

BOOK REVIEW

Michael Ratner and Ellen Ray, *Guántanamo: What the World Should Know* (Chelsea Green, 2004)

Since the terrorist attacks of 11 September 2001, the question and answer format seems to have become a favourite way for the left to get to print in a timely fashion. Noam Chomsky and Scott Ritter have both used the method,¹ and now Michael Ratner, of the Center for Constitutional Rights (CCR), and journalist Ellen Ray have followed suit.

The book is made up largely of a series of interviews between Ratner and Ray and is very much a primer for the uninitiated. It begins in 1903 with a grateful Cuba granting the US 'complete jurisdiction and control' over 45 square miles of its land at Guantanamo Bay following the US victory in the Spanish-American War. Ratner points out that the US has been in breach of the lease for many years, having agreed to operate only a coaling station there, and he is as qualified as anyone to talk about the legal black hole that the US military base at Guantanamo Bay has since become.

Although there are many lawyers now representing Guantanamo detainees, Ratner may be the only one who has previously stood before the federal courts and argued that Guantanamo Bay is subject to the legal jurisdiction of the US. In the 1990s, he represented Haitian refugees imprisoned there in 'HIV Camps' and fought the first Bush administration's assertion that people could be held on an island completely controlled by the US indefinitely without recourse to any court. In that case, Ratner secured a Federal Court order that the camps be closed and the detainees released.

Moving forward a decade, Ratner recounts his shock at hearing that 'enemy combatants' – described by the Secretary of Defence as 'among the most dangerous, vicious killers on the face of the earth',² – were to be rendered to Guantanamo Bay. The book is peppered with examples of those detainees: taxi drivers, a shepherd in his nineties, a preacher, an Al Jazeera cameraman. Ratner exposes the slipshod way in which the Americans effectively accepted anyone they were given by their Afghan allies – many of them dressed in civilian clothes – and transported them to Cuba. This included a large number of Pakistanis allegedly arrested by the police in Pakistan and various others captured by US forces and their allies around the world.

Ratner's description of the treatment meted out to prisoners makes up the central part of this book, as he charts their journey from the Northern Alliance's metal containers where hundreds at a time allegedly died, through the US base at

¹ Noam Chomsky, *9-11* (2001); Scott Ritter and William Rivers Pitt, *War on Iraq: What Team Bush Doesn't Want You to Know* (2002).

² David E Frank, 'The Worst of the Worst', *Massachusetts Lawyers Weekly*, 5 September 2005.

Bagram in Afghanistan – what Ratner says is known as ‘the torture chamber of the United States’ – to their ultimate destination at Guantanamo Bay. Here begins a compelling account of the abuses that have been served up to these detainees, who have been interrogated as many as 200 times each, chained to the floor, forced to kneel on concrete for hours on end and deprived of sleep and food. Since the book went to print, even more details of this treatment have been released. Where Ratner mentions the humiliation of exposed genitals, we are now aware of female interrogators spraying a detainee with simulated menstrual blood;³ where he briefly mentions the abuse of Korans, we now have a litany of evidence to back it up.⁴

In their interview, Ratner and Ray do not adequately discuss the connection between this treatment and the complex attempts of the Bush administration to subvert international law, although they briefly mention the administration’s legal position – that it would treat prisoners humanely ‘and to the extent appropriate and consistent with military necessity’. Time and again, officials including the President, stated publicly only that the United States does not ‘torture’⁵ and avoided addressing the issue of ‘cruel, inhuman and degrading treatment and punishment’, which is also prohibited under international law.⁶ This was a deliberate and disciplined attempt to deflect the public from the fact that it was these latter standards which were being violated at Guantanamo Bay.

Since publication of the book, the now-infamous ‘torture memo’ has been released publicly. In the memo, the President’s then-legal adviser (and current Attorney-General), Alberto Gonzales, was advised that torture only occurs where there is physical pain similar to that ‘accompanying serious physical injury, such as organ failure, impairment of bodily function or even death’⁷ (the memo was eventually withdrawn after a public outcry).⁸ The drafters of the memo were relying on the outdated European decision of *Ireland v UK*, which declared that the so-called ‘five techniques’ – stress positions (‘wall-standing’), hooding, loud noise, sleep deprivation and deprivation of food and water – were degrading treatment, not torture.⁹

The techniques described by Ratner as being used at Guantanamo Bay bear an

³ Evan Thomas, ‘How a Fire Broke Out’, *Newsweek*, 23 May 2005.

⁴ *Ibid.* See also, for example, Roland Watson, ‘US Admits Guard Soiled Koran at Guantanamo’ *The Times* (London), 4 June 2005, 43; Rupert Cornwell, ‘Guantanamo Prisoners go on hunger strike in protest at conditions’ *The Independent* (London), 23 July 2005, 31.

⁵ See, eg, President George W Bush, ‘Statement by the President on United Nations International Day in Support of Victims of Torture’ (Press Release, 26 June 2003).

⁶ International Covenant on Civil and Political Rights, art 7; Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment, art 16.

⁷ ‘Memorandum for Alberto R Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 USC §§ 2340-2340A, August 1, 2002, reprinted in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005).

⁸ Eric Lichtblau, ‘Gonzales Speaks against Torture During Hearing’ *New York Times*, 7 January 2005, A1.

⁹ *Ireland v UK* 2 EHRR 23, 59. A concurring judgment in the recent European case of *Selmouni v France* (2000) 29 EHRR 403 stated that ‘certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in the future’: at 442.

erie resemblance to the five techniques and reveal an administration desperate to squeeze the definition of torture as tight as possible in order to allow interrogators the latitude to get the information they needed.

This apparent reliance on an appallingly narrow definition of torture was only part of the administration's legal assault. By placing the detainees at Guantanamo Bay, it presumed that if anything done there did constitute torture, there would be no court with the jurisdiction to hear the complaint. Ratner accurately sketches a picture of an administration which simply believed that the executive was at war and therefore not subject to review by the judiciary; a president who believed he could 'order the indefinite detention of non-citizens simply because he says so'. However, perhaps even Ratner would have been stunned by the blatant arrogance of counsel for the administration who (in a case heard after the publication of the book) responded to a District Court judge's questions by claiming that the administration had the power to detain '[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda-activities'.¹⁰

Ratner and the CCR were attempting to combat this ingrained arrogance when they lodged habeas corpus applications challenging the detention of a number of Guantanamo detainees, including Australians Mamdou Habib and David Hicks. It is now history that this case – known as *Rasul v Bush* – was heard by the Supreme Court, which concluded that the Guantanamo detainees must be granted access to the US courts.¹¹

At the time of writing, the Supreme Court had heard arguments in the case but had not yet ruled on it. However, Ratner and Ray were able to discuss the arguments placed before the court and Ratner subsequently provided a brief summary of the result in an after word. Ratner noted that the Supreme Court had only heard arguments on the very narrow point of whether the detainees had the right to challenge their detention in US courts, but the decision is no less significant for that.

In providing a definition of habeas corpus in *Rasul v Bush*, Stevens J emphasised the deep historical underpinnings of the concept in the common law before turning to the corresponding provisions in the US Code.¹² The relevant section of the Code states that a prisoner may file a writ of habeas corpus if, among other things, he is in custody 'under or by color of the authority of the United States'¹³ or 'in violation of the Constitution or laws or treaties of the United States'.¹⁴

In reviewing the habeas provisions, the Supreme Court considered whether the jurisdiction of the federal courts extended to 'the detention of aliens in a territory over which the United States exercise plenary and exclusive jurisdiction but not

¹⁰ *In re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 475 (DDC, 2005).

¹¹ *Rasul v Bush*, 124 S Ct 2686 (2004).

¹² *Ibid* 2692-3.

¹³ 28 *United States Code*, s 2241(c)(1).

“ultimate sovereignty”¹⁵. It concluded that the federal courts have jurisdiction over US nationals held at Guantanamo Bay and that nothing in the habeas statute suggested that foreign nationals should be treated differently. Intriguingly the court also quoted the case of *Braden v 30th Judicial Circuit Court of Ky*,¹⁶ which held that ‘the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody’, before concluding that ‘no party questions the District Court’s jurisdiction over petitioner’s custodians. [The habeas statute] requires nothing more’.¹⁷ Does this open the possibility that the Supreme Court may agree with Ratner’s assertion that any person held by the US anywhere in the world, including Bagram and Abu Ghraib, should have access to American courts?

Regardless of this question, the favourable judgment in *Rasul v Bush* means, in Ratner’s words, ‘that the courthouse doors in the US are open and that the detainees can argue in US courts that they are being unlawfully detained’. In reality, this also meant that the slog had to start all over again in the lower courts, but the decision also had wider ramifications. Ratner notes in his after word that the Bush administration, reeling from the decision, almost immediately set up the Combatant Status Review Tribunals (CSRTs), which were given the responsibility of determining whether the detainees were in fact enemy combatants. This was a bald attempt by the administration to avert judicial review of the detentions by claiming that the CSRTs fulfilled the requirement that the detainees be accorded due process.

This was one of the arguments made by the administration in the district court case of *in re Guantanamo Detainee Cases*.¹⁸ When Justice Green handed down her judgment¹⁹ in that case in October 2004, she exposed the workings of the CSRTs, quoting comprehensively from transcripts of their proceedings. In one CSRT hearing, a detainee was asked to respond to the allegation that he was an acquaintance of an al Qaeda operative but the detainee was not permitted to know who that operative was.²⁰ This Kafkaesque nightmare was but another staging post along the legal road that these men have been required to travel but, unlike the hero in *The Trial*, they now have recourse to real courts and real justice. It is a result that is in no small part due to the perseverance of people like Michael Ratner and it is this perseverance that led to him and Ellen Ray releasing this book. Its timing means that it was, in some respects, out of date almost as soon as it was completed, however it provides a valuable primer to those who are unfamiliar with what has happened at Guantanamo Bay and it provides an insight into the tribulations of those who have tried to move the process forward.

¹⁴ 28 *United States Code*, s 2241(c)(3).

¹⁵ *Rasul v Bush*, 124 S Ct 2686, 2693 (2004).

¹⁶ 410 US 484 (1973).

¹⁷ *Rasul v Bush*, 124 S Ct 2686, 2698 (2004).

¹⁸ 355 F Supp 2d 443 (DDC, 2005).

¹⁹ Justice Green dismissed a motion brought by the administration to dismiss a number of habeas corpus applications filed by Guantanamo Bay detainees (including Mamdou Habib and David Hicks). The administration had claimed that the detainees had no right to bring a habeas corpus application because its Combatant Status Review Tribunals constituted sufficient due process.

²⁰ *Ibid* 469.

To that end, one of the most rewarding parts of the book is the introduction by David Hicks' then-lawyer, Stephen Kenny. Kenny's is an impassioned four-page argument against the indefinite detention of untried people focussing on the outrageous activities of an administration scarcely even pretending to adhere to the rule of law. Kenny exposes the raw propaganda fabricated against Hicks in the heady days after the invasion of Afghanistan as a shield to protect the administration from its illegal activities. Large law firms with well-credentialed pro-bono wings were 'lacking staff resources' or 'too busy' to take on the case and only hardened pro bono lawyers were willing to help. Perhaps Kenny's conclusion is the best description of the book and the circumstances surrounding it:

The full story of the abuses in Guantanamo Bay has yet to be told. It is important that we understand the mistakes that Guantanamo Bay represents and strive to ensure that they are never repeated. This book marks a beginning of that process, and Michael Ratner's continuing contribution to this challenge should be recognised and applauded.

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