



# The torture business: Buying impunity

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**I**F human rights protection in the 21st century is still aiming to end impunity, it has to shift under the conditions of globalization from a state based perspective on international norms to a victim's perspective of redress, compensation and relief from human rights violations. The victim's perspective should be the guiding basis of human rights law. In this context, the UN 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (the Norms) are the most comprehensive attempt to frame this perspective - by balancing state-based power with human rights obligations and framing corporate power with human rights accountability.

The example of torture shows how governmentally granted impunity facilitates human rights violations by corporate actors. The example is not only chosen because torture is a core concept in the US-led global 'war on terror'. It also significantly demonstrates the concept of privatization of human rights violations.

## Legitimising torture

In 2002, Alberto R. Gonzales, the current US Attorney General, and former White House Legal Council, stated that this "new type of warfare [required] a new approach to our actions towards captured terrorists". President Bush supported a "new thinking in the law of war". This call for a new approach encouraged the emergence of further proposals, initiating a debate on the legalisation of torture.

Alan Dershowitz, proposed "torture warrants". Another Harvard fellow, the then Director of the Carr Centre for Human Rights Policy, Michael Ignatieff, suggested the legitimisation of coercive interrogation methods as "lesser evils". While volumes of intellectual debate mounted on academic shelves around the world, the U.S. administration filled its secret prisons. President Bush's claim that "we don't torture people in America" took on a new meaning.

At the same time as the US Justice Department's website declared that "torture is abhorrent both to American law and values and international norms", legal creativity facilitated the use of prison ships and privately run airplanes for interrogation sessions in order to evade these norms. Cofer Black, then chief of the CIA's counter-terrorist unit, later testified that, "After 9/11 the gloves came off" and admitted that the USA is willing to determine the rules of the game alone.

The use of extraterritorial prisons such as Guantanamo, and extra-legal terms such as "unlawful combatants" or "unprivileged belligerents", provided the legal reasoning for impunity. This concept had to be altered, in the war against Iraq, since the USA as occupying power was bound by humanitarian and human rights law.

## Investing in impunity

One famous example of granted impunity is the awarded freedom from legal liability of Sir Francis Drake's explorations with The Golden Hind in 1580 by Queen Elizabeth I., who was at the same time the largest shareholder. Similarities in the relationship between the US administration and modern day business may be unintended but are evident.

The US relies extensively on private military and security for its activities as part of the war on terror. In a mission statement, CACI International Inc - a US company alleged to be implicated in the human rights violations at Abu Ghraib - describes its profile as: "provid[ing] the IT and network solutions needed to prevail in today's new era of defence, intelligence and e-government. [...] Our solutions lead the transformation of defence and intelligence, assure homeland security, enhance decision-making

and help government to work smarter, faster and more responsively." In the war in Iraq, such forces are outside the chain of command and not legally accountable. The two dead Iraqis, who died in Abu Ghraib prison after being questioned by the CIA contracted interrogators, are not an issue for the Department of Defence. This showed that neither the Uniform Code of Military Justice - that outlaws human rights violations - nor the Military Extraterritorial Jurisdiction Act of 2000, were applicable.

***Since States are responsible for deregulation and impunity for corporate human rights violations, the Human Rights Council is the right body to agree upon a normative and compulsory human rights standard. The Special Representative's advice should focus on the victim's call in host countries of corporate activities for standards that are in force in the developed home countries and agreed upon internationally.***

Although the examples of non-applicable law have shown the widely granted impunity for private military contractors, this was not seen as sufficient enough for corporate demands of risk management. Therefore, right after the beginning of the war against Iraq, the US Presidency passed, on 22 May 2003, Executive Order 13303 granting contractors and sub-contractors of the Iraqi oil business immunity for crimes under US jurisdiction. While free from accountability in their home state (*lex domicilii*), the US led CPA had to ensure impunity in the host state (*lex loci actus*). On 27 June 2003, Order 17 was passed which grants any foreign contractor or sub-contractor, and employees of such contractors of the CPA, or the Coalition Provisional Forces, immunity for their official activities pursuant to the terms and conditions of the contracts, and states that such contractors shall not be subject to Iraqi laws or regulations.

***A victim's perspective on corporate human rights violations calls for a balance of corporate power through human rights, comparable to existing human rights obligations for states. Business entities are able to accept such standards voluntarily but human rights protection should by no means depend on the choice of a potential or actual perpetrator.***

The result of this agreement was exposed to the world by Maj. Gen. Antonio M. Taguba's secret report on the mistreatment of prisoners in US custody and prisons. There he remarked that employees of private military firms contracted by the US-led CPA for interrogatory purposes "were either directly or indirectly responsible for the abuse at Abu Ghraib". Taguba further reports that military police guards were directed and actively requested by army intelligence officers, CIA agents, and private contractors "to set physical and mental conditions for favourable interrogation of witnesses". Security and military corporations like Blackwater Security Consultants, CACI International Inc., and Titan's PAC were named. Following his retirement from the CIA, Cofer Black became a CEO for Blackwater.

## Academic confusion

Asked at a side event at the 61st session of the Commission on Human Rights (CHR), the Special Rapporteur on torture, Manfred Nowak, showed himself to be a traditionalist, saying that torture by definition is an act of state agents.

Apparently more concerned with the problem, yet without any immediate solution,

was the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. Questioned on this subject at another side event of the 61st CHR Alston assured the audience that he was concerned about the issue and opposed outsourcing of human rights obligations.

Yet Alston maintained that the primary obligations rest with states to protect such rights. In his recent report (E/CN.4/2006/53), Alston writes: "Armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance... and in addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace." Unfortunately, Alston fails to say how accountability will be found where the state itself is not only unwilling, but is in fact facilitating, the outsourcing of human rights abuses.

## Victim's perspective

Torture by private military and security forces is just the tip of the iceberg. Labour law violations and disregard for environmental standards are other examples. John Ruggie, the Special Representative on 'human rights and transnational corporations and other business enterprises', in his report (E/CN.4/2006/97) states that he is not sure if human rights abuses within the corporate sector are increasing or decreasing over time, or if it is only a question of more reports by more actors. He turns a blind eye to states' intentions to create loopholes in international law.

Interestingly, Ruggie himself says in the same report: "Of course to victims of abuses this uncertainty [lack of reliable data about increase of decrease of corporate's human rights violations] matters little." Ruggie admits it is a challenging task to address all the difficulties.

The Special Rapporteur on 'adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights', Okechukwu Ibeanu, argues in his report (E/CN.4/2006/42) for accountability of corporations to international human rights standards in host and home countries. The point of departure for Ibeanu is the victim's perspective, and thus the report states that the Norms "are an attempt to hold companies to account for actions adversely affecting human rights and to limit impunity for human rights violations. The Special Rapporteur still finds that the draft Norms have made an important contribution to the debate about the scope of companies' human rights responsibilities and the extent to which international human rights law is directly applicable to them." Thus the victim's perspective becomes the litmus test for Ruggie's work.

A victim's perspective on corporate human rights violations calls for a balance of corporate power through human rights, comparable to existing human rights obligations for states. Business entities are able to accept such standards voluntarily but human rights protection should by no means depend on the choice of a potential or actual perpetrator.

Since States are responsible for deregulation and impunity for corporate human rights violations, the Human Rights Council is the right body to agree upon a normative and compulsory human rights standard for corporate activities. The Special Representative should take this into account. His advice should focus on the victim's call in host countries of corporate activities - mostly developing countries - for standards that are in force in the developed home countries and agreed upon internationally.

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