no marks, but they create ‘a synergy of physical and

---

<sup>38</sup> Greenberg and Dratel (eds) *Torture Papers*, pp. 228; 223; 237; ‘Statement for the record: Office of General Counsel involvement in interrogation issues’, Memorandum from Alberto J. Mora, General Counsel of the Navy to Vice-Admiral Albert Church, Inspector General, Department of the Navy, 7 July 2004;

psychological trauma whose sum is a hammer-blow to the fundamentals of personal identity': they deliberately ravage the body in order to 'un-house' the mind.<sup>39</sup>

In January 2003, Secretary of Defense Donald Rumsfeld withdrew his permission for the use of Category II techniques and convened a Working Group to prepare an assessment of 'Detainee Interrogations in the Global War on Terrorism'. Its final report was not circulated to those who, like Mora, had been critical of the original recommendations. In effect, the Pentagon was now pursuing what Jane Mayer describes as a 'secret detention policy' whose guidelines followed the memorandum of the previous August to the letter. The report found that, because Guantánamo is within the United States for the purpose of title 18, 'the torture Statute does not apply to the conduct of US personnel at GTMO.' It reaffirmed the inadmissibility of the Geneva Conventions and in reaffirming the ultimate authority of the President made an astonishing reversal of the precedent set by the Nuremberg tribunals: 'The defense of superior orders will generally be available for US Armed Forces personnel engaged in exceptional interrogations except where the conduct goes so far as to be patently unlawful.' (Remember that those last two words had been eviscerated by the law officers favoured by the White House). The report suggested a range of 35 interrogation techniques from 'asking straightforward questions' and providing or removing privileges through hooding, 'mild physical contact' and dietary or environmental manipulation to 'exceptional' measures that included isolation, 20-hour interrogations, forced shaving, prolonged standing, sleep deprivation, 'quick, glancing slaps', removal of clothing and 'use of aversions' ('simple presence of dog'). Rumsfeld approved 24 of them. Although he withheld approval of all the 'exceptional' measures other than isolation, however, the list of authorized techniques contained none of the crucial limitations. There was thus considerable latitude for coercive interrogation to slide through cruel, inhuman and degrading treatment into outright torture. If this were not enough, Rumsfeld also accepted that 'interrogators

---

<sup>39</sup> Alfred W. McCoy, *A question of torture: CIA interrogation from the Cold War to the war on terror* (New York: Metropolitan Books, 2006) pp. 8, 35, 46.

[must be] be provided with reasonable latitude to vary techniques' for reasons that included the degree of resistance and 'the urgency of obtaining information'.<sup>40</sup>

I have no way of knowing how much extra 'latitude' that final clause was intended to allow; I simply make two observations. First, testimony from prisoners, soldiers and interrogators makes it clear that the red lines (such as they were) were repeatedly crossed. There have been consistent reports of enforced nudity; exposure to extremes of temperature; deprivation of adequate food, water and pain medication; induced disorientation through loud music, strobe lighting and sleep deprivation; menacing by dogs; prolonged short-shackling in foetal positions; sexual taunting and assault; immersion in toilet bowls to induce fear of drowning; and isolation for months at a time.<sup>41</sup> Secondly, notwithstanding the techniques proscribed for military intelligence, since March 2002 the CIA had been authorized to use six 'enhanced' techniques, which included forcing prisoners to stand, handcuffed and shackled, for more than forty hours; forcing them to stand naked in a cold cell for prolonged periods and frequently dousing them with cold water; and simulated drowning ('waterboarding'). The CIA ran its own prison within the GTMO complex (at Camp Echo), but the CIA and the military frequently worked in concert because Guantánamo was the designated operating base for a Joint Interagency Interrogation Facility.<sup>42</sup>

---

<sup>40</sup> Greenberg and Dratel (eds) *Torture Papers*, pp. 241-285: 265-6; 286-359: 291; 360-365: 365; 'Statement for the record: Office of General Counsel involvement in interrogation issues', Memorandum from Alberto J. Mora, General Counsel of the Navy to Vice-Admiral Albert Church, Inspector General, Department of the Navy, 7 July 2004; Jane Mayer, 'The memo', *New Yorker* 27 February 2006.

<sup>41</sup> See, for example, David Rose, 'How we survived jail hell', *Observer* 14 March 2004; Severin Carrell, 'US guards at Guantánamo tortured me, says UK man,' *Independent* 24 April 2005; 'Detention in Afghanistan and Guantánamo Bay: statement of Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed', Center for Constitutional Rights, New York, 26 July 2004; Guantánamo and beyond; 'Testimony of Guantánamo detainee Jumah al-Dossari', Amnesty International, 7 November 2005; Mark Oliver, "'They couldn't take away my dignity'", *Guardian* 18 November 2005.

<sup>42</sup> Dana Priest, Scott Higham, 'At Guantánamo, a prison within a prison', *Washington Post* 17 December 2004; Douglas Jehl, 'Classified report warned on CIA's tactics in interrogation', *New York Times* 9 November 2005; Brian Ross, Richard Esposito, 'CIA's harsh interrogation tactics described', *ABC News* 18 November 2005.

During the summer of 2005, when Senator John McCain proposed an amendment to the Defense Appropriation Bill that would ban cruel, inhuman or degrading treatment or punishment of anyone in US custody anywhere, the Vice-President insisted that the CIA should be exempt – it required ‘extra latitude’ (that word again) – and the White House vigorously rejected any such measure that would ‘restrict the President’s authority [not ability] to protect Americans from terrorist attack.’ The bill passed the Senate 90-9 and the House 308-122, but when the President reluctantly signed the Detainee Treatment Act into law at year’s end he added a defiant signing statement insisting that he would interpret its provisions in a manner consistent with ‘constitutional limitations on the judicial power’ and his own executive powers to protect national security, and he made it clear that he reserved the right to waive those restrictions in ‘special situations.’ Thus the hermeneutic circle – the mutuality of interpretation – was hammered flat until it fitted the Oval Office.<sup>43</sup> But it turns out that the Act contained its own Catch-22. In March 2006 lawyers for the Department of Justice reminded a district court judge that, under the provisions of the Act, prisoners at Guantánamo only had the right to appeal their designation as enemy combatants – not to seek protection against their treatment there. As Human Rights Watch put it, ‘The law says you can’t torture detainees at Guantánamo, but it also says you can’t enforce that law in the courts.’<sup>44</sup>

### **Abu Ghraib**

Abu Ghraib had been a ‘vanishing point’ since its construction by British and Dutch contractors in the 1960s. After the coup that brought the Ba’ath party back to power in 1968, mass arrests, torture and imprisonment of opponents of the regime resumed, and political prisoners were consigned to Abu Ghraib even before it officially opened in 1970. The prison was under the control of the Directorate of General Security, and was the scene of some of the worst excesses of Saddam Hussein’s regime. Within its

---

<sup>43</sup> Josh White, ‘President relents, backs torture ban’, *Washington Post* 16 December 2005; Charlie Savage, ‘Bush could bypass new torture ban’, *Boston Globe* 4 January 2006.

<sup>44</sup> Josh White, Carol Leonnig, ‘US cites exception in torture ban’, *Washington Post* 3 March 2006.

walls prisoners were routinely beaten, broken and degraded, stripped, chilled, and electrocuted. Thousands were put to death, sometimes two or three hanging from the scaffold at the same time, their bodies buried in unmarked graves.

This history is immensely important, but not because it can be invoked to excuse what happened after the American rehabilitation of Abu Ghraib in the summer of 2003. Far worse atrocities took place there under Saddam Hussein, but it is grotesque to hold up his regime as a standard to judge the ill-treatment and torture of Iraqi prisoners by their American captors. Neither is it important because there is a direct parallel between Saddam's Iraq and Bush's Iraq. Instead, this history matters for the lives it remembers, and for the memories that were reawakened by the reopening of the prison under American administration. After the cruise missiles, the cluster bombs and the killings I doubt that many people's fears were dispelled by the large sign that replaced Saddam's portrait at the main gate: 'America is a friend of all Iraqi people.'

The decision to fold the invasion and occupation of Iraq into the 'war on terror' produced another series of fraught intersections between violence and the law. On the one side, coalition forces were surprised by the widespread resistance to continued military occupation, and their aggressive counter-insurgency operations served only to intensify the insurgency. The collection of executable intelligence was placed at the centre of this spiral. But the possibilities for interrogation were circumscribed by the President's acknowledgement that, unlike Afghanistan, the Geneva Conventions would be applied to prisoners captured in Iraq. On the other side, therefore, the rapidly improvised detention regime in Iraq exerted extraordinary pressure on the provisions of international law. There were two crucial questions: How far was it possible to 'enhance' interrogation methods in Iraq without violating the letter of the law, and – if this provided insufficient 'latitude' – was it possible to transfer prisoners out of Iraq to other sites under the control of the United States or its allies and accomplices? I treat these considerations in turn. I begin by plotting the spiral of insurgency and counter-insurgency in Iraq, and

then I turn to the architecture of an emerging carceral archipelago.<sup>45</sup> Between these two parametric geographies lies the hideous intimacy of the torture chamber, and it is at this vanishing point that I end.

### **Insurgency and counter-insurgency**

The insurgency in Iraq has many roots and takes many forms, and its complex, adaptive geography cannot be reduced to a single map. The failure of the occupying powers to comprehend the scale of dislocation and distress brought about by the combination of Saddam, sanctions and war was a major cause. Millions of Iraqis had suffered terribly under Saddam and rejoiced at the downfall of his regime, but thousands had also died as a direct result of sanctions and two US-led wars, so that there was scarcely a family that had not been touched by America's wings of death too. Shortages of electricity, water, and medical supplies, the breakdown of public order, the economic dislocation and the enforced privatization of the economy all heightened a common sense of grievance, especially in the central and southern regions of the country. Then there were the thousand and one daily humiliations of occupation: the ceaseless surveillance, the armoured patrols, the checkpoints, the body searches, the midnight raids, the sheer inability or unwillingness to understand. Time and time again American troops fired on unarmed demonstrators calling for an end to the occupation; civilians were seriously injured or killed when troops opened fire during raids on houses and markets; countless others were humiliated, beaten and even killed at checkpoints. Excuses were offered as explanations; apologies were rare, investigations perfunctory. These were all landmarks of occupation agonizingly familiar from the Israeli occupation of Palestine.<sup>46</sup>

---

<sup>45</sup> Oliver Klemens, Jesko Fezer, Kim Forster, Sabine Horlitz, 'Extra-territorial spaces and camps: judicial and political spaces in the "war on terrorism"', in Anselm Franke, Rafi Segal, Eyal Weizman (eds) *Territories: Islands, camps and other states of utopia* (Berlin: KW – Institute for Contemporary Art, 2003) pp. 22-28.

<sup>46</sup> Gregory, Colonial present., pp. 225-247; Zaki Chehab, *Inside the resistance: the Iraqi insurgency and the future of the Middle East* (New York: Nation Books, 2005) pp.129-147.

President Bush declared the end of major combat operations in May 2003, but by the summer it was difficult to distinguish occupation from war. In Baghdad there were daily attacks on troops patrolling the streets, and in the so-called ‘Sunni Triangle’ mortars and rocket-propelled grenades were used to ambush convoys and attack checkpoints. The coalition launched ever more aggressive military operations in June and July, involving thousands of troops backed by tanks, helicopter gunships and aircraft. These massive deployments resulted in the deaths of hundreds of Iraqis and the detention of thousands more, all of which increased popular resentment of the occupation.<sup>47</sup> The opposition was many-stranded, at once spontaneous and organized, non-violent and militarized. As the summer wore on, demonstrations and riots spread across the Shi’a south, with thousands marching in Basra, Najaf and other cities to demand an end to the occupation. There was the real possibility of the opposition turning into a national resistance movement in which Sunni and Shi’ites would fight side by side. While the Americans were slow to realize this, others were not. Iraq is part of the heartland of Islam, and the US occupation turned it into a new field of struggle for political Islam. Abu Mos’ab al Zarqawi, leader of a Salafi terrorist group with a base in northern Iraq, chose this moment to launch an armed *jihad* against both the coalition forces (‘the far enemy’) and the Shi’a (‘the near enemy’) in order to nullify the prospect of a unified, nationalist and above all secular resistance. In August his group was responsible for two spectacularly deadly attacks: a massive truck bomb exploded at the United Nations mission, murdering the head of the delegation and more than twenty other people, and at the end of the month a car packed with explosives crashed into the Imam Ali mosque in Najaf, murdering more than 100 Shi’ites, including the spiritual leader of the Supreme Council of the Islamic Revolution.<sup>48</sup> That month there were an average of 12 attacks a day on American forces. This rose to 15 in early September; by the beginning of October there were more than 25 a day, and at the end of that month 33 a day. Large areas of

---

<sup>47</sup> Carl Conetta, *Vicious circle: the dynamics of occupation and resistance in Iraq. Part One: Patterns of Popular Discontent* (Cambridge MA: Project on Defense Alternatives, Commonwealth Institute, 2005); Alistair Finlan, ‘Trapped in the dead ground: US counter-insurgency strategy in Iraq’, *Small wars and insurgencies* 16 (1) (2005) pp. 1-21.

<sup>48</sup> Loretta Napoleoni, *Insurgent Iraq: al Zarqawi and the new generation* (New York: Seven Stories Press, 2005) pp. 157-160.

Baghdad were declared 'hostile', and the guerilla war expanded beyond the Sunni heartland into the north and the Shi'a south. The situation was rapidly sliding out of control.

All of this bears directly on Abu Ghraib, which has been portrayed as a place of chaos outside the 'normal' order. By the winter of 2003-4 more than 8,000 prisoners were crammed inside its compounds. Facilities were poor, and overcrowding increased the pressures; the detainees seethed with resentment, and riots and escapes were common. Military investigations and the media reported that Abu Ghraib was seen by those who worked there as 'the forgotten outpost', poorly defended and constantly rocked by mortar attacks. It was variously described as 'a prison on the brink', a howling chaos, a 'hellish place' (for the guards not the prisoners). In short, it was made to appear as a sort of twilight zone where the boundary between order and disorder was constantly slipping away, patrolled by exhausted and jumpy reservists, outnumbered and ill-prepared for their duties, who laboured under inadequate resources and ineffective supervision. Beyond the perimeter and its watchtowers, however, the rest of Iraq was descending into chaos too. In response, the level of military violence was ratcheted up and 'pressure increased to obtain operational intelligence on the enemy's identity, support systems, locations, leadership, intelligence sources, weapons and ammunition caches, and centers of gravity.' It was decided that a more 'aggressive' structure of human intelligence collection and analysis was imperative.<sup>49</sup>

And so Abu Ghraib was not exceptional at all. It was the gravity of the situation *outside* Abu Ghraib that was used to license the horrors *inside* Abu Ghraib: not because the prison was 'out of place', removed from the surveillant eyes of a high command preoccupied with the insurgency beyond its perimeter, *but because the US military folded the prison into its counter-insurgency operations.* This connection is extremely

---

<sup>49</sup> Doug Saunders, 'US citizen-soldiers terrified, overwhelmed by chaotic Iraqi prison', *Globe & Mail*, 8 May 2004; Scott Higham, Josh White, Christian Davenport, 'A prison on the brink', *Washington Post*, 9 May 2004; Douglas Jehl, Eric Schmitt, 'In abuse, a portrait of ill-prepared, overwhelmed GIs', *New York Times*, 9 May 2004; Fay-Jones Report, p. 998.

important, because otherwise the violence of torture obscures the violence of invasion, incarceration and occupation. As our eyes are drawn to the hideous images from Abu Ghraib they are drawn away from the atrocities committed by the US military in places like Fallujah. As other forms of military violence are marginalized by the ‘exceptional’ violence of torture, so the politico-military project of domination becomes contorted into the image of ‘liberation’.

### **The carceral archipelago**

In May 2003, the Department of Defense sent a team to Iraq to assess its detention system. Abu Ghraib had been virtually emptied when Saddam issued a general amnesty in October 2002, and after the war – like most other Iraqi prisons – it was heavily damaged and extensively looted. Only three prisons were operational, with a combined capacity of just 500 prisoners. At Abu Ghraib two compounds had been totally destroyed and all the others were badly damaged, but two cellblocks were suitable for immediate renovation. Out of the 21 sites the team visited, the team considered Abu Ghraib ‘closest to an American prison’. They not only attached a priority to its reconstruction; they also supervised the work. As the new Baghdad Central Correctional Facility, Abu Ghraib was to serve two purposes. It was intended as a temporary prison for criminal prisoners until a new Iraqi government took office and a new prison was established elsewhere. These prisoners began to arrive in June and were confined in tent-blocks rimmed by razor-wire. It was also to serve as the primary place of detention for the US Army’s ‘security detainees’, who began to arrive as soon as the renovations of the cellblocks were completed in August.

It was not long before anxious Iraqis gathered at the gates of the prison seeking information about the thousands of men and women who had been arrested by the military. Most met with little success, and petitioners and prisoners became lost in an administrative labyrinth. By then, according to journalist Seymour Hersh, decisions to align detention and interrogation operations in Iraq with those elsewhere in the ‘war on terror’ had been made at the highest reaches of the administration. The Vice-President

subcontracted execution to the Secretary of Defense who had the system engineered by his Under Secretary of Defense for Intelligence Stephen Cambone. Rumsfeld's capacity for micro-management is well-known – 'the 8,000 mile screwdriver' – but it is extraordinarily difficult to trace the torque. The official investigations that have been made public contain much huffing and puffing about the problems of information flowing up the chain of command – 'how were they to know?' – but provide no rigorous examination of the ways in which reverse flows helped set the conditions for what happened at Abu Ghraib and elsewhere. Those flows include memoranda, directives and orders, together with more informal understandings, but they also include speeches from the White House, the Department of Defense and the military that consistently described America's enemies as outlaws, barbarians and monsters. Is it any wonder that American forces subjected their Iraqi captives to brutal and dehumanising treatment? They had been told repeatedly that this was a war against Evil incarnate, so that they were not fighting enemies so much as casting out demons. The fate of those imprisoned at Abu Ghraib was not decided by a few 'rotten apples' at the bottom of the barrel: it was the fruit of a vast poison orchard assiduously cultivated by the President and his under-gardeners.<sup>50</sup>

The central strategy for interrogation and intelligence that they devised had three elements. The first was the designation of prisoners. Although President Bush had accepted that the Geneva Conventions would apply in Iraq, their provisions were stretched to the very limit by designating most of the prisoners held after the nominal end of hostilities as 'security detainees' or 'security internees' (the terms were interchangeable) rather than Prisoners of War. Of the 5,000 prisoners in its custody in May 2003, the United States recognised only 500 as Prisoners of War. 'Security detainee' was a technical term of particular significance because it allowed the full protection of the Geneva Conventions to be withdrawn from such prisoners for the duration of the armed conflict where 'absolute military security so requires'. This

---

<sup>50</sup> Seymour Hersh, *Chain of command: the road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004) pp. 59-60. 'To fight in the name of humanity does not eliminate enmity; it only makes one's enemy the representative or embodiment of the inhuman': Andrew Norris, "'Us" and "Them": the politics of American self-assertion after 9/11', *Metaphilosophy* 32 (2004) pp. 249-72; Gregory, Colonial present.

determination was invoked in a letter dated 24 December 2003, which was drafted by the Office of the Staff Judge Advocate and signed by Brigadier-General Janice Karpinski, the officer commanding the 800<sup>th</sup> Military Police Brigade at Abu Ghraib, in reply to serious concerns about detention and interrogation operations contained in interim reports from the ICRC: ‘While the armed conflict continues, and where “absolute military security so requires”, security internees will not obtain full G[eneva] C[onvention] protection.’<sup>51</sup>

This provision is contained within Article 5 of the Fourth Geneva Convention. But in its commentary the ICRC makes it clear that this can only be applied ‘in *individual* cases of an *exceptional* nature, when the *existence of specific charges* makes it almost certain that penal proceedings will follow’, and only to those who can be shown to be a continuing threat to security. It is not a catchall clause to allow the prolonged detention of thousands of people for endless interrogation.<sup>52</sup> Yet the letter under Karpinski’s signature insisted on the ‘military necessity’ of holding security detainees for their ‘significant intelligence value’, and senior officers regularly repeated the same objectives. In the course of his inspection of detention and corrections operations in Iraq in November 2003, however, Major-General Donald Ryder, the Provost Marshal General, had found that 117 Prisoners of War, 101 ‘high value detainees’ and 3,400 security detainees were still in US custody, and he cited numerous cases ‘where Iraqis at most expressed displeasure or ill-will’ at the occupation ‘and have been held for several months.’ The intensifying counter-insurgency rapidly boosted the number of security detainees, even though it was reliably estimated that 85-90 per cent of those held were in the wrong place at the wrong time and ‘were of no intelligence value’. Perversely, this increased their vulnerability: their very innocence ‘made them more likely to be abused, because investigators refused to believe they could have been picked up on such arbitrary grounds.’<sup>53</sup> The ICRC describes Article 5 as a ‘regrettable concession to state

---

<sup>51</sup> [http://www.abc.net.au/4\\_corners/content/2004/s1143841.htm](http://www.abc.net.au/4_corners/content/2004/s1143841.htm), 7 June 2004.

<sup>52</sup> ‘Convention IV relative to the protection of civilian persons in time of war’, Geneva, 12 August 1949 [full text and commentaries] (my emphases), at <http://www.icrc.org>.

<sup>53</sup> ‘Report on Detention and Corrections Operations in Iraq’, Office of the Provost Marshal General of the Army, 5 November 2003 [the Ryder Report] pp. 27, 54; Julian Borger, “‘Cooks and drivers were working as interrogators’”, *Guardian* 7 May 2004;

expediency’, and warns with chilling prescience that ‘what is most to be feared is that widespread application of the Article may eventually lead to the existence of a category of civilian internees who do not receive the normal treatment laid down by the Convention but are detained under conditions which are almost impossible to check.’<sup>54</sup>

The second element in the strategy was to ‘enhance’ methods of interrogation. In September 2003, a 30-member military team arrived in Iraq to conduct an assessment of ‘counter-terrorism interrogation and detention operations.’ With the encouragement and support of the Department of Defense, and Under Secretary Cambone in particular, the team was led by Major General Geoffrey Miller, Commander of JTF Guantánamo. His report recommended an immediate transition from ‘tactical’ to ‘strategic’ interrogation with a focus on the ‘rapid exploitation’ of prisoners for ‘actionable intelligence.’ As at Guantánamo, detention and interrogation were to be integrated so that the one would ‘set conditions’ for the other: ‘It is essential that the guard force be actively engaged in setting the conditions for successful exploitation of the internees.’ Miller recommended the introduction of ‘new approaches and operational art’ developed at Guantánamo, which elsewhere he called a central ‘laboratory for the war on terror’, and he provided details of the standard operating procedures that had been instituted there. An expert team from Guantánamo worked at Abu Ghraib from October through December ‘to assist in the implementation of the recommendations’ and by November ‘the real changes began to show.’<sup>55</sup>

By that stage rumours of renewed abuse and torture at the prison were circulating widely in Iraq. Since April the ICRC had made a number of oral and written reports to the coalition complaining of consistent ill-treatment of prisoners and serious violations of international humanitarian law. After 29 visits to 14 internment facilities between March and November, delegates had seen enough to protest that the methods of physical and psychological coercion, ‘that in some cases might amount to torture’, formed a ‘standard

---

Douglas Jehl, ‘US disputed protected status of Iraq inmates’, *New York Times* 23 May 2004.

<sup>54</sup> ‘Convention IV’, commentary.

<sup>55</sup> Greenberg and Dratel (eds), *Torture Papers op. cit.*, pp. 451-9, 1062-1066.

operating procedure’ – a systematic apparatus of abuse – that included beating, stripping and hooding prisoners, the use of prolonged stress positions, photographing prisoners naked, and having them humiliated still further by female guards. Several officers admitted that ‘it was part of the military intelligence process’ to hold prisoners ‘naked in a completely dark and empty cell for a prolonged period [and] to use inhumane and degrading treatment, including physical and psychological coercion’ to ‘secure their cooperation.’ In January 2004, Major-General Antonio Taguba confirmed ‘numerous acts of sadistic, blatant and wanton criminal abuse’ so pervasive and repetitive that they were ‘systemic’.<sup>56</sup>

Hersh concludes that ‘Abu Ghraib had become, in effect, another Guantánamo’.<sup>57</sup> According to subsequent investigations, however, the procedures recommended by Miller were intended to be no more than ‘starting-points’, and Miller and other senior officers claimed that it was clearly understood that they could not be implemented without modification ‘because, unlike Afghanistan and Guantánamo, the Geneva Conventions applied in the Iraq theater’. The categorization of most prisoners as ‘security detainees’ considerably closed that gap between the permissible procedures, however, and the connections established between the two carceral regimes through Miller’s report and the expert team contracted the distance still further. In fact, by September 2003 JTF-7 had decided that the latitude provided for the treatment of security detainees was insufficient. Reverting to the designation of prisoners from the war in Afghanistan, Sanchez argued that ‘unlawful combatants’ were present in Iraq too and that, in accordance with the President’s Memorandum of 7 February 2002, they were not entitled to *any* of the protections of the Geneva Conventions. He then authorized 29 interrogation techniques, of which twelve went beyond those described in Army Field Manual 34-52, and five of those exceeded the techniques approved for Guantánamo. CENTCOM viewed these additional methods as ‘unacceptably aggressive’, and in mid-October Sanchez rescinded his directive ‘and disseminated methods only slightly stronger than those in Field Manual 34-52.’ Even so, his new memorandum remained as close as possible to the Guantánamo

---

<sup>56</sup> Ibid., pp. 391-2, 416.

<sup>57</sup> Hersh, Chain of command, p. 41.

template provided by Miller. Interrogation operations were to be ‘conducted in close cooperation with the detaining units’ and interrogators had to have ‘reasonable latitude’ (again) to vary their techniques depending on both the prisoner and ‘the urgency with which information must be obtained.’<sup>58</sup> In March 2004 Miller was transferred from Guantánamo to assume command of US prison operations in Iraq.

The circuits connecting Afghanistan, Guantánamo and Iraq were more than words and paper. Interrogators circulated and interrogation techniques ‘migrated’ from one theatre to another, and it gradually became clear that similar abuses were widespread in both Afghanistan and Iraq. The ICRC reported a consistent pattern of brutality during arrest and transfer in Iraq, and this was subsequently shown to have extended throughout the detention system and to have started before and continued after the torture at Abu Ghraib. One officer and two NCOs testified that ‘the torture of detainees took place almost daily’ throughout their deployment at FOB Mercury, for example, 20 kilometres east of Fallujah, from September 2003 through April 2004. Many of those most closely involved had been attached to Special Services in Afghanistan, where they had witnessed CIA interrogations, and they brought knowledge of those techniques with them to Iraq. These revelations were particularly significant because they showed that torture was not the product of a small number of ill-trained, undisciplined support troops but extended to front-line regiments, including ‘some of the best-trained, most decorated and highly respected units in the US Army.’ Special Operations units were active in Iraq too. Task Force 6-26 occupied an Iraqi military base at Baghdad International Airport, for example, designated as Camp Nama, and converted its former torture chambers into ‘interrogation rooms’. There, according to Department of Defense, CIA and FBI witnesses, prisoners were kept in darkness, beaten with rifle butts, stripped naked ‘and had cold water thrown on them to cause the sensation of drowning.’ From these and other reports it is evident that Abu Ghraib was no aberration.<sup>59</sup>

---

<sup>58</sup> Greenberg and Dratel (eds) *Torture Papers*, pp. 912, 1035-1038.

<sup>59</sup> *Leadership Failure: Firsthand accounts of torture of Iraqi detainees by the US Army’s 82<sup>nd</sup> Airborne Division*, Human Rights Watch, September 2005; Eric Schmitt, Carolyn Marshall, ‘Before and after Abu Ghraib, a US unit abused detainees’, *New York Times* 19

The third element of the interrogation and intelligence strategy was to outsource these operations. Inside Iraq the practices I have just described were plunged deeper into the shadows by the use of private contractors. The US occupation would be impossible without 20,000 contractors undertaking tasks that were once the preserve of the military. They were intimately involved in the preparation and execution of the invasion – Peter Singer calls them ‘the coalition of the billing’ – and the demand for their services soared as the occupation wore on. Thirty contractors were hired for interrogations at Abu Ghraib: the Titan Corporation (San Diego) supplied interpreters and CACI International (Arlington) supplied interrogators. This strategy was more than a matter of outsourcing and profiteering, because it enabled the actions of contractors to be removed from any public ledger where they could be called to account. They were not part of the military chain of command and so were not subject to military justice; the Coalition Provisional Authority also explicitly excluded them from the provisions of Iraqi law. Indeed, no contractors operating anywhere in Iraq have been indicted, prosecuted or punished for anything; the only corporate inquiry into the events at Abu Ghraib was conducted by CACI which, as Singer says, ‘unsurprisingly found that CACI had done no wrong.’ (Equally unsurprising, CACI also provides the US government with training videos on ethics). In short, private contractors were – and remain – free to operate in a zone of absolute indistinction between the legal and the extra-legal.<sup>60</sup>

Outsourcing reaches far beyond Iraq. Abu Ghraib was wired to a global network of prisons and detention centres run by the US military, the CIA and allied intelligence

---

March 2006. See more generally *Beyond Abu Ghraib: detention and torture in Iraq*, Amnesty International, March 2006.

<sup>60</sup> Peter Singer, ‘Beyond the law’, *Guardian*, 3 May 2004; idem, ‘War, profits and the vacuum of law: privatized military firms and international law’, *Columbia journal of transnational law* 42 (2) (2004) pp. 521-549. The use of proxies for state violence – mercenaries and private military firms – is a common strategy of distancing the state from the perpetrators of its crimes: Ruth Jamieson and Kieran McEvoy, ‘State crime by proxy and juridical othering’, *British journal of criminology* 45 (2005) pp. 504-27: 512-514.

services.<sup>61</sup> In March 2004 the White House wanted to know if it could forcibly transfer prisoners from Iraq so that they could be held indefinitely and subjected to even more extreme methods of interrogation. Forcible transfers are explicitly proscribed by the Geneva Conventions, whose architects had before them the policies of mass deportation and the enforced disappearance of individuals into the *Nacht und Nebel* programmes carried out by the Nazis. But this did not deter the legal cartographers in the Department of Justice. Their counter-argument appealed to Iraq's immigration law which, unlike virtually every other law on Iraq's statute books, apparently could not be repealed or suspended by the occupying power. This provided for anyone entering the country illegally (the 'foreign fighters' who had joined the insurgency, not the thousands in US Army uniforms) to be imprisoned or deported. It seems unlikely that the drafters of the original law entertained the prospect that these measures could be coincident, but Guantánamo and its replicant sites made it possible for the United States to deport and imprison in a single gesture.<sup>62</sup>

This programme dovetailed with a system of extraordinary renditions organised by the CIA. Renditions were first authorized by the Reagan administration in the 1980s, and allowed the overseas capture of suspected terrorists and criminals and their forcible return to the United States for trial in a regular court of law. After the bomb attacks on the World Trade Center in 1993 the Clinton administration authorized a new, reverse programme for rendering suspects to other jurisdictions. Although this programme was clandestine, nominal safeguards were attached to the process. Every abductee was supposed to have been convicted in absentia or to have been charged with a criminal offence that would lead to a judicial trial; each rendition required individual review and approval. The Bush administration dramatically expanded the programme after 9/11 and removed most of those requirements. The central objective was to shackle indefinite detention to extreme interrogation. According to Jane Mayer, what started as a programme aimed at a small, discrete set of suspects was thus widened to include a larger

---

<sup>61</sup> Dana Priest and Joe Stephens, 'Secret world of US interrogation,' *Washington Post* 11 May 2004.

<sup>62</sup> Greenberg and Dratel (eds) *Torture Papers*, pp. 373-4.

and looser target population of ‘unlawful combatants’ for whom any pretence of judicial process was abandoned. The objective was to put such people ‘outside the protection of the law’ altogether and place them ‘completely in the power of their captors.’<sup>63</sup> It is estimated that 100-150 people have been rendered under the revised programme and taken to jails in Egypt, Jordan, Libya, Morocco, Saudi Arabia, Syria and Uzbekistan: all of which have been criticized by the State Department for gross violations of human rights. Equally cynically, the programme uses the law to violate the law. Renditions are carried out using civilian rather than military aircraft to take advantage of the Chicago Convention on International Civil Aviation (1944), which makes it unnecessary for non-scheduled, non-commercial civil aircraft to seek permission to pass through the airspace of other states or to land at civilian airports. The aircraft usually belong to a number of shell companies to take advantage of commercial law: ‘You can set them up quickly,’ one former CIA agent explained, and ‘dismantle them when they are exposed.’ These slippery manoeuvres are necessary because enforced disappearances are expressly prohibited under international law, which further imposes on all states an absolute and unconditional ban on transferring people to states where they risk torture. The token gesture of compliance made by the United States is really a sign of utter contempt: it claims to seek assurances about the treatment of those subject to rendition, and US diplomats are nominally in charge of monitoring compliance. But the Director of the CIA, Porter Goss, openly admits that ‘Once they are out of our control, there’s only so much we can do...’: which is of course precisely the point.<sup>64</sup>

---

<sup>63</sup> *The United States’ “Disappeared”*: the CIA’s long-term “ghost detainees”, Human Rights Watch, October 2004; Jane Mayer, ‘Outsourcing torture’, *New Yorker* 14 February 2005; *Rendition and secure detention: a global system of human rights violations*, Amnesty International, January 2006. ‘Originally, rendition brought prisoner into the legal process. Today, however, it keeps them outside the legal process’: Joseph Margulies, *Guantánamo and the abuse of presidential power* (New York: Simon and Schuster, 2006) p. 198.

<sup>64</sup> Stephen Grey, ‘US accused of torture flights’, *Sunday Times* 14 November 2004; Dana Priest, ‘Jet is open secret in terror war’, *Washington Post* 27 December 2004; Michael Hirsh, Mark Hosenball, John Barry, ‘Aboard Air CIA’, *Newsweek* 28 February 2005; Douglas Jehl, David Johnston, ‘Rule change lets CIA freely send suspects abroad to jails’, *New York Times* 6 March 2005; Dana Priest, ‘CIA’s assurances on transferred suspects doubted’, *Washington Post* 17 March 2005; Scott Shane, Stephen Grey, Margot Williams, ‘CIA expanding terror battle under guise of charter flights’, *New York Times*

Some prisoners remain firmly under US control, however, because the CIA also has its own covert prison system that was also authorized by President Bush after 9/11. These so-called ‘black sites’ open and close at different times, and prisoners are regularly flown from one to another for interrogation that exceeds the boundaries of federal and international law. At Abu Ghraib there was a formalized Memorandum of Understanding with the military over the CIA’s ‘ghost detainees’ who were held in isolation on Tier 1A of the Hard Site. They were not identified by name or registered and they were moved around the prison to hide them from ICRC delegations. At least one prisoner died in CIA custody at Abu Ghraib.<sup>65</sup> Other black sites have been identified in Afghanistan and Pakistan; in Qatar and Yemen; on the British Indian Ocean Territory of Diego Garcia; in Thailand (which was closed in 2003); at Guantánamo (which was closed in 2004 when federal courts began to exercise jurisdiction over prisoners there); and in the Czech Republic, Poland and Romania (which were all closed in November 2005 following widespread outrage in Europe). All these sites are under direct US control where, to take Goss at his weasel word, there is plainly a great deal that the United States can do.<sup>66</sup>

The very language of ‘extraordinary rendition’, ‘ghost prisoners’, and ‘black sites’ implies something out of the ordinary, spectral, a twilight zone: a serial space of the exception. But this performative spacing works *through* the law to annul the law; it is not a ‘state’ of exception that can be counterposed to a rule-governed world of ‘normal’ politics and power. It is, at bottom, a process of *juridical* othering that involves three

---

31 May 2005; *Below the radar: secret flights to torture and ‘disappearance*, Amnesty International, April 2006.

<sup>65</sup> Josh White, ‘Army, CIA agreed on “Ghost” Prisoners’, *Washington Post* 11 March 2005; Jane Mayer, ‘A deadly interrogation’, *New Yorker* 14 November 2005.

<sup>66</sup> Dana Priest, ‘CIA holds terror suspects in secret prisons’, *Washington Post* 2 November 2005; Demetri Sevastopulo, Guy Dinmore, Caroline Daniel, Jan Cienski, ‘Evidence CIA has secret jails in Europe’, *Financial Times* 2 November 2005; Allan Freeman, ‘EU eyes alleged CIA jails’, *Globe and Mail* 4 November 2005; Josh White, ‘Prisoner accounts suggest detention at secret facilities’, *Washington Post* 7 November 2005; Luke Harding, ‘Rice admits US mistakes in war on terror after wave of criticism across Europe’ *Guardian* 7 December 2005; ‘European investigator says US “outsourced” torture’, *Associated Press* 24 January 2006.

overlapping mechanisms: the creation of special rules that withdraw legal protections and permit the torture of what Ruth Jamieson and Kieran McEvoy call ‘juridical others’; the calculated outsourcing of war crimes to regimes known to practice torture; and the exploitation of extra-territorial sites where prisoners are detained and tortured at the pleasure of sovereign power. These strategies are not novel, however, and they did not begin with 9/11. Neither are they exclusively American strategies; the agencies of many other states have been complicit in the process. What is new is the way in which the vanishing points that they so assiduously produce are selectively but deliberately brought into fleeting view – in a calculated gesture of intimidation – and the way in which they reveal the totalizing will to power that lies at the crucial intersections of sovereign power and biopolitics.<sup>67</sup> In all these ways, as Kaplan concludes, the Bush administration has sought to redraw the borders of the law in order ‘to create a world in which Guantánamo is everywhere’.<sup>68</sup>

In fact, the wheel has turned full circle, and Afghanistan has turned into a major hub in the global system of clandestine detention centres. ‘Prisoner transports criss-cross the country between a proliferating network of detention facilities’, and this prefigures what two reporters describe as ‘a radical plan to replace Guantánamo Bay.’ The intention, so they claim, is to produce a global prison network beyond the reach of American or European judicial process. By the summer of 2005 negotiations were under way to transfer 50-70 per cent of the prisoners under the jurisdiction of the Department of Defense at Guantánamo to Afghanistan, Saudi Arabia and Yemen, where they would be incarcerated in purpose-built jails financed and constructed by the United States. Once again, it was claimed that the State Department would assume responsibility for ‘monitoring agreements to make sure prisoners were not mistreated.’ It beggars belief that occasional diplomatic visits announced in advance could be regarded as effective

---

<sup>67</sup> Jamieson and McEvoy, ‘State crime by proxy’, pp. 515, 521; John Parry, ‘The shape of modern torture: extraordinary rendition and ghost detainees’, *Melbourne journal of international law* 6 (2005) pp. 516-533.

<sup>68</sup> Kaplan, ‘Where is Guantánamo?’ p. 854.

monitoring when so many officers working inside Abu Ghraib claimed not to have known what was happening day after day under their own noses. <sup>69</sup>

### **Torture chambers**

The renovated cell-blocks at Abu Ghraib ('the Hard Site') set the stage for a convergence between the US war machine and the US prison industry. The United States jails over two million of its citizens; around half of those prisoners are African-American, and many of them are Muslims: estimates suggest they make up 10-20 per cent of the total prison population. Federal and state prisons have long been sites of crucial encounter between Islam and those versions of America that exclude its Muslim 'other'. In this system, racialized brutality and intramural violence are more or less sanctioned, and humiliation and abuse have become ritualized and routinized. <sup>70</sup> As Michelle Brown remarks, prisons are thus 'liminal spaces both inside and outside the boundaries of constitutional law.' Is it so surprising that two of the ringleaders at Abu Ghraib should have been corrections officers back home? This does not excuse their actions, of course, still less the carceral system that makes them possible. Brown's point is that the ideology of crime and punishment and the prosecution of the 'war on terror' are both conducted in a language of retribution that, at the limit, reduces its 'object-other' to a pure embodiment of the force of sovereign power: to bare life. <sup>71</sup>

---

<sup>69</sup>Tom Engelhardt, 'Into the shadows', at <http://www.TomDispatch.com>, 5 April 2004; Dana Priest, Joe Stephens, 'Abu Ghraib is just the most notorious of a network of detention centers', *Washington Post* 23 May 2004; Julian Borger, 'US plans permanent Guantánamo jails', *Guardian* 3 January 2005; Jonathan Steele, 'A global gulag to hide the war on terror's dirty secrets', *Guardian* 14 January 2005; Douglas Jehl, 'Pentagon seeks to transfer more detainees from base in Cuba', *New York Times* 11 March 2005; Adrian Levy, Cathy Scott-Clark, "'One huge US jail'", *Guardian* 19 March 2005; Josh White, Robin Wright, 'Afghanistan agrees to accept detainees', *Washington Post* 5 August 2005.

<sup>70</sup>Rachel Zoll, 'US prisons become Islam battleground', Associated Press 14 July 2005.

<sup>71</sup>Michelle Brown, "'Setting the conditions" for Abu Ghraib: the prison nation abroad', *American Quarterly* 57 (2005) pp. 973-997: 989. The interpolation of Agamben is mine not Brown's. Her argument turns on the way in which the Hard Site at Abu Ghraib followed the logic of the self-contained 'supermax' prison in the United States, where

The parallels between the two are indeed close, but the space between them needs to be retained because what happened at Abu Ghraib was more than a foreign replay of the odious domestic regime of incarceration. Abu Ghraib was in the middle of a war zone where the US Army was deploying ever more force and not only failing to suppress the insurgency but also increasing opposition to its occupation. In contradistinction to the triumphant mastery displayed in the photographs of the first prisoners arriving at Guantánamo, therefore, Allen Feldman reads the images from Abu Ghraib as recording ‘ceremonies of nostalgia’ that betray a longing for the power that was so visibly slipping away. Through these rituals, he argues,

‘The perpetrators re-acquire, if only in an allegorical idiom, their former sense of mastery and command in a situation that is rapidly lurching beyond their grasp.... [The] hooded and faceless bodies that are being manipulated and posed are merely emblems of a collective, recalcitrant Iraqi body politic that has to be dissected as the treacherous social surface of an occupied Iraq.’<sup>72</sup>

This reminds us that the torture chamber is a setting for the aggrandisement of power, and that its affirmation is likely to become more frenzied as it is mocked or threatened. Elaine Scarry suggests that:

‘The torturer’s questions objectify the fact that he has a world, announce in their feigned urgency the critical importance of that world, a world whose asserted magnitude is confirmed by the cruelty it is able to motivate and justify. Part of what makes his world so huge is its continual juxtaposition with the small and shredded world objectified in the

---

exclusion, segregation and isolation – the removal of all ordinary human interaction – are used as managerial strategies under the sign of ‘security’ (pp. 986-8).

<sup>72</sup> Allen Feldman, ‘Securocratic wars of public safety: globalized policing as scopic regime’, *Interventions* 63 (2004) pp. 330-350: 340.

prisoner's answers... It is only the prisoner's steadily shrinking ground that wins for the torturer his swelling sense of territory.' <sup>73</sup>

Conversely, as the vortex of insurgency and counter-insurgency intensified, perhaps it seemed to these soldiers and their accomplices that, outside the confines of the cell-block where their command was undisputed, the ground of the US Army was steadily shrinking as the insurgency asserted its own 'swelling sense of territory' (and sovereignty). The degradation, humiliation and sheer cruelty were, in their hideous way, a petty reversal of that greater reversal. That the attempts to engorge their enfeebled sense of power played on an elaborately Orientalized fantasy of feminized Arabs and of political militants as products of a failed heterosexuality enables Jasbir Puar to link torture in a metonymic chain that culminates in a climactic assertion of a heteronormative nationalism. 'The bonding ritual of the carnival of torture – 'discussing it, producing it, getting turned on by it, recording it, disseminating the proof of it, gossiping about it – [becomes] the ultimate performance of patriotism.' No wonder it is the last refuge of the scoundrel. <sup>74</sup>

Scarry makes another suggestion that helps make sense of the larger canvas that was folded in to Abu Ghraib when she notes that the questions and answers in the torture chamber are 'a prolonged comparative display, an unfurling of world maps'. This speaks directly to the project of interrogation and intelligence. Some commentators have sought to explain what happened there by blaming it on ignorance: 'Soldiers were immersed in Islamic culture,' one military psychiatrist wrote, 'a culture that many were encountering for the first time.' <sup>75</sup> Yet the scenes that were recorded in the cellblocks revealed a display of knowledge as well as power. They combined many of what Arab cultures see as utterly shameful acts in a montage of incandescent horror: 'the display of naked flesh; the use of dogs and dog-like treatment in human company; the removal of space between people and forced contact, grovelling and prostration; physical and intimate touching by

---

<sup>73</sup> Elaine Scarry, *The body in pain: the making and unmaking of the world* (New York: Oxford University Press, 1987)p. 36.

<sup>74</sup> Jasbir Puar, 'On torture: Abu Ghraib', *Radical history review* 93 (2005) pp. 13-38: 28; see also Jasbir Puar and Amit Rai, 'Monster, terrorist, fag: the war on terrorism and the production of docile patriots', *Social text* 72 (2002) pp. 117-148.

<sup>75</sup> Greenberg and Dratel (eds) *Torture Papers*, p. 448.

strangers; nudity and sexual exposure before other men; homosexual contacts; the humiliation of men in front of women; filth; enslavement.’<sup>76</sup> This was not happenstance. Neither were the techniques invented by the torturers. Written testimony and photographs shows that prisoners’ arms were often stretched behind their backs and shackled to the bars in a high-stress position that is known as a ‘Palestinian hanging’ from its use by the Israeli secret service in the occupied territories; it contributed directly to the death of Manadel al-Jamadi in CIA custody at Abu Ghraib. The crucified position into which the hooded man was forced is called ‘the Vietnam’, an extraordinarily painful method studied by the CIA and used by interrogators in South Africa and South America. It strains credibility to believe that such tableaux of intense humiliation and pain – a theatre of cruelty if ever there was one – were nothing more than the artless staging of a handful of reservists from small-town America.

That said, one has to confront the rictus of delight shown on the faces of those hometown, Homeland soldiers. They were not just triumphant; they were exultant. Michael Taussig makes the sharp point that ‘it is not the victim as animal that gratifies the torturer, but the fact that the victim is human, thus enabling the torturer to become the savage.’ In other words, torture requires its victims to be less than human, so that the degradation can continue – the spectre of ‘the monster’ stalks the torture-chamber – but it also requires them to be human: otherwise sexual gratification is withheld from the torturer. A space that is at once inside and outside the political-judicial order is a space where these doubled subjects can be conjured into being, paraded and subjugated. Here, in the most intimate recesses of the space of the exception, we finally come face to face with the other spectre that haunts these splattered cellblocks. For here, in Taussig’s vital paraphrase of Benjamin, ‘mimesis occurs by a colonial mirroring of otherness that reflects back onto the colonists the barbarity of their own social relations, but as imputed to the savage they yearn to colonize.’<sup>77</sup>

---

<sup>76</sup> Doug Saunders, “This has disgraced America...”, *Globe & Mail*, 7 May 2004.

<sup>77</sup> Michael Taussig, *Shamanism, colonialism and the wild man: a study in terror and healing* (Chicago: University of Chicago Press, 1987) pp. 83, 134.

## After words

Iraqis responded to the images from Abu Ghraib with understandable outrage, and much of their anger was focused on the colonial mirroring that Taussig describes: the Janus-face of occupied Iraq, preaching liberation while practicing degradation. But one of the most telling responses that I have seen comes from the weblog of ‘Riverbend’, a young Iraqi woman in Baghdad:

‘Seeing those naked, helpless, hooded men was like being slapped in the face with an ice cold hand. I felt ashamed to be looking at them – like I was seeing something I shouldn’t be seeing and all I could think was, “I might know one of those faceless men...” I might have passed him in the street or worked with him. I might have brought groceries from one of them or sat through a lecture they gave in college... any one of them might be a teacher, gas station attendant or engineer... any one of them might be a father or grandfather... each and every one of them is a son and possibly a brother.’<sup>78</sup>

These are haunting words. The practices at Guantánamo, Abu Ghraib and elsewhere are saturated with a colonial past that is reactivated in our colonial present, and I hope that in making them visible I have helped to undercut the pernicious claim that terror and torture always refer to the actions of others never to ourselves. Seen thus, as Philip Kennicott says, the images from Abu Ghraib are unexceptional: ‘In different forms, they could be pictures of the Dutch brutalizing the Indonesians; the French brutalizing the Algerians; the Belgians brutalizing the people of the Congo.’ When we look at these images, he concludes, we should see ourselves because they are *ours*: ‘Every errant smart bomb, every dead civilian, ever sodomized prisoner, is ours.’<sup>79</sup> This seems exactly right to me. But Riverbend’s anguish suggests another way to see ourselves in these images: for they are also *us*. There has never been a greater need to untwist the separations between ‘us’

<sup>78</sup> Riverbend, ‘Baghdad Burning’, at <http://riverbendblog.blogspot.com>, 30 April 2004.

<sup>79</sup> Philip Kennicott, ‘A wretched new picture of America’, *Washington Post* 5 May 2004; Geoffrey Galt Harpham, ‘Inadmissible evidence: terror, torture and the world today’, *Chronicle of Higher Education* 15 October 2004.

and 'them' than the present moment of danger. For as the viral 'war on terror' proliferates across the globe, and as regimes around the world invoke 'national security' to suppress human rights, we are all, potentially, *homines sacri*. Our vulnerability is differentially distributed – scored by class, gender, sexuality, 'race' and other markers – but it is also *shared*. We could all end up on other boxes in other prisons, arms outstretched and wires attached to our trembling bodies.