RELEASED IN PART
B3, DIANRO

D2

[redacted] B3

From: [redacted] B3

Sent: Tuesday, July 24, 2007 12:00 PM

To: [redacted] B3

Subject: PRESIDENT SIGNS EO INTEPRETING COMMON ARTICLE 3 AND SETTING RULES FOR CIA DETENTION PROGRAM

Classification: UNCLASSIFIED

(U) FYI.

[redacted] B3

O 210036Z JUL 07
FM SECSTATE WASHDC
TO ALL DIPLOMATIC AND CONSULAR POSTS COLLECTIVE
AMEMBASSY TRIPOLI
UNCLAS STATE 101546
E.O. 12958: N/A
TAGS: KISL, KPAO, PGOV, PREL, MOPS, PTER, KAWC,
PHUM
SUBJECT: PRESIDENT SIGNS EXECUTIVE ORDER
INTEPRETING COMMON ARTICLE 3 AND SETTING RULES FOR
CIA DETENTION PROGRAM
REF: 2006 STATE 164628
1. (U) SUMMARY. ON JULY 20, THE PRESIDENT SIGNED AN EXECUTIVE ORDER THAT (1) INTERPRETS FOR THE PURPOSES OF U.S. LAW AND THE SATISFACTION OF U.S. TREATY OBLIGATIONS, THE MEANING AND APPLICATION OF COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS, AN ARTICLE THAT REQUIRES HUMANE TREATMENT OF DETAINEES; AND (2) PROVIDES CLEAR RULES FOR THE APPLICATION OF COMMON ARTICLE 3 TO THE CIA'S DETENTION AND INTERROGATION PROGRAM. THE ORDER COMPLIES FULLY WITH INTERNATIONAL LAW AND CREATES A SOUND LEGAL FRAMEWORK FOR THE TREATMENT OF DETAINEES BY THE CIA IN THE CONFLICT WITH AL QAEDA. THE ORDER IS AVAILABLE AT WWW.WHITEHOUSE.GOV/NEWS/RELEASES/2007/07/20070720-4.HTML. IF-ASKED POINTS ARE IN PARA. 5. QS AND AS ARE IN PARA. 6. END SUMMARY.
2. (U) IN 2006, THE SUPREME COURT HELD THAT COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS, WHICH REQUIRES HUMANE TREATMENT OF DETAINEES DURING ARMED CONFLICT AND PROHIBITS SPECIFIC ACTS OF MISTREATMENT, APPLIES TO THE U.S. ARMED CONFLICT WITH AL QAEDA. FOLLOWING THAT DECISION, CONGRESS ENACTED THE MILITARY COMMISSIONS ACT (MCA), WHICH INTERPRETED AND CRIMINALIZED THE MOST SERIOUS VIOLATIONS OF COMMON ARTICLE 3; PROHIBITED CRUEL,

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INHUMAN, AND DEGRADING TREATMENT OF DETAINEES; AND INVITED THE PRESIDENT TO PROMULGATE INTERPRETATIONS OF OTHER PROVISIONS OF THE GENEVA CONVENTIONS, INCLUDING COMMON ARTICLE 3 (SEE REF). CERTAIN TERMS IN COMMON ARTICLE 3, INCLUDING ITS PROHIBITION ON "OUTRAGES UPON PERSONAL DIGNITY, IN PARTICULAR, HUMILIATING AND DEGRADING TREATMENT," WHICH WAS NOT INCLUDED IN THE MCA, HAVE BEEN CONSIDERED VAGUE.

3. (U) WHEN HE SIGNED THE MCA INTO LAW IN 2006, THE PRESIDENT STATED THAT HE WAS CONFIDENT THAT THE MCA ENABLED A CIA DETENTION AND INTERROGATION PROGRAM TO GO FORWARD, CONSISTENT WITH APPLICABLE LAW ON HUMANE TREATMENT OF DETAINEES. IN THIS ORDER, THE PRESIDENT PROVIDES AN AUTHORITATIVE INTERPRETATION OF THE PROVISIONS OF COMMON ARTICLE 3 RELATED TO DETENTION AND INTERROGATION AND APPLIES THAT INTERPRETATION TO THE CIA DETENTION AND INTERROGATION PROGRAM. IN PARTICULAR, THE ORDER CLARIFIES THE MEANING OF "OUTRAGES UPON PERSONAL DIGNITY, IN PARTICULAR, HUMILIATING AND DEGRADING TREATMENT" BY **EXPRESSLY FORBIDDING "WILLFUL AND OUTRAGEOUS ACTS OF PERSONAL ABUSE DONE FOR THE PURPOSE OF HUMILIATING OR DEGRADING THE INDIVIDUAL IN A MANNER SO SERIOUS THAT ANY REASONABLE PERSON, CONSIDERING THE CIRCUMSTANCES, WOULD DEEM THE ACTS BEYOND THE BOUNDS OF HUMAN DECENCY," INCLUDING SEXUAL ABUSE AND USING DETAINEES AS HUMAN SHIELDS.** THIS STANDARD IS DRAWN FROM DECISIONS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA.

4. (U) IN ADDITION TO THE PROHIBITION ON THOSE "WILLFUL AND OUTRAGEOUS ACTS OF PERSONAL ABUSE" DESCRIBED ABOVE, THIS ORDER CONTAINS A LIST OF PROVISIONS WITH WHICH THE CIA PROGRAM MUST COMPLY TO BE CONSISTENT WITH COMMON ARTICLE 3. **THIS INCLUDES REQUIREMENTS THAT THE DETAINEES NOT BE SUBJECT TO TORTURE; CRUEL, INHUMAN, OR DEGRADING TREATMENT; OR ANY OFFENSE COVERED BY THE WAR CRIMES ACT. THE ORDER FORBIDS ACTS INTENDED TO DENIGRATE THE RELIGION OR RELIGIOUS PRACTICES OF THE DETAINEE, AND REQUIRES THAT THE CIA PROVIDE DETAINEES ADEQUATE FOOD, WATER, SHELTER, NECESSARY CLOTHING, PROTECTION FROM EXTREMES OF HEAT AND COLD, AND MEDICAL CARE. THE CIA IS AUTHORIZED TO DETAIN ONLY THOSE MEMBERS OR SUPPORTERS OF AL QAEDA AND ASSOCIATED ORGANIZATIONS THAT THE CIA DIRECTOR CONCLUDES ARE LIKELY TO HAVE INFORMATION THAT COULD ASSIST IN DETECTING, MITIGATING, OR PREVENTING TERRORIST ATTACKS OR LOCATING THE SENIOR LEADERSHIP OF AL QAEDA.**

5. (U) BEGIN IF-ASKED PRESS POINTS.

-THE PRESIDENT ISSUED AN EXECUTIVE ORDER ON JULY 20 IN ORDER TO PROVIDE AN AUTHORITATIVE INTERPRETATION UNDER U.S. LAW OF COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS AS APPLIED TO CERTAIN DETENTIONS AND INTERROGATIONS.

-OF MOST SIGNIFICANCE, THE ORDER DEFINES IN MORE EXPLICIT DETAIL SOME OF THE MORE VAGUE TERMS OF COMMON ARTICLE 3, DRAWING ON AND COMPLYING WITH INTERNATIONALLY-ACCEPTED STANDARDS FOR THE TREATMENT OF DETAINEES IN WAR. THESE STANDARDS DRAW IN PART FROM DECISIONS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA.

-SPECIFICALLY, THE ORDER DEFINES "OUTRAGES UPON PERSONAL DIGNITY" TO MEAN A PROHIBITION ON "WILLFUL AND OUTRAGEOUS ACTS OF PERSONAL ABUSE DONE FOR THE PURPOSE OF HUMILIATING OR DEGRADING THE INDIVIDUAL IN A MANNER SO SERIOUS THAT ANY REASONABLE PERSON, CONSIDERING THE CIRCUMSTANCES, WOULD DEEM THE ACTS BEYOND THE BOUNDS OF HUMAN DECENCY," INCLUDING SEXUAL ABUSE AND USING DETAINEES AS HUMAN SHIELDS.

-IT BUILDS ON PREVIOUS STANDARDS OF DETAINEE TREATMENT THAT ALREADY EXIST IN U.S. LAW, INCLUDING CRIMINAL STATUTES FORBIDDING TORTURE AND VARIOUS OTHER ACTS OF VIOLENCE (SUCH AS

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MURDER, MUTILATION, SERIOUS BODILY INJURY, AND RAPE), AND THE PROHIBITION ON CRUEL, INHUMAN, AND DEGRADING TREATMENT IN THE MILITARY COMMISSIONS ACT AND THE DETAINEE TREATMENT ACT.
-THE ORDER SPECIFICALLY APPLIES THE INTERPRETATION OF COMMON ARTICLE 3 TO A CIA INTERROGATION PROGRAM FOR CERTAIN CAPTURED AL QAEDA TERRORISTS WHO HAVE INFORMATION ON ATTACK PLANS OR THE WHEREABOUTS OF THE GROUP'S SENIOR LEADERS.
-THE ORDER CONTAINS A LIST OF SPECIFIC REQUIREMENTS FOR THE CONDUCT OF THE CIA'S PROGRAM. FOR EXAMPLE:
-THE PROGRAM MUST COMPLY WITH THE PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT IN THE DETAINEE TREATMENT ACT;
-THE ORDER FORBIDS ACT INTENDED TO DENIGRATE DETAINEE'S RELIGION OR RELIGIOUS PRACTICES;
-DETAINEES MUST RECEIVE ADEQUATE FOOD, WATER, SHELTER, NECESSARY CLOTHING, PROTECTION FROM EXTREMES OF HEAT AND COLD, AND MEDICAL CARE;
-INTERROGATION TECHNIQUES MUST BE DEEMED SAFE FOR EACH DETAINEE WITH WHOM THEY ARE USED; AND
-THE CIA DIRECTOR MUST ISSUE POLICIES TO ENSURE THAT THE PROGRAM OPERATES SAFELY, PROFESSIONALLY, AND IN ACCORDANCE WITH THE ORDER AND U.S. LAW.
END IF-ASKED PRESS POINTS.
6. (U) BEGIN QUESTIONS AND ANSWERS.
-Q: DOES THE ORDER APPLY ONLY TO THE CIA, OR TO ALL AGENCIES?
-A: THE ORDER INTERPRETS COMMON ARTICLE 3 AND APPLIES THAT INTERPRETATION TO THE CIA PROGRAM. THE DEPARTMENT OF DEFENSE ALREADY HAS POLICIES IN PLACE TO REQUIRE THAT ITS PERSONNEL COMPLY WITH COMMON ARTICLE 3.
-Q: DOES THE ORDER PROHIBIT WATERBOARDING, SLEEP DEPRIVATION, AND HYPOTHERMIA?
-A: THE ORDER REQUIRES PROTECTION OF DETAINEES FROM EXTREMES OF HEAT OR COLD. IT DOES NOT ENUMERATE ANY SPECIFIC PROHIBITED OR AUTHORIZED PRACTICES. ALL INTERROGATION PRACTICES MUST BE IN COMPLIANCE WITH THE TERMS OF THE EXECUTIVE ORDER.
-Q: HAS THE CIA PROGRAM CHANGED AT ALL SINCE IT BEGAN TO OPERATE SEVERAL YEARS AGO?
-A: THE LEGAL LANDSCAPE HAS CHANGED IN SIGNIFICANT WAYS SINCE 2001. THE SUPREME COURT'S DECISION IN HAMDAN V. RUMSFELD LED TO THE APPLICATION OF COMMON ARTICLE 3 TO THE CONFLICT WITH AL QAEDA. AND IN THE MCA, CONGRESS MADE OTHER SIGNIFICANT CHANGES TO THE LAW THAT ARE REFLECTED IN THIS ORDER. THE CIA PROGRAM MUST COMPLY WITH THIS ORDER.
-Q: WHY DID THE PRESIDENT ISSUE THIS ORDER NOW?
-A: THE PRESIDENT ISSUED THE ORDER TO PROVIDE CLEAR DIRECTION ON THE INTERPRETATION AND APPLICATION OF COMMON ARTICLE 3 UNDER U.S. LAW, TO ENSURE THAT THE UNITED STATES UPHOLDS ITS OWN LAWS AS WELL AS ITS TREATY OBLIGATIONS IN ITS TREATMENT OF DETAINEES. THE MCA EXPRESSLY AUTHORIZED THE PRESIDENT TO TAKE THIS STEP. IT HAS TAKEN SOME TIME SINCE THE MCA BECAME LAW TO COME TO A CONCLUSION ABOUT HOW BEST TO ACHIEVE THIS OBJECTIVE. THE PRESIDENT MADE CLEAR LAST SEPTEMBER THAT A CIA PROGRAM FOR QUESTIONING TERRORISTS WOULD CONTINUE TO BE CRUCIAL TO

DIA0199

OBTAINING LIFE-SAVING INFORMATION.
END QUESTIONS AND ANSWERS.
7. (U) MINIMIZE CONSIDERED.
RICE

Classification: UNCLASSIFIED

2/19/2009

DIA0200

RELEASED IN PART
B3, DIANRO, B1, 1.4(D) D3

[redacted] B3

From: [redacted] B3
Sent: Thursday, June 21, 2007 3:31 PM
To: [redacted] B3

Subject: Mauritania (U)

1520 – Mauritania/Secret CIA Prisons: (S//NF) AMEMBASSY NOUAKCHOTT, 211736Z, #0566. A spokesman from the Ministry of Foreign Affairs and Cooperation has categorically denied what he called "baseless" allegations, published in the New Yorker, that the government of Colonel Ely Vall had allowed the creation of secret CIA detention centers in Mauritania. The author of the article cited a former senior intelligence official and a government consultant as sources. *Post Comment:* [redacted] B1 B3

[redacted]

DTG

211736Z JUN 07

FROM

FM AMEMBASSY NOUAKCHOTT

CLASS

SECRET

BODY

TAGS: MR, PGOV, PHUM, PREL, PTER
SUBJECT: FOREIGN MINISTRY REFUTES ALLEGATIONS OF SECRET CIA PRISONS IN MAURITANIA
CLASSIFIED BY: CDA STEVEN KOUTSIS FOR REASONS 1.4 (B), (C) AND (D)
1. (U) THIS AN ACTION REQUEST. PLEASE SEE PARAGRAPH 6.
2. (U) A SPOKESMAN FROM THE MINISTRY OF FORRIGN AFFAIRS AND COOPERATION HAS CATEGORICALLY DENIED WHAT HE CALLED "BASELESS" ALLEGATIONS, PUBLISHED IN THE NEW YORKER, THAT THE GOVERNMENT OF COLONEL ELY VALL HAD ALLOWED THE CREATION OF SECRET CIA DETENTION CENTERS IN MAURITANIA. THE SPOKESMAN EMPHASIZED THAT MAURITANIA IS A DEMOCRATIC STATE THAT CONSIDERS INTERNATIONAL CONVENTIONS SUPREME AND IRREVERSIBLE. THE GOVERNMENT RESPONSE CAME FOLLOWING CALLS FROM OPPOSITION PARTIES FOR THE GOVERNMENTS IMMEDIATE INQUIRY INTO THE MATTER.
3. (U) IN AN ARTICLE PUBLISHED BY THE NEW YORKER TITLED "HOW ANTONIO TAGUBA, WHO INVESTIGATED THE ABU GHRAIB SCANDAL, BECAME ONE OF ITS VICTIMS" AND AVAILABLE ON-LINE, REPORTER SEYMOUR HERSH, CITING A FORMER SENIOR INTELLIGENCE OFFICIAL AND A GOVERNMENT CONSULTANT AS SOURCES, ALLEGED THAT AFTER EXISTENCE OF SECRET CIA PRISONS IN EUROPE WAS EXPOSED BY THE WASHINGTON POST IN LATE 2005, THE BUSH ADMINISTRATION

1/15/2009
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DATE/CASE ID: 22 JUN 2009 200902196

DIA0201

"RESPONDED WITH A NEW DETAINEE CENTER IN MAURITANIA." THE SOURCES ALSO SAID, ACCORDING TO THE ARTICLE: "AFTER A NEW GOVERNMENT FRIENDLY TO THE U.S. TOOK POWER, IN A BLOODLESS COUP D'ETAT IN AUGUST, 2005,... IT WAS MUCH EASIER FOR THE INTELLIGENCE COMMUNITY TO MASK SECRET FLIGHTS THERE."

4. (U) SEVERAL LOCAL NEWS SOURCES HAVE REPORTED THE NEW YORKER STORY AND THE FOREIGN MINISTRY'S RESPONSE. MOREOVER, CERTAIN PAPERS HAVE REINTRODUCED THE PREVIOUS RUMOR THAT THE UNITED STATES GOVERNMENT HAD A HAND IN THE 2005 BLOODLESS COUP, AND ONE NEWSPAPER SPECULATED THAT THE SUPPOSED DETENTION CENTER WAS AT THE MAURITANIAN MILITARY CAMP IN OUALATA. OTHER PRESS HAS PICKED UP HERSH'S SUBSEQUENT INTERVIEW WITH DEMOCRACY NOW! CORRESPONDENT AMY GOODMAN, WHERE HE SPECULATED THAT 37 TO 39 "OF THE TOUGHER HIGH VALUE TARGETS" WHO ARE SUPPOSEDLY UNACCOUNTED FOR WERE IN FACT RENDERED TO MAURITANIA. HE CALLED THE SUPPOSED DETENTION CENTER THE "PRISON OF CHOICE." HE IS QUOTED TO SAY, "THAT THERE IS A PRISON THERE, NO QUESTION. ALL THE DETAILS, I REALLY DON'T KNOW."

[redacted] B1

KOUTSIS

SUBJECT

FOREIGN MINISTRY REFUTES ALLEGATIONS OF SECRET CIA PRISONS IN MAURITANIA
CLASSIFIED BY: CDA STEVEN KOUTSIS FOR REASONS 1.4 (B), (C) AND (D)

ADMIN

BT
#0566
C0B2

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DERIVED FROM: MS
DECLASSIFY ON: MR

Classification: Secret//NOFORN//MR

1/15/2009

DIA0202

Y1

ACTION IO-00

INFO	LOG-00	EEB-00	AF-00	AID-00	AMAD-00	CIAE-00	INL-00
	DODE-00	WHA-00	EAP-00	DHSE-00	EUR-00	UTED-00	TEDE-00
	INR-00	LAB-01	L-00	NEA-00	DCP-00	NSAE-00	ISN-00
	NSCE-00	OIC-00	OIG-00	NIMA-00	PA-00	GIWI-00	PRS-00
	P-00	ISNE-00	DOHS-00	SP-00	IRM-00	SS-00	STR-00
	TRSE-00	NCTC-00	FMP-00	PRM-00	DRL-00	G-00	SCA-00
	SAS-00	FA-00	SWCI-00	/001W			

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R 111404Z JUL 07
FM USMISSION GENEVA
TO SECSTATE WASHDC 4709
USMISSION USUN NEW YORK

RELEASED IN FULL

UNCLAS GENEVA 001766

STATE FOR IO-RHS, DRL-MLA, L-HRR

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: Enforced Disappearances - #20 in Geneva 2007 Communications Log

1. Mission has received a communication from the Chairman-Rapporteur on the Working Group on Enforced or Involuntary Disappearances, Santiago Corcuera, regarding the implementation of the Declaration on the Protection of All Persons from Enforced Disappearances. This communication has been sent via e-mail to IO-RHS and is #20 on the Geneva 2007 Communications Log.

2. Begin text of letter:
Excellency,

At the request and on behalf of the Chairman of the Working Group on Enforced or Involuntary Disappearances, I have the honour to communicate the following letter addressed to you:

"Excellency,

I have the honour to write to you on behalf of the Working Group on Enforced or Involuntary Disappearances, which held its 82nd session from 25 to 29 June 2007 at the Office of the United Nations High Commissioner for Human Rights in Geneva.

In the course of the session, the Working Group decided to inform your Government of general allegations it has received in relation to the implementation of the Declaration on the Protection of All Persons from Enforced Disappearances in your country. A summary is

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provided in Annex I. Any comments regarding these general allegations should be received by the date given in the next paragraph in order to be included in the Working Group's annual report.

I would like to take this opportunity to remind your Government that the Working Group will hold its 83rd session at the United Nations Office in Geneva from 21 to 30 November 2007. As such, the Working Group would be grateful if any written information which your Government wishes to submit for the Working Group's consideration, could be received by 1 October 2007. Information may be submitted at any time of the year, and will be reviewed as soon as it can be processed.

In conformity with its usual practice, the Working Group is prepared to receive representatives of interested Governments during the first three days of its next session, from 21 to 23 November 2007. Should your Government wish to be represented at the forthcoming session, please contact the Working Group's secretariat at the United Nations Office of the High Commissioner for Human Rights in Geneva (tel: 022 917 9176, fax: 022 917 9006) to schedule an appointment with the Working Group. The dates of subsequent sessions for the coming year may also be requested or found on the WGEID webpage: http ://www. ohchr. org/english/issues/disappear.

I remain, Excellency,
Yours sincerely,
Santiago Corcuera Chairman-Rapporteur Working Group on Enforced or Involuntary Disappearances"

I remain, Excellency,
Yours sincerely,

Tanya Smith
Secretary
Working Group on Enforced
or Involuntary Disappearances

Annex
General Allegation: USA 07.06.07
The Working Group received information from non-governmental organizations concerning reported obstacles encountered in the implementation of the Declaration on the Protection of All Persons from Enforced Disappearance.

It was reported that on 6 September 2006, the US President stated that the United States runs a system of secret detention in the "War on Terror". However, US authorities have not disclosed how many individuals were secretly detained.

The United States government has reportedly constructed a wide-ranging detention system for terrorism suspects. It is alleged that this system includes detention in secret US-controlled detention facilities outside the United States.
End of text.
Chammas

NNNN

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RELEASED IN FULL

ACTION IO-00

INFO LOG-00 AF-00 AID-00 AMAD-00 CIAE-00 INL-00 DODE-00
WHA-00 PDI-00 EAP-00 EB-00 EUR-00 UTED-00 H-00
TEDE-00 INR-00 LAB-01 L-00 NEA-00 NSAE-00 NSCE-00
OIC-00 OIG-00 OMB-00 NIMA-00 PA-00 GIWI-00 PRS-00
P-00 SP-00 SSO-00 SS-00 STR-00 TRSE-00 FMP-00
BBG-00 IIP-00 PRM-00 DRL-00 G-00 SCA-00 SAS-00
SWCI-00 /001W

----------CA0E7A 090910Z /38

P 090830Z MAY 06
FM USMISSION GENEVA
TO USMISSION USUN NEW YORK PRIORITY
SECSTATE WASHDC PRIORITY 9455
AMEMBASSY DHAKA
INFO HUMAN RIGHTS COMMISSION COLLECTIVE

UNCLAS GENEVA 001100

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: INFORMAL DISCUSSIONS CONTINUE ON HUMAN RIGHTS COUNCIL

REF: GENEVA 00939

Summary
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1. Norway, Chile, India, Russia, and South Africa hosted informal consultations May 3 to discuss with Geneva missions, NGOs, and OHCHR Secretariat staff the Human Rights Council's (HRC) first session and initial phase of operations. The tone of the meeting was pleasantly cordial and non-confrontational, suggesting that members were on their best behavior in the run-up to the May 9 HRC elections. China stressed that an HRC chair-designate, a provisional agenda, and a plan to extend all mandates should be put in place before the June 19 HRC start date. This reflected the general consensus, which also called for formulating a road map for the first year's sessions, establishing a working group to consider the procedures for the universal periodic review and to review mandates from the Commission on Human Rights (CHR), and holding a dignified, transparent, and all-inclusive first session. The debate on how much substance should be included in the first session continued, but all agreed that there would be little time given the two-week schedule. Several representatives, mostly from European and GRULAC countries, suggested including the five

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inter-governmental working groups at the inaugural session. Although there was widespread agreement on the need for a facilitator to guide preparations for the HRC's first session, many countries preferred to wait until after the May 9 Council elections and the designation of a chair. End Summary.

Widespread Agreement on Many Key Issues
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2. This cross-regional event showcased widespread consensus on the necessity of the following for the first session:

-advance preparations;
-a facilitator (though half of those who spoke wanted this role filled only by the chair-designate);
-focus on short-fuse priorities, including extension of all mandates for one year;
-extension of the Sub-Commission so it can meet in August;
-creation of a flexible road map outlining sessions for the next year;
-strong focus on procedural matters;
-a High-Level Segment with speaking times of 5-10 minutes;
-creation of working groups to develop the universal periodic review process and to review all existing mandates and mechanisms; and
-transparency and inclusion of non-Council members and NGOs.

China Speaks Up
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3. Chinese Counselor Yifan La said the first session should be a structured and dignified affair focused on procedural matters and the creation of a road map for the next year. Pressing issues would be the selection of a Council and chair-designate, a provisional agenda to include the extension of all expiring mandates, and the establishment of a working group to formulate universal periodic review procedures and other mechanisms inherited from the Commission on Human Rights (CHR), including the 1503 complaints mechanism. Functioning rules of procedure should also be in place by the first session. La conceded that it was a "daunting task" but one that the Council would need to undertake "to bury the old Commission." He said all stakeholders should be part of the first session but did not elaborate how they would participate. Participants appeared to share most of China's views, though GRULAC members appeared dissatisfied after La said that China supported drawing lots for the Council chairmanship position or doing it alphabetically, starting with the African Group. Earlier

in the meeting, Brazil had stated that a GRULAC country would claim the chairmanship of the new Council.

Fitting Substance into First Session
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4. Many members expressed the need to include some substance in the first session's agenda. A proposal to take action on the five inter-governmental working groups -- Rights of Indigenous Peoples, Enforced Disappearances, Optional Protocol to Economic, Social and Cultural Rights Covenant, Right to Development, and Durban Implementation -- at the inaugural session garnered widespread support from Chile, the Czech Republic, France, Malaysia, Mexico, Portugal, Spain, and Switzerland. Some representatives, most notably Spain, suggested that the adoption of the Draft Convention Against Enforced Disappearances and the Draft Declaration on the

Rights of Indigenous Peoples was a forgone conclusion. In separate interventions, Poloff and her Australian counterpart pointed out that a number of countries considered the two at different stages of development and not ready for adoption. Several Asian Group countries, including Indonesia, cautioned the group to refrain from introducing anything controversial during the first session to ensure a smooth launching of the HRC. China reminded member states of how the last CHR session "almost didn't happen" due to disagreements among members and reiterated that all contentious issues should be avoided for the first session. Several countries agreed that there should be a role at the first session for Special Procedures, especially since most of the mandate holders would be in Geneva anyway during the week of June 19 for their annual meeting. Discussion on the exact degree of participation ranged, however, from simply attending the opening ceremony to having the Special Procedures chair make a general presentation to interactive dialogue with all mandate holders.

Chair-Designate As Facilitator
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5. Most countries stressed the urgency of having a facilitator to guide preparations leading up to the June 19 HRC session, but a few countries, most notably China, suggested it would be better to wait for a chair-designate to be determined and let that person facilitate consultations. China said that the host countries at the May 3 consultations were already serving as facilitators, so it would be better to wait for a chair-designate. France and several other

countries said that they could wait for a chair-designate to be selected after the May 9 elections. (Note: Discussions on the margin confirmed that agreement on a chair is still a long way off. End note) Switzerland noted that it was organizing its own cross-regional consultation meeting in Lausanne on May 15 to continue informal discussions on the HRC.
ROBINSON

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RELEASED IN FULL

ORIGIN L-00

INFO	LOG-00	AID-00	AMAD-00	CIAE-00	INL-00	DODE-00	DS-00
	EUR-00	UTED-00	VCI-00	H-00	TEDE-00	INR-00	IO-00
	LAB-01	VCIE-00	NSAE-00	OIC-00	NIMA-00	PA-00	PER-00
	GIWI-00	SP-00	SSO-00	SS-00	NCTC-00	FMP-00	DSCC-00
	PRM-00	DRL-00	G-00	SAS-00	SWCI-00	/001R	

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SOURCE: CBLEXCLS.004511
DRAFTED BY: L/HRR:HARRISRK -- 04/17/2006 202-647-4035
APPROVED BY: IO:LAGONMP
IO/RHS:TAJOHNSON
L/HRR:AMSURENA
DRL:JVALLSNOYES(SUBS)
----------BC0F84 172147Z /38
P 172143Z APR 06
FM SECSTATE WASHDC
TO USMISSION GENEVA PRIORITY

UNCLAS STATE 060910

E.O. 12958: N/A
TAGS: PHUM, UN, PREL
SUBJECT: ICCPR - PREPARATIONS FOR JULY MEETING WITH U.N. HUMAN RIGHTS COMMITTEE

1. This is an action request. See paragraph 2.

2. Mission is requested to transmit to the Secretariat the text in paragraph 3 regarding preparations for the July 17-18 U.S. session before the Human Rights Committee.

3. Begin text.

(Complimentary opening) and refers to the Secretary General,s letter of March 31, 2006 regarding the United States report of its implementation of the International Covenant on Civil and Political Rights and its upcoming meeting with the Human Rights Committee on July 17 and 18, 2006.

The United States is pleased to work collaboratively with the Human Rights Committee and the Secretariat staff to make the July session productive and informative. As part of this effort, the United States will be sending a very large, high-level interagency delegation to the meetings in Geneva. As discussed in the working lunch with the Chairman of the Committee referred to in the Secretary General,s note, the

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various commitments by members of this delegation make it impossible to agree for that delegation to be available for a third session, and the Government of the United States appreciates the Committee,s understanding on this issue. As further discussed at that luncheon, the United States will be scrupulous in staying within the time limits set by the Committee during the two sessions, to make sure that there is adequate time available to have a thorough discussion of the issues of concern to the Committee.

As the Secretariat is aware, the United States Government will be presenting to the Committee Against Torture its report on its implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in May of 2005. As the U.S. government participants in that meeting and the July session are similar and as providing concise and complete responses to the complex issues raised by the Committee involves an intensive and deliberative process within the U.S. government, it will be difficult for the United States to guarantee that its written answers will be available three weeks in advance of the July hearing. That said, the United States will work diligently to provide those answers as much in advance of the July session as is possible. As United States delegation members discussed with the Committee Chairman at the working lunch, the United States will probably not be in a position to provide its answers in French and Spanish, and it understands that no country has yet provided such answers to the Committee in three languages.

The United States will be pleased to inform the Secretary General in writing of the names and titles of the representatives who will represent the United States at the July session.

The United States looks forward to an informative and productive exchange of information and perspectives with the Human Rights Committee in the July meetings and is committed to working collaboratively with the Committee to make that session a success.

(Complimentary closing)

End text.
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ACTION PRM-00

INFO	LOG-00	NP-00	AF-00	CIAE-00	INL-00	DODE-00	WHA-00
	PDI-00	EAP-00	EUR-00	OIGO-00	UTED-00	VC-00	TEDE-00
	INR-00	IO-00	L-00	VCE-00	AC-00	NEA-00	NSAE-00
	NSCE-00	OIC-00	OIG-00	OMB-00	PA-00	PER-00	PM-00
	GIWI-00	PRS-00	ACE-00	P-00	SP-00	IRM-00	SS-00
	TRSE-00	T-00	SA-00	FMP-00	BBG-00	IIP-00	PMB-00
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FM USMISSION GENEVA
TO USMISSION USUN NEW YORK
SECSTATE WASHDC 7361
INFO AMEMBASSY PARIS

RELEASED IN FULL

UNCLAS GENEVA 002613

L/UNA BRANCATO; IO; DRL

E.O. 12958: N/A
TAGS: FR, UNGA;UNHR
SUBJECT: FINAL REPORT ON UNHCR WG SESSION OF FORCED DISAPPEARANCES (SEPTEMBER 12-23, 2005)

1. (U) SUMMARY. The Intersessional Working Group to elaborate a draft legally binding normative instrument completed work on a Convention for the Protection of All Persons from Forced Disappearance and, although there was no consensus, agreed that there was no impediment to consideration of the text by the Human Rights Commission. The U.S. stated objections on several points that will be recorded in the final report of the session. END SUMMARY.

2. (U) The Fifth and Final session of the Working Group to elaborate a draft legally binding instrument on Enforced Disappearance was held in Geneva September 12 - 23, 2005. The U.S. Delegation included Gilda Brancato (L/HRR), Mission Legal Adviser Jeffrey Kovar, Deputy Legal Adviser Paula Barton, Political Counselor Velia DePirro and Human Rights Officer Jan Levin.

3. (U) Overview. The French Chair of the Working Group opened the meetings by announcing that he intended to have the Working Group finish its consideration of issues not taken up at the January session, then go through the whole draft text again for editorial changes only. He stated he would only accept substantial changes if they commanded consensus. Outstanding issues were 1) the role of non-state

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 18 JUN 2009 200706444

actors; 2) the territorial reach of [redacted] the Right to Know and, finally, 4) the form of the instrument and the nature of the monitoring body. The first of these was resolved with a compromise language formula concerning state action which reflects the international law position of the United States; the second was resolved when China withdrew its proposed article in favor of making an interpretive declaration at the time of ratification. The other two issues consumed much of the two week negotiation. On the final reading, several other issues were raised, including definition, criminal intent, the statute of limitations and "found in" jurisdiction, as well as the defense of superior orders, non-refoulement and the reference to the term "Crimes against Humanity." US Del made statements of position for the record regarding these issues.

4. (U) The Right to Know. How to provide access to information was one of the most controversial issues raised in the negotiations. The Latin countries with some Asian and European allies insisted that a "Right to Truth" be included in the text that would guarantee access by families and other concerned parties to all information related to the possible enforced disappearance of an individual. The United States with the support of several common law countries insisted that the right to information was never absolute, that domestic law in many countries was incompatible with such an absolute right and that there were occasions when there was a legitimate public interest in withholding certain information. US Del attempted to make revisions to both the preamblar language of PP7 and the text of Article 24(2). They sought support for the use of the term "Freedom of Information" in the manner that it was used in the ICCPR and in the USG approved resolution on the Right to Truth at the CHR, a formula also compatible with US domestic law. In the end, an important reference to "freedom of information" was included in the preamble, and statements were recorded that the right to truth could only be understood as implemented through a freedom of information system. Nevertheless, we could not achieve the level of clarity desired or changes to Article 24(2). The US Del requested that the record indicate its dissatisfaction.

5. (U) Monitoring Body. Despite a sharp split of opinion in favor of an optional protocol to the ICCPR and use of the Human Rights Committee (HRC) as the monitoring mechanism, it was clear from the outset that the Chair envisioned a new convention with an independent monitoring body. Arguments in favor of the Chair's approach were that the HRC was already overburdened and backlogged, that the new committee could be composed of persons who were experts on the issue of Enforced

Disappearance, and that the independent body should incorporate a system for addressing "urgent situations." The contrary view (shared by the U.S.) held that an existing and experienced committee would be more efficient and effective and avoid redundancies and inconsistent jurisprudence, that providing adequate financial support to the HRC could reduce its backlog allowing it to accomodate the work of enforced disappearance. In addition, the U.N. is in the process of evaluating whether to consolidate all treaty bodies as well as make other reforms and, because of that effort, this was not the appropriate time to create a new treaty body. The Chair finally acknowledged his view that the most important reason for making a separate convention and treaty body was a political one; that is, a separate treaty would underscore the importance of the issue and it was what the families wanted. There was extended debate concerning whether or not a separate convention could legally be implemented using the HRC but the final decision was made by the Chair. In an attempt to insert some compromise the Chair proposed to include a clause that called for a conference of states parties within four to six years of entry into force to evaluate the effectiveness of the new treaty body in light of its performance and the U.N. reforms, and determine whether it should be continued or replaced by an existing body.(This suggestion actually drew a less than enthusiastic response from the attendees but was included in the document anyway.) The U.S. stated its objections to this result for the record.

6. (U) The Final Reading. US Del made numerous proposals and raised objections for the record on Second Reading. These objections included statements with reference to preamblar paragraph 7 on the Right to Know, Article 2 on the definition of an enforced disappearance, Article 4 on Criminalization, Article 5 referring to Crimes Against Humanity, Article 6(2) on Defense of Obedience to Superior Orders, Article 8 on Statutes of Limitations, Article 9(2) on "found in" jurisdiction, Article 16 on non-refoulement, Article 17 on access to places of detention, and Article 24(2) again concerning the Right to Know. Several other states expressed reservations on several provisions of the final text. Notable were the concerns of Germany on the Right to Know, New Zealand on reparations, and the Netherlands on the danger of undercutting the U.N. system with a new treaty body. Although the Second Reading was proclaimed by the Chair to be editorial only, the Chair included changes to text suggested by the Latin states, NGOs and the families.

7. (U) No Consensus. Throughout the negotiations the US Del met with the Chair to express serious concern that the pace of the negotiations and failure to accommodate significant legal concerns of the United States would make it impossible for the U.S. to join a consensus. The Chair acknowledged the problem but was adamant that this be the last session and the product of this negotiation was his text and would go forward to the Commission. The Chair made clear that all states could submit their objections for the record in the Chair's report. In the end, the Chair did not declare consensus, but only stated that the working group could make no more progress and its work was at an end. We have provided USG changes to the draft Report and will be reviewing the final Report as soon as it is prepared to verify that all of our concerns are reflected.

8) (U) The Wrap-up. The final day of negotiations was taken up with general statements by delegations. Many delegations and organizations representing disappeared persons reacted with outpourings of emotion over the conclusion of the draft text. Several delegations also took the occasion to restate their objections for the record. The US Del delivered a statement confirming each of the objections that it had previously raised. Text of that statement was emailed to L/HRR.

Moley

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ACTION IO-00

INFO	LOG-00	AF-00	AID-00	AMAD-00	CIAE-00	INL-00	DODE-00
	WHA-00	EAP-00	EB-00	EUR-00	UTED-00	H-00	TEDE-00
	INR-00	L-00	NEA-00	NSAE-00	NSCE-00	OIC-00	OIG-00
	PA-00	PER-00	GIWI-00	PRS-00	P-00	SP-00	IRM-00
	SS-00	STR-00	TEST-00	TRSE-00	SA-00	FMP-00	ECA-00
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P 020732Z SEP 04
FM USMISSION GENEVA
TO SECSTATE WASHDC PRIORITY 2149
INFO USMISSION USUN NEW YORK

RELEASED IN FULL

UNCLAS GENEVA 002441

STATE FOR IO/SHA, DRL/MLA, L/HRR

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: COMMUNICATION FROM THE WORKING GROUP ON ENFORCED DISAPPEARANCES

1. Mission received the following letter dated August 25, 2004 from the Chairman of the Working Group on Enforced or Involuntary Disappearances, Stephen J. Toope, addressed to Ambassador Moley. The letter concerns reports the Working Group has received regarding alleged secret detention centers under United States' authority in various parts of the world and invites the USG to submit written information by October 15 and/or send a representative to appear in person at the next Working Group session November 8-15, 2004.

2. Text of letter and annex follows:

Begin text.

25 August 2004

Dear Mr. Ambassador,

I should like to communicate to you, on behalf of the Chairman of the Working Group on Enforced or Involuntary Disappearances, the following letter addressed to you:

"Dear Mr. Ambassador,

I have the honour to write to you on behalf of the Working Group on Enforced or Involuntary Disappearances, which held

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 18 JUN 2009 200706444

its seventy-third session from 16 to 20 August 2004, at the United Nations Office in Geneva.

In the course of the session, the Working Group decided to inform your Government of reports it had received about developments in your country having an influence on the phenomenon of disappearances or the solution of the cases not yet clarified, and/or on the implementation of the Declaration on the Protection of All Persons from Enforced Disappearances. A summary is provided as an Annex to this letter.

I would like to take this opportunity to remind your Government that the Working Group will hold its seventy-fourth session from 8 to 15 November 2004, at the Untied Nations Office in Geneva. It would therefore be very much appreciated if any written information that your Government wishes to submit for the Working Group's consideration, could be received, if possible, by 15 October 2004.

In conformity with its usual practice, the Working Group is prepared to receive representatives of interested Governments during the first three days of its session. Should your Government wish to be represented at the forthcoming session, I would appreciated your contacting the Group's secretariat at the Untied Nations Office of the High Commissioner for Human Rights in Geneva (tel. 022-917-9176), in order to schedule an appointment with the Group.

I remain
Dear Mr. Ambassador,

Yours sincerely

Stephen J. Toope
Chairman
Working Group on Enforced or Involuntary Disappearances"

I remain,
Dear Mr. Ambassador,

Yours sincerely,
//////////////////////
Tanya Smith
Secretary a.i.
Working Group on Enforced or Involuntary Disappearances

ANNEX
WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

General allegations

United States of America

The Working Group received information from non-governmental organizations concerning the reported non-compliance by the Government of the United States of America with provisions of the Declaration on the Protection of All persons from Enforced Disappearance.

Reports were received by the Working Group regarding secret detention centers under United States' authority in various parts of the world, in which an unknown number of persons are detained. Reports assert that there was inadequate provision of notice to families about the capture of detainees and

their conditions, legal status and rights. It is also reported that it is unclear in many circumstances which U.S. agency is ultimately responsible for the arrest or the conditions of confinement of the detainees in these facilities.

Reports further specify that the most sensitive and high-profile detainees are not being held in Guantanamo because it is believed that detainees there will eventually be monitored by the U.S. courts. It is stated that terrorism suspects are detained by the Untied States in "undisclosed locations," presumably outside the United States, with no access to the ICRC, no notification to families, no oversight of any sort of their treatment, and in most cases no acknowledgment that they are even being held. Information was provided on 13 specific alleged detainees, apprehended in places such as Pakistan, Indonesia, Thailand, Morocco, and the United Arab Emirates, who have reportedly disappeared in U.S. custody.

American authorities have also apparently refused to disclose the names of men secretly detained during the past few years within the United States. Families have not been informed on the arrested persons' locations. Reports state that some of these detainees have now been released or deported.

End text.

3. Mission transmitted a copy of the letter by fax to IO/SHA, Attention Director.
Cassel

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ACTION IO-00

INFO	LOG-00	AID-00	AMAD-00	CIAE-00	INL-00	DODE-00	SRPP-00
	EB-00	UTED-00	TEDE-00	INR-00	L-00	NSAE-00	NSCE-00
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	STR-00	TEST-00	TRSE-00	USIE-00	ECA-00	PRM-00	DRL-00
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P 081402Z OCT 03
FM USMISSION GENEVA
TO SECSTATE WASHDC PRIORITY 7206
INFO USMISSION USUN NEW YORK

RELEASED IN FULL

UNCLAS GENEVA 003196

STATE FOR IO/SHA, DRL/MLA, L/HRR

E.O. 12958: N/A
TAGS: PHUM
SUBJECT: ICCPR PERIODIC REPORT OVERDUE

REF: A. GENEVA 2046
B. GENEVA 1844

1. THIS IS AN ACTION REQUEST. SEE PARAGRAPH 6.

2. SUMMARY: MISSION RECEIVED A DIPLOMATIC NOTE DATED SEPTEMBER 17, 2003 FROM THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR) REMINDING US THAT THE SECOND PERIODIC REPORT REQUIRED UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) IS OVERDUE. THE REPORT WAS ORIGINALLY DUE IN 1998, AND, SINCE THE THIRD REPORT IS DUE NEXT MONTH, THE SECRETARIAT HAS RECOMMENDED THAT OUR SUBMISSION COVER THE PERIOD FROM 1995 TO MID 2003. IN THE EVENT THAT THE REPORT IS NOT RECEIVED BY MARCH 16, 2004, SIX MONTHS FROM THE DATE OF THE NOTE, THE HUMAN RIGHTS COMMITTEE MAY INVOKE RULE 69A, GIVING IT THE AUTHORITY TO EXAMINE COMPLIANCE ON THE BASIS OF OTHER SOURCES OF INFORMATION. END SUMMARY.

3. MISSION RECEIVED A DIPLOMATIC NOTE DATED SEPTEMBER 17, 2003 FROM THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR) REMINDING US OF OUR OVERDUE SECOND PERIODIC REPORT REQUIRED UNDER ARTICLE 40 OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS (ICCPR). THE TEXT OF THE NOTE IS AS FOLLOWS:

BEGIN TEXT:
THE SECRETARIAT OF THE UNITED NATIONS (OFFICE OF THE

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 18 JUN 2009 200706444

HIGH COMMISSIONER FOR HUMAN RIGHTS) PRESENTS ITS COMPLIMENTS TO THE PERMANENT MISSION OF THE UNITED STATES TO THE UNITED NATIONS OFFICE AT GENEVA AND HAS THE HONOUR TO REFER TO PARAGRAPH 66 OF THE ANNUAL REPORT OF THE UN HUMAN RIGHTS COMMITTEE TO THE GENERAL ASSEMBLY (DOCUMENT A/56/40, VOL. I). PURSUANT TO THIS PARAGRAPH, THE GOVERNMENT OF THE UNITED STATES WAS SCHEDULED TO PRESENT ITS SECOND PERIODIC REPORT UNDER ARTICLE 40 OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS BY 7 SEPTEMBER 1998. SAID REPORT HAS NOT YET BEEN RECEIVED BY THE COMMITTEE.

THE HUMAN RIGHTS COMMITTEE RESPECTFULLY URGES THE GOVERNMENT OF THE UNITED STATES TO SUBMIT ITS SECOND PERIODIC REPORT UNDER ARTICLE 40 OF THE COVENANT AT THE GOVERNMENT'S EARLIEST CONVENIENCE, AND NOT LATER THAN 6 MONTHS FROM THE DATE OF THIS PRESENT NOTE. REFERENCE IS MADE TO RULE 69A OF THE COMMITTEE'S RULES OF PROCEDURE, WHICH ENABLES THE COMMITTEE TO CONSIDER THE MEASURES TAKEN BY THE STATE PARTY TO GIVE EFFECT TO THE RIGHTS PROTECTED UNDER THE COVENANT IN THE ABSENCE OF A REPORT. A COPY OF THE COMMITTEE'S RULES OF PROCEDURE IS ATTACHED FOR EASE OF REFERENCE.
END TEXT.

4. PERIODIC REPORTS ARE REQUIRED EVERY FIVE YEARS UNDER THE ICCPR. OUR SECOND REPORT WAS DUE ON SEPTEMBER 7, 1998 AND OUR THIRD REPORT WOULD NORMALLY BE DUE ON NOVEMBER 20, 2003. THE SECRETARIAT OF THE HUMAN RIGHTS COMMITTEE ADVISED THAT THE CURRENT REPORT, TO BE SUBMITTED BEFORE MARCH 16, 2004, SHOULD COVER THE PERIOD FROM 1995 TO MID-2003.

5. RULE 69A ALLOWS THE COMMITTEE TO CONSIDER A STATE'S COMPLIANCE WITH THE ICCPR IN CASES WHERE IT HAS NOT SUBMITTED A WRITTEN REPORT.

6. COMMENT AND ACTION REQUEST: WITHOUT OUR REPORT, THE COMMITTEE WILL RELY ONLY ON NGO AND OTHER OUTSIDE SOURCES OF INFORMATION IN THEIR CONSIDERATION OF OUR COMPLIANCE WITH THE ICCPR. POST REQUESTS GUIDANCE ON AN INTERIM RESPONSE TO THE COMMITTEE CONCERNING THE STATUS OF OUR SUBMISSION. END COMMENT.

7. POST WILL FAX A COPY OF THE NOTE AND RULE 69A TO TOM JOHNSON IN IO/SHA.
MOLEY

NNNN

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RELEASED IN FULL

PAGE 01 GENEVA 01726 01 OF 06 241926Z
ACTION IO-00

INFO	LOG-00	AF-00	AID-00	AMAD-00	EVG-00	CIAE-00	DODE-00
	WHA-00	SRPP-00	EAP-00	EB-00	EUR-00	UTED-00	H-01
	TEDE-00	INR-00	L-00	NEA-00	DCP-01	NSAE-00	NSCE-00
	OIC-02	OPIC-01	PRS-00	P-00	SP-00	SS-00	STR-00
	TEST-00	TRSE-00	USIE-00	SA-00	PRM-01	DRL-02	G-00
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FM USMISSION GENEVA
TO SECSTATE WASHDC 0999
INFO HUMAN RIGHTS COMMISSION COLLECTIVE

UNCLAS SECTION 01 OF 06 GENEVA 001726

FOR IO/SHA AND DRL/MLA

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: CHR VOTING RESULTS -- APRIL 23, 2001

1. THIS IS CHR DELEGATION CABLE 110.

2. ON APRIL 23, THE COMMISSION COMPLETED CONSIDERATION OF AGENDA ITEM 10 (ECONOMIC, SOCIAL AND CULTURAL RIGHTS) AND BEGAN CONSIDERATION OF AGENDA ITEM 11 (CIVIL AND POLITICAL RIGHTS). THE COMMISSION ADOPTED TWENTY TEXTS, INCLUDING SEVEN BY VOTE. PARAGRAPH VOTES WERE ALSO TAKEN ON TWO OF THE

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RESOLUTIONS, BEFORE THE OVERALL TEXTS WERE ADOPTED BY CONSENSUS.

AGENDA ITEM 10 - ECONOMIC, SOCIAL AND CULTURAL RIGHTS

--L.45 HUMAN RIGHTS AND EXTREME POVERTY (FRANCE)

ADOPTED WITHOUT A VOTE. SEE CHR 2000/12 (FRANCE), ADOPTED WITHOUT A VOTE.

--L.48 GLOBALIZATION (PAKISTAN)

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ADOPTED BY A VOTE OF 37-15(US)-1. U.S. CALLED FOR THE VOTE AND GAVE EOV BEFORE THE VOTE.

--L.50 ACCESS TO MEDICATION IN THE CONTEXT OF PANDEMICS SUCH AS HIV/AIDS (BRAZIL)(NEW)

ADOPTED BY A VOTE OF 52-0-1(US). U.S. GAVE EOV BEFORE THE VOTE.

--L.53 WOMEN'S EQUAL OWNERSHIP OF, ACCESS TO AND CONTROL OVER LAND AND THE EQUAL RIGHTS TO OWN PROPERTY AND TO ADEQUATE HOUSING (MEXICO)

ADOPTED WITHOUT A VOTE. U.S. CALL FOR A VOTE ON OP5 AND WAS REJECTED BY A VOTE OF 49-1(US)-3. SEE CHR 2000/13 (MEXICO), ACCEPTED WITHOUT A VOTE.

--L.54 ADVERSE EFFECTS OF THE ILLICIT MOVEMENT AND DUMPING OF TOXIC AND DANGEROUS PRODUCTS AND WASTES ON THE ENJOYMENT OF HUMAN RIGHTS (KENYA)

ADOPTED BY A VOTE OF 38-15(US). TEXT EXTENDED MANDATE OF SPECIAL RAPPORTEUR BY THREE YEARS. SEE CHR 2000/72 (AF COORDINATOR) ADOPTED BY VOTE 37-16(US).

--L.37 THE SOCIAL FORUM - SUB-COMMISSION DRAFT DECISION 2 (NORWAY)

NORWEGIAN AMENDMENT ADOPTED WITHOUT A VOTE.

--L.43 PROMOTION OF THE REALIZATION OF THE RIGHT TO DRINKING WATER AND SANITATION - SUB-COMMISSION DRAFT DECISION 3 (NORWAY)

NORWEGIAN AMENDMENT ADOPTED WITHOUT A VOTE.

AGENDA ITEM 11 - CIVIL AND POLITICAL RIGHTS

--L.8/REV.1 CIVIL AND POLITICAL RIGHTS: STRENGTHENING OF POPULAR PARTICIPATION, EQUITY, SOCIAL JUSTICE AND NON-DISCRIMINATION AS ESSENTIAL FOUNDATIONS OF DEMOCRACY.

ADOPTED BY A VOTE OF 28-4(US)-21. CUBAN PROPOSAL OF A SUB-AMENDMENT TO THE EU AMENDMENTS CHANGING "AFFIRMS" TO

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"NOTES" WAS ADOPTED BY A VOTE OF 24-17(US)-12.

--L/34 HUMAN RIGHTS AND TERRORISM (ALGERIA)

ADOPTED BY A VOTE OF 33-14(US)-6 (NO WESTERN CO-SPONSORS).
SEE CHR 200/30, ADOPTED BY VOTE 27-13-12.

--L/35 HOSTAGE-TAKING (RUSSIA)

ADOPTED WITHOUT A VOTE. SEE CHR 2000/29.

--L/38 INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY,
JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS (HUNGARY)

ADOPTED WITHOUT A VOTE. USDEL CO-SPONSORED. SEE CHR 2000/42.

--L/40 THE RIGHT TO RESTITUTION, COMPENSATION AND
REHABILITATION FOR VICTIMS OF GRAVE VIOLATIONS OF HUMAN
RIGHTS AND FUNDAMENTAL FREEDOMS (CHILE)

ADOPTED WITHOUT A VOTE. SEE CHR 2000/41.

--L/44 QUESTION OF ARBITRARY DETENTION (FRANCE)

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ACTION IO-00

INFO	LOG-00	AF-00	AID-00	AMAD-00	EVG-00	CIAE-00	DODE-00
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TO SECSTATE WASHDC 1000
INFO HUMAN RIGHTS COMMISSION COLLECTIVE

UNCLAS SECTION 02 OF 06 GENEVA 001726

FOR IO/SHA AND DRL/MLA

ADOPTED WITHOUT A VOTE. SEE CHR 2000/36.

--L.46 CONTINUING DIALOGUE ON MEASURES TO PROMOTE AND CONSOLIDATE DEMOCRACY

ADOPTED BY A VOTE OF 44(US)-0-9. (CUBAN AMENDMENT L.66 WAS WITHDRAWN; OP 5 WAS RETAINED BY A VOTE OF 37(US)-8-8.)

--L.49 IMPLEMENTATION OF THE DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF (IRELAND)

ADOPTED WITHOUT A VOTE. USDEL CO-SPONSORED.

--L.51 THE INCOMPATIBILITY BETWEEN DEMOCRACY AND RACISM (BRAZIL)

ADOPTED WITHOUT A VOTE. USDEL CO-SPONSORED.

--L.52 DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (COSTA RICA)

ADOPTED WITHOUT A VOTE. USDEL CO-SPONSORED.

--L.55 EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS (SWEDEN)

ADOPTED WITHOUT A VOTE. U.S. CHANGE ADOPTED FOR OP8 ("OBLIGATIONS ASSUMED UNDER"). USDEL GAVE EOP AT END OF THE AGENDA ITEM.

--L.57 QUESTION OF ENFORCED OR INVOLUNTARY DISAPPEARANCES

ADOPTED WITHOUT A VOTE. U.S. AMENDMENT TO DELETE OP12 (ESTABLISHMENT OF A WORKING GROUP) WAS REJECTED BY A VOTE OF 4(U.S., INDIA, JAPAN AND MALAYSIA)-34-15; U.S. AMENDMENT TO OP11 (DELETING REFERRAL OF THE REPORT OF THE INDEPENDENT

EXPERT TO THE WORKING GROUP) WAS REJECTED BY A VOTE OF 5(U.S., CANADA, INDIA, JAPAN AND KENYA)-37-11.

--L.56 THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION (CANADA)

CANADIAN AMENDMENT TO PP1 AS SUB-AMENDED BY CUBA ADOPTED WITHOUT A VOTE; CUBAN AMENDMENTS TO WITHDRAW PARAGRAPHS PP 3,4, 10 AND OP2, 14, AND 16(A) FAILED BY A VOTE OF 43(U.S.)-3-7. FOLLOWING ADOPTION OF THE CUBAN AMENDMENT, USDEL WITHDREW CO-SPONSORSHIP. RESOLUTION WAS VOTED AND ADOPTED BY A 44(US)-0-8. USDEL GAVE EOV.

3. THE FOLLOWING EXPLANATIONS OF VOTE AND EXPLANATIONS OF POSITION WERE DELIVERED BY THE U.S. DELEGATION DURING THE CONSIDERATION OF AGENDA ITEMS 10 AND 11.

BEGIN TEXT.

U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EXPLANATION OF VOTE
L.48, GLOBALIZATION AND HUMAN RIGHTS

AMBASSADOR GEORGE MOOSE
U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EOV: L. 48, GLOBALIZATION AND HUMAN RIGHTS
APRIL 23, 2001

UNCLASSIFIED

PAGE 04 GENEVA 01726 02 OF 06 241927Z
MR. CHAIRMAN:

THE UNITED STATES DOES NOT ACCEPT THE PREMISE THAT THE NET EFFECT WORLD-WIDE OF THE MANY PHENOMENA GROUPED UNDER THE TERM "GLOBALIZATION" HAS BEEN AN INCREASE IN POVERTY, NOR THAT GLOBALIZATION HAS HAD A BROAD NEGATIVE IMPACT ON THE ENJOYMENT OF HUMAN RIGHTS. IN ITS NON-ECONOMIC ASPECTS, THE VASTLY INCREASED INFORMATION FLOWS FACILITATED BY GLOBALIZATION HAVE ALLOWED A MUCH BRIGHTER LIGHT TO BE FOCUSED ON HUMAN RIGHTS ABUSES AROUND THE WORLD, BRINGING GREATER INTERNATIONAL ATTENTION THAN EVER BEFORE.

AS FOR GLOBALIZATION'S ECONOMIC ASPECTS, THE PAST THREE DECADES HAVE SEEN MORE PEOPLE RISE OUT OF ABSOLUTE POVERTY THAN IN ANY COMPARABLE PERIOD IN THE WORLD'S HISTORY. THE COUNTRIES THAT HAVE SUCCEEDED BEST AT HELPING THEIR CITIZENS ESCAPE FROM POVERTY HAVE BEEN THOSE WITH EFFECTIVE GOVERNMENTS THAT LARGELY EMBRACED FREER MARKETS, FREER TRADE, AND TECHNOLOGICAL CHANGE.

IT IS CERTAINLY TRUE THAT GLOBALIZATION EMBODIES CHANGE, THAT CHANGE PRESENTS CHALLENGE TO ANY SOCIETY, AND THAT AMONG THESE CHALLENGES IS THE PROBLEM OF HELPING THOSE WHO MAY FIND IT DIFFICULT TO ADAPT FOR WHATEVER REASON. NATIONAL POLICIES

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ACTION IO-00

INFO	LOG-00	AF-00	AID-00	AMAD-00	EVG-00	CIAE-00	DODE-00
	WHA-00	SRPP-00	EAP-00	EB-00	EUR-00	UTED-00	H-01
	TEDE-00	INR-00	L-00	NEA-00	DCP-01	NSAE-00	NSCE-00
	OIC-02	OPIC-01	PRS-00	P-00	SP-00	SS-00	STR-00
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R 241927Z APR 01
FM USMISSION GENEVA
TO SECSTATE WASHDC 1001
INFO HUMAN RIGHTS COMMISSION COLLECTIVE

UNCLAS SECTION 03 OF 06 GENEVA 001726

FOR IO/SHA AND DRL/MLA

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: CHR VOTING RESULTS -- APRIL 23, 2001

PROMOTING PARTICIPATION IN GLOBALIZATION'S OPPORTUNITIES AND PROVIDING SAFETY NETS FOR THOSE WHO MAY BE ADVERSELY AFFECTED ARE VITAL IN THIS REGARD.

THE LESSONS OF RECENT DECADES ARE CLEAR, HOWEVER. THE DEVELOPING COUNTRIES WITH THE FASTEST GROWTH RATES FOR EXTENDED PERIODS HAVE BEEN THOSE THAT ARE MOST INTEGRATED IN

PAGE 02 GENEVA 01726 03 OF 06 241927Z
THE WORLD ECONOMY, AND THE MOST INVOLVED IN THE PROCESS OF GLOBALIZATION. FAILURE TO TAKE ADVANTAGE OF NEW OPPORTUNITIES, EVEN WHERE THESE ARE ACCOMPANIED BY CHALLENGES, WILL CONDEMN POPULATIONS TO FURTHER ECONOMIC MARGINALIZATION AND STAGNATION.

THIS REALITY IS NOT REFLECTED IN THE CURRENT DRAFT. FOR

THESE REASONS, AMONG OTHERS, THE U.S. OPPOSES THIS RESOLUTION.

THANK YOU.

U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EXPLANATION OF VOTE
L.50, ACCESS TO MEDICATIN IN THE CONTEXT OF
PANDEMICS SUCH AS HIV/AIDS

AMBASSADOR GEORGE MOOSE
U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EOV: L.50
ACCESS TO MEDICATION IN THE CONTEXT OF PANDEMICS SUCH AS HIV/AIDS

MR. CHAIRMAN:

THE UNITED STATES IS STRONGLY COMMITTED TO ADDRESSING THE AIDS PANDEMIC INTERNATIONALLY, INCLUDING ACCESS TO TREATMENT AND CARE. FOR THAT REASON, WE WORKED HARD WITH BRAZIL AND OTHER DELEGATIONS TO TRY TO COME TO AGREEMENT ON AN

ACCEPTABLE TEXT. WE CERTAINLY UNDERSTAND AND APPRECIATE THE SENTIMENTS THAT HAVE MOTIVATED THIS INITIATIVE. WE VERY MUCH REGRET, HOWEVER, THAT, DESPITE EXTENSIVE DIALOGUE REGARDING THIS VERY COMPLEX ISSUE, WE ARE UNABLE TO JOIN CONSENSUS ON THIS TEXT.

FROM THE PERSPECTIVE OF GOOD PUBLIC HEALTH PRACTICE, WE BELIEVE THAT THIS RESOLUTION IS FLAWED IN A NUMBER OF WAYS. AS WRITTEN THE RESOLUTION WOULD LIMIT THE RIGHTS OF STATES TO SET PRIORITIES WITHIN THEIR NATIONAL POLICIES AND STRATEGIES FOR DEALING WITH SUCH PANDEMICS. WE BELIEVE THAT STATES MUST HAVE THE LATITUDE TO DEVELOP BALANCED STRATEGIES THAT INCLUDE PREVENTION, COUNSELING AND RELATED SUPPORT SERVICES, AS WELL AS CARE, INCLUDING ACCESS TO DRUGS.

WE NOTE THAT UNAIDS - THE UN'S UMBRELLA ORGANIZATION FOR RESPONDING TO THE HIV/AIDS CRISIS - WAS ESTABLISHED TO DE-MEDICALIZE HIV/AIDS AND TO FOCUS ON THE NEED FOR A MULTI-DIMENSIONAL APPROACH TO THIS PANDEMIC. IT IS CLEAR THAT AN OVER-EMPHASIS ON USE OF PHARMACEUTICALS, NO MATTER HOW WELL INTENTIONED, DETRACTS FROM THE MORE FUNDAMENTAL NEED FOR PRIMARY PREVENTION.

HIV/AIDS IS A HORRIBLE DISEASE. ONCE STARTED, MEDICINES MUST

BE USED CONSISTENTLY DAY AFTER DAY FOR THE REST OF A PATIENT'S LIFE. IF STOPPED, WHEN THE PATIENT FEELS BETTER, THE DISEASE RETURNS VERY STRONGLY. THEREFORE, FOR TREATMENT TO BE EFFECTIVE, IT IS ESSENTIAL THAT STATES PUT IN PLACE THE INFRASTRUCTURE TO ENSURE THAT ANTI-RETROVIRALS ARE USED APPROPRIATELY.

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PAGE 04 GENEVA 01726 03 OF 06 241927Z
THE RESOLUTION CALLS INTO QUESTION THE LEGITIMATE RESPONSIBILITY OF NATIONAL GOVERNMENTS TO ASSURE THE EFFECTIVENESS AND SAFETY OF PHARMACEUTICAL PRODUCTS FOR USE IN PANDEMICS. FURTHER, IT APPEARS TO QUESTION THE VALIDITY OF INTERNATIONALLY AGREED PROTECTIONS OF INTELLECTUAL PROPERTY RIGHTS. IN SO DOING, IT COULD WELL HAVE THE UNINTENDED CONSEQUENCE OF DISCOURAGING INVESTMENT IN THE IMPORTANT RESEARCH DESPERATELY NEEDED TO FIND THE CURES OF THE FUTURE. NOR DOES THIS RESOLUTION CONSIDER THE POTENTIAL FOR OTHER UNINTENDED CONSEQUENCES, INCLUDING THE EMERGENCE OF MORE VIGOROUS AND DRUG RESISTANT FORMS OF THE HIV VIRUS. SIMPLY PUT, THIS IS BAD PUBLIC HEALTH POLICY.

THIS RESOLUTION IS, IN ESSENCE, A FLAWED HEALTH DOCUMENT, NOT A HUMAN RIGHTS DOCUMENT. COMPLEX HEALTH MATTERS ARE BEST DEALT WITH BY THE UN ORGANIZATION THAT HAS THE TECHNICAL COMPETENCE IN THOSE MATTERS -- THE WORLD HEALTH ORGANIZATION. THE 191 MEMBER STATES THAT COMPRISE THE WORLD HEALTH ASSEMBLY WILL BE MEETING HERE IN GENEVA IN THREE WEEKS TIME, AND BOTH HIV/AIDS AND WHO'S REVISED DRUG STRATEGY WILL BE ON THE AGENDA. THAT IS THE MOST APPROPRIATE VENUE FOR HEALTH MATTERS.

MY GOVERNMENT IS ALSO CONCERNED BY REFERENCES WHICH APPEAR TO

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UNCLASSIFIED PTQ3122

PAGE 01 GENEVA 01726 04 OF 06 241927Z
ACTION IO-00

INFO	LOG-00	AF-00	AID-00	AMAD-00	EVG-00	CIAE-00	DODE-00
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	TEDE-00	INR-00	L-00	NEA-00	DCP-01	NSAE-00	NSCE-00
	OIC-02	OPIC-01	PRS-00	P-00	SP-00	SS-00	STR-00
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	SAS-00	SWCI-00	/008W				

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R 241927Z APR 01

FM USMISSION GENEVA
TO SECSTATE WASHDC 1002
INFO HUMAN RIGHTS COMMISSION COLLECTIVE

UNCLAS SECTION 04 OF 06 GENEVA 001726

FOR IO/SHA AND DRL/MLA

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: CHR VOTING RESULTS -- APRIL 23, 2001

BE AIMED AT CREATING A NEW CATEGORY OF RIGHTS, SUCH AS THE REFERENCE TO THE RIGHT TO THE "HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH." THE UNITED STATES DOES NOT SUPPORT THE CREATION OF LEGALLY ENFORCEABLE ENTITLEMENTS OR THE ESTABLISHMENT OF JUDICIAL OR ADMINISTRATIVE REMEDIES AT THE NATIONAL OR INTERNATIONAL LEVELS TO ADJUDICATE SUCH PRESUMED RIGHTS.

THE U.S. GOVERNMENT IS THE WORLD'S LEADING PROVIDER OF INTERNATIONAL ASSISTANCE FOR THE PURPOSE OF PROVIDING THAT PEOPLE LIVING WITH HIV/AIDS RECEIVE TREATMENT AND CARE, INCLUDING PHARMACEUTICALS. WE HAVE PLAYED A LEADING ROLE IN THE DEVELOPMENT OF INTERNATIONAL STRATEGIES TO COMBAT THE SCOURGE OF THIS DISEASE. WE CANNOT, HOWEVER, SUPPORT A FLAWED RESOLUTION WHOSE UNINTENDED CONSEQUENCES COULD PROVE EXTREMELY HARMFUL TO OUR COLLECTIVE EFFORTS.

FOR THESE REASONS, AND OTHERS, MY DELEGATION WILL ABSTAIN IN THE VOTE ON THIS RESOLUTION.

THANK YOU.

U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EXPLANATION OF POSITION
L.53, WOMEN'S EQUAL OWNERSHIP OF, ACCESS TO AND CONTROL OVER LAND

AMBASSADOR GEORGE MOOSE
U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EOP: L.53, WOMEN'S EQUAL OWNERSHIP OF, ACCESS TO AND CONTROL OVER LAND
APRIL 23, 2001

THE UNITED STATES REGRETS THAT IT IS FORCED TO CALL FOR A
UNCLASSIFIED

PAGE 03 GENEVA 01726 04 OF 06 241927Z
VOTE ON OP 5 OF RESOLUTION L. 53. IT IS CLEAR THAT OUR MODEST, TECHNICAL AMENDMENT DOES NOT HAVE THE SUPPORT OF THE MEMBERS OF THE COMMISSION. WE REGRET THAT. WE THINK IT IS A MISTAKE FOR THIS BODY, OR ANY U.N. BODY, TO ENGAGE IN THE PRACTICE OF REWRITING THE HISTORICAL RECORD.

THAT SAID, GIVEN THE OPPOSITION TO OUR AMENDMENT, WE HEREBY WITHDRAW IT. HOWEVER, UNDER THE CIRCUMSTANCES, WE FEEL OBLIGED TO REQUEST A VOTE ON OP 5. ONCE AGAIN, WITH RESPECT TO OP 5, COMMISSION ON THE STATUS OF WOMEN RESOLUTION 42-1 -- REAFFIRMED IN THIS PARAGRAPH - INCLUDES NO MENTION OF THE RIGHT TO ADEQUATE HOUSING.

FURTHERMORE, THE REFERENCE TO THE RIGHT OF ADEQUATE HOUSING IS A MISSTATEMENT OF INTERNATIONAL HUMAN RIGHTS LAW. WE HAVE SOUGHT IN NEGOTIATIONS BEFORE TODAY TO AMEND THIS RESOLUTION TO MAKE IT CONSISTENT WITH THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, AS WELL AS WITH THE HUMAN RIGHTS AND HOUSING RESOLUTION ALSO BEING ADOPTED UNDER THIS AGENDA ITEM. WE STRONGLY SUPPORT, MOREOVER, THE PROPOSITION THAT WOMEN'S RIGHTS IN THE AREA OF HOUSING SHOULD BE EQUAL TO THOSE OF MEN.

THIS, HOWEVER, CANNOT BE ACHIEVED THROUGH MISSTATEMENT OF ACCEPTED INTERNATIONAL PRINCIPLES OR INCORRECT CITATIONS OF RESOLUTIONS ADOPTED BY OTHER BODIES. IT IS FOR THESE REASONS THAT WE ARE UNABLE TO CO-SPONSOR THIS RESOLUTION.

THANK YOU.

U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
UNCLASSIFIED

PAGE 04 GENEVA 01726 04 OF 06 241927Z
EXPLANATION OF VOTE
L.34, HUMAN RIGHTS AND TERRORISM

AMBASSADOR GEORGE MOOSE
U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EOV: L.34, HUMAN RIGHTS AND TERRORISM
APRIL 23, 2001

MR. CHAIRMAN:

RECENT EVENTS HAVE SHOWN THAT TERRORISM CONTINUES TO POSE CLEAR AND PRESENT DANGER TO THE INTERNATIONAL COMMUNITY. THE ATTACK ON THE U.S.S. COLE AND THE RASH OF TERRORIST ATTACKS AROUND THE WORLD ARE ONLY THE LATEST IN A SERIES OF EVENTS THAT DEMONSTRATE CLEARLY THAT TERRORISTS HAVE NO RESPECT FOR HUMAN LIFE. THE UNITED STATES HAS A STRONG AND ABIDING COMMITMENT TO COMBATING TERRORISM, WHICH INCLUDES COOPERATING WITH THE APPROPRIATE MECHANISMS ESTABLISHED BY THE INTERNATIONAL COMMUNITY.

WE REGRET, THEREFORE, THAT WE ARE OBLIGED TO VOTE AGAINST THIS RESOLUTION. OUR REASON IS THAT THE SPONSORS HAVE INCLUDED LANGUAGE THAT GRANTS TERRORISTS AND TERRORIST

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PAGE 01 GENEVA 01726 05 OF 06 241927Z
ACTION IO-00

INFO	LOG-00	AF-00	AID-00	AMAD-00	EVG-00	CIAE-00	DODE-00
	WHA-00	SRPP-00	EAP-00	EB-00	EUR-00	UTED-00	H-01
	TEDE-00	INR-00	L-00	NEA-00	DCP-01	NSAE-00	NSCE-00
	OIC-02	OPIC-01	PRS-00	P-00	SP-00	SS-00	STR-00
	TEST-00	TRSE-00	USIE-00	SA-00	PRM-01	DRL-02	G-00
	SAS-00	SWCI-00	/008W				

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R 241927Z APR 01
FM USMISSION GENEVA
TO SECSTATE WASHDC 1003
INFO HUMAN RIGHTS COMMISSION COLLECTIVE

UNCLAS SECTION 05 OF 06 GENEVA 001726

FOR IO/SHA AND DRL/MLA

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: CHR VOTING RESULTS -- APRIL 23, 2001

ORGANIZATIONS A MEASURE OF LEGITIMACY BY EQUATING THEIR CONDUCT WITH THAT OF STATES. WE BELIEVE THAT THE BASIC FUNCTION OF THE COMMISSION IS TO SET HUMAN RIGHTS STANDARDS THAT ARE BINDING UPON STATES AND TO REVIEW STATES' COMPLIANCE WITH THOSE STANDARDS. TERRORISTS ARE NOT STATE ACTORS, BUT CRIMINALS WHO BEAR INDIVIDUAL CRIMINAL RESPONSIBILITY FOR THEIR ACTIONS. THE PERPETUATION OF THIS UNFORTUNATE

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CONFUSION ADDS NOTHING TO THE ABILITY, OR THE OBLIGATION, OF MEMBER STATES TO COOPERATE IN THE EFFORT TO COMBAT TERRORISM.

FOR THIS REASON, THE UNITED STATES BELIEVES THAT THE SUBJECT OF TERRORISM IS BEST ADDRESSED IN OTHER FORA, SUCH AS THE SIXTH COMMITTEE OF THE U.N. GENERAL ASSEMBLY.

THANK YOU.

U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EXPLANATION OF POSITION
L.47, TORTURE AND OTHER CRUEL, UNHUMAN OR
DEGRADING TREATMENT OR PUNISHMENT

AMBASSADOR SHIRIN TAHIR-KHELI
U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EOP: L.47, TORTURE AND OTHER CRUEL, UNHUMAN OR
DEGRADING TREATMENT OR PUNISHMENT
APRIL 23, 2001

MR. CHAIRMAN:

THE COMMITMENT OF THE UNITED STATES TO THE GOALS OF THIS RESOLUTION REMAIN AS STRONG AS EVER, AND WE ARE GRATEFUL TO DENMARK FOR THE LEADERSHIP IT HAS SHOWN ON THIS ISSUE.

WHILE WE REMAIN CONCERNED ABOUT THIS ASPECT OF TORTURE, WE BELIEVE THAT IT IS UNREASONABLE TO CALL FOR LEGISLATIVE

MEASURES TO PREVENT THE PRODUCTION OF THESE DEVICES WHEN THERE ARE CLEARLY MANY PROBLEMS DEFINING PRECISELY WHAT THESE DEVICES ARE.

THUS, WE HAVE WITHDRAWN OUR CO-SPONSORSHIP OF L.47 FOR ONE REASON ONLY: WE OPPOSE THE INCLUSION IN OP 8 OF THE REFERENCE TO THE PRODUCTION OF TORTURE DEVICES.

THANK YOU.

U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EXPLANATION OF POSITION
L.56, FREEDOM OF OPINION AND EXPRESSION

STEVEN SOLOMON
U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EOP:L.56, FREEDOM OF OPINION AND EXPRESSION
APRIL 23, 2001

MR. CHAIRMAN:

IT IS WITH REGRET THAT WE WITHDRAW OUR COSPONSORSHIP FROM L.56, THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION. THE ACCEPTANCE OF THE AMENDMENT WHICH REFERS TO ARTICLE 4 OF THE CONVENTION ON THE ELIMINATION OF RACIAL DISCRIMINATION CAUSES US TO DO SO.

WE OBJECT IN PRINCIPLE TO THE LANGUAGE TO THE EXTENT IT PURPORTS TO BIND STATES TO TREATY PROVISIONS WHETHER OR NOT

THEY HAVE BEEN ACCEPTED BY A PARTICULAR STATE.

LET US ALSO ADD THAT THE CONSTITUTION AND LAWS OF THE UNITED STATES CONTAIN EXTENSIVE PROTECTIONS OF INDIVIDUAL FREEDOM OF SPEECH, EXPRESSION AND ASSOCIATION. AS THE UNITED STATES MADE CLEAR UPON ITS RATIFICATION OF THE CONVENTION, THE UNITED STATES DOES NOT ACCEPT ANY OBLIGATION UNDER THIS CONVENTION, IN PARTICULAR UNDER ARTICLE 4, TO RESTRICT THOSE RIGHTS, THROUGH THE ADOPTION OF LEGISLATION OR ANY OTHER MEASURES, TO THE EXTENT THAT THEY ARE PROTECTED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES.

OUR COMMITMENT TO THE GOALS OF THIS RESOLUTION AS TABLED BY CANADA REMAINS AS STRONG AS EVER.

WE WOULD ALSO LIKE TO RESTATE OUR GRATITUDE TO CANADA FOR ITS EFFORTS ON AND COMMITMENT TO THIS ISSUE.

THANK YOU.

U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EXPLANATION OF POSITION
L. 57, ENFORCED OR INVOLUNTARY DISAPPEARANCES

ACTION IO-00

INFO	LOG-00	AF-00	AID-00	AMAD-00	EVG-00	CIAE-00	DODE-00
	WHA-00	SRPP-00	EAP-00	EB-00	EUR-00	UTED-00	H-01
	TEDE-00	INR-00	L-00	NEA-00	DCP-01	NSAE-00	NSCE-00
	OIC-02	OPIC-01	PRS-00	P-00	SP-00	SS-00	STR-00
	TEST-00	TRSE-00	USIE-00	SA-00	PRM-01	DRL-02	G-00
	SAS-00	SWCI-00	/008W				

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R 241927Z APR 01
FM USMISSION GENEVA
TO SECSTATE WASHDC 1004
INFO HUMAN RIGHTS COMMISSION COLLECTIVE

UNCLAS SECTION 06 OF 06 GENEVA 001726

FOR IO/SHA AND DRL/MLA

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: CHR VOTING RESULTS -- APRIL 23, 2001

MICHAEL DENNIS
U.S. DELEGATION, UN COMMISSION ON HUMAN RIGHTS
EOP: L. 57, ENFORCED OR INVOLUNTARY DISAPPEARANCES
APRIL 23, 2001

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PAGE 02 GENEVA 01726 06 OF 06 241928Z
MR. CHAIRMAN:
THE UNITED STATES IS PLEASED TO SUPPORT THE RENEWAL IN L.57 OF THE MANDATE OF THE WORKING GROUP ON ENFORCED AND INVOLUNTARY DISAPPEARANCES AND TO COMMEND THEM ON THEIR EXCELLENT WORK IN SUPPORT OF THE FAMILIES OF THE DISAPPEARED.

HOWEVER, MR. CHAIRMAN, WE MUST ALSO RESTATE OUR OPPOSITION TO THE ESTABLISHMENT OF AN INTER-SESSIONAL, OPEN-ENDED WORKING GROUP AS PROPOSED IN OP 12 OF THE REVISED TEXT IN THE SEPARATE DOCUMENT. ALTHOUGH WE UNDERSTAND THE MOTIVATIONS OF THE SUPPORTERS OF THIS IDEA AND THE IMPORTANCE OF MECHANISMS DESIGNED TO ADDRESS ENFORCED OR INVOLUNTARY DISAPPEARANCES, IN OUR VIEW THIS WOULD CLEARLY DUPLICATE WORK NOW BEING HANDLED BY OTHER INTERNATIONAL INSTRUMENTS AND BY TWO EXISTING TREATY BODIES.

MR. CHAIRMAN, WE NOTE FURTHER THAT THERE IS A BASIC CONTRADICTION IN THE PROPOSALS CONTAINED IN OP 11 AND OP 12. OP 11 CALLS FOR THE APPOINTMENT OF AN INDEPENDENT EXPERT TO

EXAMINE WHETHER THERE EXIST "ANY GAPS" IN THE CURRENT PROTECTIONS WITH REGARD TO ENFORCED OR INVOLUNTARY DISAPPEARANCES. OP 12 WOULD CREATE, SIMULTANEOUSLY, A NEW WORKING GROUP THAT WOULD BEGIN WORK ON A NEW, LEGALLY-BINDING INSTRUMENT EVEN BEFORE KNOWING WHETHER THE STUDY OF THE INDEPENDENT EXPERT REVEALS ANY NEED FOR SUCH AN INSTRUMENT. CLEARLY, THE PROPOSED CREATION OF A WORKING GROUP IS, AT BEST, PREMATURE.

FOR THIS REASON, MR. CHAIRMAN, WE PROPOSE AN AMENDMENT DELETING OP 12, WHICH WOULD ESTABLISH THE WORKING GROUP.

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PAGE 03 GENEVA 01726 06 OF 06 241928Z
ADDITIONALLY, THE U.S. PROPOSES A TECHNICAL AMENDMENT TO OP 11 TO DELETE THE PHRASE IN THE LAST LINE OF THE REVISED TEXT: AND TO THE FIRST SESSION OF THE WORKING GROUP ESTABLISHED UNDER PARAGRAPH 12. THE INDEPENDENT EXPERT SHOULD SUBMIT HIS REPORT TO THE COMMISSION ON HUMAN RIGHTS SO THAT A DECISION CAN BE TAKEN BY THIS BODY ON NEXT STEPS.

TO REPEAT, MR. CHAIRMAN, THE UNITED STATES IS PROPOSING AN AMENDMENT DELETING OP 12 CALLING FOR THE PREMATURE ESTABLISHMENT OF THE WORKING GROUP. SECOND, WE ARE CALLING FOR AN AMENDMENT TO OP 11 TO DELETE THE WORDS: AND TO THE FIRST SESSION OF THE WORKING GROUP ESTABLISHED UNDER PARAGRAPH 12. AGAIN, THE INDEPENDENT EXPERT SHOULD REPORT TO THE COMMISSION.

THANK YOU, MR. CHAIRMAN.

END TEXT.
MOOSE

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<< END OF DOCUMENT >>

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PAGE 01 GENEVA 04616 110953Z
ACTION IO-00

INFO	LOG-00	AF-00	AID-00	AMAD-00	CIAE-00	DODE-00	WHA-00
	SRPP-00	EAP-00	EB-00	EUR-00	UTED-00	H-01	TEDE-00
	INR-00	LAB-01	L-00	NEA-00	NSAE-00	NSCE-00	OIC-02
	OPIC-01	PRS-00	P-00	SP-00	SSO-00	SS-00	STR-00
	TRSE-00	USIE-00	SA-00	IIP-00	PRM-01	DRL-02	G-00
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TO SECSTATE WASHDC IMMEDIATE 6208
INFO USMISSION USUN NEW YORK PRIORITY

UNCLAS GENEVA 004616

DEPT. FOR IO/ESA AND L/HRR

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1, US
SUBJECT: CHR RESOLUTION 2000/37 - QUESTION ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

1. MISSION HAS RECEIVED THE FOLLOWING NOTE VERBALE NO. 3301 DATED AUGUST 8, 2000 REQUESTING THE USG TO PROVIDE ANY INFORMATION IT MAY WISH TO TRANSMIT TO THE OHCHR ON CHR RESOLUTION 2000/37, IF POSSIBLE, BY SEPTEMBER 30, 2000.

BEGIN TEXT:

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PAGE 02 GENEVA 04616 110953Z

THE SECRETARY-GENERAL OF THE UNITED NATIONS PRESENTS ITS COMPLIMENTS TO YOUR GOVERNMENT AND HAS THE HONOUR TO DRAW ITS ATTENTION TO RESOLUTION 2000/37 ADOPTED BY THE COMMISSION ON HUMAN RIGHTS ON 20 APRIL 2000 ENTITLED "QUESTION ON ENFORCED OR INVOLUNTARY DISAPPEARANCES."

IN ITS OPERATIVE PARAGRAPH 9, THE COMMISSION ON HUMAN RIGHTS REQUESTED THE SECRETARY-GENERAL TO ENSURE THE WIDE DISSEMINATION OF THE DRAFT INTERNATIONAL CONVENTION OF THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES (E/CN 4/SUB. 2/1998/19, ANNEX) TRANSMITTED BY THE SUB-COMMISSION IN ITS RESOLUTION 1998/25 OF 26 AUGUST 1998, ASKING STATES, INTERNATIONAL ORGANIZATIONS AND NON-GOVERNMENTAL

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 18 JUN 2009 200706444

ORGANIZATIONS TO SUBMIT THEIR VIEWS AND COMMENTS, AS A MATTER OF HIGH PRIORITY, ON THE DRAFT INTERNATIONAL CONVENTION, ON THE FOLLOW-UP THERETO, AND IN PARTICULAR, ON WHETHER AN INTERSESSIONAL WORKING GROUP SHOULD BE SET UP TO CONSIDER THE DRAFT INTERNATIONAL CONVENTION. A COPY OF THE DRAFT INTERNATIONAL CONVENTION IS ATTACHED HEREWITH.

THE SECRETARY-GENERAL WOULD BE GRATEFUL IF YOUR GOVERNMENT COULD FORWARD TO THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, ACTIVITIES AND PROGRAMMES BRANCH, UNITED NATIONS OFFICE AT GENEVA, CH 1211 10, IF POSSIBLE BY 30 SEPTEMBER 2000, ANY INFORMATION IT MAY WISH TO PROVIDE ON THE MATTER.

8 AUGUST 2000

END OF TEXT.

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PAGE 03 GENEVA 04616 110953Z

2. MISSION WILL TRANSMIT BY POUCH NOTE VERBALE AND ANNEX TO IO/ESA.

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<< END OF DOCUMENT >>

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ACTION IO-00

INFO	LOG-00	EEB-00	AF-00	AID-00	AMAD-00	CIAE-00	INL-00
	DODE-00	WHA-00	EAP-00	EUR-00	UTED-00	TEDE-00	INR-00
	LAB-01	L-00	NEA-00	NSAE-00	NSCE-00	OIC-00	OIG-00
	PA-00	GIWI-00	PRS-00	P-00	SP-00	SS-00	STR-00
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FM USMISSION GENEVA
TO SECSTATE WASHDC 5920
INFO USMISSION USUN NEW YORK

UNCLAS GENEVA 000036

STATE FOR IO-RHS, DRL-MLGA, L-HRR

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: Working Group on Enforced or Involuntary Disappearances

1. Mission has received a communication from the Secretary, a.i. on the Working Group on Enforced or Involuntary. This communication is number 04 on the Geneva 2008 Communications Log.

2. Begin text of letter. Excellency, At the request and on behalf of the Chairman of the Working Group on Enforced or Involuntary Disappearances, I have the honour to communicate the following letter addressed to you:
"Excellency, I have the honour to write to you on behalf of the Working Group on Enforced or Involuntary Disappearances, which held its 83rd session from 21 to 30 November 2007 at the Office of the United Nations High Commissioner for Human Rights in Geneva.

In the course of the session, the Working Group decided to inform your Government of general allegations it has received in relation to the implementation of the Declaration on the Protection of All Persons from Enforced Disappearances in your country. A summary is provided in Annex I. Any comments regarding these general allegations should be received by 1 October 2008 in order to be included in the Working Group's annual report.

I would like to take this opportunity to remind your Government that the Working Group will hold its 84th session at the United Nations Office in Geneva from 10 to 14 March 2008. As such, the Working Group would be grateful if any written information which your Government wishes to submit for the Working Group's consideration, could be received by 8 February 2008. Information may be submitted at any time of the year, and will be reviewed as soon as it can be processed.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 18 JUN 2009 200706444

In conformity with its usual practice, the Working Group is prepared to receive representatives of interested Governments during the first three days of its next session, from 10 to 11 March 2008. Should your Government wish to be represented at the forthcoming session, please contact the Working Group's secretariat at the United Nations Office of the High Commissioner for Human Rights in Geneva (tel: 022 917 9176, fax: 022 917 9006) to schedule an appointment with the Working Group. The dates of subsequent sessions for the coining year may also be requested or found on the WGEID webpage: http://www.ohchr.org/english/issues/disappear. I remain, Excellency, Yours sincerely, Santiago Corcuera Chairman-Rapporteur Working Group on Enforced or Involuntary Disappearances'

83rd Session General Allegation: USA
The Working Group received information from non-governmental organizations concerning reported obstacles encountered in the implementation of the Declaration on the Protection of All Persons from Enforced Disappearance.

It was reported that one case of extraordinary rendition, which occurred in Italy on 17 February 2003, involved an enforced disappearance for a certain period of time. The Working Group was informed that this case took place in the context of extraordinary rendition programmes that were allegedly carried out by the United States of America together with Egypt, where the person was secretly imprisoned and reportedly tortured.
End text of letter

NNNN

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PAGE 01 GENEVA 01681 01 OF 02 191736Z
ACTION IO-00

INFO	LOG-00	AF-00	AID-00	AMAD-00	CIAE-00	DODE-00	WHA-00
	SRPP-00	EAP-00	EB-00	EUR-00	UTED-00	H-01	TEDE-00
	INR-00	LAB-01	L-00	NEA-00	NSAE-00	NSCE-00	OIC-02
	OPIC-01	PRS-00	P-00	SP-00	IRM-00	SS-00	STR-00
	TEST-00	TRSE-00	USIE-00	SA-00	PRM-01	DRL-02	G-00
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R 191735Z APR 01
FM USMISSION GENEVA
TO SECSTATE WASHDC 0934

UNCLAS SECTION 01 OF 02 GENEVA 001681

DEPT FOR IO/SHA, DRL/MLA

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: CHR 57: GUIDANCE ON DRAFT RESOLUTION ON INVOLUNTARY DISAPPEARANCES

REF: A) SECSTATE 60693 B) GENEVA FAX NO. 191 DATED 4/19/01

1. THIS IS CHR DEL CABLE NUMBER 102.

2. THE FRENCH DELEGATION, AS SPONSORS OF ABOVE-REFERENCED RESOLUTION, CIRCULATED REV. 3 AT DRAFTING SESSION THIS MORNING. REV. 3 PROPOSES (A) THE CREATION, AT NEXT YEAR'S

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UNHRC, OF "AN INTER-SESSIONAL OPEN ENDED WORKING GROUP . . . WITH THE MANDATE TO ELABORATE A DRAFT LEGALLY BINDING NORMATIVE INSTRUMENT FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES" (OP 11) AND (B) THE APPOINTMENT OF "AN INDEPENDENT EXPERT WITH THE MANDATE TO PREPARE AN EXHAUSTIVE EXAMINATION OF THE EXISTING LEGAL NORMS AND OF THE MOST RECENT EVOLUTIONS IN THE INTERNATIONAL AND REGIONAL FRAMEWORK IN THIS MATTER." (OP12). THIS IS VIEWED BY THE GRULAC AS A "COMPROMISE" FROM THEIR ORIGINAL POSITION, WHICH CALLED FOR THE CREATION OF A WORKING GROUP, BUT NOT THE APPOINTMENT OF AN EXPERT. THE NOTION OF AN INDEPENDENT EXPERT WAS PROPOSED BY THE NEW ZEALAND AND AUSTRALIAN DELEGATIONS AS AN ALTERNATIVE TO THE CREATION OF AN

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 24 JUL 2009 200706444

INTER-SESSIONAL OPEN-ENDED WORKING GROUP. THE CURRENT DRAFT COMBINES BOTH CONCEPTS, AND THEREFORE PRESENTS AN EVEN MORE PROBLEMATIC RESOLUTION THAN THE ONE ORIGINALLY INTRODUCED BY THE FRENCH, I.E., A RESOLUTION THAT CREATES A WORKING GROUP TO DRAFT TREATY LANGUAGE ON DISAPPEARANCES WHILE, AT THE SAME TIME, AN INDEPENDENT EXPERT IS IN THE PROCESS OF EXAMINING THE NEED FOR ADDITIONAL INSTRUMENTS. THIS COUNTER-INTUITIVE PROBLEM WAS NOTED BY SEVERAL DELEGATIONS, INCLUDING INDIA, WHICH POINTED OUT THAT THERE IS THE POSSIBILITY THAT THE EXPERT MAY CONCLUDE THAT INTERNATIONAL LAW IS SUFFICIENTLY WELL-DEVELOPED AND DOES NOT REQUIRE ANOTHER TREATY OR TREATY BODY. THE FRENCH DELEGATION ADMITTED THAT THE LATEST APPROACH WAS NOT THE MOST "CARTESIAN" SOLUTION, BUT SEEMS TO BE THE BEST WAY TO BRIDGE THE GAP BETWEEN THE GRULAC AND THOSE OPPOSING THE CREATION OF THE INTER-SESSIONAL WORKING GROUP.

3. THE NEW ZEALAND DELEGATION, SUPPORTED BY INDIA, THAILAND,

U.K., NORWAY, PORTUGAL, CANADA, AND EGYPT, OFFERED ALTERNATIVE LANGUAGE FOR OP 11 AND OP 12 (SEE SEPARATE FAX). ITS PROPOSAL WOULD APPOINT AN INDEPENDENT EXPERT TO EXAMINE EXISTING LAW ON DISAPPEARANCES AND TO REPORT HIS/HER FINDINGS TO THE COMMISSION TO ENABLE STATES TO CONSIDER THE PROPOSAL FOR AN INTERSESSIONAL OPEN-ENDED WORKING GROUP. AS A FALLBACK, THE U.K. PROPOSED AMENDING REV. 3 TO READ THAT "IF APPROPRIATE, IN LIGHT OF THE FINDINGS OF THE INDEPENDENT EXPERT," THE COMMISSION WOULD CREATE AN INTER-SESSIONAL OPEN ENDED WORKING GROUP." THESE SUGGESTIONS WERE MET WITH HOSTILITY BY ARGENTINA, WHICH SAID THAT IT WAS THROUGH NEGOTIATING, THAT REV. 3 WAS AS FAR AS IT WAS PREPARED TO GO, AND THAT IT WOULD PREFER TO TAKE THIS LANGUAGE TO A VOTE AS AN ALTERNATIVE TO FURTHER CONCESSIONS. GUATEMALA AND URUGUAY JOINED ARGENTINA IN THE SUBSTANCE, THOUGH NOT THE TONE, OF ITS INTERVENTION.

4. SEVERAL EUROPEAN COUNTRIES, INCLUDING SWITZERLAND, NORWAY, PORTUGAL, AND LICHTENSTEIN EXPRESSED CONCERN THAT, WITHOUT CONSENSUS, THE MANDATE OF THE PROPOSED INTERSESSIONAL WORKING GROUP WOULD BE DIMINISHED.

5. USDEL MADE POINTS IN REFTEL. AT CLOSE OF THE SESSION, FRANCE AGREED TO ATTEMPT TO REDRAFT OP 11 AND OP 12 ALONG THE LINES PROPOSED IN PARA. 1 ABOVE, I.E., SOME COMBINATION OF AUTHORIZED WORK FOR BOTH THE INDEPENDENT EXPERT AND THE WORKING GROUP.

6. THERE APPEARS TO BE LITTLE SUPPORT FOR THE U.S. POSITION

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INDEPENDENT EXPERT OR THE WORKING GROUP.

B5

7. IN THE ABSENCE OF ATTEMPTING TO STRIVE TOWARD CONSENSUS BASED ON THE NEW ZEALAND TEXT, IT IS LIKELY THAT THE GRULAC WILL SUCCEED IN PASSING A TEXT CALLING FOR THE CREATION OF BOTH THE WORKING GROUP AND THE INDEPENDENT EXPERT. GUATEMALA DELEGATION ADVISED USDEL THAT THE CREATION OF THE WORKING GROUP WAS A PRIORITY, BECAUSE IT IS SEEN AS A NECESSARY FIRST STEP TOWARD ITS FULFILLMENT OF PEACE AGREEMENT OBLIGATIONS TO RATIFY AN INTERNATIONAL TREATY ON DISAPPEARANCES. ARGENTINA AND GUATEMALA NOTED THAT NO EXISTING INTERNATIONAL TREATY OR TREATY BODY (INCLUDING THE INTER-AMERICAN CONVENTION ON DISAPPEARANCES) IS SUFFICIENTLY COMPREHENSIVE, AND HENCE THE NEED FOR THE UN TO DO WHAT THEIR OWN GOVERNMENTS OR REGIONAL ORGANIZATIONS SO FAR HAVE FAILED TO ACCOMPLISH.

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ACTION IO-00

INFO	LOG-00	AF-00	AID-00	AMAD-00	CIAE-00	DODE-00	WHA-00
	SRPP-00	EAP-00	EB-00	EUR-00	UTED-00	H-01	TEDE-00
	INR-00	LAB-01	L-00	NEA-00	NSAE-00	NSCE-00	OIC-02
	OPIC-01	PRS-00	P-00	SP-00	IRM-00	SS-00	STR-00
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R 191735Z APR 01
FM USMISSION GENEVA
TO SECSTATE WASHDC 0935

UNCLAS SECTION 02 OF 02 GENEVA 001681

DEPT FOR IO/SHA, DRL/MLA

E.O. 12958: N/A

8. IT IS NOT CLEAR WHETHER ANY MEMBER WOULD CALL FOR A VOTE ON THE RESOLUTION AS PRESENTLY CONFIGURED. INDIAN DCM TALKED TO USDEL AFTER THE MEETING TO EXPRESS HIS CONCERNS WITH THE DIRECTION OF THE RESOLUTION, AND WISHED TO DISCUSS WHETHER OUR DELEGATIONS COULD COLLABORATE ON SOME AMENDMENT TO THE GRULAC FORMULATION. AUSTRALIAN AND CANADA BOTH ASKED USDEL IF WE INTENDED TO CALL FOR A VOTE. (COMMENT: IT APPEARS TO USDEL THAT A NUMBER OF MEMBERS ARE UPSET WITH THE DIRECTION

THE GRULAC IS TAKING THIS RESOLUTION, BUT THAT NONE OF THEM WISH TO CALL FOR A VOTE, AND ARE HOPING THAT USDEL TAKES THE FIRST STEP OF CALLING FOR A VOTE, AND VOTING NO. IF USDEL CALLS FOR A VOTE, THEN IT IS LIKELY THAT MEMBER DELEGATIONS OPPOSED TO THE CREATION OF THE INTER-SESSIONAL WORKING GROUP WOULD ABSTAIN. END COMMENT)

9. ACCORDING TO CANADA, NEW ZEALAND, AUSTRALIA, JAPAN, INDIA, THAILAND, U.K., GERMANY, AND NORWAY ARE OPPOSED TO OP 11 AND OP 12 (INDEPENDENT EXPERT AND WORKING GROUP, RESPECTIVELY). CANADA SUGGESTED THAT THE US SHOULD CALL FOR A VOTE. IF USDEL CALLS FOR A VOTE, CANADA WOULD ABSTAIN, AND THE OTHERS WOULD PROBABLY ABSTAIN OR VOTE NO -- FOR ABOUT 20 ABSTENTIONS AND NO VOTES -- PER CANADA'S COUNT, WITH SOME DEVELOPING COUNTRIES JOINING THE ABSTAINERS. THIS COULD MEAN THAT THE WORKING GROUP IS EFFECTIVELY DEPRIVED ITS MANDATE, SINCE, EVEN IF THE THE RESOLUTION PASSES, THE WORKING GROUP STILL NEEDS TO OPERATE BY CONSENSUS. IT IS UNCLEAR WHY CANADA IS RELUCTANT TO CALL FOR THE VOTE ITSELF.

10. USDEL REQUESTS GUIDANCE ON WHETHER IT CAN JOIN NEW ZEALAND PROPOSAL FOR JUST THE CREATION OF AN INDEPENDENT EXPERT. USDEL RECOMMENDS THAT WE BE GIVEN THE LATITUDE TO SEEK CONSENSUS. AS NOTED, THE MOST LIKELY OUTCOME IN GENEVA IS THE REJECTION OF THE NEW ZEALAND FORMULATION. OUR ABILITY TO EFFECTIVELY INFLUENCE THE OUTCOME OF NEGOTIATIONS IS SUBSTANTIALLY DIMINISHED IF WE CANNOT PROVIDE SUPPORT TO NEW ZEALAND PROPOSAL.

11. USDEL ALSO REQUESTS GUIDANCE ON WHETHER WE SHOULD CALL

FOR A VOTE ON OP11 AND OP 12 (IF LANGUAGE REMAINS UNCHANGED IN SUBSTANCE FROM REV. 3), AND WHETHER WE SHOULD CALL FOR A

VOTE ON THE RESOLUTION. IF REFERENCES TO THE WORKING GROUP CAN BE REMOVED FROM OP 12, THEN WE DO NOT NEED TO OPPOSE THIS OPERATIVE PARAGRAPH. USDEL WOULD APPRECIATE FLEXIBILITY TO TRY AND WORK OUT APPROPRIATE AMENDMENTS WITH OTHER DELEGATIONS (I.E., THE NEW ZEALAND OPTION) SHOULD THAT COURSE PRESENT ITSELF.
MOOSE

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<< END OF DOCUMENT >>

ACTION IO-00

INFO	LOG-00	EEB-00	AF-00	AMAD-00	CIAE-00	INL-00	DODE-00
	WHA-00	EAP-00	EUR-00	UTED-00	FOE-00	TEDE-00	INR-00
	LAB-01	L-00	MFLO-00	MOFM-00	MOF-00	NEA-00	NSAE-00
	NSCE-00	OIC-00	OIG-00	NIMA-00	PA-00	PER-00	PRS-00
	P-00	SP-00	SS-00	STR-00	TRSE-00	FMP-00	PRM-00
	DRL-00	G-00	SCA-00	SAS-00	FA-00	SWCI-00	/001W

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FM USMISSION GENEVA
TO SECSTATE WASHDC 7057

UNCLAS GENEVA 000693

STATE FOR IO-RHS, DRL-MLGA, L-HRR

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: COMMUNICATION FROM THE UN COMMITTEE AGAINST TORTURE FOR THE UNITED STATES OF AMERICA

1. Mission has received a communication from the United Nations Committee against Torture for the United States of America. This communication is number 4 on the Geneva 2006 Communications Log.

2. Begin text of letter. Mr. Ambassador, In my capacity as Rapporteur for Follow-up on Conclusions and Recommendations of the United Nations Committee against Torture for the United States of America, I refer to the examination of the second periodic report of United States of America (CAT/C/48/Add.3/Rev.1). The Committee, in its Conclusions and Recommendations (CAT/C/USA/CO/2), requested the State Party to provide within one year information on the specific recommendation identified by the Committee in paragraph 43 (paragraphs 16, 20, 21, 22, 24, 33, 34 and 42 of the mentioned Conclusions and Recommendations).

The Government of the United States of America provided the information requested in September 2007 (CAT/C/USA/CO/2/Add.1). The Committee thanks the State party for its cooperation and presents its comments on the responses provided in the framework of the follow-up procedure, as part of the procedure through which the Committee monitors the implementation of specific recommendations that are serious, protective and may be implemented within one year as well of the continuous dialogue with States parties.

UNITED STATES DEPARTMENT OF STATE
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DATE/CASE ID: 22 JUN 2009 200706444

With regard to the recommendation made in paragraph 16, the Committee welcomes the information that relevant authorities of the State party, including military, "as a matter of good administration practice, generally maintain appropriate records on persons detained by them. Such records would generally include the information mentioned in the Committee's recommendation". The Committee considers that maintaining records of persons detained is mandatory as it constitutes a basic guarantee, particularly in order to prevent torture, for all persons deprived of their liberty (paragraph 13 of the General Comment no. 2 on the implementation of article 2 by States parties, adopted on 23 November 2007). The Committee does not make any distinction between categories of persons deprived of their liberty and it considers that all of them are protected by this guarantee. The Committee reiterates that the State party should adopt the necessary measures to establish the obligation of registration of all persons deprived of liberty. I would be grateful if you could clarify in which cases the mentioned authorities do not maintain appropriate records on persons detained. Is the State party considering adopting any legislative measures to ensure that such registration is an obligation for all authorities, including military, and that it is not only carried out as a matter of good administrative practice?

While the Committee welcomes the information on paragraph 20 that "as a matter of policy, the United States Government does not transfer persons to countries where it determines that it is more likely than not that they will be tortured (and that this) policy applies to all components of the government including the intelligence agencies", the Committee wishes to remind the State party that the guarantee of non refoulement is a normative determination, of article 3 of the Convention, of the absolute, and jus cogens, prohibition of torture. It must be enforced effectively by the authorities of the State Party as a matter of law in any territory subject to its de jure or de facto control. No provision of the Convention limits the State territorial scope to the "territory of sovereignty" of State parties. It is reasonable to consider that the most adequate way to implement the assurance of non refoulement is the establishment of adequate judicial mechanisms to challenge all refoulement decisions. The Committee reiterates the recommendation to introduce such judicial control and would appreciate if the State party could indicate any measure taken in this regard.

As to the recommendation made in paragraph 21, the

Committee welcomes the information received on the policy and practice of the Government of the United States, when relying on "diplomatic assurances". In particular, the Declaration of the Ambassador-at-large for War Crimes, Mr. Clint Williamson, clarifies the motives and details of the practice. However, the Committee regrets the absolute confidentiality of such procedure and the lack of information on cases where assurances have been provided, which does not enable the Committee to monitor these arrangements and the de facto implementation of the Convention's provisions by the State party. It also recalls that an adequate judicial mechanism for reviewing, in last instance, the sufficiency and appropriateness of diplomatic assurances in any applicable case, would have to be established. This principle also constitutes the basic of the decision adopted by the United States District Court for the Middle District of Pennsylvania

in the case "Sameh Sami S. Khouzam v. Thomas H. Hogan et al." (3:CV-07-0992; Judge Vanaskie), of 22 August 2007. Please indicate, in light of the above, any steps that might have been taken to consider the establishment of a judicial mechanism to this effect. Considering the confidential nature the State party has given to the procedure, please describe the post-return monitoring machinery in place on a generic and non-specific basis. Has the State party received information on any assurances that have not been honored and what appropriate actions were taken in such cases by the State party?

With regard to the recommendation made in paragraph 22, the Committee reiterates its interpretation of the scope of obligations imposed on State Parties, in time of peace as well as in time of armed conflict. All the guarantees that must be applied to all persons deprived of their liberty referred to previously (paragraph 13 of the General Comment no. 2) must also be applied to detainees in Guantanamo and, among these, "the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability (...) of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment". Taking also into account the rules on evidence established by the Military Commissions Act of 2006, it is also relevant to recall that it is absolutely forbidden by article 15 of the Convention to invoke, as evidence in any proceedings, any statement which is established to have been made as a result

of torture, except against a person accused of torture as evidence that the statement was made. That means that in a fair process, a person has the inderogable right to prove that evidence against him or her was obtained under torture. The Committee has closely followed the successive decisions of the Supreme Court of the United States to protect the constitutional rights and liberties of detainees in Guantanamo. It reiterates the recommendation that the State Party must provide access to a fair judicial process to the Guantanamo detainees, to comply with its obligations under the Convention.

In respect of the recommendations made in paragraph 24, the Committee takes note with satisfaction of the progress made in order to eradicate any interrogation technique that amounts to torture by any agent of United States Government. The Committee reiterates that in this context, the use of interrogation techniques amounting to torture, such as those identified by the Committee, must be forbidden to all "components of the Government, including intelligence agencies". However, it seems that some special legal exception would be reserved to these intelligence agencies as to the use of prohibited techniques, therefore derogating from the principle of absolute prohibition of torture. Please clarify the objective of the presidential veto of the 2008 Intelligence Authorization Act which would have applied to the Army Field Manual on interrogation to all "components of the Government, including intelligence agencies", thus prohibiting torture without any exception. Does this veto indicate that certain agencies outside of the Department of Defense, such as the CIA, may use prohibited acts, including interrogation such as methods involving sexual humiliation, "water boarding", "short shackling" and using dogs to induce fear, which the Committee has clearly indicated as constituting torture or cruel, inhuman or degrading treatment or punishment?

Concerning the recommendations made in paragraphs 33 and 34, the Committee thanks the State party for the information submitted. However, the Committee considers that the United States should consider ratifying the Convention on the Rights of the Child (as all other members of the international community have, except Somalia and the United States) in order to accept the conventional obligation to prohibit the sentencing of juveniles to life imprisonment without the possibility of parole.

With regard to the recommendation made in paragraph 42, the Committee thanks the State party for the information submitted. However, the Committee considers that the next

periodic report, which the United States will have to present to the Committee on 19 November 2011, should include all the detailed statistical data requested in the concluding observations. While taking note of the responses of the State Party to the recommendation of the establishment of a federal database on the implementation of the provisions of the Convention, the Committee reiterates this recommendation as it would allow the State party to provide the Committee with information it was unable to provide. Without the detailed statistical data as requested, the Committee will not be able to adequately monitor the full implementation of

the State party's obligations under the Convention when considering the next report of the United States of America.

The Committee looks forward to pursuing the constructive dialogue started with the authorities of the United States of America on the implementation of the Convention. In this context, the Committee seeks to receive your written response to this request for further clarifications.

Accept, Mr. Ambassador, the assurances of my highest consideration. Fernando M. Marino, Rapporteur for follow-up on Conclusions and recommendations for the United States of America Committee against Torture. End text of letter.
TICHENOR

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RELEASED IN FULL

ORIGIN L-00

INFO	LOG-00	AID-00	AMAD-00	A-00	CIAE-00	COME-00	INL-00
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SOURCE: CBLEXCLS.001675
DRAFTED BY: L/HRR:RKHARRIS -- 10/20/2005 202-647-4035
APPROVED BY: IO:MLAGON
IO/SHA:, TJOHNSON, DRL:, JGINSBURG
----------4FC43B 202250Z /38
O 202240Z OCT 05
FM SECSTATE WASHDC
TO USMISSION GENEVA IMMEDIATE

UNCLAS STATE 194539

E.O. 12958: N/A
TAGS: AORC, PHUM
SUBJECT: SUBMISSION OF PERRIDIC REPORT OF THE UNITED STATES OF AMERICA TO THE HUMAN RIGHTS COMMITTEE

1. On Friday morning, October 21, Mission is instructed to transmit the attached two letters to the Chairman of the Human Rights Committee and one letter to the Chairman of the Committee Against Torture, conveying: (A) the U.S. government,s combined second and third periodic report of its implementation of the International Covenant on Civil and Political Rights (under cover of the of the letter at para (3);
(B) to the Human Rights Committee a revised Annex to the USG,s report on the Convention Against Torture discussing certain persons in the custody of the U.S. Armed Forces (under cover of the letter at para (4); and (C) to the Committee Against Torture, that same revised Annex to the USG,s report on the Convention Against Torture discussing certain persons in the custody of the U.S. Armed Forces (under cover of the letter at para (5). For reasons of protocol, Mission

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REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

is
asked to deliver the letter and package to the Committee Against
Torture (referenced in para (5)) prior to delivery of the packages
to the Committee on Human Rights.

2. Given the length of the three attachments described above, these
texts will not be conveyed in cable form, but electronically will be
sent to the Mission from L/HRR on Thursday evening, October 20.
Following transmitteal, Mission is required to send to the Department (IO/SHA
and L/HRR) copies of signed transmittal letters.
3. First Letter to HRC (transmitting the report)

Ms. Christine Chanet
Chairman
Human Rights Committee
Office of the UN High Commissioner for Human Rights
Palais Wilson
CH-1211 Geneva 10

Dear Madame Chairman:

I have the honor to transmit to you the combined second and third
periodic report of the United States of America, with annexes, provided
under Article 40 of the International Covenant on Civil and Political Rights. As you requested in your letter of July 23, 2005,
the report contains a discussion of U.S. implementation of the Patriot Act.
The Government of the United States will be pleased to answer further
questions from the Committee on the basis of this report, in keeping
with the Committee,s rules and standard practice.

Please allow me
to express once again the longstanding commitment of the United States
to the protection and promotion of human rights and to the work
of the Committee.

Yours very truly,

Kevin E. Moley
Ambassador

4. Second Letter to HRC (transmitting updated detainee CAT Annex)

&Ms. Christine Chanet
Chairman
Human Rights Committee
Office of the UN High Commissioner for Human Rights
Palais Wilson
CH-1211 Geneva 10

Dear Madame Chairman:

In a letter that I had the honor to send you today, the United States of America transmitted to the Committee on Human Rights the combined second and third periodic report of the United States of America, provided under Article 40 of the International Covenant on Civil and Political Rights. Although not part of the U.S. report, as described more fully in paragraph 129 of the U.S. report, I am pleased in this letter to enclose as a matter of courtesy a separate description relating to individuals under the control of the U.S. Armed Forces captured during operations against the Taliban Al-Qaida, and their affiliates and supporters and captured during military operations in Iraq. This information updates information provided in May of this year by the United States to the Committee Against Torture.

We hope that this information will be responsive to the concerns you expressed in your July 23, 2005 letter.

Yours very truly,

Kevin E. Moley
Ambassador8

5. Letter to the Committee Against Torture (transmitting updated detainee CAT Annex)

Professor Fernando Marino Menendez
Chairman
Committee Against Torture
Office of the UN High Commissioner for Human Rights
Palais Wilson
rue des Pquis 52
1202 Geneva

Dear Mr. Chairman:

As you recall, in May of this year, the United States conveyed to the Committee Against Torture (the &Committee8) its Second Periodic Report on measures giving effect to its undertakings under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and on other information of interest to the Committee. By letter of May 21, 2004, the Committee requested &updated information concerning the situation in places of detention in Iraq.8 In Annex 1 of the May 2005 U.S. report, the United States provided a discussion and related materials relevant to its detention of individuals under the control of U.S. Armed forces in Iraq captured during military operations and similar information with respect to detentions of individuals under the control of U.S. Armed Forces in Afghanistan and Guantanamo Bay, Cuba.

In light of the Committee,s continuing interest in these matters, I have the honor to transmit to you an update of the information contained in Annex 1. Please allow me to express once again the longstanding commitment of the United States to the protection and promotion of human rights and to the work of the Committee.

Yours very truly,

Kevin E. Moley
Ambassador8

6. Press Guidance

&L Press Guidance October 21, 2005

United States Periodic Report on the
International Covenant on Civil and Political Rights

Q: Is it true that the United States recently filed a report on its implementation of the International Covenant on Civil and Political Rights? What is this report, and why did the United States produce it?

A:

z On October 21, 2005, the United States submitted to the Human Rights Committee its combined second and third periodic report on its implementation of the International Covenant on Civil and Political Rights (&ICCPR8 or the &Covenant8).
The report is a required and routine update of the Initial Report, which the United States filed in July 1994.

z The new report describes recent legislation, caselaw, policies, programs and other relevant information to update our Initial Report.

z The report is comprehensive and covers a very wide range of subjects, including law and practice in the United States to protect freedoms of speech, conscience, religion, association, peaceful assembly, non-discrimination, life, personal freedom and security. It also addresses liberty of movement, due process and fair judicial procedures, and equality under the law. The report also covers the rights to be free from arbitrary arrest or detention, torture, cruel inhuman or degrading treatment or punishment, and slavery or involuntary servitude.

z The report also updates what is known as the &core document,8 which provides an overview of census information about the United States, its general political structure, and the general framework for the protection of human rights within the United States.

z The Human Rights Committee will post the report on its website in accordance with its standard practice. The Department of State will also post the report on its own website.

z The United States looks forward to presenting the report orally before the Human Rights Committee at one of its future sessions.

Core themes to emphasize:

z Through an extensive inter-agency process we have produced a thorough and comprehensive report, consistent with our reporting obligations under the ICCPR.

z We believe the report presents the Committee with a clear picture of how U.S. law and institutions promote and enforce the human rights contained in the ICCPR. We hope that this record of recent U.S. experience may help other countries in their efforts to promote and protect human rights.

z We look forward to engaging in a dialogue on these

issues when we present the report orally before the Human Rights Committee at one of its future sessions.
(Background: Article 40 of the ICCPR provides that all States Parties shall submit to the Human Rights Committee reports on measures they have taken to implement the treaty. The Committee, which is charged with reviewing the reports, is a body of eighteen experts created by the ICCPR. These experts, who act in their individual capacities, includes a U.S. citizen. The report and its annexes are more than 250 pages in length.)

IF ASKED:
Reporting process:
Q. Isn't it true that the United States is many years behind schedule in submitting its report? Doesn't that send a negative signal about the seriousness of its commitment to preventing torture?

A:
z The U.S. was behind schedule, but this in no way reflects our commitment to producing a comprehensive report.

z The United States is strongly committed to ensuring that it implements its obligations under the ICCPR.
z The reporting process is a good way for the United States to take stock of its efforts and to provide this information in a transparent manner to its ICCPR treaty partners.

If needed:
z The drafting of a comprehensive report on U.S. implementation of a treaty with the broad scope of the ICCPR is a complex and ambitious undertaking, which involves contributions by and coordination among many departments within the U.S. government.
z Because of the scope of these undertakings, many countries in addition to the United States have found it difficult to submit their treaty reports on time.
z With respect to national reports on implementation of the ICCPR, 93 countries are currently overdue in meeting their reporting requirements.

Q. What happens now that the United States has filed its ICCPR report?
A:
z The Human Rights Committee invites States Parties to present their reports to the Committee in oral session.
z The United States, for example, appeared before the Committee in March of 1995 to explain its Initial Report.
z The Department of State anticipates that the Committee

will schedule such a session on the U.S. report in one of its future sessions.

IF ASKED
Treatment of Terrorist Detainees

Q. Does the U.S. Report discuss the treatment of U.S. detainees overseas captured during operations against the Taliban, al-Qaida and their affiliates and supporters or treatment of detainees in Iraq?

z The report the United States submitted in May of 2005 on its implementation of the Convention Against Torture contained a lengthy annex on detentions of individuals under the control of U.S. Armed Forces in Afghanistan, Iraq and Guantanamo Bay, Cuba, a description of the investigations into abuse allegations arising out of these detentions, and a summary of actions to hold personnel of the U.S. armed forces accountable under the military justice system when they have been found to have committed unlawful acts. That annex also summarized the mechanisms for reviewing the detention of a detainee through combatant status review tribunals and annual administrative review boards, as well as for trying a detainee by military commissions.
z By its terms, the ICCPR expressly applies only to individuals within its (a States Party,s) territory and subject to its jurisdiction. Thus, it does not impose obligations on the United States outside of its territory. Notwithstanding this provision and the fact that these individuals are being held pursuant to the law or war, the United States as a matter of courtesy separately provided information on this subject to the Committee. This material is not part of the U.S. report.
IF ASKED
Torture
Q. Does the report discuss the general subject of torture and cruel, inhuman or degrading treatment or punishment?
A.
z Yes.
z The U.S. Government does not permit, tolerate, or condone torture, or other unlawful treatment of detainees by its personnel or employees under any circumstances.
z Article 7 of the ICCPR provides, inter alia, that (n)o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
z The report describes U.S. law and practice on this subject in the years since the U.S. Initial Report.
o The report underscores that the United States takes all allegations of abuse seriously and investigates them.
o Those people who are found to have committed unlawful

acts are held accountable as the circumstances warrant.
o Investigations are thorough and have high priority.
z As this subject is contained in only one of the twenty seven substantive articles of the ICCPR, a lengthier discussion of U.S. law and practice on torture and cruel, inhuman or degrading treatment or punishment can be found in the May 2005 U.S. Periodic Report on the U.S. implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
(Note: Issues related to torture were discussed at greater length in May 6, 2005 L press guidance available at the time of the rollout of the U.S. report of its implementation of the Convention Against Torture and will be attached to the package sent to PA.)

Drafted: L/HRR: RHarris
Clearances: IO/SHA: Tjohnson
DRL: JGinsburg

Authorizer: IO: MLagon
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L/UNA BRANCATO, IO - TJOHNSON

E.O. 12958: N/A
TAGS: FR, UNGA, UNHR
SUBJECT: ENFORCED DISAPPEARANCES INTER-SESSIONAL WORKING GROUP MEETS INFORMALLY; HOMES IN ON ISSUES FOR FORMAL JANUARY 2004 NEGOTIATIONS

REF: GENEVA 002390 AND PREVIOUS

1. (U) BEGIN SUMMARY. THE INTER-SESSIONAL WORKING GROUP HELD "INFORMAL CONSULTATIONS" SEPTEMBER 1-5 PURSUANT TO ITS COMMISSION ON HUMAN RIGHTS MANDATE TO ELABORATE A LEGALLY BINDING INSTRUMENT ON ENFORCED DISAPPEARANCES (E.D.). AT THE OPENING DAY'S SESSION, THE U.S. UNDERSCORED AND EXPLAINED ITS PROCEDURAL OBJECTIONS TO HOLDING INFORMAL MEETINGS THAT UNDULY ACCELERATE NEGOTIATIONS ON LEGAL INSTRUMENTS. U.S. MADE SELECTIVE INTERVENTIONS THAT FOCUSED HEAVILY ON THE SUBSTANTIVE CONCERNS PREVIOUSLY IDENTIFIED IN GUIDANCE FROM STATE AND JUSTICE DEPARTMENTS. U.S. PROCEDURAL OBJECTIONS FELL LARGELY ON UNWELCOME EARS, WITH NO STATEMENTS (PUBLICLY) VOICED IN SUPPORT OF THOSE OBJECTIONS. HOWEVER, U.S VIEWS ON SEVERAL IMPORTANT SUBSTANTIVE ISSUES WERE STRONGLY IN LINE WITH THOSE OF SEVERAL KEY DELEGATIONS. INTERESTINGLY, THE CHAIRMAN AND SEVERAL DELEGATIONS HAVE BEGUN TO ACKNOWLEDGE OPENLY THAT THE ISSUES RAISED BY THESE NEGOTIATIONS ARE MORE COMPLEX THAN HAD BEEN PREVIOUSLY ASSUMED. THIS AWARENESS HAS ALREADY HAD A PERCEPTIBLE MODERATING EFFECT ON SUBSTANTIVE POSITIONS INITIALLY TAKEN BY SOME DELEGATIONS, INCLUDING KEY LATIN DELEGATIONS SUCH AS ARGENTINA AND MEXICO. THOSE ISSUES ON WHICH VIEWS STILL REMAIN FAR FROM CONSENSUS ARE THE FOLLOWING: THE FORM AND MANDATE OF AN INTERNATIONAL

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

MONITORING BODY; THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW (IHL) IN PROTECTING AGAINST E.D.; NON-DEROGABILITY OF TREATY OBLIGATIONS TO BE ASSUMED BY STATES PARTIES; AND THE FORM OF THE INSTRUMENT (CONVENTION VS. PROTOCOL). KEY ISSUES ON WHICH A FAVORABLE (FOR THE U.S.) CONSENSUS APPEARS TO BE EMERGING ARE: THE DEFINITION OF E.D.; THE DEATH PENALTY; MILITARY AND SPECIAL TRIBUNALS; STATUTES OF LIMITATIONS (S/L); NON-STATE ACTORS; AMNESTIES, PARDONS, AND PROSECUTORIAL IMMUNITIES; AND TREATY RESERVATIONS. THE NEXT ROUND OF NEGOTIATIONS WILL TAKE PLACE OVER A TWO-WEEK PERIOD FROM 12-23 JANUARY 2004, WHERE THE CHAIRMAN HOPES TO REACH AGREEMENT ON THE TEXTS OF AS MANY DRAFT ARTICLES FOR THE E.D. INSTRUMENT AS POSSIBLE. THE CHAIRMAN IS PREPARING A DRAFT WORKING TEXT OF SUCH ARTICLES THAT WILL BE DISTRIBUTED TO WORKING GROUP MEMBERS ON/ABOUT DECEMBER 1. END SUMMARY.

2. (U) AS ANTICIPATED IN REFTEL, THE DISCUSSIONS BEGAN WITH A FULL EXCHANGE OF VIEWS ON THE REMAINING ISSUES THAT COULD NOT BE REACHED AT THE JANUARY 2003 OPENING ROUND OF NEGOTIATIONS (SEE PARAS 3 AND 4 BELOW), NAMELY: THE NATURE AND FUNCTIONS OF AN INTERNATIONAL MONITORING MECHANISM; THE FORM THE NEW INSTRUMENT SHOULD TAKE (I.E., CONVENTION VS. PROTOCOL), INCLUDING RELATED LEGAL AND OTHER IMPLICATIONS; AND THE INSTRUMENT'S FINAL CLAUSES -- OF PARTICULAR CONCERN, A RESERVATIONS CLAUSE. DISCUSSION THEN RESUMED WITH FURTHER ANALYSIS OF THE PREVIOUSLY DEBATED "CHAPTERS" IN THE CHAIRMAN'S "KEY ELEMENTS" DISCUSSION PAPER (SEE REPORTING AT PARAS 5-13 BELOW). (THAT PAPER WAS FIRST DISTRIBUTED IN JULY 2003 AND RE-DISTRIBUTED DURING THE SEPTEMBER CONSULTATIONS).

3. (U) INTERNATIONAL MONITORING MECHANISM. MOST SPEAKERS STRONGLY FAVORED INCLUDING AN INTERNATIONAL FOLLOW-UP BODY WITHIN THE FRAMEWORK OF THE NEW INSTRUMENT. THE U.S. INTERVENED TO RESERVE ITS POSITION AND TO SUGGEST THAT THIS ISSUE IS ONE BEST LEFT FOR LATER EXAMINATION FOLLOWING NEGOTIATION OF SUBSTANTIVE STATE OBLIGATIONS YET TO BE DETERMINED. THIS VIEW WAS ECHOED BY SEVERAL OTHER DELEGATIONS, SUCH AS CANADA, JAPAN, AND THE UK. DESPITE CALLS BY SOME DELEGATIONS (SUCH AS SWITZERLAND) FOR AN INTRUSIVE MONITORING REGIME (SUCH AS THE TORTURE CONVENTION'S OPTIONAL PROTOCOL'S "ANYTIME-ANYWHERE" SITE VISIT AUTHORITY), THE WORKING GROUP CHAIRMAN VOICED HIS INTENTION NOT TO PRODUCE AN INSTRUMENT WITH SUCH A CONTROVERSIAL FEATURE. AT THE SAME TIME, THE CHAIR MADE CLEAR HIS STRONG PREFERENCE FOR AN INTERNATIONAL MECHANISM WHOSE MOST IMPORTANT FUNCTION WOULD BE TO INQUIRE IMMEDIATELY WITH THE AFFECTED STATE FOLLOWING A CREDIBLE REPORT OF AN ALLEGED ENFORCED DISAPPEARANCE WITHIN ITS TERRITORY. DEBATE OVER WHETHER TO

CREATE A NEW MONITORING MECHANISM OR TO UTILIZE AN EXISTING ONE (SUCH AS THE HUMAN RIGHTS COMMITTEE) QUICKLY LED TO DISCUSSION OF IMPORTANT SUBSIDIARY ISSUES. AMONG THEM: WHETHER THE HUMAN RIGHTS COMMITTEE (HRC) POSSESSES THE NECESSARY MANDATE AND FUNDING TO EXAMINE ACTS OF FORCED DISAPPEARANCE; AND WHETHER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR), WHICH CREATED THE HRC, WOULD NEED TO BE AMENDED IN ORDER TO GIVE NEW E.D. RESPONSIBILITIES TO THE HRC. MOST DELEGATIONS AND THE CHAIRMAN ARE CURRENTLY INCLINED TOWARDS USING THE HUMAN RIGHTS COMMITTEE AS THE FOLLOW-UP MECHANISM, THOUGH THIS ISSUE REMAINS FAR FROM RESOLVED.

4. (U) INTERNATIONAL MONITORING MECHANISM (CONTINUED). LATE IN THE AFTERNOON OF THE FINAL DAY, THE WORKING GROUP RECEIVED A LEGAL OPINION AUTHORED BY RALPH ZACKLIN OF THE UN

HEADQUARTERS LEGAL OFFICE. THAT OPINION CONCLUDED THAT USING THE E.D. TREATY TO TASK NEW MONITORING DUTIES TO THE HRC COULD PRESENT COMPLEX AND "SERIOUS LEGAL OBSTACLES" AS WELL AS "RAISE SUBSTANTIAL ADMINISTRATIVE AND FINANCIAL ISSUES". THIS LEGAL OPINION IS SURE TO HAVE A SOBERING EFFECT ON THE WORKING GROUP'S FUTURE NEGOTIATIONS OF THE INTERNATIONAL MONITORING MECHANISM ISSUE, INCLUDING THE RELATED ISSUE OF WHETHER THE NEW INSTRUMENT SHOULD BE ADOPTED IN THE FORM OF A PROTOCOL TO THE ICCPR OR AS AN ENTIRELY NEW CONVENTION.

5. (U) TREATY RESERVATIONS CLAUSE. THIS ISSUE HAS LONG-STANDING AND INSTITUTIONAL INTEREST TO THE DEPARTMENT. THE US UNDERSCORED THE IMPORTANCE OF RESERVATIONS CLAUSES AS TOOLS THAT CAN ASSIST ALL STATES (PARTICULARLY FEDERAL STATES SUCH AS THE U.S.) IN DECIDING WHETHER TO BECOME PARTIES TO A TREATY REGIME. IN SUPPORT OF OUR POSITION, THE U.S. DREW THE WORKING GROUP'S ATTENTION TO THE TEXT OF THE INTERNATIONAL LAW COMMISSION'S (ILC) 1997 PRELIMINARY CONCLUSIONS IN WHICH THE ILC SAID THAT RESERVATIONS CLAUSES WERE SUITABLE FOR ALL NORMATIVE MULTILATERAL TREATIES, "INCLUDING TREATIES IN THE AREA OF HUMAN RIGHTS." NOTWITHSTANDING ARGENTINA'S IMPASSIONED PLEA TO BAN ANY RESERVATIONS TO THE NEW INSTRUMENT, THE CHAIRMAN STATED HIS FIRM VIEW THAT BARRING RESERVATIONS WOULD PREVENT COUNTRIES FROM JOINING THE TREATY REGIME, PARTICULARLY STATES THAT NEED RESERVATIONS TO AVOID CONSTITUTIONAL OR OTHER DOMESTIC LAW IMPEDIMENTS IF THEY BECAME PARTIES. SWITZERLAND (SPEAKING AS A FEDERAL STATE) ALSO ANNOUNCED ITS SUPPORT FOR A RESERVATIONS CLAUSE. ALTERNATIVELY, THEY SAID, SILENCE ON THIS ISSUE WOULD THEN ALLOW THE VIENNA CONVENTION ON THE LAW OF TREATIES TO HAVE ITS EFFECT. MEXICO JOINED THE BANDWAGON, CALLING RESERVATIONS A "NECESSARY EVIL". SOUTH AFRICA AND THE UK SAID ALLOWING RESERVATIONS WAS THE "PRAGMATIC" THING TO DO.

6. (U) DEFINITION OF "ENFORCED DISAPPEARANCE". THERE WERE SHARPLY DIVERGENT AND DIFFICULT TO RECONCILE VIEWS INITIALLY EXPRESSED ON THIS ISSUE. CONSIDERABLE ATTENTION CENTERED ON WHETHER TO ADOPT IN FULL (OR TO BUILD UPON) THE DEFINITION OF ENFORCED DISAPPEARANCE FOUND IN THE ROME STATUTE TO THE INTERNATIONAL CRIMINAL COURT (ICC) OR THE DEFINITION FOUND IN THE 1998 DRAFT CONVENTION ON E.D. AS THE DEBATE EVOLVED, A STRICT ROME STATUTE APPROACH BEGAN TO FALL INCREASINGLY INTO DISFAVOR. THIS WAS BECAUSE, IF THE ROME STATUTE APPROACH WERE TO BE FULLY APPLIED, ENFORCED DISAPPEARANCE WOULD ONLY BE PUNISHED "WHEN COMMITTED AS PART OF A WIDESPREAD AND SYSTEMATIC ATTACK DIRECTED AGAINST ANY CIVILIAN POPULATION" (HENCE, ONLY WHEN IT RISES TO THE LEVEL OF A VIRTUAL "CRIME AGAINST HUMANITY"). THIS APPROACH WAS ULTIMATELY REGARDED AS UNDULY NARROW. U.S. TALKING POINTS ON ALL ISSUES RELATED TO THE DEFINITION OF E.D. WERE DEPLOYED. THE U.S. JOINED SEVERAL OTHER DELEGATIONS WHO OPPOSED A "WIDESPREAD AND SYSTEMATIC" APPROACH (E.G., ARGENTINA, CANADA, FRANCE, AND MEXICO). THE U.S. SUPPORTED CANADA'S, CHINA'S AND SPAIN'S APPEALS TO PERMIT REASONABLE DETENTION OF SUSPECTED CRIMINALS FOR LAW ENFORCEMENT PURPOSES, PROVIDED SUCH DETENTION IS NOT FOR "A PROLONGED PERIOD OF TIME." SOME DELEGATIONS URGED THAT ANY DEPRIVATION OF A PERSON'S LIBERTY ASSOCIATED WITH AN ACT OF ENFORCED DISAPPEARANCE SHOULD BE DEEMED UNLAWFUL "IN WHATEVER FORM OR FOR WHATEVER REASON", AND THUS PREFERRED THE APPROACH FOUND IN ARTICLE I OF THE 1998 DRAFT E.D. CONVENTION.

7. (U) DEFINITION (CONTINUED). THE ISSUE OF WHETHER THE NEW INSTRUMENT SHOULD ADOPT AN EXCLUSIVE DEFINITION OF ENFORCED DISAPPEARANCES (AND IF SO, ONE BASED ON THE ROME STATUTE, THE DRAFT 1998 CONVENTION, OR VARIANTS OF THOSE INSTRUMENTS) WAS HOTLY DEBATED. AN ALTERNATIVE APPROACH IS THAT FOUND IN THE CONVENTION AGAINST TORTURE ("CAT"), WHICH PENALIZES "ALL ACTS OF TORTURE" (AND THUS BY EXTENSION "ALL ACTS OF ENFORCED DISAPPEARANCES"). THE U.S. SUPPORTED OTHER DELEGATIONS (CANADA, JAPAN, UK) WHO VOICED STRONG SUPPORT FOR AN "ACTS" APPROACH. THESE DELEGATIONS POINTED TO THE EFFECTIVENESS SUCH APPROACH COULD HAVE UNDER THEIR RESPECTIVE DOMESTIC LAWS. AS THE DISCUSSION EVOLVED, A NUMBER OF PREVIOUSLY SKEPTICAL DELEGATIONS BEGAN TO PERCEIVE THAT AN "ACTS" APPROACH COULD GENUINELY BE RECONCILED WITH THE GOAL OF CRIMINALIZING AND PUNISHING ENFORCED DISAPPEARANCES. THE CHAIRMAN URGED AN APPROACH OF "PRAGMATISM" IN ORDER TO ALLOW THOSE STATES THAT COULD RELY ON AN "ACTS" APPROACH TO BE FREE TO DO SO, WITHOUT BEING OBLIGED TO ENACT AN EXCLUSIVE, NEW CRIMINAL STATUTE DEFINING AND PUNISHING ENFORCED DISAPPEARANCES. THE CHAIRMAN EXPLAINED THAT "OUR PURPOSE IS NOT TO CREATE A NEW INTERNATIONAL CRIMINAL CODE. WE MUST TAKE INTO ACCOUNT AND, AS APPROPRIATE, BASE OUR WORK ON

DOMESTIC LAW." HIS INTERVENTION CHILLED FURTHER DISCUSSION OF THE DEFINITION ISSUE. REGARDING NON-STATE ACTORS OR OTHER PRIVATE ACTORS WITH NO LINK TO THE STATE, THE U.S. SUPPORTED SEVERAL OTHER STATE DELEGATIONS (ARGENTINA, CANADA, MEXICO, JAPAN, PAKISTAN, SWEDEN AND UK), AND ONE KEY NGO DELEGATION (FEDEFAM), THAT HAD STRONG RESERVATIONS ABOUT INCLUDING SUCH ACTORS WITHIN THE DEFINITION OF ENFORCED DISAPPEARANCES. IN

HIS SUMMARY STATEMENT, THE CHAIRMAN DISCOURAGED ANY FURTHER SERIOUS EFFORT TO INCLUDE NON-STATE ACTORS WITHIN THE E.D. DEFINITION.

8. (U) STATUTES OF LIMITATIONS. A FAIRLY STRONG CONSENSUS QUICKLY EMERGED IN FAVOR OF A FLEXIBLE APPROACH IN ADDRESSING THE STATUTE OF LIMITATIONS (S/L) ISSUE. SEVERAL DELEGATIONS (CANADA, CHINA, GERMANY, INDIA, JAPAN, SWEDEN, THE UNITED STATES AND THE UK) SAID THEY SAW MERIT IN AN APPROACH THAT ALLOWED SUCH STATUTES TO BE APPLIED COMMENSURATE WITH THE GRAVITY OF THE OFFENSE. IN THE SAME VEIN, SEVERAL DELEGATIONS (LED BY CANADA) SAID THEY COULD, AS AN ALTERNATIVE, SUPPORT A SILENT APPROACH THAT WOULD ALLOW EACH STATE'S S/L LAWS TO TAKE THEIR NATURAL EFFECT. THE CHAIRMAN WARMLY ENDORSED SUCH AN APPROACH AS BEING CONSISTENT WITH HIS PREFERENCE TO RELY, WHERE FEASIBLE, ON EXISTING DOMESTIC LAW TO ADDRESS PROCEDURAL ISSUES.

9. (U) AMNESTIES, PARDONS, AND PROSECUTORIAL IMMUNITIES. THE U.S. JOINED THE UK, SOUTH AFRICA AND THAILAND IN URGING A SIMILAR "DOMESTIC LAW-BASED" APPROACH WITH REGARD TO THE ACCEPTABILITY OF AMNESTIES, AND PARDONS AND "SIMILAR MEASURES". MANY HEADS NODDED IN THE AFFIRMATIVE WHEN THE U.S. UNDERSCORED THE IMPORTANCE OF AVOIDING CONSTITUTIONAL ISSUES THAT WOULD QUICKLY BE RAISED BY BANNING OR RESTRICTING AMNESTIES AND PARDONS IN THE CONTEXT OF ENFORCED DISAPPEARANCE PROSECUTIONS. U.S. REP EXPLAINED THE U.S. LAW ENFORCEMENT ADVANTAGES RESULTING FROM PROSECUTORS' USE OF TRANSACTIONAL IMMUNITY TO COMPEL CRITICAL CO-DEFENDANT TESTIMONY TO CONVICT A MAJOR OFFENDER. U.S. REP THEREFORE URGED REJECTION OF LANGUAGE LIKE THAT FOUND IN ARTICLE 18 OF THE 1992 U.N. "DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES" BARRING "SIMILAR MEASURES THAT MIGHT HAVE THE EFFECT OF EXEMPTING (OFFENDERS) FROM CRIMINAL PROCEEDINGS OR SANCTION." THIS WORDING HAD BEEN STRONGLY FAVORED BY MOST OF THE LATIN STATE DELEGATIONS AND SEVERAL NGOS PRESENT. HOWEVER, THEIR OPPOSITION SEEMS TO BE WEAKENING.

10. (U) MILITARY AND SPECIAL TRIBUNALS. IN CONNECTION WITH DISCUSSION OF ISSUES RELATING TO "IMPUNITY", A FEW DELEGATIONS ATTEMPTED TO OPEN A BROAD DISCUSSION ON WHETHER

THE INSTRUMENT SHOULD BAR MILITARY AND SPECIAL TRIBUNALS. THE U.S. SUPPORTED THOSE WHO URGED AN APPROACH NOT DISSIMILAR TO THAT FOUND IN PARAGRAPH 6 OF THE CHAIRMAN'S WORKING PAPER ("PERSONS SUSPECTED OF ENFORCED DISAPPEARANCES SHALL BE PRESENTED BEFORE INDEPENDENT AND IMPARTIAL COURTS AND ENJOY ALL GUARANTIES OF A FAIR TRIAL."). THE U.S. FURTHER ASSERTED THAT THE FORM OF THE TRIBUNAL WAS NOT CRITICAL, BUT RATHER WHETHER IT WAS CAPABLE OF PROVIDING FAIR JUDICIAL PROCESS WITH MINIMUM RECOGNIZED STANDARDS OF DUE PROCESS. THE CHAIRMAN THEN MADE ANOTHER TIMELY INTERVENTION TO ANNOUNCE HIS FIRM INTENTION TO PRODUCE AN INSTRUMENT THAT DOES NOT CONDEMN THE USE OF MILITARY OR SPECIAL TRIBUNALS. WHAT MATTERED MOST, HE SAID, WAS WHETHER THE ACTUAL PROCEDURE AMOUNTED TO "SHAM JUSTICE." HE THEN NOTED THAT, AS FAR AS HE WAS CONCERNED, IT COULD GENERALLY BE ASSUMED THAT U.S. MILITARY TRIBUNALS ARE INDEED CAPABLE OF ADHERING TO MINIMUM DUE PROCESS STANDARDS. THAT RATHER ABRUPTLY ENDED DISCUSSION OF THIS ISSUE.

11. (U) DEATH PENALTY. SEVERAL DELEGATIONS (INSTIGATED MAINLY BY THE SWISS, AND LATER BY BELGIUM AND MEXICO) MADE AN UNSUCCESSFUL ATTEMPT TO REQUIRE AN EXPRESS BAR TO THE DEATH PENALTY WHEN STATES ENGAGE IN INTERNATIONAL COOPERATION IN SUPPRESSING OR PUNISHING ENFORCED DISAPPEARANCES. FOR INSTANCE, THEY SOUGHT INCLUSION OF LANGUAGE THAT WOULD PREVENT EXTRADITION, IF SUCH COOPERATION RISKED EXPOSING A SUSPECTED CRIMINAL TO THE DEATH PENALTY UPON CONVICTION. THE U.S. PUT DELEGATIONS ON NOTICE THAT ADDING SUCH LANGUAGE WOULD BE INFLAMMATORY AND COMPEL CERTAIN STATES TO ENTER A RESERVATION REJECTING SUCH A RESTRICTION. THIS PROMPTED THE CHAIR TO ANNOUNCE HIS GOAL OF CONCLUDING A "UNIVERSAL INSTRUMENT" THAT WOULD AVOID THE NEED FOR A "PROLIFERATION OF RESERVATIONS." THE CHAIRMAN THEN NOTED EMPHATICALLY THAT ADDRESSING "THE DEATH PENALTY IS NOT (HE UNDERSCORED NOT) PART OF OUR MANDATE." THE INTERNATIONALLY RENOWNED PRESIDENT OF THE NGO, FEDEFAM, (HERSELF A MOTHER WHO LOST A DAUGHTER AND GRANDDAUGHTER TWENTY-SEVEN YEARS AGO TO ENFORCED DISAPPEARANCE) SECONDED THE CHAIRMAN'S STATEMENT AND SAID "THIS IS NOT THE SUBJECT WE ARE HERE TO DEAL WITH" (DESPITE HER STATED PERSONAL OPPOSITION TO THE DEATH PENALTY). SHE CONTINUED, "WE MUST ACCEPT THE FACT THAT EACH COUNTRY IS FREE TO ACT ON THIS QUESTION AS IT DEEMS FIT." THESE KEY INTERVENTIONS SEEM TO HAVE DIMINISHED SIGNIFICANTLY THE POSSIBILITY OF A FINAL INSTRUMENT THAT EXPLICITLY ADDRESSES OR RESTRICTS THE DEATH PENALTY.

12. (U) PREVENTION. UNDER THE "PREVENTION" CHAPTER, THERE WAS ACTIVE EXAMINATION OF THE NINE POINTS ADDRESSED IN THE

DISCUSSION PAPER. PARTICULAR FOCUS WAS GIVEN TO POINT 2 (THE

NON-DEROGABILITY OF THE RIGHT "TO BE INFORMED OF THE PLACE AND MOTIVES OF THE DETENTION"), AND POINT 3 (THE OBLIGATION OF THE STATE TO PRESENT DETAINEES WITHOUT UNDUE DELAY BEFORE A COURT OR JUDICIAL AUTHORITY). DELEGATION VIEWS ON THESE AND RELATED ISSUES SPLIT ALONG PREDICTABLE LINES. HOWEVER, PARTICULARLY NOTABLE WAS THE FACT THAT THE CHAIRMAN, HIS ABLE LEGAL ADVISER FROM PARIS (ANTOINE BUCHET), AND THE HIGHLY RESPECTED INDEPENDENT EXPERT AND ADVISER TO THE WORKING GROUP, LOUIS JOINET, (ALL FRENCH NATIONALS) HELPED STEER THE DEBATE INTO CONSTRUCTIVE, REALISTIC DIRECTIONS, OFFERING WELL-REASONED REBUTTALS TO MORE FAR-REACHING PROPOSALS BY SOME DELEGATIONS AND NGOS. IN SUMMING UP, THE CHAIR ACKNOWLEDGED, HOWEVER, THAT DISCUSSION OF THE NINE POINTS LISTED UNDER THIS CHAPTER HAD NOT YIELDED A CONSENSUS.

13. (U) DEFINING VICTIMS OF E.D. DISCUSSION FOCUSED PRIMARILY ON TWO ISSUES: HOW BROADLY TO DEFINE THE SCOPE OF "VICTIMS"; AND APPROPRIATE REMEDIES, INCLUDING, INTER ALIA, THE RIGHT TO REPARATION. THE U.S. SUGGESTED THE UTILITY OF AN APPROACH THAT WOULD ALLOW EACH STATE SUFFICIENT FLEXIBILITY TO DETERMINE THE EACH CLASS OF POTENTIAL "VICTIMS" BY APPLYING ITS DOMESTIC LAW PRINCIPLES ON "STANDING" TO SUE. DELEGATIONS SEEM GENERALLY WILLING TO CONSIDER SUCH A PRAGMATIC APPROACH, IN LIEU OF A PREDETERMINED LIST OF ALL POTENTIAL E.D. "VICTIMS" ALLEGEDLY ENTITLED TO SEEK A REMEDY.

14. (U) APPLICATION OF IHL TO ENFORCED DISAPPEARANCES. A REPRESENTATIVE OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) OFFERED PREPARED REMARKS (ALREADY FAXED TO L/HRR) THAT DISCUSSED THE INTERPLAY BETWEEN INTERNATIONAL HUMANITARIAN LAW (IHL) AND ENFORCED DISAPPEARANCES AS A VIOLATION OF HUMAN RIGHTS LAW. ALTHOUGH THE ICRC REP AVOIDED SPEAKING IN CATEGORICAL TERMS, HER REMARKS WERE UNHELPFUL IN SEVERAL RESPECTS, AS THEY TENDED TO SUGGEST (AND TO RECOMMEND) THAT PRINCIPLES FROM IHL COULD APPROPRIATELY BE APPLIED TO FILL GAPS IN HUMAN RIGHTS LAW TO ENHANCE PROTECTION FROM ENFORCED DISAPPEARANCES. HER COMMENTS WOULD HAVE PROVOKED A GENERAL DEBATE, BUT THE CHAIR PRECLUDED THAT AND ENCOURAGED DELEGATIONS TO CAREFULLY CONSIDER THE ICRC,S REMARKS IN THE CONTEXT OF THE NEXT ROUND OF NEGOTIATIONS.

15. (U) NEXT STEPS. THE CHAIRMAN ANNOUNCED THE NEXT FORMAL SESSION OF THE WORKING GROUP WOULD BE HELD FROM 12-23 JANUARY 2004, WHERE HE WILL BEGIN "TRYING TO REACH CONSENSUS ON DRAFTING ARTICLES". HE ANNOUNCED HIS INTENTION TO PRODUCE A NEW WORKING DOCUMENT (PRESUMABLY AN INITIAL DRAFT OF A CONVENTION TEXT). THIS NEW WORKING DOCUMENT WILL DRAW FROM THE SEPTEMBER DISCUSSIONS AND BE MADE AVAILABLE TO THE

WORKING GROUP ON OR ABOUT DECEMBER 1. IN SUMMING UP, THE CHAIRMAN (AMBASSADOR KESSEDJIAN) IDENTIFIED FOUR GOALS HE INTENDS TO USE AS GUIDING PRINCIPLES AT THE JANUARY SESSION. FIRST, USE THE 1992 DRAFT DECLARATION AS A MINIMUM THRESHOLD AND POINT OF REFERENCE, WITH A VIEW TO INCORPORATING ALL OF ITS KEY ELEMENTS. SECOND, AS FAR AS POSSIBLE, USE AGREED LEGAL EXPRESSIONS FOUND IN OTHER INSTRUMENTS IN DRAFTING TEXT FOR THE E.D. INSTRUMENT, UPDATING SUCH AGREED LANGUAGE ONLY WHERE NECESSARY. THIRD, AVOID NEEDLESSLY OVERBURDENING STATES PARTIES, RECOGNIZING THAT THE NEW INSTRUMENT NEED NOT FILL IN ALL THE LEGAL GAPS DESIRED BY SOME TO PROVIDE FULL PROTECTION FROM ENFORCED DISAPPEARANCES. IN EFFECT, THIS MEANS LEAVING SUFFICIENT ROOM FOR APPLICABLE DOMESTIC LAW TO FILL IN CERTAIN GAPS, HE EXPLAINED. AND FOURTH, AVOID LEAVING GAPS IN THAT WOULD CLEARLY WEAKEN THE EFFECTIVENESS OF THE NEW INTERNATIONAL INSTRUMENT PROTECTING AGAINST E.D.

16. (U) NOTABLE CLOSING SESSION DEVELOPMENTS. JAPAN STRESSED THE NEED FOR THE NEXT WORKING DOCUMENT TO "REFLECT ALL THE DIFFERENT VIEWS" (READ: INCLUDING CONSERVATIVE, MINORITY VIEWS FROM STATE DELEGATIONS). ON THE FINAL DAY OF DISCUSSIONS, AN AD HOC GROUP OF LIKE-MINDED DELEGATIONS, INCLUDING CANADA, JAPAN, THE UNITED STATES AND AUSTRALIA, INTERCEPTED THE CHAIRMAN BEFORE HIS ARRIVAL AT THE MEETING ROOM TO QUERY HIM ABOUT HOW HE INTENDED TO PREPARE THE NEXT DRAFT DOCUMENT. WE CAUTIONED HIM ABOUT THE SERIOUS CONCERNS THAT WOULD BE RAISED IF THAT DOCUMENT REFLECTED UNDULY AN "NGO" PERSPECTIVE. IN A TWENTY-MINUTE MEETING OUTSIDE THE MEETING HALL, THE CHAIRMAN WENT TO LENGTHS TO REASSURE THE AD HOC GROUP THAT HE WOULD BE PRAGMATIC IN STRIKING A PROPER BALANCE BETWEEN THE COMPETING VIEWS, STICKING WITH HIS PREVIOUSLY STATED OPPOSITION TO INFLAMMATORY REFERENCES SUCH AS THE DEATH PENALTY, MILITARY TRIBUNALS, ETC. LATER, THE FEDEFAM (OUTGOING) PRESIDENT (MARTA OCAMPO DE VASQUEZ) (SEE PARA 11 ABOVE) WAS INVITED BY THE CHAIRMAN TO MAKE A PARTING STATEMENT, IN VIEW OF HER INTERNATIONALLY RENOWNED STATURE ON THE E.D. ISSUE. TO HER CREDIT, OCAMPO URGED NEGOTIATORS TO STAY FOCUSED ON THE IMPORTANT ISSUES NEEDED TO PRODUCE AN EFFECTIVE INSTRUMENT AS SWIFTLY AS POSSIBLE. IN THE CONTEXT

OF HER PREVIOUS INTERVENTIONS, THIS WAS CODEWORD FOR AVOID EXTRANEOUS DEBATES OVER SUCH ISSUES AS REFERENCES TO THE DEATH PENALTY AND THE INCLUSION OF NON-STATE ACTORS WITHIN THE TREATY REGIME.

17. (U) COMMENT.

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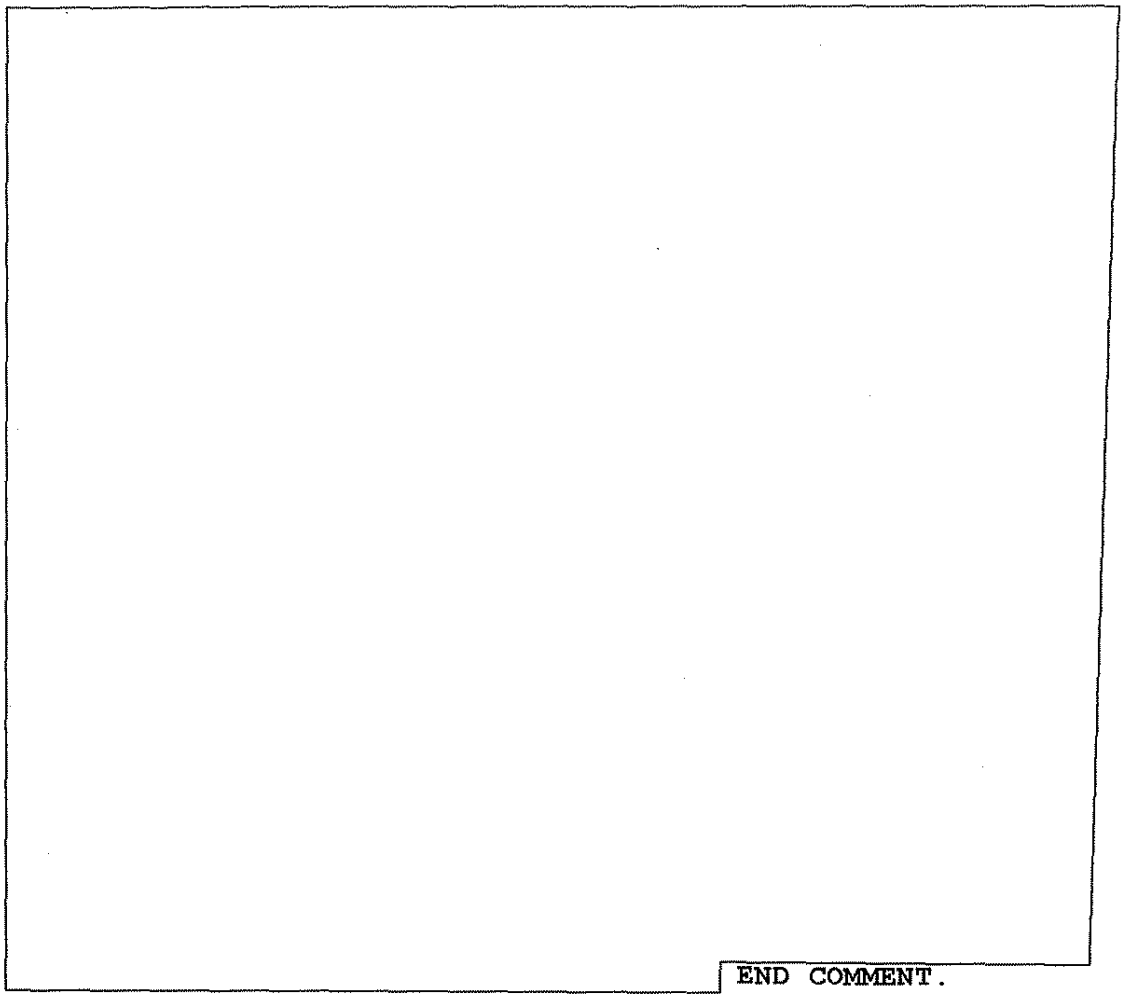

END COMMENT.

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ACTION IO-00

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	NSAE-00	NSCE-00	OIC-00	OIG-00	NIMA-00	PA-00	GIWI-00
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STATE FOR IO/SHA, DRL/MLA

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: REPLY ROM THE HUMAN RIGHTS COMMITTEE

1. Mission receved the following reply from Christine Chanet, Cairperson, Human Rights Committee, to a letter from Glyn Davies regarding the United States' combined second and third periodic reports. This communication has been forwarded to IO/SHA and DRL/MLA via fax and is number 24 on the Geneva 2005 Communications Log.

2. Begin text of letter:

28 July 2005

Reference: PG/PW/vd

Dear Sir,

I have the honour to refer to your letter dated 22 July 2005. In that correspondence, you informed the Human Rights Committee that the U.S. Government would not be in a position to submit its combined second and third reports by the time of the Committee's 84th session (July 2005), as previously indicated in the letter of Mr. M. Kozak of 24 March 2005. You also indicated your Government's intention to submit them as soon as possible after this year.

After careful consideration of the matter, the Committee wishes to inform you that the above-mentioned reports should be submitted by 17 October 2005, the starting date of the

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 16 JUN 2009 200706444

Committee's 85th session. In the absence of those reports, the Committee will adopt a list of issues on the specific concerns contained in its letter of 27 July 2004 (the effect of measures taken in the fight against terrorism following the events of 11 September 2001 and notably the implications of the Patriot Act on nationals as well as non-nationals; and problems relating to the legal status and treatment of persons detained in Afghanistan, Guantanamo, Iraq, and other places of detention outside of the United States of America - copy attached for ease of reference) with a view to examining any other matters in the light of replies from your Government to the list of issues on these concerns at its 86th session to be held from 13 to 31 March 2006.

Thank you in advance for your forthcoming reply.

Sincerely

Christine Chanet
Chairperson
Human Rights Committee

cc: H.E. Amb. Kevin E. Moley
Permanent Representative of the United States of America to the United Nations Office at Geneva and other International Organizations

End text of letter.

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ACTION IO-00

INFO	LOG-00	AF-00	AID-00	AMAD-00	CIAE-00	INL-00	DODE-00
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STATE FOR IO/SHA, DRL/MLA, L/HRR

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: COMMUNICATION FROM THE WORKING GROUP ON ENFORCED DISAPPEARANCES

1. Mission received the following letter dated August 25, 2004 from the Chairman of the Working Group on Enforced or Involuntary Disappearances, Stephen J. Toope, addressed to Ambassador Moley. The letter concerns reports the Working Group has received regarding alleged secret detention centers under United States' authority in various parts of the world and invites the USG to submit written information by October 15 and/or send a representative to appear in person at the next Working Group session November 8-15, 2004.

2. Text of letter and annex follows:

Begin text.

25 August 2004

Dear Mr. Ambassador,

I should like to communicate to you, on behalf of the Chairman of the Working Group on Enforced or Involuntary Disappearances, the following letter addressed to you:

"Dear Mr. Ambassador,

I have the honour to write to you on behalf of the Working Group on Enforced or Involuntary Disappearances, which held

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its seventy-third session from 16 to 20 August 2004 at the United Nations Office in Geneva.

In the course of the session, the Working Group decided to inform your Government of reports it had received about developments in your country having an influence on the phenomenon of disappearances or the solution of the cases not yet clarified, and/or on the implementation of the Declaration on the Protection of All Persons from Enforced Disappearances. A summary is provided as an Annex to this letter.

I would like to take this opportunity to remind your Government that the Working Group will hold its seventy-fourth session from 8 to 15 November 2004, at the Untied Nations Office in Geneva. It would therefore be very much appreciated if any written information that your Government wishes to submit for the Working Group's consideration, could be received, if possible, by 15 October 2004.

In conformity with its usual practice, the Working Group is prepared to receive representatives of interested Governments during the first three days of its session. Should your Government wish to be represented at the forthcoming session, I would appreciated your contacting the Group's secretariat at the Untied Nations Office of the High Commissioner for Human Rights in Geneva (tel. 022-917-9176), in order to schedule an appointment with the Group.

I remain
Dear Mr. Ambassador,

Yours sincerely

Stephen J. Toope
Chairman
Working Group on Enforced or Involuntary Disappearances"

I remain,
Dear Mr. Ambassador,

Yours sincerely,
//////////////////////
Tanya Smith
Secretary a.i.
Working Group on Enforced or Involuntary Disappearances

ANNEX
WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

General allegations

United States of America

The Working Group received information from non-governmental organizations concerning the reported non-compliance by the Government of the United States of America with provisions of the Declaration on the Protection of All persons from Enforced Disappearance.

Reports were received by the Working Group regarding secret detention centers under United States' authority in various parts of the world, in which an unknown number of persons are detained. Reports assert that there was inadequate provision of notice to families about the capture of detainees and

their conditions, legal status and rights. It is also reported that it is unclear in many circumstances which U.S. agency is ultimately responsible for the arrest or the conditions of confinement of the detainees in these facilities.

Reports further specify that the most sensitive and high-profile detainees are not being held in Guantanamo because it is believed that detainees there will eventually be monitored by the U.S. courts. It is stated that terrorism suspects are detained by the Untied States in "undisclosed locations," presumably outside the United States, with no access to the ICRC, no notification to families, no oversight of any sort of their treatment, and in most cases no acknowledgment that they are even being held. Information was provided on 13 specific alleged detainees, apprehended in places such as Pakistan, Indonesia, Thailand, Morocco, and the United Arab Emirates, who have reportedly disappeared in U.S. custody.

American authorities have also apparently refused to disclose the names of men secretly detained during the past few years within the United States. Families have not been informed on the arrested persons' locations. Reports state that some of these detainees have now been released or deported.

End text.

3. Mission transmitted a copy of the letter by fax to IO/SHA, Attention Director.
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UNCLAS STATE 060693

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1, US
SUBJECT: 57TH CHR: INITIAL GUIDANCE ON DRAFT RESOLUTION ON INVOLUNTARY DISAPPEARANCES

UNCLASSIFIED

PAGE 02 STATE 060693 060002Z
REF: GENEVA FAX NO. 73 DATED 4/5/01

1. USDEL SHOULD OPPOSE EFFORTS IN OP11 AND OP12 TO CREATE AN AN INTERSESSIONAL WORKING GROUP AND APPOINT AN EXPERT TO CREATE A DRAFT INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE BASED ON THE WORK OF THE SUB-COMMISSION ON THIS ISSUE. THIS INTERNATIONAL CONVENTION WOULD CLEARLY DUPLICATE WORK NOW BEING HANDLED BY A HOST OF INTERNATIONAL INSTRUMENTS, INCLUDING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, THE CONVENTION AGAINST TORTURE, THE DECLARATION OF THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES (ADOPTED BY THE GENERAL ASSEMBLY IN 1992) AND THE INTER-AMERICAN CONVENTION

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
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ON DISAPPEARANCES. EXISTING TREATY BODIES INCLUDING THE HUMAN RIGHTS COMMITTEE AND THE COMMITTEE AGAINST TORTURE ARE ALREADY CHARGED WITH MONITORING STATE COMPLIANCE WITH RESPECT TO THE QUESTION OF INVOLUNTARY DISAPPEARANCES. THE CREATION OF YET ANOTHER TREATY BODY COULD VERY WELL CONFUSE THE LINES OF AUTHORITY TO THE DETRIMENT OF WORK CURRENTLY BEING PERFORMED IN THIS AREA.

2. THE ABOVE SHOULD NOT BE CONFUSED WITH THE WORKING GROUP ON ENFORCED AND INVOLUNTARY DISAPPEARANCES WHOSE BASIC MANDATE IS TO ASSIST THE RELATIVES OF DISAPPEARED PERSONS TO ASCERTAIN THE FATE AND WHEREABOUTS OF THEIR FAMILY MEMBERS. THE U.S. STRONGLY SUPPORTS THIS WORKING GROUP AND THE RENEWAL OF ITS MANDATE FOR AN ADDITIONAL THREE YEARS (OP9).
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L/HRR, IO/SHA, DRL

E.O. 12958: N/A
TAGS: UNHR, UNGA, PHUM
SUBJECT: FORCED DISAPPEARANCES: THIRD FORMAL NEGOTIATING SESSION

1. (U) Summary. During the Third Formal Session of the Working Group to Elaborate a draft convention to punish and prohibit forced disappearances, held in Geneva from October 4-8, 2004, the Working Group, chaired by the French Permanent Representative, devoted the majority of the session to an initial and thorough discussion of the proposed treaty monitoring body, its structure and functions, found in Part II of the draft text. The final two days were devoted to a discussion of several articles in Part I that contain contentious issues, namely, the definition of enforced disappearance, criminalization as an autonomous offense, complicity, defense of superior orders, and jurisdiction, in particular "found in" quasi-universal jurisdiction. The Fourth formal session of the Working Group, scheduled to take place from January 31-Feburary 11, 2005, will pick up with Article 11 (the extradite or prosecute provisions). Although the chair would like to conclude the negotiations during the fourth session and produce a final text for adoption by the CHR and by the UNGA in 2005, many delegations believe that the work remaining to be done will not accommodate such an ambitious schedule. End Summary.

2. (U) Treaty Monitoring Body. The first three days of the session were devoted to discussion of the proposed treaty monitoring body, its structure and mandate. The group considered whether the proposed instrument should be styled as an Optional Protocol to the International Covenant on

UNITED STATES DEPARTMENT OF STATE
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DATE/CASE ID: 24 JUL 2009 200706444

Civil and Political Rights (ICCPR), using the Human Rights Committee (or a subcommittee of that Committee) as the monitoring body. This optional approach appears to be supported by the vast majority of States in the room (including the United States). Alternatively, the group considered whether the proposed instrument should be an independent treaty that creates a new monitoring body, a position supported by a number of Latin states and all NGOs representing families of the disappeared. Both the longtime UN expert on involuntary disappearances Manfred Nowak and the current Chair of the Human Rights Committee, Mr. Abdelfattah Amor, who punctuated the week-long session with scholarly and thoughtful contributions, support an Optional Protocol using the existing Human Rights committee. The two experts underscored that the Human Rights Committee already has jurisdiction over disappearances, which are a violation of several of the rights granted under the ICCPR, and also jurisdiction over individual communications alleging disappearances with respect to States Parties to the First Optional Protocol to the ICCPR (to which the U.S. is not a party). Although the overwhelming majority of States support structuring this instrument as an Optional Protocol to ICCPR, the Chair seems reluctant to let go of his vision for a treaty and new monitoring body.

3. (U) Treaty Body Functions. The Working Group spent much time discussing the potential mandate of the monitoring body. The chair,s draft text envisions several monitoring body functions including:

a. Examining initial State reports;

b. An urgent action procedure that would also entail a possible site visit, if consented to by the State Party in question. However, this procedure (as currently worded) would also afford nearly unfettered discretion to the monitoring body in determining the modalities of the visit once consent is granted. The chair envisions this element of the mandate to be a core function for the monitoring body;

c. An individual communication mechanism that, as currently drafted, is an awkward melding of the traditional treaty-based individual communications procedure and the CHR,s 1503 procedure;

d. A contemplated referral procedure to the Secretary General in cases where widespread or systematic enforced disappearance is practiced within or by a State, a function that would be unprecedented in a human rights treaty; and

e. An annual report prepared by the monitoring body which could include a section that would "name and shame" States that are uncooperative with the treaty body.

4. (U) Discussion also focused on additional important

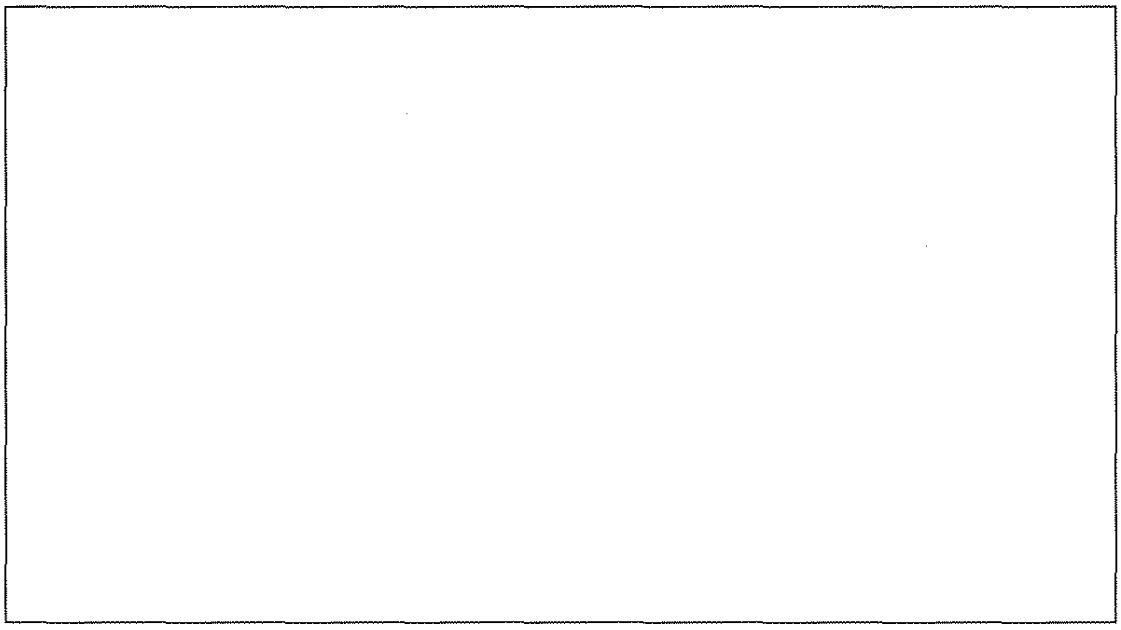
issues; including:
a. the proposal supported by some delegations to rework the individual communications procedure to render it consistent with current treaty body law and practice, including making it optional;
b. the merits and demerits of confidentiality of complaints and of "naming and shaming";
c. the desirability of providing for follow-up state reports at the request of the treaty body;
d. the potential duplication between the proposed urgent action mechanisms of the treaty monitoring body and the existing CHR special procedure (i.e., the working group on involuntary disappearances, created in 1980);
e. the absence of a state-to-state, or inter se, complaints mechanism;
f. the need to clarify the predicates for a monitoring body site visit;
g. the need to make approved site visits subject to agreed modalities between the State and the treaty body; and
h. the reasons underlying the serious reservations of many States regarding referral to the Secretary General.

5. (U) Despite the chair's ambitious desire for a speedy adoption of this text, additional conceptual refinement and additional redrafting of Part II of the draft text remains to be done. Moreover, if this instrument is ultimately styled as an Optional Protocol to the ICCPR and thus entails use of the Human Rights Committee, Part II could be radically simplified along the lines of the procedural articles of the Second Optional Protocol to the ICCPR (articles 3-5), with the possible addition of an urgent action procedure and a site visit upon state consent. For this reason, several States urged that the working group decide the question of nature of the instrument before discussing the details of Part II. However, the Chair deferred decision-making on this issue, apparently in order to allow time for broader support to develop for adoption of a new, autonomous instrument.

6. (U) Substantive Articles (Article 1-11). During the last two days, the Working Group also discussed several (but not all) of the first eleven articles (on a somewhat hurried basis due to lack of time). Those provisions included:
a. PP2 and article 2bis on crimes against humanity;
b. pp4 on the right to know;
c. article 1 on the definition of a forced disappearance and on state action;
d. article 2 on criminalization as an autonomous offense;

e. article 3 on complicity and on elimination of a defense of superior orders;
f. article 4 on mitigating circumstances;
g. article 5 on statute of limitations;
h. article 9 on jurisdiction; and
i. article 11 on "found in" (quasi-universal) jurisdiction.
(Note: We continue to be seriously concerned that such a provision could expose U.S. officials to criminal prosecution for alleged involvement in military or law enforcement activities that arguably fall within the overbroad definition of enforced disappearances, should such officials travel to the territory of a State party. However, there is near-universal support for a quasi-universal jurisdiction provision).

7. (U) In execution of the written guidance for the delegation, which incorporated comments of several agencies including DOD/OSD, DOJ/OIA, DHS, and HHS/ACF, and which was cleared in full by NSC, DOD, and several offices within the State Department, the delegation made interventions that addressed the structure and authorities of the treaty monitoring body and each of the substantive issues noted in paragraphs 1-6 above. The U.S. delegation underscored that the overbroad and vague definition was not only flawed in and of itself but also that it rendered more problematic a number of other articles in the instrument, including elimination of a defense of superior orders and the jurisdictional provisions. The delegation also continued to object to provisions that would require or imply recognition of a right to know, eliminate a defense of superior orders, or require quasi-universal jurisdiction.



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SENSITIVE

FOR IO/SHA - TOM JOHNSON, L/HRR - ANDRE SURENA, L/HRR GILDA BRANCATO, L/LEI - DENISE MANNING, L/PM, DRL/MLA - CHRIS CAMPONOVO, DOJ/OIA - THOMAS BURROWS, DOD/GC - ELIANA DAVIDSON

E.O. 12958: N/A
TAGS: PHUM, UNHRC, SOCI
SUBJECT: FINAL REPORT ON UNHRC WG SESSION ON FORCED DISAPPEARANCES (JANUARY 6-17, 2003)

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PAGE 02 GENEVA 00272 01 OF 03 231604Z
REF: GENEVA 00095

1. (SBU) SUMMARY. DURING THE SECOND AND FINAL WEEK OF THE WG SESSION ON A PROPOSED LEGALLY BINDING INSTRUMENT ON FORCED DISAPPEARANCES, DISCUSSION CONTINUED ON THE CORE SUBSTANTIVE ELEMENTS OF THE PROPOSED INSTRUMENT (E.G., DEFINITION OF "FORCED DISAPPEARANCE" AND ITS CRIMINALIZATION; PROTECTION AGAINST IMPUNITY; DOMESTIC PROSECUTION AND INTERNATIONAL COOPERATION; PREVENTION; VICTIMS; AND CHILDREN OF DISAPPEARED PERSONS). THROUGHOUT, THE DIALOGUE REMAINED ANALYTICAL, FOCUSED, APOLITICAL, AND HIGHLY CONSTRUCTIVE, INCLUDING CONTRIBUTIONS FROM THE NGOS. HOWEVER, IT IS CLEAR THAT WHEN A DRAFT WORKING TEXT IS PRESENTED AT THE NEXT TWO-WEEK SESSION, THERE WILL BE MAJOR DIVIDES BETWEEN ACTIVIST GRULAC

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COUNTRIES AND THAT IS PRECISE, EASILY TRANSPOSED INTO NATIONAL LAW, AND ACCEPTABLE TO A WIDE GROUP OF STATES. MODERATE STATES INCLUDE CANADA, JAPAN, SWITZERLAND, THE UK (AND POTENTIALLY THE US). A THIRD GROUP OF MORE OPENLY RELUCTANT STATES INCLUDES INDIA, SAUDI ARABIA, RUSSIA, AND PAKISTAN, SOME OF WHICH BELIEVE THERE IS NO CURRENT, DEMONSTRATED NEED FOR AN INSTRUMENT. WHETHER THIS THIRD GROUP WILL REMAIN RIGIDLY OPPOSED TO AN INSTRUMENT OR SOFTEN THEIR POSITION OVER TIME REMAINS TO BE SEEN.

2. (SBU) SUMMARY CONTINUED. ON THE FINAL DAY, JANUARY 17, THE WORKING GROUP REVIEWED AND APPROVED IN PRINCIPLE THE CHAIR'S (FRENCH PERMREP BERNARD KESSEDJIAN) DRAFT REPORT WHICH REFLECTED THE TWO WEEKS OF DELIBERATIONS. THE WG SESSION ENDED WITH A CHORUS OF PRAISE FOR THE CHAIR'S BALANCED AND SUBSTANTIVE CONDUCT OF THE PROCEEDINGS. THE

CHAIR REITERATED HIS INTENTION TO SEEK A ONE-WEEK INFORMAL SESSION IN GENEVA IN SEPTEMBER 2003 BEFORE THE SECOND FORMAL SESSION IN JANUARY 2004. AT THE LATTER MEETING, A PROPOSED WORKING DOCUMENT IS EXPECTED TO BE PRESENTED AND DISCUSSED. WE PREDICT THAT, AT THAT TIME, DIVERGENCES IN THE VIEWS OF DELEGATIONS WILL BECOME MORE SHARPLY CLARIFIED AND DEBATED. END SUMMARY.

3. (SBU) FROM JANUARY 6-17, THE WG'S DELIBERATIONS WERE EXPLORATORY IN NATURE AND FOCUSED ON SEVERAL GROUPINGS OF ISSUES, SPECIFICALLY:
DEFINITION/CRIMINALIZATION/JURISDICTION/PENALTIES, AND "PROTECTIONS AGAINST IMPUNITY," THAT IS, STATUTE OF LIMITATIONS, IMMUNITIES, MILITARY COURTS AND SPECIAL TRIBUNALS, A DEFENSE OF "SUPERIOR ORDERS," APPLICATIONS FOR ASYLUM, AMNESTY AND PARDON, OTHER CAUSES OF EXONERATION, ALLEVIATION OF CRIMINAL LIABILITY, AND MITIGATION. MAJOR SUBSIDIARY ISSUES RAISED INCLUDED (1) THE NEED FOR PRECISION IN THE DEFINITION; (2) WHETHER THE TREATY WILL REQUIRE STATES PARTIES TO ENACT A SPECIFIC, STAND-ALONE OFFENSE OF "FORCED DISAPPEARANCE" OR WHETHER IT WILL SIMPLY PROHIBIT "ACTS" OF FORCED DISAPPEARANCE (THE US DELEGATION SUPPORTED THE LATTER VIEW); (3) WHETHER A STATUTE OF LIMITATIONS FOR FORCED DISAPPEARANCES SHOULD BE THE LONGEST PERIOD ALLOWED UNDER DOMESTIC LAWS OR, AS PROPOSED BY THE US DELEGATION, A PERIOD OF TIME COMMENSURATE WITH THE GRAVITY OF THE OFFENSE; AND (4) PROHIBITION OF ALL SPECIAL TRIBUNALS AND MILITARY COURTS, WHICH WAS OPPOSED BY THE US DELEGATION. AMNESTIES, ASYLUM AND REFUGE, NON-REFOULEMENT, IMMUNITIES AND MITIGATION PROVOKED MUCH DISCUSSION BUT SURPRISINGLY LITTLE DISSENSION

AT THIS MEETING. WE EXPECT IMMUNITIES AND ASSISTANCE TO
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BECOME CONTROVERSIAL AT A FUTURE STAGE.

4. (SBU) THE NEXT TRANCHE OF TOPICS DISCUSSED WERE JURISDICTION, EXTRADITION, AND MUTUAL LEGAL ASSISTANCE. SEVERAL DELEGATIONS (INCLUDING THE FRENCH) SUPPORTED BROAD JURISDICTIONAL GROUNDS TO ENSURE CRIMINAL PROSECUTION OF ENFORCED DISAPPEARANCE OFFENDERS (E.G., "PRESENT IN" OR QUASI-UNIVERSAL CRIMINAL JURISDICTION), WHILE OTHERS PROPOSED A MORE CAUTIOUS APPROACH. THE US DELEGATION RECOMMENDED THAT THE OPTIONAL PROTOCOL ON CHILD SALE/PROSTITUTION SERVE AS A REFERENCE TEXT (IN ADDITION TO THE TEXTS ON THE TABLE, THAT IS THE 1992 DECLARATION ON FORCED DISAPPEARANCES, THE 1998 DRAFT CONVENTION ON FORCED DISAPPEARANCES ADOPTED BY THE SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, THE ICCPR, AND THE CONVENTION AGAINST TORTURE) FOR PROVISIONS RELATING TO JURISDICTION, EXTRADITION, AND MUTUAL LEGAL ASSISTANCE.

5. (SBU) THE GROUP ALSO DISCUSSED PREVENTION OF FORCED DISAPPEARANCES, INCLUDING MONITORING OF DETENTIONS, REGISTRATION OF DETAINEES, ACCESS TO INFORMATION, TRAINING OF LAW ENFORCEMENT PERSONNEL, AND JUDICIAL REMEDIES. NUMEROUS DELEGATIONS UNDERSCORED THE IMPORTANCE OF PROHIBITION OF SECRET PLACES OF DETENTION AND THE AVAILABILITY OF

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UNCLAS SECTION 02 OF 03 GENEVA 000272

SENSITIVE

FOR IO/SHA - TOM JOHNSON, L/HRR - ANDRE SURENA, L/HRR GILDA BRANCATO, L/LEI - DENISE MANNING, L/PM, DRL/MLA - CHRIS CAMPONOVO, DOJ/OIA - THOMAS BURROWS, DOD/GC - ELIANA DAVIDSON

E.O. 12958: N/A
TAGS: PHUM, UNHRC, SOCI
SUBJECT: FINAL REPORT ON UNHRC WG SESSION ON FORCED DISAPPEARANCES (JANUARY 6-17, 2003)

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PAGE 02 GENEVA 00272 02 OF 03 231604Z
NON-DEROGABLE JUDICIAL REMEDIES, SUCH AS HABEAS CORPUS. DELEGATIONS ALSO HIGHLIGHTED THE IMPORTANCE OF EXPEDITED INVESTIGATIONS INTO DISAPPEARANCES. THE UNITED STATES DELEGATION SUGGESTED STRENGTHENING THE TRAINING PROVISION AND MODELING THE ARTICLES ON JUDICIAL REMEDIES UPON THE ICCPR (ARTICLES 2 AND 9).

6. (SBU) THE FINAL DAYS OF SUBSTANTIVE DELIBERATIONS FOCUSED ON THE DEFINITION AND RIGHTS OF VICTIMS, RIGHT TO REPARATION, AND THE CHILDREN OF DISAPPEARED PERSONS, WHO ARE TAKEN FROM THEIR PARENTS DURING THE ABDUCTION OR UPON BIRTH TO A DISAPPEARED MOTHER. THERE WAS AGREEMENT IN PRINCIPLE ON THE NEED FOR EFFECTIVE REMEDIES, BUT THE DEVIL WILL BE IN THE DETAILS, PARTICULARLY REGARDING THE BREADTH OF CIVIL REMEDIES AVAILABLE TO THE DISAPPEARED PERSON, FAMILY MEMBERS, AND POSSIBLY OTHERS DIRECTLY AFFECTED BY THE DISAPPEARANCE.

7. (SBU) THE SESSION CONCLUDED WITH REVIEW AND ENDORSEMENT IN PRINCIPLE OF A DRAFT REPORT PREPARED BY THE CHAIR AND THE SECRETARIAT WHICH SUMMARIZES THE TWO WEEKS OF DISCUSSION. IT IDENTIFIES THE SUBSTANTIVE ISSUES AND CONCEPTS THAT WERE DISCUSSED, AND PROVIDES "CHAIRMAN'S SUMMARIES" OF THE SALIENT CONCLUSIONS THAT APPEARED TO EMERGE FROM THE WORKING GROUP'S DISCUSSIONS OF THE CORE SUBSTANTIVE ISSUES NOTED ABOVE. DELEGATIONS MADE ORAL COMMENTS ON THE DRAFT REPORT, AND, IN RESPONSE TO THE CHAIR'S INVITATION FOR DELEGATIONS TO SUBMIT WRITTEN COMMENTS ON IT, THE U.S. DELEGATION HAS PREPARED WRITTEN PROPOSED EDITS IN AN EFFORT TO ENSURE GREATER ACCURACY AND BALANCE IN THE DESCRIPTION OF WHAT WAS DISCUSSED. THOSE COMMENTS WILL BE PRESENTED TO THE CHAIR DURING THE WEEK OF JANUARY 20. THE DRAFT REPORT RECOMMENDS

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THAT THE WORKING GROUP MEET FORMALLY BEFORE THE SIXTIETH SESSION OF THE CHR (EARLY IN 2004) AND THAT AN INFORMAL PREPARATORY MEETING OF FIVE WORKING DAYS TAKE PLACE LATER THIS YEAR, PREFERABLY AT THE BEGINNING OF SEPTEMBER, TO LAY THE FOUNDATION FOR THE 2004 FORMAL SESSION. AT THAT SESSION, THE WG WILL PROBABLY ADDRESS OTHER ISSUES OF PARTICULAR IMPORTANCE TO THE U.S., SUCH AS THE NATURE OF THE INSTRUMENT (SEPARATE CONVENTION VICE OPTIONAL PROTOCOL), RELATIONSHIP WITH OTHER INSTRUMENTS (PARTICULARLY THE GENEVA CONVENTIONS OF 1949 AND ADDITIONAL PROTOCOLS), THE QUESTION OF A SUPERVISORY MECHANISM (EXISTING OR NEW TREATY BODY, AND ITS COMPETENCE), AND FINAL CLAUSES OF THE INSTRUMENT, NOTABLY WHETHER RESERVATIONS WILL BE PERMITTED.

8. (SBU) IN SEVERAL PRIVATE ASIDES, THE CHAIR REPEATEDLY THANKED THE UNITED STATES DELEGATION FOR ITS ACTIVE ENGAGEMENT, WHILE ACKNOWLEDGING THAT THE U.S. GOVERNMENT RESERVES ITS POSITION ON THE OUTCOME OF THIS PROCESS. [redacted] B5

[redacted] RATHER THAN REQUIRE ADOPTION OF A SEPARATE, STAND-ALONE FORCED DISAPPEARANCE OFFENSE, THE CHAIR SUGGESTED THAT, PRIOR TO THE NEXT WG MEETING, FRANCE WOULD BE PREPARED TO HOST AN INFORMAL MEETING OF CRIMINAL LAW EXPERTS FROM THE US DEPARTMENT OF JUSTICE AND THEIR FRENCH COUNTERPARTS. THE MEETING COULD BE IN PARIS OR GENEVA AND THE PURPOSE WOULD BE TO EXCHANGE VIEWS ON PERTINENT LAW ENFORCEMENT ISSUES AND CONCERNS THAT WOULD BE RAISED BY A NEW INSTRUMENT ON FORCED DISAPPEARANCES. HE INTIMATED THAT HIS OWN JUSTICE MINISTRY LAWYERS HAVE CONCERNS THAT WOULD NEED TO BE ADDRESSED IN SUCH AN INSTRUMENT AND SUGGESTED THAT PERHAPS

THE U.S. AND FRENCH EXPERTS COULD FIND SOME COMMON GROUND IN RESOLVING SOME OF THEIR RESPECTIVE CONCERNS. THOSE DISCUSSIONS MIGHT INCLUDE, HE SUGGESTED, SUCH ISSUES AS PENALIZATION, SANCTIONS, IMMUNITIES, JURISDICTION, EXTRADITION, AND MUTUAL LEGAL ASSISTANCE. MISSION GENEVA CONSIDERS THAT THIS SINCERELY TENDERED OFFER SHOULD BE GIVEN SERIOUS CONSIDERATION IN WASHINGTON. SUCH A FOCUSED EXCHANGE OF VIEWS AMONG SUCH CRIMINAL LAW EXPERTS COULD HELP SHAPE MORE CONSTRUCTIVELY THE FOLLOW-ON NEGOTIATIONS IN GENEVA, WITHOUT PREJUDICE TO THE USG'S CONTINUED RESERVATION OF ITS POSITION REGARDING ANY INSTRUMENT THAT FINALLY EMERGES FROM THE WG PROCESS.

9. (SBU) COMMENT: THE WG'S TWO WEEKS OF DELIBERATIONS WITNESSED A REMARKABLE CONVERGENCE OF SUBSTANTIVE, NON-POLEMICAL LEGAL DISCUSSION COUPLED WITH A SPIRIT OF

COOPERATION AMONG ALL IN ATTENDANCE, INCLUDING STATE DELEGATIONS, NGOS, AND ASSOCIATIONS OF FAMILIES OF THE DISAPPEARED. THE PROGRESS ACHIEVED AND GOOD ATMOSPHERICS WERE DUE IN LARGE PART TO THE FRENCH AMBASSADOR'S STRONG LEADERSHIP AND SUBSTANTIVE COMPETENCE COMBINED WITH A HIGH DEGREE OF PROFESSIONALISM AND SINCERITY AMONG THE WG MEMBERS. THE FRENCH CHAIR SEEMS GENUINELY WEDDED TO THE IDEA OF TRYING TO PRODUCE A DOCUMENT THAT WILL BE EFFECTIVE, BUT AT

ACTION IO-00

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SENSITIVE

FOR IO/SHA - TOM JOHNSON, L/HRR - ANDRE SURENA, L/HRR GILDA BRANCATO, L/LEI - DENISE MANNING, L/PM, DRL/MLA - CHRIS CAMPONOVO, DOJ/OIA - THOMAS BURROWS, DOD/GC - ELIANA DAVIDSON

E.O. 12958: N/A
TAGS: PHUM, UNHRC, SOCI
SUBJECT: FINAL REPORT ON UNHRC WG SESSION ON FORCED DISAPPEARANCES (JANUARY 6-17, 2003)

THE SAME TIME REASONABLE IN COMBATTING ENFORCED DISAPPEARANCES. HE HAS CLEARLY INDICATED THAT HE WILL RESIST EFFORTS BY DELEGATIONS THAT SEEK TO INJECT EXTRANEOUS ISSUES -- SUCH AS THE DEATH PENALTY AND NON-REFOULEMENT -- FEARING

THEY WOULD ONLY COMPLICATE THE EFFORT TO REACH WIDE AGREEMENT ON A FORCED DISAPPEARANCES INSTRUMENT. IN VIEW OF THIS HELPFUL ATTITUDE, AND THE CHAIR'S STRONG DESIRE TO KEEP THE U.S. IN THE GAME, WE SHOULD REMAIN ACTIVELY ENGAGED IN THE PROCESS AND SEE IF A FINAL TEXT IS PRODUCED THAT MERITS SERIOUS U.S. CONSIDERATION. US PARTICIPATION IN ALL ASPECTS OF THE DISCUSSIONS WILL HELP TO ENSURE THAT THE WG, AND HOPEFULLY THE FINAL TEXT, REMAINS FOCUSED.

10. (SBU) COMMENT CONTINUED. THAT SAID, THE NEGOTIATIONS PROCESS WILL TAKE SOME TIME, POSSIBLY ANOTHER TWO YEARS, TO CONCLUDE. A SECOND FORMAL TWO-WEEK SESSION WILL REQUIRE AUTHORIZATION BY THE 59TH SESSION OF THE COMMISSION ON HUMAN RIGHTS (17 MARCH-25 APRIL, 2003) PURSUANT TO A NEW RESOLUTION ON ENFORCED DISAPPEARANCES (ANNUALLY PROPOSED BY THE FRENCH GOVERNMENT). WE EXPECT A RESOLUTION CONTAINING SUCH AUTHORIZATION TO BE ADOPTED. THE JUST-CONCLUDED INTER-SESSIONAL DELIBERATIONS REPRESENT AN INITIAL STAGE IN WHICH ALL INTERVENTIONS WERE PRELIMINARY IN NATURE. MANY STATES WERE SPEAKING WITHOUT FORMAL INSTRUCTIONS, AND NO FORMAL WORKING TEXT HAS YET BEEN PRESENTED. AS NEGOTIATIONS PROCEED AND BEGIN TO FOCUS ON A DRAFT TEXT, NEGOTIATORS FROM STATES' FOREIGN AFFAIRS AND JUSTICE DEPARTMENTS WILL INCREASINGLY BE CALLED UPON TO PROVIDE THEIR CONSIDERED VIEWS. THAT NEXT STAGE COULD BEGIN LATER THIS YEAR. END COMMENT.
MOLEY

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SENSITIVE

IO/SHA, DRL/MLA,L/HRR, L/LEI, L/PM

E.O. 12958: N/A
TAGS: UNGA, UNHR, PHUM, SOCI
SUBJECT: REPORTING CABLE ON FORCED DISAPPEARANCES TREATY NEGOTIATIONS

REF: 03 GENEVA 3431

1.(SBU) SUMMARY: In two weeks of intense negotiations, the French Chair led the inter-sessional Working Group mandated to prepare a binding normative instrument on forced disappearances through a first, and somewhat hurried, reading of the Chair,s draft instrument, followed by a slightly more in-depth review of selected articles that presented particular difficulty or sensitivity. The Chair made clear his ambitious intent to complete the negotiations process in time for adoption of a draft instrument at the 2005 session of the Commission on Human Rights (CHR) and subsequently by the UNGA. A few delegations (notably U.S., Canada, and China) have attempted to slow down the pace, underscoring that treaty negotiations require full review and discussion and that the entire draft text remains open and bracketed. For the time being, the Chair shows no sign of relenting from his pace, while relying upon a rough consensus on less controversial provisions as evidence of a coalescing instrument that requires only further review of the most controversial issues.

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UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 24 JUL 2009 200706444

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3. (SBU) The two-week session concluded with a hurried review and ad referendum adoption of the Chair,s draft report. The Chair confirmed his plan to produce a revised Chair,s text by June to serve as the basis for a two-week formal negotiating session in September, followed by another formal two-week session in January 2005, which he termed &the concluding negotiating session.8 He will seek to further lock in his proposed timetable in the coming weeks through adoption of a draft resolution on enforced disappearances that will be sponsored by the French delegation at the CHR session that begins mid-March. END SUMMARY.

4. (SBU) [redacted]

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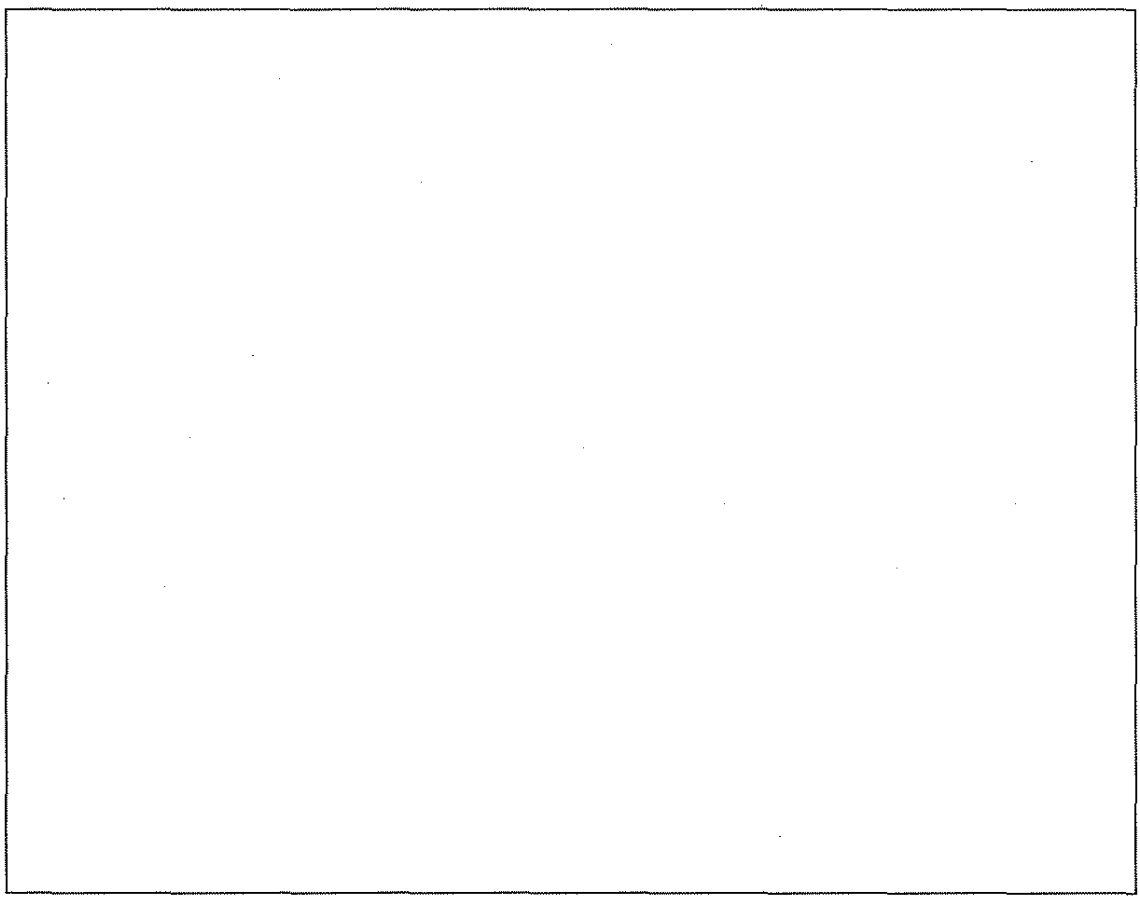
[redacted] UN independent expert on forced disappearances, Manfred Nowak, addressed the working group. His only constructive contribution was the suggestion that it probably made more sense to adopt the new instrument as an optional protocol to the International Covenant on Civil and Political Rights (ICCPR). Two current members of the UN expert Working Group on forced disappearances reminded negotiators to bear in mind the &woeful8 lack of Secretariat resources and

support for existing human rights mechanisms and highlighted areas of potential overlap between their work and a proposed new treaty monitoring body on forced disappearances. UN expert Louis Joinet, and occasionally representatives from NGOs, punctuated the discussion with helpful legal analysis. Families of the disappeared from Latin America and Asia, some still searching for loved ones after twenty-six years, bore witness to the horror of that crime and the reign of terror that it spawned.



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6. (SBU) Chapter One. (Definition). The Chair appears ready to adopt the proposal made by the US and UK that the definition of &enforced disappearance8 should contain a state action requirement and that disappearances committed by private parties should be addressed in a separate criminalization provision. It remains to be seen, however, whether this bifurcated approach will prevail over continuing counter pressures.

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of a requirement to prove specific &intent to remove the disappeared person from the protection of the law. The UK and Japan have proposed compromise definitions that would refer to &arrest, abduction, detention, or other deprivation of liberty8 or, alternatively, to &arrest, abduction, detention, confinement or similar deprivation of liberty.8 Mens rea as a key element of the crime remains a subject of live controversy. The US delegation underscored that a carefully framed definition is a critical fulcrum on which the acceptability of many other provisions -- such as quasi-universal jurisdiction, command responsibility, and elimination of the defense of superior orders -- depends.

8. (SBU) Chapter Two and Three. (Offenses and Penalties, Protection Against Impunity). A critical issue is whether the instrument will require criminalization of &acts8 of forced disappearance (a formula used in Article 4 of the Torture Convention) or other language to this effect. Such wording would allow a number of States (like the U.S.) sufficient discretion within their existing national law to penalize the offense(s) within the spirit of the instrument. The French and Latin countries continue to strongly resist an &acts8 approach and insist upon a requirement that States Parties enact a new, separate or autonomous crime of &enforced disappearance8 as defined in the instrument. They argue that the punishment, jurisdiction, extradition, legal assistance, statute of limitations, and other provisions of the instrument would be more workable and uniform among States Parties if they all enact a new criminal offense denominated &enforced disappearance.8 The U.S. was among the most forcefully outspoken Federal States in supporting an &acts8 approach; India and Norway also made strong interventions to this effect. In this regard, the Chair formally invited India and Norway to provide papers that would explain and demonstrate how, under their existing legal system, they could punish crimes of enforced disappearance using an &acts-based8 approach. The Chair, in a private aside, intimated that a similar paper from the U.S. would also be welcome.

9. (SBU) Other issues addressed within this chapter are: aggravating and mitigating circumstances; statutes of limitations; command responsibility; prohibition of the defense of superior orders; and amnesties and pardons. Advances were made in clarifying the scope of the first three of these subjects. Aggravating and mitigating circumstances listed in the treaty will not be considered exhaustive. The statute of limitations standard that seems to be gaining increasing favor is the requirement that it be &commensurate with the gravity of the offense8 rather than &the longest

period prescribed under local law8 (as in the Argentine Chair,s text). And the standard for command responsibility will track that contained in the ICC statute for non-military superiors, which contains a higher mens rea requirement than for military superiors (see Rome Statute article 28).

10. (SBU) The United States was isolated in urging retention of the good soldier defense to ensure fairness and due process for the accused. We noted our objection for the record, underscoring that the eventual acceptability of this article may be linked to the specificity and mens rea components of the definition of the crime. Our point was that innocent actors following lawful, or ostensibly lawful, orders should not be prosecuted as accomplices to a crime.

11. (SBU) The issue of amnesties is among the most sharply contested in the evolving instrument. Some delegations, families of the disappeared, and NGOs believe that this instrument should in no way absolve enforced disappearances by means of amnesty provisions, fearing this would foster impunity and negate the value of the instrument. Other delegations emphasized the constitutional prerogatives of executives and legislatures in granting pardons and condoning amnesties. The Chair, however, appears to be leaning toward deleting any reference to amnesties from the instrument. He noted that international law and practice on amnesties is still evolving and that each State should be allowed to reach its sovereign decision on this sensitive subject. The Chair also deleted a proposed article in the instrument on asylum.

12. (SBU) Chapters Four and Five. (Domestic Prosecution and International Cooperation). There is strong support to include a requirement that States Parties exercise quasi-universal (&present in8) jurisdiction, so that any fugitive who is accused of enforced disappearance and is found within their territory will be subject to either prosecution or extradition. The US delegation submitted a proposal urging that this basis of jurisdiction (as well as passive personality) be made optional at the discretion of the State Party, but this approach currently seems unlikely to prevail. Delegations remain divided over whether a reservation with respect to such jurisdiction would be incompatible with the object and purpose of the instrument.

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13. (SBU) Importantly, what began as an express prohibition of military tribunals is now evolving towards a requirement to prosecute enforced disappearance crimes before &independent and impartial tribunals with due process guarantees.8 Although the investigation, extradition, and legal assistance formulations within the proposed instrument were tightened during this round of negotiations, they still need further improvement. We will continue to oppose other problematic provisions within this chapter, such as one requiring &immediate8 consular notification regarding someone accused of enforced disappearance. That standard could conflict with a matrix of existing multilateral and bilateral consular notification provisions.

14. (SBU) Chapters Six and Seven. (Measures of Prevention and Rights of Victims). These two chapters remain among the most difficult in the draft instrument. They seek to establish an unqualified &right of families and others with a legitimate interest to know8 the whereabouts and other circumstances of a disappeared person. They attempt to regulate and specify the type of information to be provided. They seek to penalize the provision of misinformation and require training of official and medical personnel. They also contain broad provisions on civil remedies, requiring compensation, rehabilitation, and other forms of reparation. There was little consensus on these articles, and substantial further discussion is required.

15. (SBU) The US delegation, standing virtually alone on this issue, made a valiant effort to avoid recognition of an unqualified and enforceable 8right to know8 as an established concept in human rights law, while strongly recognizing, on compassionate grounds, the fundamental need of families to seek the truth and receive information. Toward this end, and with timely and critical support from the Department, the US delegation offered an alternate text that tracks language in the ICCPR (Article 19(2)) on &the freedom to seek and receive information.8 Many delegations seek to have this &right8 framed as both unqualified and universal, with no circumstances allowing for derogation or other exception. Notwithstanding recognition by Japan,

Canada and some other delegations as to a possible need in certain situations to balance privacy and law enforcement interests against a legitimate demand for information in the context of an enforced disappearance,

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NGOs and families of the disappeared have passionately pled that this should be one of the core principles of this instrument and have found strong support among many European and Latin States. Moreover, the Chairman has said to the U.S. delegation privately on several occasions that he regards inclusion of this right in the instrument as a key goal.

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16. (SBU) The non-refoulement provision will likely be revised to conform to international standards (as a result of interventions by the U.S. and other delegations), although this is not yet a done deal. It remains unclear whether differences of view regarding the provisions on disappeared children will be resolved in favor of the &best interests of the child8 standard (a principle enshrined in Article 3, paragraph one of the Convention on the Rights of the Child and used in the US for custody cases) or the &custodial parent8 standard (found in Hague Convention on Abduction), particularly in addressing the abduction or surreptitious transfer of disappeared children to non-biological families.

17. (SBU) PART TWO OF THE INSTRUMENT. (Treaty Monitoring Body). There was substantial but incomplete discussion of the proposed mandate of the treaty monitoring body envisioned for this instrument. There was widespread support for an &urgent action request8 procedure when there are credible grounds to believe a forced disappearance has occurred. There was also support for on-site visits predicated upon state consent, although some concern was expressed about proposed far-reaching powers that would be granted to the treaty body once the site visit is approved by the State Party. Some States supported expanding treaty body powers to include authority to receive individual petitions and to require a State to offer reasons for refusing a site visit. China proposed, in lieu of creating a treaty monitoring body, having a follow-up conference of States.

18. (SBU) There is increasing support among a number of delegations for using an existing treaty monitoring body, including the possibility of creating -- under the auspices of such a body -- a sub-committee on forced disappearances. This position gained further momentum when two expert members of the current UNCHR special mechanism on forced disappearances highlighted areas of potential overlap between their work and that of a treaty body, also underscoring the

severe and chronic underfunding of their work. They distributed a paper indicating that in 1999 the chair of their expert group questioned the need for a legally binding instrument on forced disappearances but demurred as to whether this remains the chair,s current thinking.

19. (SBU) PART THREE. (Treaty clauses). The Working Group discussed principally Articles III-E (non-derogation) and III-F (Provisions of International Humanitarian Law), the two most critical to USG interests. Following lengthy US and International Committee of the Red Cross (ICRC) interventions on the distinctions between international human rights law and international humanitarian law, the Chair announced that he would include in his next text a new III-F clause acceptable to both the US and the ICRC that will read as follows. QUOTE The present instrument is without prejudice to the provisions of international humanitarian law, including the obligations of High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, or to the opportunity available to any State Party to authorize the ICRC to visit places of detention in situations not covered by international humanitarian law. UNQUOTE Inclusion of such an acceptable IHL clause making clear that the law of armed conflict remains the lex specialis governing situations of armed conflict would mean that Article III-E on non-derogation would remain unchanged.

20. (SBU) Finally, the Chair indicated continued support for keeping out of the text a clause that would flatly bar any reservations to the instrument, preferring to allow international treaty law to govern the subject. He noted that this approach would also foster the goal of wider acceptance of the instrument within the international community. Additionally, the Chair noted that most

delegations supported in principle a preambular reference to &crimes against humanity8 and that, in his view, it would also be useful to add an operative provision on this subject. The United States delegation expressed serious concerns about any such references in the instrument and reserved to make it clear that there was no consensus in the room on such an approach. MOLEY

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E.O. 12958: N/A
TAGS: PHUM, UNHRC, SOCI
SUBJECT: REPORT ON OPENING OF WG SESSION ON FORCED DISAPPEARANCES

REF: 02 GENEVA 005200

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1. (SBU) SUMMARY. IN WEEK ONE, THE UNHRC WORKING GROUP SESSION ON A PROPOSED LEGALLY BINDING INSTRUMENT ON FORCED DISAPPEARANCES HAS BEEN MOVING SWIFTLY, CONTRARY TO THE ORIGINAL PREDICTIONS OF THE CHAIR THAT IT WOULD TAKE THE FULL TWO-WEEK SESSION TO COMPLETE GENERAL DISCUSSION AND THE DEFINITION OF FORCED DISAPPEARANCES. DISCOURSE HAS BEEN HIGHLY SUBSTANTIVE AND FOCUSED, INCLUDING THE CONTRIBUTIONS OF MOST OF THE NGOS (NOTABLY THE INTERNATIONAL COMMISSION OF JURISTS, AMNESTY INTERNATIONAL, HUMAN RIGHTS WATCH, AND THE INTERNATIONAL FEDERATION OF HUMAN RIGHTS) AND THE ELOQUENT PRESENTATIONS OF MOTHERS OF THE DISAPPEARED. THERE IS GOOD WILL IN THE ROOM, IN LARGE PART DUE TO THE EXCELLENT ATMOSPHERICS SET BY THE FRENCH AMBASSADOR SELECTED TO CHAIR

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
DATE/CASE ID: 24 AUG 2009 200706444

THE WG AND THE UNIVERSAL RECOGNITION AMONG DELEGATIONS OF THE REPREHENSIBLE NATURE OF FORCED DISAPPEARANCES. STILL, FAULT LINES ARE BEGINNING TO EMERGE. SEE ACTION REQUESTS IN PARA. 6 BELOW. END SUMMARY.

2. (SBU) THE WG SESSION OPENED ON JANUARY 6. AFTER THE UNANIMOUS SELECTION OF THE CHAIR AND SETTING OF THE AGENDA, MR. JOINET, A UN HUMAN RIGHTS EXPERT WHO HAS BEEN WORKING ON THE PROBLEM OF FORCED DISAPPEARANCES FOR CLOSE TO TWO DECADES, MADE A PRESENTATION. DURING THE GENERAL DEBATE THAT FOLLOWED, VARIOUS DELEGATIONS EXPRESSED VIEWS RANGING FROM (1) SWIFT ADOPTION OF A COMPREHENSIVE INSTRUMENT PRESCRIBING BROAD CRIMINALIZATION, PREVENTION AND REPARATION MECHANISMS (ENDORSED BY GRULAC) TO (2) ADOPTION OF A "SPECIFIC, EFFECTIVE AND UNIVERSAL" INSTRUMENT ADDRESSING ALL ASPECTS OF THE PROBLEM (FORMAL STATEMENT OF THE EU DELIVERED BY GREECE) TO (3) READINESS TO ACTIVELY ENGAGE IN DISCUSSIONS, WHILE

LAYING DOWN EXPLICITLY SOME INITIAL GENERAL AREAS OF CONCERN REGARDING SUGGESTED PROVISIONS/CONCEPTS (THE U.S. AND CANADA) TO (4) THERE IS NO DEMONSTRATED NEED FOR AN INSTRUMENT (INDIA AND TO A LESSER DEGREE SAUDI ARABIA AND PAKISTAN). (TEXT OF U.S. INITIAL STATEMENT HAS BEEN SENT ELECTRONICALLY TO L/HRR, IO/SHA, AND DRL/MLA). ON JANUARY 7 THE INDEPENDENT EXPERT PROF. NOWAK PRESENTED HIS LENGTHY AND COMPREHENSIVE REPORT AND ANSWERED NUMEROUS THOUGHTFUL QUESTIONS.

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3. (SBU) CORE ISSUES THAT EMERGED OUT OF THE FIRST TWO DAYS OF DISCUSSION INCLUDE (1) COVERAGE OF NON-STATE ACTORS IN THE TREATY, (2) THE INTER-RELATIONSHIP OF HUMAN RIGHTS LAW, INTERNATIONAL HUMANITARIAN LAW, AND INTERNATIONAL CRIMINAL LAW, (3) NON-DEROGATION OF THE DUTY TO REFRAIN FROM COMMITTING ENFORCED DISAPPEARANCES AND, MORE PROBLEMATICALLY FOR SOME, OF MEASURES OF PROTECTION SUCH AS HABEAS CORPUS, (4) NEED FOR MEASURES AT THE NATIONAL VICE INTERNATIONAL LEVEL, (5) FORMAT OF THE PROPOSED INSTRUMENT, THAT IS, SEPARATE CONVENTION VICE OPTIONAL PROTOCOL TO ICCPR OR CONVENTION AGAINST TORTURE, AND THE CONCOMITANT QUESTION OF TREATY MONITORING BODY, AND (6) STRENGTHS AND WEAKNESSES OF VARIOUS REFERENCE TEXTS. ON THE LATTER POINT THE UNITED STATES (AND OTHERS) FLAGGED DEFICIENCIES IN THE "98 DRAFT TEXT, OTHER DELS WARMLY EMBRACED IT, AND THE CHAIR REASSURED THE ASSEMBLED THAT ONLY THE 1992 UNGA DECLARATION REPRESENTED THE UNCONTESTED CONSENSUS OF STATES.

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4. (SBU) ON WEDNESDAY THE SESSION MOVED FROM GENERAL DEBATE TO SPECIFIC, SUBSTANTIVE DISCUSSION OF THE PROPOSED CONTENTS OF A LEGAL INSTRUMENT. AFTER SOME BACK AND FORTH ON THE METHODOLOGY FOR EMBARKING ON OUR WORK, THE GROUP CONCLUDED THAT THIS SESSION WILL FOCUS ON CONCEPTS AND ISSUES, AS DELEGATES CANNOT BE EXPECTED AT THIS EARLY JUNCTURE TO ADDRESS IN DEPTH A DRAFT TEXT WITH INSTRUCTIONS FROM CAPITALS. TO FACILITATE AN ORDERLY REVIEW OF THOSE CONCEPTS AND ISSUES, A "DISCUSSION GUIDE" HAS BEEN PREPARED BY THE CHAIR (COPY TO BE FORWARDED TO THE DEPARTMENT). THERE FOLLOWED A USEFUL DISCUSSION OF THE DEFINITION OF FORCED DISAPPEARANCES, WITH SOME CONVERGENCE ON CORE ELEMENTS SUCH AS CONCEALMENT OF WHEREABOUTS, BUT WITH STARK DIVERGENCES OF VIEW BECOMING APPARENT. THESE INCLUDE, AS NOTED ABOVE, THE ISSUES OF TREATY COVERAGE OF PRIVATE PARTIES' ACTS AND ALSO INCLUDING IN THE DEFINITION OF "ACTS TAKING PLACE AT ALL TIMES", [redacted] B5
THE U.S. DELEGATION REQUESTED THAT THIS LATTER POINT BE REMOVED FROM THE DEFINITION AND DEFERRED TO A LATER DISCUSSION OF THE RELATIONSHIP BETWEEN THIS INSTRUMENT AND OTHER CONVENTIONS, NOTABLY THE GENEVA CONVENTIONS.

5. (SBU) U.S. DELEGATION EXPRESSED PRELIMINARY THOUGHTS ON THE DEFINITIONAL ISSUE, NOTING OUR OPPOSITION TO THE

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INFO	LOG-00	AF-00	AID-00	AMAD-00	CIAE-00	WHA-00	SRPP-00
	EAP-00	EB-00	ED-01	EUR-00	UTED-00	HHS-01	H-01
	TEDE-00	INR-00	L-00	NEA-00	DCP-01	NSAE-00	NSCE-00
	OIC-02	OPIC-01	PRS-00	P-00	SP-00	SS-00	STR-00
	TEST-00	TRSE-00	USIE-00	SA-00	PRM-00	DRL-02	G-00
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TO DEPTJUSTICE WASHDC
SECSTATE WASHDC 1958
INFO DOD WASHDC

UNCLAS SECTION 02 OF 02 GENEVA 000095

SENSITIVE

FOR IO/SHA - TOM JOHNSON, L/HRR - ANDRE SURENA, L/LEI - DENISE MANNING, L/PM, DRL/MLA - CHRIS CAMPONOVO, DOJ/OIA - THOMAS BURROWS, DOD/GC - ELIANA DAVIDSON

E.O. 12958: N/A
TAGS: PHUM, UNHRC, SOCI
SUBJECT: REPORT ON OPENING OF WG SESSION ON FORCED DISAPPEARANCES

INCLUSION OF PURELY PRIVATE ACTORS IN THE TREATY, FOR BOTH
UNCLASSIFIED

PAGE 02 GENEVA 00095 02 OF 02 101001Z
THEOLOGICAL AND PRACTICAL REASONS. WE BASED OUR INTERVENTIONS ON THE GENERAL INSTRUCTIONS FOR THIS SESSION CLEARED WITHIN STATE, JUSTICE'S COMMENTS ON OUR DRAFT INSTRUCTIONS, AND INTER-AGENCY INSTRUCTIONS AND AGENCY VIEWS PREPARED IN CONNECTION WITH NEGOTIATION OF THE OAS FORCED DISAPPEARANCES CONVENTION IN 1992-94. ON JANUARY 9, WE MOVED FROM DISCUSSION OF THE DEFINITION OF ENFORCED DISAPPEARANCE TO CRIMINALIZATION AND JURISDICTION TO PROSECUTE SUCH AN OFFENSE. INTERESTINGLY, NUMEROUS INITIAL INTERVENTIONS WERE PRESENTED BY UN AMBASSADORS IN GENEVA, THE JAPANESE MADE AN ELEVENTH HOUR DECISION TO BRING IN A TEAM OF TWO FROM TOKYO (INCLUDING A TREATY LAWYER), AND THE CANADIANS ARE REPRESENTED BY A DEPARTMENT OF JUSTICE ATTORNEY FROM OTTAWA (AS WELL AS A LOCAL REPRESENTATIVE). STATES ARE TAKING THIS EXERCISE SERIOUSLY. THE SIZE AND COMPOSITION OF THE U.S. DELEGATION HAS ALSO BEEN NOTICED AND WELL-RECEIVED BY THE CHAIR AND A NUMBER OF DELEGATIONS.

6. (SBU) COMMENT AND ACTION REQUESTS. THE DISCUSSION TO DATE HAS MADE IT VERY CLEAR THAT THE WORKING GROUP WILL PROBABLY REACH, AND THUS WE SHOULD BE PREPARED TO ADDRESS, CONCEPTS AND ISSUES SET FORTH IN THE "DISCUSSION GUIDE" NOTED ABOVE. DURING THE SESSION, THE U.S. HAS MADE CLEAR THAT IT IS EXPRESSING PRELIMINARY VIEWS ONLY. HOWEVER, IN VIEW OF THE FAST-PROGRESSING AND SUBSTANTIVE NATURE OF THE DISCUSSIONS, WE REQUEST THAT DOD/GC PROVIDE EARLY COMMENTS AND CLEARANCE ON THE GENERAL AND ARTICLE-BY-ARTICLE INSTRUCTIONS EARLIER PROVIDED FOR REVIEW. WE ALSO SOLICIT ANY ADDITIONAL COMMENTS FROM STATE OR JUSTICE ON THE ARTICLE-BY-ARTICLE DRAFT OR OTHERWISE THAT COULD BE OF BENEFIT TO THE DELEGATION DURING THE COURSE OF THIS SESSION, WHICH ENDS JANUARY 17, AND IN
UNCLASSIFIED

PAGE 03 GENEVA 00095 02 OF 02 101001Z

PREPARATION FOR FUTURE SUCH SESSIONS.
FOLEY

UNCLASSIFIED

<< END OF DOCUMENT >>

Y3

ORIGIN L-00

INFO	LOG-00	AID-00	CIAE-00	INL-00	DODE-00	DS-00	VCI-00
	H-00	TEDE-00	INR-00	IO-00	LAB-01	MOFM-00	MOF-00
	VCIE-00	NSAE-00	NSCE-00	OIC-00	PA-00	GIWI-00	FMPC-00
	SP-00	IRM-00	SSO-00	SS-00	DSCC-00	PRM-00	DRL-00
	G-00	SAS-00	FA-00	SWCI-00	/001R		

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B1, 1.4(D), B5

181098
SOURCE: CBLEXCLS.009468
DRAFTED BY: L/HRR:RHARRIS/EASWAD -- 10/31/2006 202-736-7082
APPROVED BY: IO:MLAGON
DRL/MLGA:LSICADE
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C O N F I D E N T I A L STATE 181098

E.O. 12958: DECL: 10/30/2016
TAGS: PREL, PHUM
SUBJECT: INSTRUCTIONS: DISAPPEARANCES CONVENTION AT THIRD COMMITTEE

Classified By: Deputy Assistant Secretary Mark Lagon: Reasons 1.4 B/D

1. (U) DEPARTMENT PROVIDES THE INSTRUCTIONS IN PARAGRAPH 3 WITH RESPECT TO ACTION ON THE FRENCH RESOLUTION THAT WOULD ADOPT AND OPEN FOR SIGNATURE THE DISAPPEARANCES CONVENTION. ADDITIONAL BACKGROUND ON THE DECLARATION IS SET FORTH IN PARAGRAPH 2.

2. (SBU) WHILE THE DISAPPEARANCES CONVENTION WAS THE RESULT OF SEVERAL YEARS OF CONTENTIOUS NEGOTIATIONS, IT WAS ULTIMATELY ADOPTED BY CONSENSUS AT THE HUMAN RIGHTS COUNCIL IN JUNE 2006. AS MANY DELEGATIONS WHO PARTICIPATED IN THE PROCESS KNOW (INCLUDING FRANCE), THE UNITED STATES HAS MANY LEGAL CONCERNS ABOUT THE TEXT OF THE CONVENTION. THAT SAID, AS A GENERAL RULE, ADOPTION OF A TREATY BY THE UN GENERAL ASSEMBLY IS A PROCEDURAL STEP THAT MERELY DENOTES THE CONCLUSION OF THE NEGOTIATION FINALIZING THE TEXT OF THE TREATY AND PRECEDES THE TREATY'S BECOMING FORMALLY OPEN FOR

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
DATE/CASE ID: 24 AUG 2009 200706444

SIGNATURE. IN THE CASE OF THIS TREATY, ITS ADOPTION BY THE GENERAL ASSEMBLY WILL NOT RESULT IN ANY LEGAL OBLIGATION ON THE PART OF THE UNITED STATES.

B5

THE TEXT NEEDS TO BE INTRODUCED AS IT APPEARS BELOW.

3. (C) DEPARTMENT PROVIDES THE FOLLOWING INSTRUCTIONS WITH RESPECT TO ACTION ON THIS CONVENTION:

B1

(B) DELEGATION IS REQUESTED TO READ THE FOLLOWING INTERAGENCY-CLEARED STATEMENT AT THE TIME OF ADOPTION OF THE TREATY: "THE UNITED STATES THANKS THE CHAIR OF THE WORKING GROUP TO DRAFT A CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES AND ALL PARTICIPANTS IN THE WORKING GROUP FOR FOCUSING ATTENTION ON THIS IMPORTANT ISSUE. THE UNITED STATES HAS BEEN AN ACTIVE PARTICIPANT IN EACH AND EVERY SESSION OF THE WORKING GROUP TO DRAFT A CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES. GIVEN OUR FULL AND CONTINUOUS PARTICIPATION, WE HAVE ALREADY PROVIDED OUR UNDERSTANDING OF THE INTENT OF STATES THAT

PARTICIPATED IN THE WORKING GROUP ON A NUMBER OF CORE ISSUES, WHICH ADDITIONALLY EXPRESSES OUR CONCERNS WITH THE FINAL TEXT. WE REAFFIRM AND INCORPORATE HEREIN OUR STATEMENT PRESENTED TO THE HUMAN RIGHTS COUNCIL THIS PAST JUNE, WHICH CAN BE FOUND AT A/HRC/1/G/1 27 JUNE 2006. THE UNITED STATES HAS REQUESTED THAT THIS INTERVENTION AND STATEMENT BEFORE THE COUNCIL BE MADE PART OF THE OFFICIAL RECORD OF THE GENERAL ASSEMBLY IN REGARD TO THE PROPOSED CONVENTION."

(C) DELEGATION IS REQUESTED TO POST BOTH THE EXPLANATION OF POSITION IN 3(B) AND THE HRC STATEMENT ON THE USUN WEBSITE AFTER ADOPTION OF THE CONVENTION. DELEGATION IS ALSO REQUESTED TO HAVE THE EXPLANATION OF POSITION AND THE HRC STATEMENT MADE AN OFFICIAL DOCUMENT OF THE THIRD COMMITTEE AT AN APPROPRIATE TIME GIVEN STRATEGY ISSUES IN 3(A).
RICE

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Preparations for USG defense of the Second Periodic Report of the United States concerning implementation of the Convention Against Torture,
May 5-May 8, 2006

GEZ

1. Overview of the time-table for the USG delegation in Geneva – (delegation meeting, hearing schedule)

2. Mechanics of hearing – (USG's opening statements, script of USG presentation, note-takers, additional questions from the Committee, Committee's conclusions and recommendations)

3. Agency reps and their participation in USG's presentation

4. Strategy for addressing additional questions from the Committee

5. Additional work-products
   a. Script of USG presentation – opening statements, summaries of answers to Committee's list of questions.
   b. Briefing book – DOS to provide
   c. Hard Questions – each agency to draft, submit to DOS
   d. Press Guidance – DOS to draft, and circulate for interagency clearance

6. Travel/other administrative matters
   a. Final delegation list, accreditation
   b. Travel, hotel reservations

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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From: DePirro, Velia M
Sent: Thursday, December 01, 2005 11:12 AM
To: Williams, Kendl
Subject: FW: press guidance and noon briefing language on alleged secret prisons

for new press guidance file

Velia De Pirro
Political Counselor
U.S. Mission Geneva
(41) 22-749-4111

-----Original Message-----
From: Robinson, Brooks A
Sent: Thursday, December 01, 2005 10:52 AM
To: Moley, Kevin E; Cassel, Lynn L; Kovar, Jeffrey D; Barton, Paula J; DePirro, Velia M; Levin, Jan; Campbell, Piper ; Cassidy, Joseph F; Siekert, Magda S; Lubetkin, Wendy C
Subject: press guidance and noon briefing language on alleged secret prisons

L Press Guidance
November 30, 2005

Alleged CIA "Secret Prisons" in Europe

Question:

Have we received the letter from Jack Straw regarding allegations that the CIA has maintained secret prisons in Europe? What is your answer?

Answer:

- We received today a letter to the Secretary from Jack Straw on behalf of the European Union in which he asks for information from the United States regarding press reports about the alleged detention or transportation of terrorist suspects in or through EU member states.

- We are of course aware of those press reports and the parliamentary and public concerns they have created.

- As the Secretary and I have said, the United States will respond to the EU's inquiry as soon as we are able. In the meantime, we will of course remain in regular communication with our European allies about a wide range of issues, including the war on terrorism.

If Pressed: What do you anticipate the United States will say in response to the letter?

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REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

- It would not be appropriate for me to speculate about that at this time.

Drafted: L/EUR: DTerrill

Cleared:
L: SWitten - ok
EUR/ERA: RFaucher - ok
S/WCI: ASagor - ok

Noon briefing, 11/30/05

QUESTION: So if you are prepared to go as far as saying that as a theoretical legal matter that's recognized, how about the issue of secret prisons? I don't know if those complaining in Europe have actually made the argument that these things are illegal. They may not like them, but are -- in principle, having secret prisons, would that be illegal?

MR. MCCORMACK: Again, what you're getting back to is the question that we spent quite a bit of time on yesterday, the substance, the core of your question. And we have all seen the news reports about the allegations of secret detainee sites. It's not a -- these are reports that I cannot confirm or deny the substance of for you. So the sort of core of your question is just not one that I can get into from any particular angle. I appreciate the fact we're trying to come at it from a different angle. I can't do that.

One thing I can do for you is I know it's of interest to all of you -- we talked about it yesterday -- is we have received a letter from the EU presidency, from Foreign Secretary Straw. The UK is currently -- currently holds the rotating presidency of the EU. And although I'm not in a position to release the letter for you, just as a matter of practice, I think that that would be something that would be up to the UK to decide whether or not they, in fact, release the letter, I can describe the gist of it for you.

I would say that what it does is it asks for information from the United States regarding press reports about the alleged detention or transportation of terrorist suspects in or through EU member states. And the letter does talk about the fact that these press reports have been -- have attracted considerable attention among European publics as well as parliaments.

So our reaction -- we have just received the letter recently. I think it was either last night or today. I didn't get the exact time. We will, as I said yesterday, endeavor to respond to this letter to the best of our ability in a timely and forthright manner. We haven't had a chance to compose that response so I'm not going to presuppose what will be contained in the response. But as I said yesterday, we will try to -- when we do provide that response to the EU -- I'll try to provide as much information as I possibly can to you about that response.

Yes.

QUESTION: Does the letter characterize detention or overflights as illegal under EU law?

MR. MCCORMACK: No, no. It talks about alleged U.S. detention or transportation. It talks in terms of the news reports and these allegations.

QUESTION: Does it do anything other than ask for information?

MR. MCCORMACK: No.

QUESTION: Have you -- you just said you don't have a specific timeline for answering that, but have you made any further progress on answering the queries that were already outstanding?

MR. MCCORMACK: I have no updates for you on that.

QUESTION: When you say it's been -- it's going to be a timely answer, is it that the Secretary will deliver the response when she's in Europe?

MR. MCCORMACK: Yeah. I'm sure that this will be a question that she has discussions with her counterparts in Europe. I'm sure it will come up.

QUESTION: But you don't --

MR. MCCORMACK: As for the response to the letter, as I said, I can't give you a specific timeline at the moment, but we will do our best to respond in as timely a manner as possible.

Yes.

QUESTION: Wouldn't it be awkward, though, for her to be in Europe without having given a response on this? I mean, do you expect to be able to do it before she leaves?

MR. MCCORMACK: We'll see what the timeline is. At this point I can't speak to exactly when we will provide a response to Foreign Secretary's Straw's letter. I can say that the Secretary will look forward to having whatever discussions concerning this matter do arise in her meetings in Europe.

I would note one thing -- yesterday -- from yesterday's discussion. I would underline it again for you today. All of these questions concerning these allegations of overflights and secret detainee sites for those who may have engaged or intended to engage in terrorist activities all take place within the context of fighting a war against terrorism. As I said yesterday, this is a different kind of war. This is a war in which countries -- European, American and others around the world -- employ all their aspects of national power in order to fight a shadowy enemy, an enemy that doesn't recognize any rules, doesn't recognize any laws, doesn't recognize any regulations. Their sole intent is to try to kill innocent civilians in an attempt to undermine our way of life.

So that is not to say the United States acts in contravention to its laws, the Constitution or its international obligations. But it is to say that this is a different kind of war in which we use our military assets, that we use our assets to dry up terrorist financing, that we use our law

enforcement assets, that we use our intelligence assets. And inasmuch as our intelligence community and intelligence agencies are engaged in fighting this war on terrorism, I'm not in a position to talk about some potential actions that our intelligence community may or may not be engaged in. I don't think -- I think the American publics as well as foreign publics certainly understand that because to discuss -- to potentially discuss such actions undermines -- would undermine our ability to fight the war on terrorism.

So I note this just to bring to your attention, to bring to the attention of the American public as well as foreign publics, that this is a different kind of war that we're fighting. And make no mistake, we are in a war. These individuals, these groups, are intent and they continue to plot and plan to try to kill Americans, Europeans and others around the world.

Yes.

QUESTION: As you say, this is a different kind of war and the President has also said that different kind of tactics are probably needed to fight this kind of war. So does that mean that because it's a different kind of war with different kind of threats, that the use of covert sites would be justified?

MR. MCCORMACK: Again, this gets back to that same core point that, you know, I just am not at liberty from this podium to discuss, to either confirm or deny.

QUESTION: One more?

MR. MCCORMACK: We'll come back to you.

Yes, sir.

QUESTION: Does the United States through outreach and diplomacy believe that the publics of Europe and the government of Europe -- governments of Europe also believe that this is a different kind of war that perhaps requires different kinds of tactics?

MR. MCCORMACK: Well, you know, I think -- I don't have any particular polling data. I haven't seen any polls on that and, you know, I leave it to you whether or not you believe, you know, any particular poll on these subjects. But I think the fact -- the very fact that the people of Europe themselves have experienced terrorism, they have suffered losses in this war against terrorism, whether that is on the battlefields of Afghanistan or Iraq or in the capitals of Madrid or London, that I think they understand very clearly what kind of war it is that we're fighting, that this is an enemy that is determined to strike at them when they are engaged in their daily activities -- riding a bus, getting on a train, flying on an airplane.

I think that people are acutely aware of the fact that this is a different kind of war and the very fact that we do -- that we have managed to build an extraordinary cooperation on a variety of different levels with European governments as well as other governments in fighting this war on terrorism, I think is testimony to the fact that governments certainly understand. I think that reflects the will of the people as well that we are fighting a different kind of war and that we

have built up relationships on law enforcement, the military, in terms of intelligence cooperation in fighting this war.

QUESTION: But in Europe the people didn't know about these secret prisons, as the U.S. public didn't know about it, so when you say that they understand this kind of war and that your partnerships are testimony to that, don't they deserve to have the answers then that they -- their governments and we are asking you?

MR. MCCORMACK: Again, this gets back to Saul's point to and Sue's -- and Sue's point.

QUESTION: Well, of course, it's the same issue. It's all going to get back to that.

MR. MCCORMACK: Right. And I -- again, I'm happy to entertain these questions. I can't go any further than I have in my previous answers to that particular point.

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SECRET

Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance

Fourth session

Geneva, 31 January-11 February 2005

Dist.
RESTRICTED

E/CN.4/2005/WG.22/CRP.1
3 February 2005

ENGLISH
Original: FRENCH

GE20

Introduction

1. By resolution 2004/14 dated 19 April 2004, the Commission on Human Rights at its sixtieth session requested the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance to meet for a period of 15 working days in two formal sessions before the sixty-first session of the Commission, with one session of 10 working days and one session of 5 working days with a view to the prompt completion of its work. Pursuant to that resolution, the Working Group held its third and fourth sessions at the Palais des Nations in Geneva from 4 to 8 October 2004 and from 31 January to 11 February 2005, respectively. The Commission also requested the Chairperson-Rapporteur of the Intersessional Working Group to undertake informal consultations with all interested parties.

I. ORGANIZATION OF THE SESSIONS

A. Election of officers

2. On a motion from Germany seconded by Argentina, the Working Group at its third session re-elected Mr. Bernard Kessedjian (France) as its Chairperson-Rapporteur.

B. Attendance

3. Representatives of the following States members of the Commission on Human Rights attended the Working Group's meetings: Argentina, Australia, Brazil, Canada, China, Congo, Costa Rica, Cuba, Dominican Republic, Ecuador, Egypt, Finland, France, Germany, Guatemala,

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REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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Hungary, India, Indonesia, Ireland, Italy, Japan, Malaysia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Qatar, Romania, Russian Federation, South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America.

4. The following States non-members of the Commission on Human Rights were represented by observers at the Working Group's meetings: Algeria, Angola, Austria, Azerbaijan, Bangladesh, Belgium, Bolivia, Chile, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Ghana, Greece, Haïti, Iran (Islamic Republic of), Israel, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malta, Morocco, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Rwanda, Spain, Serbia and Montenegro, Slovenia, Sweden, Switzerland, Syrian Arab Republic, Tunisia, Turkey, Uruguay.

5. The Holy See was also represented by an observer.

6. The following non-governmental organizations in consultative status with the Economic and Social Council were represented by observers at the Working Group's meetings: Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Association against Torture, International Commission of Jurists, International Federation of Human Rights Leagues, International League for the Rights and Liberation of Peoples, International Service for Human Rights, Latin American Federation of Associations of Relatives of Disappeared Detainees, World Federation of Trade Unions.

7. The International Committee of the Red Cross (ICRC), the European Commission and the League of Arab States were represented by observers.

8. The following experts also participated in the sessions: Manfred Nowak, in pursuance of his mandate under resolution 2001/46; Louis Joinet, in his capacity as independent expert and Chairman of the Working Group on the Administration of Justice of the Sub-Commission on the Promotion and Protection of Human Rights which drew up the draft international convention on the protection of all persons from enforced disappearance in 1998; and Darko Göttlicher (third session) and Santiago Corcuera Cabezut (fourth session), members of the Working Group on Enforced or Involuntary Disappearances.

C. Documentation

9. The Working Group had before it the following documents:

E/CN.4/2005/WG.22/1	Provisional agenda
A/RES/47/133	Declaration on the Protection of All Persons from Enforced Disappearance
E/CN.4/Sub.2/RES/1998/25	Draft international convention on the protection of all persons from enforced disappearance
E/CN.4/Sub.2/1998/19	Report of the Sub-Commission's sessional Working Group on the Administration of Justice Sous-Commission
E/CN.4/2002/71	Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, in pursuance of paragraph 11 of Commission resolution 2001/4
E/CN.4/2004/59	Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance
E/CN.4/2004/WG.22/WP.2	Working paper

II. ORGANIZATION OF WORK

10. At the outset of the third session the Chairperson-Rapporteur submitted a working paper containing a draft instrument which he had prepared and made available to delegations before the session (E/CN.4/2004/WG.22/WP.2). This was a revised version of the working paper considered at the second session (E/CN.4/2004/WG.22/WP.1/Rev.1), taking account of comments made by delegations at that session and in informal consultations. He suggested taking the new working paper as a working basis and conducting the discussions on it. The Working Group accented that suggestion. Discussions of the paper continued at the fourth session.

At the end of the 4th session the Chair in summ. noted that —

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"The United States is pleased to join consensus, as we did during the 2002 UNGA session, on this resolution addressing the critical subject of missing persons during armed conflict. We deliver this EOP to clarify legal points of importance. First, with regard to OP3, it is our interpretation that the reference to the right to know the fate of missing relatives is based upon Article 32 of Additional Protocol I to the Geneva Conventions of 1949, and that right is binding only on States Parties to Additional Protocol I. Second, we interpret OP4 to mean that States should take reasonable and appropriate measures to search for missing persons. Third, with respect to pp4 and pp6, reference to human rights law during armed conflict by necessity refers only to those provisions, if any, that may be applicable. As may be well known, it is the position of the United States Government that the law of war is the lex specialis governing armed conflict. Thank you Mr. chairperson."

--The United States underscores that the international community should use all available and appropriate international, regional, and domestic judicial mechanisms to attack the problem of crimes against humanity, including widespread or systematic forced disappearances, and to hold accountable those responsible for such crimes.

--Additionally, with respect to OP22, the United States believes that treaty negotiations on human rights instruments should be careful and deliberate, and aimed to achieve the objective of a well-drafted, well-vetted instrument that reflects a genuine consensus.

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DATE/CASE ID: 22 JUN 2009 200706444

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Lee, Michelle G

From: Noyes, Julieta V (DRL)
Sent: Tuesday, May 02, 2006 1:07 AM
To: Harris, Robert K; Kovar, Jeffrey D; Schou, Nina E; Bentes, Julianna W
Cc: DRL Staff Assistants; Davidson, Lynne A (DRL)
Subject: Barry's Opening Statement - Final
Attachments: Lowenkron Statement Mon pm version 5-1-06.doc; Lowenkron Statement Mon pm version 5-1-06 (clean).doc

Here is the shorter, final version, after the changes from Bob, Jeff, DOJ and Barry himself. Tracked and clean versions attached. The latter can be distributed on Friday to interested parties as a PD document, as agreed at our meeting this morning.

(Lynn & Lynda -- I will forward separately the version in the right font and in cadence.)

Julieta Valls Noyes
Director, Multilateral Affairs
Bureau of Democracy, Human Rights and Labor
U.S. Department of State
tel.: (202) 647-4380
fax: (202) 647-4344
email: Noyesjv@state.gov

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

RELEASED IN FULL

FP0670

GE30A

U.S. DELEGATION ORAL RESPONSES TO CAT

COMMITTEE QUESTIONS

[BELLINGER]

I will now provide summaries of our answers to the many questions posed by the Committee. In all cases, I would encourage you to consult those written responses as they provide more detail than I and my colleagues will be able to provide today.

Questions 1 and 2 concern the memorandums drafted by the Department of Justice's Office of Legal Counsel in August 2002 and December 2004 that provided legal advice on the meaning of the term "torture" under the extraterritorial criminal torture statute that implements portions of the CAT. Nothing in these memos changes the definition of torture governing U.S. obligations under the CAT from what the United States accepted upon ratification of the Convention.

The Department of Justice's Office of Legal Counsel, which provides opinions on questions of law to the Executive Branch of the United States Government, produced the August 2002 and December 2004 memoranda. The August 2002 memorandum provided legal advice on the meaning of the term "torture" under the extraterritorial criminal torture statute and addressed issues concerning the separation of powers under the United States Constitution. This opinion was requested to provide operational guidance with respect to the implementation of the criminal statute at the level of detail needed to guide U.S. government officials

OLC later withdrew that opinion and issued another opinion dated December 30, 2004, which is confined to an interpretation of the extraterritorial criminal torture statute. The December 2004 opinion supersedes the August 2002 opinion in its entirety and thus provides the Executive Branch's authoritative interpretation of the extraterritorial criminal torture statute.

The August 2002 opinion was withdrawn not because it purported to change the definition of torture but rather because it addressed questions that were not necessary to address. In this regard, the December 2004 Memorandum clarified that "[b]ecause the discussion in that [August 2002] memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."

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DATE/CASE ID: 22 JUN 2009 200706444

FP0671

The purpose of both opinions was to provide legal advice related to a domestic criminal statute. Neither opinion purported to change the definition of torture set out in Article 1 as understood by the United States. The question that the OLC addressed was simply what the terms of that definition, as now reflected in the United States Code, mean.

Question 3 asks whether the references to "torture" as involving extreme acts in the December 2004 memorandum are compatible with the CAT. The fact that the CAT in Article 1 defines torture and then subsequently refers in Article 16 to "other acts of cruel, inhuman or degrading treatment or punishment" reflects the recognition of the negotiators that torture applied to more severe acts of cruelty and abuse than did cruel, inhuman or degrading treatment or punishment. This basic distinction between the severity of the conduct constituting torture and cruel, inhuman and degrading treatment or punishment is reflected in the underlying regime set forth in the treaty text to combat and prevent each form of conduct. Specifically because of the aggravated nature of torture, States Parties agreed to comprehensive measures to prohibit it under their criminal law, to prosecute perpetrators found in territory under their jurisdiction, and not to return individuals to other States where there are substantial grounds for believing that such persons would be in danger of

being subjected to torture. In contrast, the obligations regarding cruel, inhuman or degrading treatment or punishment are far more limited.

The December 2004 memorandum, recognizing what is clear from the text and structure of the CAT, distinguishes "torture" from "other acts of cruel, inhuman or degrading treatment or punishment" as expressed in Article 16, by explaining that torture is a more severe, or extreme, form of mistreatment than that described by Article 16. The use of the word "extreme" in these contexts clarifies the meaning of the word "severe" contained in the definition of torture set forth in Article 1 .

The fact that the term "torture" is reserved for those acts involving more severe pain and suffering, as distinguished from cruel, inhuman or degrading treatment or punishment, is also confirmed by the Convention's negotiating history and is consistent with other international law sources, cited in our written submission

Question 4 suggests that both OLC memoranda are more restrictive than previous U.N. standards, including the 1975 Declaration. We respectfully disagree. The interpretation of the term "severe" contained in the December 2004 memorandum reflects the understanding that torture constitutes a more aggravated form of abuse than that covered by the "cruel, inhuman or degrading treatment or punishment" described in Article 16. As

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I have just explained, this distinction is not only express in the text of the Convention, but also is apparent from the negotiating history, the U.S. ratification record, and other international law sources. This is also consistent with, and is not more restrictive than, the 1975 Declaration, which distinguishes torture from other lesser forms of abuse in part on the basis of the severity of the underlying acts.

Regarding Question 5 and how the United States ensures implementation of its CAT obligations, I would note that, before ratifying the CAT, the United States carefully reviewed U.S. federal and state laws for compliance with the terms of the CAT. The United States concluded that, with the sole exception of prohibiting certain acts of torture committed outside the territory of the United States, U.S. state and federal law covered all of the offenses stated in the Convention. The United States filled this lone shortcoming by enactment of the criminal extraterritorial torture statute.

In other words, the United States ensures compliance with its CAT obligations through operation and enforcement of its existing laws. As a result, there is no specific federal crime styled as "torture" for acts occurring within U.S. territory. The reason for this is simply that any act of torture falling within the CAT definition, as ratified by the United States, is already criminally prosecutable under U.S. federal and state laws. These laws,

which meet the requirements of the CAT, are binding on governmental officials and are enforced through a variety of administrative procedures, criminal prosecutions, and civil suits. Our written response to this question provides a comprehensive list of such mechanisms.

There are various mechanisms that allow the United States to ensure its CAT obligations. Of these, the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA"), is particularly relevant to the Committee's question about monitoring of prisons as it enables the Department of Justice to eliminate a pattern or practice of abuse in any state prison, jail or detention facility, is perhaps the most direct source of the federal government's authority to enforce the federal constitutional rights of persons in jails and prisons, including juvenile justice facilities, at the state and local level. Our written response provides more detailed information on the activities of the Department of Justice under this statute.

Question 6 is exceptionally broad. It asks for a vast amount of information, including statistics relating to detained persons both within and outside United States territory. Due to the sheer amount of information at issue and time constraints, I would direct you to our written answer, which includes detailed statistical data.

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Question 7 concerns alleged "secret detention facilities" under the "*de facto* effective control" of the United States. As a preliminary matter I would like to reiterate that it is the policy of the United States not to comment on allegations of intelligence activities. That said, the U.S. Government is clear in the legal standard to which all of its entities must adhere. All components of the United States Government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. Government does not permit, tolerate, or condone unlawful practices by its personnel or employees (including contractors) under any circumstances. The extraterritorial criminal torture statute makes it a crime for a person acting under the color of law to commit, attempt to commit, or conspire to commit torture outside the United States. In addition, pursuant to the Detainee Treatment Act of 2005, which I mentioned in my opening remarks, the United States voluntarily has undertaken a prohibition on cruel, inhuman, and degrading treatment or punishment that applies as a matter of statute to protect any persons "in the custody or under the physical control of the United States Government, regardless of nationality or physical location."

I will now turn to Charles Stimson, Deputy Assistant Secretary for Detainee Affairs at the Department of Defense to address Question 8.

[STIMSON]

Question 8 concerns and the Committee's interest in measures to remedy command and operational problems at detention facilities in light of what the Committee describes as "numerous allegations of torture and ill-treatment of persons in detention under the jurisdiction of the State party and the case of the Abu Ghraib prison." The United States would like first of all to address an underlying assumption of the Committee's question. While the United States is aware of allegations of torture and ill-treatment and takes them very seriously, it disagrees strongly with the suggestion that such practices are widespread or systematic. As Legal Adviser Bellinger stated in his opening remarks, these allegations must be placed in context: they relate to an extremely small percentage of the overall number of persons in detention. Moreover, it is obvious that not all allegations reflect actual abuse. For example, it is well-known that the Al Qaeda Manchester training manual instructs all Al Qaeda members to allege torture when captured, even if they are not subjected to abuse. Of course, where allegations are well-founded, the United States deplores the abuse and takes action to

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investigate and to hold wrongdoers accountable. The United States provided numerous examples of specific measures taken in response to abuses at Department of Defense ("DOD") detention facilities at Guantanamo Bay, Cuba and in Afghanistan and Iraq in our written response to the Committee's questions and in the Annex to the *Second Periodic Report*.

With respect to access and information provided to the International Committee of the Red Cross (ICRC), the ICRC has access to detainee at DoD internment facilities worldwide, including at Guantanamo and in Iraq and Afghanistan, and may meet privately with detainees under DoD control. DoD accounts for detainees under its control fully and provides notice of detention to the ICRC as soon as practicable, normally within 14 days from capture.

The ICRC transmits its confidential communications to senior officials in DoD, including military commanders in Afghanistan, Iraq, and Guantanamo, and to other senior officials of the United States government. DoD has established procedures to ensure that ICRC communications are properly routed to senior leadership and acted upon in a timely manner. DoD works with the ICRC to identify and correct concerns that come to light. While our dialogue with the ICRC is confidential, we take seriously the matters the ICRC raises and have made changes and improvements

based on its recommendations. We value the relationship between the U.S. Government and the ICRC and will continue to discuss detention issues with the ICRC.

I will now return the floor to John Bellinger.

[BELLINGER]

Question 9 asks about derogations. I would like to state unequivocally that under U.S. law, there is no derogation from the express prohibition on torture. The legal and administrative measures undertaken by the United States to implement this prohibition are described in detail in both our *Initial Report* and *Second Periodic Report*.

In response to Questions 10 and 11, which ask whether there are exceptions to the prohibition on torture, I would like to reiterate that the United States stands by its obligations under Article 2, that "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture" and that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." These are longstanding commitments of the United States, repeatedly reaffirmed at the highest levels of the U.S. Government.

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With regard to the Committee's concern about investigations, as described in great detail in the Annex to the *Second Periodic Report*, the Department of Defense has conducted 12 major investigations into all aspects of its detention operations following the events of Abu Ghraib.

As these major investigations reflect, the U.S. government is committed to investigating and holding accountable those who engage in acts of torture or other unlawful treatment of detainees. If it appears that criminal laws have been violated, then those violations are investigated and prosecuted as appropriate by the relevant authorities.

Let me now turn to the Committee's questions about interrogation rules in Question 12. The Detainee Treatment Act of 2005, as I mentioned, prohibits cruel, inhuman, and degrading treatment or punishment, as that term is defined by U.S. obligations under Article 16, and applies as a matter of statute to protect any persons "in the custody or under the physical control of the United States Government, regardless of nationality or physical location." The Act also provides for uniform interrogation standards that "[n]o person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and

listed in the United States Army Field Manual on Intelligence Interrogation." These standards apply to military, DoD civilians, and contract interrogators.

The question also asks about any interrogation rules, instructions, and methods that may have been adopted by the CIA. As already noted, the United States does not comment publicly on alleged intelligence activities. But, like any other U.S. government agency, any activities of the CIA would be subject to the extraterritorial criminal torture statute and the Detainee Treatment Act's prohibition on cruel, inhuman, or degrading treatment or punishment.

The United States provided a detailed answer to the Committee's questions in Question 13 about the process under which Article 3 is implemented in its written answers to the Committee. Rather than oversimplifying the various intricacies of procedure that may apply, I refer you to that discussion as well as the relevant discussion contained in the *Second Periodic Report*. To summarize briefly, however, let me make several points. Regulations in the immigration removal and extradition contexts permit aliens to assert Article 3 claims as a defense to either removal or extradition. Consistent with its obligations under Article 3, the United States does not transfer persons to countries where it determines that it is "more likely than not" that they would be tortured. Additionally, the

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United States' implementing laws and regulations do not exclude categories of persons from protection from refoulement under Article 3. The United States may not revoke or terminate an individual's protection under Article 3 from involuntary removal to a particular country so long as it continues to be shown that the protected individual would "more likely than not" be tortured in that country.

Our policy is clear. The United States does not transfer persons to countries where it believes it is more likely than not that they will be tortured. This policy applies to all components of the U.S. Government and to individuals in U.S. custody or control, regardless of where they may be detained. Nevertheless, on this point, I would like to refer you to our detailed analysis in our written response to this question. It explains that as a legal matter, the view of the United States is that Article 3 does not impose obligations on the United States with respect to an individual who is outside the territory of the United States. Neither the text of the Convention, its negotiating history, nor the U.S. record of ratification supports a view that Article 3 applies to persons outside of U.S. territory.

In Question 14 the Committee asks whether the United States' understanding to Article 3 interpreting "substantial grounds for believing" is in fact a reservation that restricts or changes the scope of the provision. At

the time the United States became a State Party to the CAT, it considered that the standard enunciated in its understanding was merely a clarification of the definitional scope of Article 3, rather than a statement that would exclude or modify the legal effect of Article 3 as it applied to the United States. This view has not changed. With respect to the question of who is the competent authority to make Article 3 determinations, this turns on the context in which the determination is made. For example, as I mentioned in the previous question, the decision maker will differ in immigration removal and extradition proceedings. To provide a thorough answer to this complex question, I would refer you to our more detailed description of the procedures governing these various contexts that is contained in our written submissions.

On Question 15, let me briefly describe the appeal rights of individuals asserting Article 3 claims in the immigration removal context. Generally speaking, in immigration removal proceedings (with the narrow exception of certain expedited proceedings described in our written response), an individual seeking protection from removal from the United States under Article 3 may appeal an adverse decision of the immigration judge to the Board of Immigration Appeals (BIA). If the BIA dismisses the individual's administrative appeal or denies his or her motion to reopen, the

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individual may file a petition for review of the BIA's decision with the appropriate federal court of appeals. I refer you to our written submissions for a more detailed description of these appeals procedures.

With respect to Question 16, as an initial matter, I would like to reiterate that the United States does not comment on information or reports relating to alleged intelligence operations. That being said, Secretary Rice recently explained that United States and other countries have long used renditions to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice. Rendition is a vital tool in combating international terrorism, which takes terrorists out of action and saves lives. I would like to emphasize that the United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture. The United States has not transported anyone, and will not transport anyone, to a country if the United States believes he or she will be tortured. Where appropriate, the United States seeks assurances it considers to be credible that transferred persons will not be tortured.

Concerning Question 17, I would like to note that while enforced or involuntary disappearances are unacceptable practices, they are not

synonymous with acts of torture. As we have noted previously, conduct that constitutes torture is prohibited under U.S. law. In addition, U.S. federal and state law otherwise prohibit acts that would constitute an enforced or involuntary disappearance, for example, by prohibiting assault, abduction, kidnapping, false imprisonment and by regulating the release or detention of defendants.

Additionally, the United States notes that although the non-refoulement protection of Article 3 does not explicitly prohibit the return of individuals to countries where they may face an enforced disappearance, during both immigration removal and extradition proceedings, an individual may raise any fears that he or she may have regarding forced disappearance upon return. The United States government further notes that the United States also rigorously implements its obligations under the Protocol Relating to the Status of Refugees, including the non-refoulement provisions contained therein.

Regarding the Committee's questions about diplomatic assurances in Question 18, I would like to emphasize, as the United States did in paragraph 33 of the *Second Periodic Report*, that diplomatic assurances are used sparingly. As an example, I would refer you to the over 2500 cases where Article 3 protection was granted to individuals in removal

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proceedings between 2000 and 2004. Procedures are in place that permit the United States, as appropriate, to seek assurances in order to be satisfied that it is not "more likely than not" that the individual in question will be tortured upon return. These procedures are described at length in our written submissions. Diplomatic assurances are not a substitute for a case-by-case determination of whether that standard is met.

If, taking into account all relevant information, including any assurances received, the United States believes that it is "more likely than not" that a person would be tortured if returned to a foreign country, the United States would not approve the return of the person to that country. There have been cases where the United States has considered the use of diplomatic assurances, but declined to return individuals because the United States was not satisfied such an assurance would satisfy its obligations under Article 3.

In response to the Committee's question about the "rule of non-inquiry," this is a judicial doctrine under which courts of the United States refrain from examining the penal systems of nations requesting extradition of fugitives when considering whether to permit extradition. Instead, such issues are considered by the Secretary of State in making the final extradition decision. The rule of non-inquiry recognizes that, in the U.S.

constitutional system, the Executive branch is best equipped to evaluate and deal with such issues. The rule of non-inquiry is regularly cited and relied upon in U.S. judicial opinions involving extradition.

In Question 19, the Committee refers to cases in which the United States has allegedly returned individuals to countries that the United States considers "not to respect human rights." In response, I would like to emphasize that Article 3 does not prohibit the return or transfer of individuals to countries with a poor human rights record *per se*, nor does it apply with respect to returns that might involve "ill treatment" that does not amount to torture. Rather, the United States implements its obligations under Article 3 through making an individualized determination as to whether a **particular individual** "more likely than not" will face torture in a **particular country.**

To the extent that the Committee's question is directed to returns or transfers of individuals that are effected outside of U.S. territory, the U.S. reiterates its view that Article 3, by its terms, does not apply to individuals outside of U.S. territory. That said, as we have noted previously, whether or not Article 3 applies outside of U.S. territory, the United States does not transfer persons to countries where it believes it is "more likely than not" that they will be tortured.

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Finally, a note on what the Committee and others have called "extraordinary renditions." If that term is meant to refer to moving persons across borders outside normal extradition procedures, the United States has acknowledged, as I just stated, that it, like other countries, has long used procedures in addition to extraditions or other judicial mechanisms to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice. If, however, the term is meant to refer to a practice of rendering a person to a place where he or she will be tortured, I cannot be more emphatic: we do not engage in that practice. This applies to all components of the United States government and with respect to individuals in U.S. custody regardless of whether they are inside or outside of U.S. territory.

In Question 20, the Committee asks whether torture constitutes a specific federal offense if it is committed within the United States. As I explained previously, while there is no specific federal crime styled as "torture" for acts occurring within U.S. territory, any act of torture falling within the Convention's definition, as ratified by the United States, is criminally prosecutable. There is a long list of criminal violations that could be charged depending on the facts of the case: for example, aggravated

assault or battery or mayhem in cases of physical injury; homicide, murder or manslaughter, when a killing results; kidnapping, false imprisonment or abduction where an unlawful detention is concerned; rape, sodomy, or molestation if those acts occur; an attempt or a conspiracy to commit any of the above acts; or a criminal violation of an individual's civil rights. Thus, there is no "lacuna" in U.S. law, as all acts that would constitute torture under the CAT are crimes in the United States.

Additionally, in our written response to Question 5, we described a range of mechanisms by which U.S. compliance with its CAT obligations is implemented. The availability of these mechanisms ensure that individuals are protected from torture and other serious forms of abuse, and that when violations arise, prosecution at the federal and state level and appropriate remedies are available.

To give one example that I think highlights just how broad the available tools for criminal prosecution under our system are: many acts which would qualify as "torture" could, provided the offender was acting under color of law, be prosecuted under 18 U.S.C. § 242 as criminal deprivations of Constitutional rights. As the examples in paragraphs 20 and 21 of the *Second Periodic Report* make clear, 18 U.S.C. § 242 also reaches, and the Department of Justice prosecutes as criminal deprivations of

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Constitutional rights, many violations that would constitute torture but also many that do not rise to that level.

The same is true of the military justice system, which is the focus of Question 21. As described in the Annex to the *Second Periodic Report*, it is a violation of our Uniform Code of Military Justice or "UCMJ," which applies world-wide, to engage in cruelty and maltreatment. Further, under the UCMJ, acts of assault, maiming, rape and carnal knowledge, manslaughter, murder, and unlawful detention, among other violations, can be prosecuted.

Under the UCMJ, individuals may also be charged for violations of U.S. federal criminal statutes, including the extraterritorial criminal torture statute and the other federal crimes I listed in response to Question 20.

Concerning Question 22, there is no "penal immunity" for any person for the crime of torture under U.S. law. Additionally, although there have been no criminal prosecutions initiated under the extraterritorial criminal torture statute to date, there have been prosecutions for offenses occurring outside the United States under other statutory provisions, including the Uniform Code of Military Justice.

I will now turn to Cully Stimson to respond to Questions 23 through 27 as they concern detention operations by the Department of Defense, including relating to training of military personnel and applicable interrogation rules.

[STIMSON]

Regarding Question 23 and 24, which concern education and training of military and DoD civilian personnel, including contractor employees, I would like to emphasize that there are extensive programs of training and information, rules and instructions, and mechanisms of systematic review that apply to personnel involved in the custody, interrogation or treatment of detainees. Education programs and information for personnel, including contractors, involved in the custody, interrogation or treatment of individuals in detention include training on the law of war, which is provided on at least an annual basis (and more frequently as appropriate) for the members of every service and for every person, including contractors, who works with detainees. This extensive training on law of war includes instruction on the prohibition against torture and the requirement of humane treatment and other subjects, including human rights, and is described in greater detail in Annex 3 to our written response to the Committee's questions. Our written

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answer includes information on law of war training in the military academies.

Rules and instructions regarding the custody, interrogation, and treatment of detainees are described in the Annex to the *Second Periodic Report* and will also be addressed in response to Question 26. Mechanisms for systematic review of military, DoD civilians, and contractor employees involved in detention operations include inspector general visits, command visits and inspections, Congressional and intelligence oversight committees and visits, as well as reviews conducted pursuant to unit procedures and by the chain of command. They also include case-specific investigations and overall reviews, including the 12 major Department of Defense reviews of detainee policy described in detail in the Annex to the *Second Periodic Report*.

The U.S. written response to Question 25 concerning the recruitment, use and training of contractors involved in detention facilities includes detailed information regarding contractors involved in detention operations overseen by the Department of Justice's Bureau of Prisons and Department of Homeland Security. I would refer you to our written response for that information. As concerns the use of contractors in Department of Defense detainee operations, I would also refer you to our written response for more

detailed information, but let me provide a brief overview here. The Department of Defense requires all contractors to comply fully with its rules, regulations, and standards, regarding the humane treatment of detainees and has explicitly required contractors to agree to adhere to these requirements. On April 11, 2005, the Secretary of Defense established a policy that all federal employees and civilian contractors engaged in the custody or interrogation of individuals detained by the Department of Defense shall complete annual training on the law of war, including the obligations of the United States under domestic and international law. In addition, all personnel deploying to the Iraq and Afghanistan theaters receive Geneva Conventions training before they leave for their deployment. In addition, personnel receive periodic training with their units while deployed. This is applicable to all the military services.

Regarding Question 26, which asks about whether the December 2004 memorandum created unnecessary confusion for trainers and personnel, the answer is no. As the United States explained in the Annex to the *Second Periodic Report*, the main finding of the investigation conducted by General Kern, Lieutenant General Jones, and Major General Fay (commonly referred to as the Jones-Fay report) was that a small group of individuals, acting in contravention of U.S. law and DoD policy, were responsible for perpetrating

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the acts of abuse at Abu Ghraib. Specifically, in an interview after the report's release, General Kern told reporters, "We found that the pictures you have seen, as revolting as they are, were not the result of any doctrine, training or policy failures, but violations of the law and misconduct." This finding has been supported in 12 other major reviews conducted by the Department of Defense.

The issues arising in Question 27 concern interrogation rules and has largely been addressed by John Bellinger in his reply to question 12. As he stated, the Detainee Treatment Act of 2005 prohibits cruel, inhuman, or degrading treatment or punishment, as that term is defined by U.S. obligations under Article 16 of the CAT, and provides for uniform interrogation rules for persons in the custody of DoD or under its effective control or under detention in a DoD facility: the Army Field Manual on Intelligence Interrogations.

Other U.S. government agencies may also have their own interrogation policies. As already noted, any activities of such other agencies would be subject to the federal anti-torture statute and the prohibition on cruel, inhuman, or degrading treatment or punishment in the Detainee Treatment Act of 2005.

I would now like to return the floor to John Bellinger.

[BELLINGER]

Let me now introduce Mr. Thomas Monheim, an Associate Deputy Attorney General at the Department of Justice, to respond to Questions 28 and 29 concerning the programs of the Department of Justice's Civil Rights Division.

[MONHEIM]

In the limited time we have for oral reply, it is difficult to succinctly describe both the functions of the Civil Rights Division as well as to adequately pay tribute to its many accomplishments. For that reason, please refer to the more detailed information contained both in our written response to the Committee's questions as well as the U.S. *Initial Periodic Report* and the *Second Periodic Report*. However, I will briefly explain the Division's role.

The Division was established in 1957 and is responsible for enforcing federal statutes prohibiting discrimination on the basis of race, sex, handicap, religion, and national origin, and numerous other federal civil rights statutes and additional civil rights provisions contained in other laws and regulations. These laws prohibit discrimination in education,

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employment, credit, housing, public accommodations and facilities, voting, and certain federally funded and conducted programs. The Division also enforces the Civil Rights of Institutional Persons Act of 1980, which I will refer to through its acronym "CRIPA," which Mr. Bellinger mentioned previously in response to Question 5 and which is also the subject of the next question.

In addition, the Division prosecutes actions under several federal criminal civil rights statutes, mentioned previously, including those prohibiting conspiracy to interfere with Constitutional rights, deprivation of rights under color of law – both of which are key mechanisms to ensure U.S. compliance with its CAT obligations.

Finally, the Civil Rights Division is responsible for coordinating civil rights enforcement efforts of other federal agencies in certain areas. Since October 1999, the Division has achieved an impressive level of accomplishments protecting and enforcing the civil rights of all persons, filing 537 criminal civil rights cases against 971 defendants and obtaining 766 convictions to date. This includes 254 cases filed charging 436 law enforcement officers with official misconduct, which have resulted in 359 convictions to date. While I should note that not all of these cases involve matters within the scope of the CAT, this is an impressive record.

Regarding Question 29, the Department of Justice has continued its vigorous enforcement of the Civil Rights of Institutional Persons Act. Since October 1999, the Department of Justice has opened 65 investigations covering 79 facilities. The Department of Justice has also entered into 39 settlement agreements, including seven consent decrees. Over the past five years the Department of Justice has initiated 25 percent more new investigations than in the preceding five-year period. In fiscal year 2005 alone, the Department of Justice opened 11 CRIPA investigations; sent nine findings letters; obtained nine agreements involving 12 facilities; entered four consent decrees involving six facilities; and conducted approximately 120 investigatory and compliance tours of facilities. In addition, the Department of Justice is monitoring compliance with court orders that cover persons who previously resided in institutions but who currently reside in community-based residential settings in the District of Columbia, Hawaii, Pennsylvania, Indiana, Puerto Rico, Wisconsin, and Tennessee. As of April, 2006, there are currently 41 active investigations covering 44 facilities.

Question 29 also asks about investigations that ended in prosecution for torture or cruel, inhuman, degrading treatment or punishment. As noted in the *Second Periodic Report*, complaints about abuse, including physical injury by individual law enforcement officers, continue to be made and are

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investigated by the Department of Justice and, if the facts so warrant, prosecuted. The Department remains committed to investigating all incidents of willful use of excessive force by law enforcement officers and to prosecuting federal law violations where action by state or local authorities fails to vindicate the federal interest. Since October 1, 1999, 432 law enforcement officers have been convicted of violating federal civil rights statutes. Most of these officers were charged with using excessive force.

The Civil Rights Division also investigates conditions in state prisons and local jail facilities pursuant to CRIPA, and investigates conditions in state and local juvenile detention facilities pursuant to either CRIPA or the pattern or practice provision of the Violent Crime Control and Law Enforcement Act of 1994. These statutes allow the Department to bring legal actions for declaratory or equitable relief for a pattern or practice of unconstitutional conditions of confinement.

Regarding the Committee's question about what measures have been taken to improve conditions of detention, when the investigations of the Civil Rights Division uncover unconstitutional conditions at prisons, jails, or juvenile detention facilities, it takes measures -- including working with local and state authorities -- to remedy these conditions. The remedies, often

memorialized in negotiated settlement agreements, represent constitutional solutions and recognized best national practices. Once the reforms are agreed upon with the facility, DOJ will often work cooperatively with the jurisdiction to jointly select a monitor to ensure implementation. The monitor will then work with the jurisdiction to promptly identify issues of non-compliance and provide status assessments regarding compliance to both the jurisdiction and DOJ.

In addition, in this regard, I would also like to emphasize the importance of the Civil Right's Division's impressive record of prosecuting officers who engaged in unlawful use of force. Prosecution enhances conditions of confinement by providing general and specific deterrence to law enforcement officers, and ensuring persons in custody that laws prohibiting use of excessive force or other constitutional violations will be vigorously enforced.

[BELLINGER]

Thank you, Tom. Turning to Question 30, which asks for detailed disaggregated statistical data regarding deaths in custody according to detention, due to the very large amount of data requested by the Committee and provided by the U.S. in response to this question, I would like to refer

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you to our written response to this question, including the disaggregated statistical information we provided to the Committee in the annexes to those answers. However, let me just emphasize that any death of an individual in United States Government custody is reported, and if the facts suggest that there may be criminal implications resulting from such deaths, the incident will be investigated. If the facts so warrant, the responsible individuals will be held accountable.

Mr. Chairman, up until now we have been responding to the questions in numerical order. For the next few questions, in order to avoid having to pass the floor back and forth among my colleagues excessively, I would like to group some of the questions together. I will first ask Mr. Stimson to respond to Questions 31 through 34, Question 36 and Question 39. I will then ask Mr. Monheim to address Questions 35, 37, and 38. I will then resume the presentation from Question 40.

[STIMSON]

Questions 31 and 32 concern the number of individuals who have died in DOD control and cases involving assaults on detainees in Afghanistan, Iraq and Guantanamo Bay.

There have been a total of 120 deaths of detainees in Department of Defense control in Afghanistan and Iraq. There have been no deaths at

Guantanamo. The vast majority of the deaths in Afghanistan and Iraq were caused by factors such as natural causes, injuries sustained on the battlefield, or detainee-on-detainee violence. In only 29 cases was abuse or other violations of law or policy suspected. In these cases, these alleged violations were properly investigated, and appropriate action was taken. Our written answers to the Committee's questions provide extensive information about the investigations and, where appropriate, prosecutions that have been undertaken to date in specific cases of detainee deaths or alleged detainee abuse. These investigations have numbered in the hundreds. I would invite the Committee to review that very detailed information, which includes information about punishment.

I should note that the process of holding violators accountable is ongoing. For example, in the time between our submitting of the answers to the Committee's questions last Friday and today, the Army has charged a senior officer, the former head of the interrogation center at Abu Ghraib prison, for his alleged involvement in the abuse of detainees and for allegedly interfering with the abuse investigation.

Concerning the Committee's question about overall reviews of policy in Question 33, as mentioned before, the Department of Defense has conducted 12 major reviews of its detention operations. Let me make a few

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points about the allegations mentioned by the Committee that these investigations have not been not fully independent. In all 12 of these reviews, panels were allowed access to all materials and individuals they requested. They were provided any resources for which they asked, including the assignment of more senior personnel when investigations required it. In no way did DoD officials direct the conclusions drawn. As the Secretary of Defense, Donald H. Rumsfeld, has said on numerous occasions and in numerous venues with respect to the investigations, DoD policy was "to let the chips fall where they may." The recommendations generated by these investigations have been taken seriously, as described in further detail in the Annex to the *Second Periodic Report.*

As the Department of Defense has conducted an honest, open and impartial set of investigations since the events of Abu Ghraib into all aspects of detention operations, other investigations are not foreseen at this time, as they would not add value to the 12 investigations already conducted. Should information come to light that would suggest additional investigation is warranted, the Department of Defense will, as it has before, investigate such allegations fully.

The question also asks about access to detention facilities, a topic already addressed by Mr. Bellinger under Question 8.

Question 34 asks whether the Combatant Status Review Tribunals and the Administrative Review Boards have any jurisdiction regarding complaints of torture and cruel, inhuman or degrading treatment or punishment. The Annex to the *Second Periodic Report* describes the scope, jurisdiction, and impartiality of these processes. Our answers to the Committee's questions provide an update on the judicial review applicable to the CSRTs under the Detainee Treatment Act of 2005. These are processes with specific purposes, namely to review the initial enemy combatant determination in the case of the CSRTs and to determine on an annual basis whether there is a continued need to detain an enemy combatant in the ARBs. Of course, if credible allegations of torture or CIDT were raised during such proceedings (or in any other context), they would be investigated and acted upon based upon the information that is uncovered.

Question 36 asks about remedies, including compensation, available to detainees who have alleged abuse while under U.S. control. The Department of Defense has administrative procedures in place under various domestic statutes that enable it to pay compensation in such cases. 33 detainees have filed claims for compensation (this includes some Abu Ghraib detainees), and the claims process is ongoing. Our written answer provides more detail on these procedures, as well as a table with a

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breakdown of the statistical data regarding allegations of torture or ill-treatment according to gender, age, location of the complaint and result of the investigation.

Question 39 requests an update on *habeas corpus* litigation in U.S. courts. Currently, there are approximately 195 *habeas corpus* cases on behalf of more than 350 detainees presently pending before 15 district court judges. Proceedings in almost all of these cases are stayed awaiting a decision of either the U.S. Supreme Court in the case of Hamdan v. Rumsfeld or the U.S. Court of Appeals on the appeals pending before it.

In a significant development, the Detainee Treatment Act of 2005 withdrew the jurisdiction of U.S. courts to consider *habeas corpus* petitions or other claims by or on behalf of Guantanamo detainees except under certain circumstances delineated within the statute.

As Mr. Bellinger requested, I will now pass the floor to Mr. Monheim to answers Questions 35, 37 and 38.

[MONHEIM]

Question 35 asks for further information on the Justice for All Act. This Act provides for a range of rights of victims of federal crimes described in greater detail in our written response. The protections contained in the Act improve the ability of victims of abuse to monitor and assist in efforts to

prosecute the perpetrators of such abuse. The Act includes rights to protection from the accused, to notice of public court proceedings involving the crime or of any release or escape of the accused, to presence at public court proceedings, to be heard at public proceedings, to confer with the government in the case, to full and timely restitution as provided in law, and the right to be treated with fairness and with respect for the victim's dignity and privacy.

If a victim believes that he has been denied these rights by an employee of the Department, he may file a complaint with the DOJ's Victims' Rights Ombudsman (VRO). As far as the DOJ is aware, no alleged victims of torture by U.S. government personnel have asserted any of these rights, filed for writs of mandamus, or filed complaints with the VRO.

Regarding Question 37, while the Prison Litigation Reform Act of 1995 ("PLRA") contains several provisions designed to curtail frivolous lawsuits by prison inmates, it does so in a manner consistent with Article 13 of the CAT. By no means does it "increase the possibility of impunity for perpetrators," as the Committee's question suggests. Those who violate the rights of prisoners are subject to both civil and criminal liability for their actions.

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The Act does not limit a prisoner's ability to "complain to and to have his case promptly and impartially examined by competent authorities regarding allegations of torture," which is the language used in Article 13 of the CAT. The Act does not prevent a prisoner from bringing a federal civil action to redress allegations of torture. A prisoner alleging actual physical injury may seek compensatory, nominal, and punitive damages, and injunctive and declaratory relief. In addition, courts of appeals have held that this provision permits prisoners alleging a non-physical constitutional injury to seek nominal and punitive damages, and injunctive and declaratory relief.

Moreover, nothing in the Act prevents access to the wide range of other administrative and other avenues by which prisoners may present complaints and grievances, including administrative remedies at the federal and state level as well as judicial remedies before state courts.

Regarding Question 38, the United States is not aware of any allegations of torture by U.S. government personnel that have been brought to the attention of the Center for Victims of Torture.

I now return the floor to Mr. Bellinger.

[BELLINGER]

Question 40 seeks an explanation of the exact legal status of "enemy combatants" and asks whether the United States is considering reviewing its decision not to apply the Geneva Conventions to them. As an initial matter, I note that the applicability of and compliance with the Geneva Conventions is a matter unrelated to the scope of U.S. obligations under the CAT.

While the question seems to conflate the discussion relating to persons detained in Iraq, in Afghanistan, and at Guantanamo, it is important to be precise and recognize the different legal status of each of these categories of detainees.

The United States has not made any "decision not to apply" the Geneva Convention where it would, by its terms, apply. For example, the United States recognized that the Geneva Conventions apply to the war in Iraq and made it clear that our armed forces would treat captured Iraqi armed forces in accordance with the Geneva Conventions.

The United States is aware that questions are often raised about the concept of "unlawful combatants," which certain academics and others have asserted is not a concept found in the Geneva Conventions. The United States strongly disagrees: the concept of "unlawful combatants" is well-recognized in international law by courts, in military manuals, and by international legal scholars, some of whom are cited in our written response.

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With regard to Taliban detainees, the President determined that the Third Geneva Convention does apply to the Taliban detainees, but that the Taliban fail to meet the requirements of Article 4 of that Convention and so are not entitled to the status of prisoners of war. With regard to the al-Qaeda detainees, the President determined that the Geneva Convention did not apply because al-Qaeda is not a party to the Convention. Article 2 of the Convention makes it clear that the Convention only applies as between High Contracting Parties. Because these decisions are grounded in the Geneva Conventions themselves, the United States does not consider it necessary to review them.

At the same time, I should note that in making these determinations, President Bush ordered that "the United States Armed Forces shall continue to treat detainees humanely. . . in a manner consistent with the principles of Geneva." Moreover, let me reiterate that the United States Government complies with its Constitution, its laws, and its treaty obligations with respect to all detainee, enemy combatants.

Question 41 requests examples of cases where statements have been found inadmissible in court on the grounds that they were obtained coercively. As the United States explained in its *Initial Report*, and in its *Second Periodic Report*, U.S. law provides strict rules regarding the

inadmissibility of coerced statements. U.S. courts take these rules seriously, as evidenced by the numerous cases cited in our written response and prior reports. We direct the Committee to those reports for further details.

Question 42 asks how Article 15 of the CAT is implemented in the Combatant Status Review Tribunal and Administrative Review Boards proceedings. Article 15 of the Convention is a treaty obligation of the United States, and the United States is obligated to abide by that obligation in Combatant Status Review Tribunals and Administrative Review Boards.

On Article 15, the United States would like to draw the Committee's attention to an important recent development with regard to the implementation of that article in military commission proceedings. On March 24, 2006, an instruction was adopted that provides that "the commission shall not admit statements established to have been made as a result of torture as evidence against an accused, except as evidence against a person accused of torture as evidence the statement was made."

Regarding the Committee's question about the U.S. reservation to Article 16 in Question 43, let me begin first by explaining why the United States felt it necessary to take this reservation. Pursuant to the U.S. reservation, the United States agreed under Article 16 to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or

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degrading treatment or punishment which do not amount to torture," "insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution." As we have explained, this reservation was adopted because of concern over the uncertain meaning of the phrase "cruel, inhuman or degrading treatment or punishment" and was intended to ensure that existing U.S. constitutional standards would satisfy U.S. obligations under Article 16. Moreover, I would like to emphasize that while the United States recognizes that other courts in other countries, often dealing with different instruments than the CAT, have held that certain types of conduct satisfy standards similar to that in Article 16, the relevant test for the United States is the obligation it assumed as set forth in the U.S. reservation.

Because the meaning of Article 16's "cruel, inhuman or degrading treatment or punishment" standard is uncertain, it is difficult to state with certainty and precision what treatment or punishment (if any) would be prohibited by Article 16 with no reservation, but permitted under Article 16 as reserved by the United States. It is this very uncertainty that prompted the reservation in the first place.

In response to Question 44, and the Committee's question about the geographic scope of Article 16, as ratified by the United States, I would like to emphasize that by its terms, Article 16 of the CAT obliges States Parties "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. . . ." (Emphasis added.) Clearly this legal obligation does not apply to activities undertaken outside of the "territory under [the] jurisdiction" of the United States. The United States does not accept the concept that "de facto control" equates to territory under its jurisdiction. There is nothing in the text or the travaux of the Convention that indicates that the two are equivalent.

Notwithstanding debates over the territorial scope of Article 16, it is important to bear in mind that, as a matter of U.S. law, the Detainee Treatment Act of 2005 now provides that "[n]o individual in the custody or under the physical control of the U.S. government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment" as that term is defined by U.S. obligations under Article 16. Cruel, inhuman and degrading treatment or punishment is also prohibited under the Uniform Code of Military Justice, which governs U.S. military personnel wherever they may be located and prohibits abusive conduct.

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Regarding the special maritime and territorial jurisdiction of the United States, I would direct you to our more detailed explanation contained in our written response to this question.

The territorial restriction in Article 16 of the CAT, which also appears in other provisions of the CAT, uses different terms to describe its coverage and serves a purpose entirely different from the technical term "special maritime and territorial jurisdiction," which Congress used to define the jurisdiction of certain U.S. criminal statutes. Article 16 is limited, by its own terms, to "territory under [the State Party's] jurisdiction." Moreover, "special maritime and territorial jurisdiction" includes concepts obviously inapposite to Article 16's reach, such as offenses committed on certain spacecraft and in "places outside the jurisdiction of any nation."

I now turn to Mr. Monheim to address Questions 45 through 50.

[MONHEIM]

Question 45 asks for information about the Department of Homeland Security's National Detention Standards, which serve as a framework for selection of contract detention facilities. The American Bar Association has applauded the standards as a "significant achievement" and "good first step towards providing uniform treatment and access to counsel for immigrants and asylum seekers."

One practical example of these standards at work can be seen in the recently opened South Texas Detention Complex, a facility comprised of several secure "pods" that allow for separation of detainees based on gender and degree of risk posed. Other examples are discussed in our written responses, which also address under Question 49 measures to prevent sexual violence.

Question 46 is about the use of Tasers. Through the Departments of Justice and Defense, the U.S. government is conducting extensive research into the safety and effectiveness of electro-muscular disruption devices, including Tasers. In addition, the Department of Justice works with local police agencies to assist them in their development of policies regarding the use of these devices. This policy guidance includes consideration of community acceptance, use-of-force protocols, continuous monitoring of all uses of these devices, medical response, and training.

The use of Tasers to control arrestees and inmates is consistent with the law. Courts have reviewed the application of such devices for consistency with the Eighth Amendment's "prohibition of cruel and unusual punishment," and have upheld their legality.

Furthermore, use of Tasers often obviates the need to use other forms of more severe, or even deadly, force. Nevertheless, the Department of

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Justice remains committed to investigating and, where appropriate, prosecuting use of Tasers where the circumstances indicate a willful use of excessive force in violation of Constitutional standards. In addition, the Departments of Justice and Defense continue to develop less-lethal options, including novel electro-muscular devices that may provide improved safety and effectiveness to law enforcement and military personnel.

Question 47 concerns the detention of juveniles with adults. As an initial matter, it should be noted that that the detention of juveniles with adults would not *per se* constitute cruel, inhuman or degrading treatment or punishment.

That being said, Federal law prohibits juvenile offenders held in custody of federal authorities from being housed in correctional institutions or detention facilities in which they could have regular contact with adult offenders. When a juvenile must be temporarily detained in an adult facility, as, for example, immediately following arrest, it is for a minimal period of time and "sight and sound" separation from the adult offenders is ensured within the institution. Similarly, under the Juvenile Justice and Delinquency Act, accused juvenile delinquents in custody of state authorities may be detained in adult jails for only 6 hours after arrest and only for the purposes

of identification, processing, and awaiting pickup by a parent or guardian. Juvenile delinquents also may be detained in adult jails 6 hours before and 6 hours after a court appearance. In both instances, juveniles must be "sight and sound" separated from adult inmates.

Regarding the Committee's request for statistics, please see our written response to this question.

Additionally, with respect to juveniles in Department of Homeland Security custody, as discussed in greater detail in our written response, generally speaking, juveniles are not detained with adults in any DHS adult or juvenile detention facilities. One limited exception allows for the detention of a juvenile with an unrelated adult for a temporary period of time (not to exceed 24 hours) only to the extent necessary for processing or for transport from a remote area.

Question 48 concerns a range of restraints used on detainees as well as supermaximum prisons. First, let me emphasize that it is not the general policy or practice of the United States government to shackle female prisoners during childbirth. Although the use of restraints is not prohibited, the Bureau of Prisons does not generally restrain inmates in any manner during labor and delivery because they are not considered a flight risk. An

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inmate would be restrained only in the unlikely case that she posed a threat to herself, her baby, or others around her.

Allegations of the misuse of shackles or other restraints in both federal and state prisons are investigated by the Department of Justice. However, it should be noted that since the use of shackles on prisoners is not per se unconstitutional, there are circumstances in which the use of shackles is permissible.

The Department of Justice has been vigilant in its monitoring of unconstitutional practices by prisons, including use of chain gangs and the hitching post. While the use of chain gangs is not *per se* unconstitutional, the Department's investigations examine whether the practice is conducted in conformity with the Constitution (such as, providing inmates on chain gangs with adequate water, access to toilets, medical care, etc.). If the practice were conducted in violation of constitutional principles, the Department would seek immediate prohibition of such practices.

Regarding the Committee's question about supermaximum prisons, the Department of Justice has reviewed allegations involving several super maximum facilities in the last several years, applying the same constitutional standards as in other penal facility investigations. For example, the Department investigated a super maximum facility in Baltimore, Maryland,

and worked with the State of Maryland to address the identified deficiencies. The Department intends to continue to fully investigate all credible allegations pertaining to super maximum facilities.

Question 49 concerns measures to prevent sexual violence against detainees. First, I should note that the Prison Rape Elimination Act of 2000 mandates that all correctional facilities have standards that identify and report sexual assaults and rapes. Our written materials provide detailed information regarding Department of Justice and Department of Homeland Security policies and practices design to prevent sexual violence, including information on allegations of sexual abuse and misconduct by staff and on inmate-on-inmate sexual abuse, as well as the availability of compensation for victims.

While the Department of Justice and Department of Homeland Security have their own policies, in general terms, I can say that staff and inmates alike are encouraged to report incidents of misconduct or otherwise inappropriate behavior. When allegations of serious abuse are accompanied by credible evidence, appropriate administrative measures are taken. For example, in the Bureau of Prisons, the staff member is removed from contact with inmates or placed on administrative leave. Cases are also referred for criminal prosecution when warranted. Finally, staff working with female

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inmates receive appropriate training including training on policies prohibiting sexual abuse, assault, and intimidation.

Question 50 concerns the use of solitary confinement and monitoring of the mental health of detainees. The Bureau of Prisons does not use solitary confinement in its facilities. Procedures and safeguards applicable in the limited cases where it is necessary to separate inmates temporarily from the general population, including mental health monitoring, are described in our written answer.

On the question relating to "prolonged isolation and indefinite detention," the United States takes exception to the assumption contained in the question that prolonged isolation and indefinite detention *per se* constitutes cruel, inhuman, and degrading treatment or punishment. Under U.S. criminal law, the United States does not detain individuals convicted of criminal charges indefinitely.

Finally, inasmuch as this question is meant to relate to the detention of enemy combatants, there is no question that a State is authorized under the law of war to detain combatants – whether lawful or unlawful – for the duration of the armed conflict without charges.

Question 51 concerns executions by lethal injection. The United States included an understanding in its instrument of ratification of the CAT that the treaty does not "restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." The Supreme Court of the United States has found lethal injection to be consistent with the Constitution

I now return the floor to Mr. Bellinger.

[BELLINGER]

Question 52 deals with alleged interrogation techniques. Although we have submitted a lengthy written response, for purposes of our meeting today, our answer to Question 27 provides our views on the topic.

Question 53 concerns implementation of the CAT in light of the federal structure of the United States

Under the U.S. Constitution, the federal government is a government of limited authority and responsibility. The resulting division of authority means that state and local governments retain significant responsibility in many areas, including in areas relevant to certain aspects of the implementation of the CAT. Nonetheless, as a practical matter, this has not detracted from or limited our substantive obligations under the CAT because

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the U.S. Constitution prohibits such conduct by state and local government officials.

Question 54 concerns the individual complaints procedure under Article 22 of the CAT. The United States is not considering making a declaration under Article 22.

On Question 55, while the United States has considered its existing reservations, understandings and declarations in light of the Committee's recommendation to withdraw them, there have been no developments in the interim that have caused the United States to revise its view.

Question 56 concerns the Optional Protocol to the Convention Against Torture. The United States is not considering ratification of this instrument. Question 57 concerns restrictions on equipment specifically designed to inflict torture. The United States recognizes that trade and export of certain items should be controlled to prevent their misuse. Under the Export Administration Regulations, the export of such items requires a special license. Human rights vetting is a prerequisite for the issuance of such licenses. Items specifically designed for the use of torture would never receive such a license.

Question 58 concerns measures to respond to terrorism and Question 59 asks for information on measures to prevent domestic violence. Both

questions are extremely broad, raising many issues outside the scope of the Convention. In the interest of time, I would refer you to our written answers, our *Second Periodic Report*, as well as the latest U.S. Periodic Report to the Human Rights Committee.

Mr. Chairman, that concludes our oral responses to the Committee's extensive list of questions. As I mentioned before, our written submissions as well as the information submitted in the *Initial Report* and the *Second Periodic Report* are much more detailed, and I would once again refer the Committee to those materials.

Thank you very much. My delegation looks forward to your questions.

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U.S. Meeting with U.N. Committee Against Torture

Opening Remarks
John B. Bellinger, III
Legal Adviser, U.S. Department of State
May 5, 2006

Mr. Chairman, Distinguished Members of the Committee, Members of Civil Society and Other Observers,

My name is John Bellinger. I am the Legal Adviser of the Department of State, and I serve as head of the United States delegation to the Committee Against Torture.

Given the constraints of time today and the need to answer the Committee's many questions, I will keep this opening statement brief. I will make a few general comments about our domestic legal framework related to torture, reiterate our international commitments, and provide an overview of our presentation.

At the outset I want to reiterate the United States Government's absolute commitment to upholding our national and international obligations to eradicate torture and to prevent cruel, inhuman, and degrading treatment or punishment worldwide. The President of the United States has made clear that "[t]orture anywhere is an affront to human dignity everywhere" and that "freedom from torture is an inalienable human right." Beyond the protections in our Constitution that Mr. Lowenkron mentioned, the domestic criminal laws in the United States prohibit torture. There are no exceptions to this prohibition. Our Congress has passed laws that provide for tough federal sanctions, both civil and criminal, against those who engage in torture outside the territory of the United States. Within the United States, our 50 states and the federal government prohibit conduct that would constitute torture under their civil and criminal laws.

And our laws have gone further. Our focus on eradicating torture and punishing its perpetrators would be incomplete without a parallel effort to help its victims recover from abuses. The Torture Victims Protection Act of 1992 supplements the Alien Tort Statute so that citizens and non-citizens of the United States who are victims of torture can bring claims for damages

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against foreign government officials in U.S. federal courts. Additionally, the Torture Victims Relief Act of 1998 authorizes funding for the U.S. Department of Health and Human Services and the U.S. Agency for International Development to support programs that assist victims of torture, domestically and overseas. The United States continues to lead the world in its support of the United Nations Voluntary Fund for Victims of Torture. U.S. appropriations to the Fund for Fiscal Years 1999-2004 totaled 28.5 million dollars.

And late last year, our Congress enacted, and the President signed into law, the Detainee Treatment Act of 2005. The Act included a provision that codified in law our already-existing policy against the use of cruel, inhuman or degrading treatment as that term defined under the obligations the United States assumed under the Convention. As a result of the law, no person "in the custody or under the physical control of the United States Government, regardless of nationality or physical location" shall be subjected to cruel, unusual, and inhumane treatment or punishment prohibited by certain provisions of the U.S. Constitution. The enactment of the Detainee Treatment Act reinforces our nations commitment to upholding the values of freedom and humanity on which our Nation was founded.

The United States recognizes the importance of our international legal obligations and the key role this Committee plays in the treaty-monitoring process. The United States greatly appreciates this opportunity to meet with the Committee and to explain the measures we have taken to give effect to the obligations we have undertaken as a State Party to the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment. The fact that the United States takes its international obligations seriously is reflected in the great lengths to which we have gone to provide you with an extensive report and thorough answers to the many questions you have posed. Our delegation is composed of senior-level officials, representing every federal agency of the United States Government that is directly involved in implementing the Convention, and this further demonstrates our commitment not only to fulfilling our obligations under the Convention, but also to engaging in what we expect will be a productive dialogue with you.

We know that you will have many questions about actions the U.S. Government has taken in response to the terrorist attacks upon our country on September 11 as well as the many allegations that have appeared in the

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or punishment in Article 16 of the CAT. There are similar provisions in the law of war.

Moreover, much of the domestic U.S. law that addresses torture and other forms of abuse applies both in both armed conflict and in other situations. For example, our extraterritorial torture statute prohibits torture overseas and applies equally to personnel operating in an armed conflict and to individuals outside such situations. The Uniform Code of Military Justice punishes abuse whether it occurs in an armed conflict or not. The Detainee Treatment Act of 2005 prohibits cruel, inhuman, or degrading treatment or punishment wherever such conduct might occur and applies with respect to both civilian and military authorities.

As a result, while the United States maintains its view that the law of war is the *lex specialis* governing the detainee operations that we will discuss, we are pleased to describe parallel protections afforded under U.S. laws and to provide extensive information about these operations in a sincere spirit of cooperation with the Committee.

We will now begin to answer the questions you have posed to us. In light of time constraints on this oral presentation, it will be impossible for us to reply in detail to every aspect of your wide-ranging questions. In many cases, we will refer you to the more detailed responses we have provided in writing.

Thank you very much.

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Lee, Michelle G

From: Gale, T Hanny
Sent: Friday, May 12, 2006 11:12 AM
To: Lubetkin, Wendy C
Cc: Harris, Robert K; Kovar, Jeffrey D
Subject: Responses to additional questions

Wendy,
Attached are the USA responses to the additional questions. Bob Harris says it is o.k. to post it.

12 May 2006 - Response of the ...

Hanny Gale
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U.S. Mission Geneva
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"A friend is someone who knows the song in your heart
and can sing it back to you when you have forgotten the words."

This e-mail is UNCLASSIFIED per E.O. 12958

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West, Lora

From: Brancato, Gilda M
Sent: Tuesday, November 14, 2006 5:15 PM
To: Kovar, Jeffrey D; Barton, Paula J; Peay, T Michael
Cc: Aswad, Evelyn M; Harris, Robert K
Subject: UNGA adopts Disappearances convention by consensus !!!!

Mike, Jeff, Paula - The US delegation read a short EOP laying a marker and incorporating our Human Rights Council statement.

Deepest appreciation all around for all of your hard work and dedication to this negotiation and decision-making process.
All the Best, Gilda

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General Statement of the United States: Forced Disappearances Text

As the task of the Working Group draws to a close and responsibility is passed to the Human Rights Commission to consider further work, we express sincere appreciation to the Chair and his team, including the Secretariat, for your enormous dedication, skill, and industriousness during negotiations on a binding instrument to combat this heinous crime.

We also commend the State delegations, the independent experts, the ICRC, and non-governmental organizations for their intense commitment, expertise, tireless work, and collegiality throughout, and give special thanks to the families of the disappeared for bearing witness to this terrible scourge.

At the same time, as we have said before, in order to produce a document that will attract the widest possible number of states parties, treaty negotiations should be deliberate, unhurried, and careful, allowing for full expression of views by all representatives, with every effort to achieve a consensus text that can be applied in all legal systems.

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We regret that often the pace of negotiations, among other factors, has resulted in a document that includes provisions the United States does not support, and to which we have registered key reservations. These reservations include, but are not limited to the following:

Preambular paragraph 7 and Article 24(2) on the RIGHT TO THE TRUTH. This is a notion that the United States views only in the context of the freedom of information, which is enshrined in Article 19 of the ICCPR, consistent with our long-standing position under the Geneva Conventions. We are grateful for the good will shown in seeking compromise language in the Preamble, but our reservations remain concerning this issue, including with respect to Article 24 (2), which we read in this same light.

We have serious concerns about Article 2 which we firmly believe needs a more focused DEFINITION that includes the element of intentionality. This is the core of the Convention and we believe it needs a great deal more work.

Article 5 requiring domestic legislation criminalizing CRIMES AGAINST HUMANITY remains insufficiently defined and inappropriate to an operative paragraph in the text.

As we have noted, the lack of a DEFENSE OF SUPERIOR ORDERS in Article 6(2) could unfairly subject unwitting military and law enforcement personnel to the possibility of prosecution for actions that they did not and could not know were prohibited.

Despite some modifications, the specific requirements for a STATUTE OF LIMITATIONS in Article 8 continue to present a problem of implementation within a Federal system like that of the U.S. Likewise, Article 4 should not be read to require our various domestic legal systems to enact an autonomous offense of enforced disappearance, which is unnecessary and, from a practical standpoint, extremely burdensome and unworkable in the United States.

We also note that our continuing objection to Article 9 (2) concerning "FOUND IN" JURISDICTION has not been satisfactorily addressed.

We have clearly stated for the record our continuing reservation to the absence of language in Article 16 explicitly conforming this text to

the principle of NON-REFOULEMENT articulated in the 1951 Refugee Convention.

We find that Article 17 concerning ACCESS TO PLACES OF DETENTION, despite significant improvement, retains the possibility of conflict with constitutional and legal provisions in the laws of some state parties.

Finally, we remain unconvinced that the appropriate vehicle for implementation of this instrument is a NEW TREATY MONITORING BODY.

Despite our continuing reservations, let me reiterate to you, Mr. Chairman, and your magnificent staff, the appreciation of my delegation for your outstanding leadership and the warm, cooperative and collegial spirit which defined these negotiations.

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RELEASED IN FULL

GE41

West, Lora

From: Brancato, Gilda M
Sent: Thursday, July 27, 2006 12:28 AM
To: Witten, Samuel M; Harris, Robert K; Aswad, Evelyn M; Hill, Steven R; Dorosin, Joshua L; Haines, Avril D; Deeks, Ashley S; Padmanabhan, Vijay M; 'Das, Himamauli'; 'Camponovo, Christopher N.'; 'Burger, James, Mr, DoD OGC'; 'thomas.burrows@usdoj.gov'; Propp, Kenneth R; Hodgkinson, Sandra L; Sicade, Lynn M (DRL); Johnson, Thomas A; Lagon, Mark P; Barks-Ruggles, Erica J (DRL)
Cc: Kovar, Jeffrey D; Barton, Paula J
Subject: RE: HRC adoption of draft disappearances treaty

I take this opportunity to inform you that Evelyn Aswad will be the new contact point in the Legal Adviser's Office on the proposed disappearances convention, as after today I will be rotating to the Legal Office for Consular Affairs. Evelyn's email address is above and her phone number is 202 736-7082. You will greatly enjoy working with her before and during the upcoming UN General Assembly, when the proposed convention will be considered for adoption by Member States, probably during November.

Wishing you all the best, and thanking you for your collegiality and assistance during the disappearances negotiations, Gilda

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The United States appreciates the opportunity to address the Human Rights Council on the Draft Convention for the Protection of all Persons from Enforced Disappearance. We thank the Chair of the Working Group and all participants in the Working Group for focusing attention on this serious human rights violation, although we express disappointment that the draft text of the Convention, albeit significantly improved from earlier drafts, does not represent the consensus of all members of the Working Group. The United States has been an active participant in the Working Group in each session, and given our steady participation, we are providing our understanding of the intent of States that participated in the Working Group on a number of core issues. We will provide further, detailed interpretations when this document comes up for consideration at the UN General Assembly. We reaffirm and incorporate herein our Closing Statement at the final session of the Working Group, reproduced at pages 48-49 of the Working Group Report of the Fifth Session (E/CN.4/2006/57) ("Report").

We underscore at the outset our view, shared by other delegations, that the definition of the crime (Article 2) would have been much improved had it been more precise and included an explicit requirement for intentionality, particularly the specific intent to place a person outside the protection of the law. The need for intentionality was recognized by the Chair and recorded in paragraph 96 of the Report, which states that an intentionality requirement is implicit in the definition of enforced disappearance, recognizing that "in no penal system was there an offense of enforced disappearance without intent." We agree and reaffirm our understanding that under the Convention *mens rea* is an essential ingredient of the

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crime under Articles 2, 4, 6 (particularly Article 6(2)), 12(4), 22, 25, & other articles.

Second the United States expresses its intent to interpret the Right to Truth in the preamble and in Article 24(2) consistent with the Commission on Human Rights Resolution on the Right to Truth (2005/66), which states that the right may be recognized in various legal systems (such as our own) as freedom of information, the right to know, or the right to be informed, and also consistent with the International Covenant on Civil and Political Rights which speaks to the right to seek, receive and impart information. As noted in our Explanation of Position delivered upon adoption of UNCHR resolution 2005/66, the United States' position on the right to know has not changed since the ICRC Conference on the Missing in February 2003 as well as at the 28th ICRC/Red Cross Conference in December 2003; that is, the United States is committed to advancing the cause of families dealing with the problem of missing persons; however, we do not acknowledge any new international right or obligation in this regard. For the United States, which is not a party to the 1977 Additional Protocol I to the Geneva Conventions and has no obligations vis-à-vis any "right to truth" under Article 32 of that instrument, families are informed of the fate of their missing family members based on the longstanding policy of the United States and not because of Article 32.

Third, the United States wishes to place on record our understanding of Article 43 of the draft Convention. We understand this provision to confirm that the provisions of the law of armed conflict, also called international humanitarian law, remain the *lex specialis* in situations of armed conflict and other situations to which

international humanitarian law applies. The United States understands Article 43 to operate as a "savings clause" in order to ensure that the relevant provisions of international humanitarian law take precedence over any other provisions contained in this Convention.

Fourth, the United States continues to support the use of an existing treaty body to perform monitoring functions, that is, the Human Rights Committee, which currently deals with forced disappearances, in view of the Committee's expertise; in the interests of consistency of jurisprudence, efficiency, avoidance of redundancy, and cost; and in light of the ongoing proposals for treaty body reform. We would hope that, per Article 27 of the draft Convention, States Parties adopt in the future use of the Human Rights Committee as the monitoring body.

In addition to the points expressed above, we place on the record our reservations, many of which are noted in the Report and in our Closing Statement, to, *inter alia,* the following articles, which is an illustrative (not exhaustive) list:

- **Article 4 on criminalization should not be read to require various domestic legal systems to enact an autonomous offense of enforced disappearance, which is unnecessary and, from a practical standpoint, unworkable in, for example, a federal system such as our own.**
- **Article 5 requiring criminalization of crimes against humanity is vague, aspirational in nature, and inappropriate as an operative treaty provision. The United States agrees with the statement in paragraph 106 of the Report that Article 5 would "not create any additional obligations on States to accede to particular instruments or amend their domestic legislation."**

- **Article 6(2) on the unavailability of a defense of obedience to superior orders in a prosecution related to enforced disappearance could under certain circumstances be inconsistent with due process guarantees and could subject unwitting government personnel to the possibility of prosecution for actions that they did not and could not know were prohibited. Therefore, as stated in paragraph 109 of the Report, the United States interprets Article 6(2) to establish no criminal responsibility on the part of an individual unaware of participating in the commission of an enforced disappearance.**
- **Article 8 on statute of limitations presents problems of implementation in a federal system and contains unclear text in paragraph 2.**
- **Article 9(2) on "found in" jurisdiction remains unacceptable to the United States, especially in view of the lack of precision in the definition of enforced disappearance.**
- **Article 16 on *non-refoulement*, which refers to violations of international humanitarian law in the country of return, does not conform to international principles on *non-refoulement*, as articulated in the 1951 Refugee Convention.**
- **Article 17 on standards for and access to places of detention retains the possibility of conflict with constitutional and other legal provisions in the laws of some States; accordingly we would interpret the term "any persons with a legitimate interest" in Articles 17, 18, and 30 in accordance with the domestic law of a State.**

- **Article 18 on access to information similarly retains the possibility of conflict with constitutional and other legal provisions of a State and sets unreasonable standards guaranteeing information.**
- **Article 22 on additional criminalization, among other concerns, should contain an express intentionality requirement, and the United States will interpret it to contain such an intent requirement (as noted above).**
- **Article 24 on the right to the truth and reparation contains text that is vague and at the same time overly specific, employs an overbroad definition of a "victim," and may not be consistent with a common law system for granting remedies and compensation.**
- **Article 25 on children must be interpreted consistent with adoption laws and other relevant domestic laws and with international obligations of the State regarding children.**

The United States respectfully requests that its views be made a part of the official record of the Human Rights Council.

Drafted: L/HRR – Gilda Brancato 6/8/06 x 72773 doc 26432

Cleared: Mission Geneva/L – Jeff Kovar
Mission Geneva/PSC – Jan Levin
L/HRR – Bob Harris (subs) – ok
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DOJ/OLP – Larry Rothenberg – ok
DOD/OGC – Chuck Allen – ok
NSC/Legal – Him Das - ok

UNCLASSIFIED
RELEASED IN FULL

6E43B

General Statement of the United States: Forced Disappearances Text

As the task of the Working Group draws to a close and responsibility is passed to the Human Rights Commission to consider further work, we express sincere appreciation to the Chair and his team, including the Secretariat, for your enormous dedication, skill, and industriousness during negotiations on a binding instrument to *combat this heinous crime.*

We also commend the State delegations, the independent experts, the ICRC, and non-governmental organizations for their intense commitment, expertise, tireless work, and collegiality throughout, and give special thanks to the families of the disappeared for bearing witness to this terrible scourge.

At the same time, as we have said before, in order to produce a document that will attract the widest possible number of states parties, treaty negotiations should be deliberate, unhurried, and careful, allowing for full expression of views by all representatives, with every effort to achieve a consensus text that can be applied in all legal systems.

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REVIEW AUTHORITY: ARCHIE M BOLSTER
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UNCLASSIFIED

We regret that often the pace of negotiations, among other factors, has resulted in a document that includes provisions the United States does not support, and to which we have registered key reservations. These reservations include, but are not limited to the following:

Preambular paragraph 7 and Article 24(2) on the RIGHT TO THE TRUTH. This is a notion that the United States views only in the context of the freedom of information, which is enshrined in Article 19 of the ICCPR, consistent with our long-standing position under the Geneva Conventions. We are grateful for the good will shown in seeking compromise language in the Preamble, but our reservations remain concerning this issue, including with respect to Article 24 (2), which we read in this same light.

We have serious concerns about Article 2 which we firmly believe needs a more focused DEFINITION that includes the element of intentionality. This is the core of the Convention and we believe it needs a great deal more work.

Article 5 requiring domestic legislation criminalizing CRIMES AGAINST HUMANITY remains insufficiently defined and inappropriate to an operative paragraph in the text.

As we have noted, the lack of a DEFENSE OF SUPERIOR ORDERS in Article 6(2) could unfairly subject unwitting military and law enforcement personnel to the possibility of prosecution for actions that they did not and could not know were prohibited.

***Despite some modifications, the specific requirements for a* STATUTE OF LIMITATIONS *in Article 8 continue to present a* problem of implementation within a Federal system like that of the U.S. Likewise, Article 4 should not be read to require our various domestic legal systems to enact an autonomous offense of enforced disappearance, which is unnecessary and, from a practical standpoint, extremely burdensome and unworkable in the United States.

We also note that our continuing objection to Article 9 (2) concerning "FOUND IN" JURISDICTION has not been satisfactorily addressed.

We have clearly stated for the record our continuing reservation to the absence of language in Article 16 explicitly conforming this text to

the principle of NON-REFOULEMENT articulated in the 1951 Refugee *Convention.*

We find that Article 17 concerning ACCESS TO PLACES OF DETENTION, despite significant improvement, retains the possibility of conflict with constitutional and legal provisions in the laws of some state parties.

Finally, we remain unconvinced that the appropriate vehicle for implementation of this instrument is a NEW TREATY MONITORING BODY.

Despite our continuing reservations, let me reiterate to you, Mr. Chairman, and your magnificent staff, the appreciation of my delegation for your outstanding leadership and the warm, cooperative and collegial spirit which defined these negotiations.

#18367

RELEASED IN FULL

GE44A

United States/Selected Core Legal Reservations to the Draft Forced Disappearances Instrument

The United States maintains several core legal reservations to the draft forced disappearances treaty text and, for example, proposed the following textual amendments to draft treaty provisions during the course of the five formal negotiating sessions of the Working Group to elaborate a binding normative instrument to prohibit and punish forced disappearances. The following list of textual amendments proposed by the United States during negotiations is illustrative and not exhaustive. Please consult our written statement on the draft convention distributed at the Human Rights Council during its first session (and posted on our website) as well as our Closing Statement at the conclusion of negotiations in October 2005 (reproduced at pages 48-49 of the Report of the Fifth Session of the Working Group) for additional information on the views of the United States.

An illustrative sampling of proposed textual amendments proffered by the United States delegation during negotiations:

DEFINITION - Article 2

"For the purposes of this instrument, enforced disappearance is considered to be the arrest, detention, or abduction of a person by or with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, with the intention of removing that person from the protection of the law for a prolonged period of time."

CRIMINALIZATION - Article 4

"Each State Party shall take the necessary measures to ensure that an enforced disappearance is fully covered under its criminal or penal law."

CRIME AGAINST HUMANITY - Article 5 –

The United States supporting reframing Article 5 as a preambular provision.

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DEFENSE OF SUPERIOR ORDERS - Article 6(2)

"No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance if the accused knew that the order was unlawful or a person of ordinary sense and understanding would have known the order to be unlawful."

STATUTE OF LIMITATIONS – Article 8

"A State Party which applies a statute of limitation in respect of an enforced disappearance shall take the necessary measures to ensure that the term of limitation is proportionate to the extreme seriousness of the offence."

JURISDICTION - Article 9

"1. Each State party shall take the necessary measures to establish its competence to exercise jurisdiction over an enforced disappearance:

(a) When the offence is committed within its territory;

(b) When the alleged offender is one of its nationals; and

(c) When the disappeared person is one of its nationals and the State Party considers it appropriate."

CONSULTATION WITH CONSULAR AUTHORITIES – Article 10(3)

"Any foreign national held in custody pursuant to paragraph one may communicate with an appropriate representative of the state of which he or she is a national in accordance with applicable international legal obligations."

NON-REFOULEMENT - Article 16

"1. No State party shall expel, return (*"refouler"*), or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subject to an enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights"

3. The benefit of the present provision may not, however, be claimed by a person whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. "

RIGHT TO THE TRUTH/FREEDOM OF INFORMATION - Article 24(2)

"Each victim has the freedom to seek, receive, and impart information regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard."

TREATY MONITORY BODY - The United States firmly supported use of an existing treaty body, the Human Rights Committee.

- **The Human Rights Committee already deals with forced disappearances, which violate numerous provisions of the ICCPR.**
- **The Human Rights Committee should continue to perform this monitoring role, including under this instrument, for reasons of:**
  - **expertise,**
  - **consistency of jurisprudence,**
  - **efficiency,**
  - **avoidance of redundancy, and**
  - **cost savings.**
- **In view of the specific proposal of the High Commissioner on Human Rights to create a single, unified, standing treaty body, and the widespread acknowledgement of the need for treaty body reform, the creation of a new body at this juncture is not warranted.**

Doc 26771

Drafted: L/HRR – Gilda Brancato

Cleared: IO/RHS – Thomas Johnson
DRL/MLA – Lynn Sicade
Mission Geneva – Jeffrey Kovar

RELEASED IN FULL
GE45A

The United States appreciates the opportunity to address the Human Rights Council on the Draft Convention for the Protection of all Persons from Enforced Disappearance. We thank the Chair of the Working Group and all participants for focusing attention on this serious human rights violation, although we express disappointment that the draft text of the Convention, albeit significantly improved from earlier drafts, does not represent the consensus of all members of the Working Group. The United States was an active participant in the Working Group in each session, and we are providing our understanding of the intent of States that participated in the Working Group on a number of core issues. For a fuller explanation, we refer you to our Written Statement on the draft Convention which we have distributed at the Council and which we ask be made a part of the record of proceedings, and we will provide further, detailed interpretations when this document comes up for consideration at the UN General Assembly. We also reaffirm and incorporate herein our Closing Statement delivered at the final session of the Working Group, reproduced at pages 48-49 of the Report of the Fifth Session.

We underscore at the outset our view, shared by other delegations, that the definition of the crime (Article 2) would have benefited by being more precise and including an explicit requirement for intentionality, particularly the specific intent to place a person outside the protection of the law. The need for intentionality was recognized by the Chair and recorded in paragraph 96 of the Report, which states that an intentionality requirement is implicit in the definition of enforced disappearance. We agree and reaffirm our understanding that under the

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Convention *mens rea* is an essential ingredient of the crime under Articles 2, 4, 6 (particularly Article 6(2)), 12(4), 22, 25, & other articles.

Second, the United States expresses its intent to interpret the Right to Truth in the preamble and in Article 24(2) consistent with the Commission on Human Rights Resolution on the Right to Truth (2005/66), which states that the right may be recognized in various legal systems (such as our own) as freedom of information, the right to know, or the right to be informed, and also consistent with the International Covenant on Civil and Political Rights (art. 19(2)). We also reaffirm our EoP delivered upon adoption of the UNCHR resolution.

Third, with respect to Article 43 of the draft Convention, we understand this provision to confirm that the provisions of the law of armed conflict, also called international humanitarian law, remain the *lex specialis* in situations of armed conflict and other situations to which international humanitarian law applies. The United States understands Article 43 to operate as a "savings clause" in order to ensure that the relevant provisions of international humanitarian law take precedence over any other provisions contained in this Convention.

Fourth, the United States continues to support the use of an existing treaty body to perform monitoring functions, that is, the Human Rights Committee, in view of the Committee's expertise and in the interests of consistency of jurisprudence, efficiency, avoidance of redundancy, and cost; and in light of the ongoing proposals for treaty body reform. Finally we refer you to our Written Statement for additional views on Articles 4, 5, 6, 8, 9(2), 16, 17, 18, 22, 24 & 25 of the draft Convention. Thank you Mr. Chair.

The United States appreciates the opportunity to address the Human Rights Council on the Draft Convention for the Protection of all Persons from Enforced Disappearance. We thank the Chair of the Working Group and all participants in the Working Group for focusing attention on this serious human rights violation, although we express disappointment that the draft text of the Convention, albeit significantly improved from earlier drafts, does not represent the consensus of all members of the Working Group. The United States has been an active participant in the Working Group in each session, and given our steady participation, we are providing our understanding of the intent of States that participated in the Working Group on a number of core issues. We will provide further, detailed interpretations when this document comes up for consideration at the UN General Assembly. We reaffirm and incorporate herein our Closing Statement at the final session of the Working Group, reproduced at pages 48-49 of the Working Group Report of the Fifth Session (E/CN.4/2006/57) ("Report").

We underscore at the outset our view, shared by other delegations, that the definition of the crime (Article 2) would have been much improved had it been more precise and included an explicit requirement for intentionality, particularly the specific intent to place a person outside the protection of the law. The need for intentionality was recognized by the Chair and recorded in paragraph 96 of the Report, which states that an intentionality requirement is implicit in the definition of enforced disappearance, recognizing that "in no penal system was there an offense of enforced disappearance without intent." We agree and reaffirm our understanding that under the Convention *mens rea* is an essential ingredient of the

crime under Articles 2, 4, 6 (particularly Article 6(2)), 12(4), 22, 25, & other articles.

Second the United States expresses its intent to interpret the Right to Truth in the preamble and in Article 24(2) consistent with the Commission on Human Rights Resolution on the Right to Truth (2005/66), which states that the right may be recognized in various legal systems (such as our own) as freedom of information, the right to know, or the right to be informed, and also consistent with the International Covenant on Civil and Political Rights which speaks to the right to seek, receive and impart information. As noted in our Explanation of Position delivered upon adoption of UNCHR resolution 2005/66, the United States' position on the right to know has not changed since the ICRC Conference on the Missing in February 2003 as well as at the 28th ICRC/Red Cross Conference in December 2003; that is, the United States is committed to advancing the cause of families dealing with the problem of missing persons; however, we do not acknowledge any new international right or obligation in this regard. For the United States, which is not a party to the 1977 Additional Protocol I to the Geneva Conventions and has no obligations vis-à-vis any "right to truth" under Article 32 of that instrument, families are informed of the fate of their missing family members based on the longstanding policy of the United States and not because of Article 32.

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In addition to the points expressed above, we place on the record our reservations, many of which are noted in the Report and in our Closing Statement, to, *inter alia,* the following articles, which is an illustrative (not exhaustive) list:

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- **Article 25 on children must be interpreted consistent with adoption laws and other relevant domestic laws and with international obligations of the State regarding children.**

The United States respectfully requests that its views be made a part of the official record of the Human Rights Council.

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S/WCI – Sam Witten (subs) - ok
DOJ/OLP – Larry Rothenberg – ok
DOD/OGC – Chuck Allen – ok
NSC/Legal – Him Das - ok

RELEASED IN FULL GE46D

The United States appreciates the opportunity to address the Human Rights Council on the Draft Convention for the Protection of all Persons from Enforced Disappearance. We thank the Chair of the Working Group and all participants for focusing attention on this grave human rights violation, although we express disappointment that the draft text of the Convention, albeit significantly improved from earlier drafts, does not represent the consensus of all members of the Working Group. The United States was an active participant in the Working Group in each session, and we are providing our understanding of the intent of States that participated in the Working Group on a number of core issues. For a fuller explanation, we refer you to our Written Statement on the draft Convention which we have distributed at the Council and which we ask be made a part of the record of proceedings, and we will provide further, detailed interpretations when this document comes up for consideration at the UN General Assembly. We also reaffirm and incorporate herein our Closing Statement delivered at the final session of the Working Group, reproduced at pages 48-49 of the Report of the Fifth Session.

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Convention *mens rea* is an essential ingredient of the crime under Articles 2, 4, 6 (particularly Article 6(2)), 12(4), 22, 25, & other articles.

Second, the United States expresses its intent to interpret the Right to Truth in the preamble and in Article 24(2) consistent with the Commission on Human Rights Resolution on the Right to Truth (2005/66), which states that the right may be recognized in various legal systems (such as our own) as freedom of information, the right to know, or the right to be informed, and also consistent with the International Covenant on Civil and Political Rights (art. 19(2)). We also reaffirm our EoP delivered upon adoption of the UNCHR resolution.

Third, with respect to Article 43 of the draft Convention, we understand this provision to confirm that the provisions of the law of armed conflict, also called international humanitarian law, remain the *lex specialis* in situations of armed conflict and other situations to which international humanitarian law applies. The United States understands Article 43 to operate as a "savings clause" in order to ensure that the relevant provisions of international humanitarian law take precedence over any other provisions contained in this Convention.

Fourth, the United States continues to support the use of an existing treaty body to perform monitoring functions, that is, the Human Rights Committee, in view of the Committee's expertise and in the interests of consistency of jurisprudence, efficiency, avoidance of redundancy, and cost; and in light of the ongoing proposals for treaty body reform. Finally we refer you to our Written Statement for additional views on Articles 4, 5, 6, 8, 9(2), 16, 17, 18, 22, 24 & 25 of the draft Convention. Thank you Mr. Chair.

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RELEASED IN FULL 6E51

West, Lora

From: Brancato, Gilda M
Sent: Friday, December 09, 2005 5:40 PM
To: 'hdas@nsc.eop.gov'; 'jweigman@nsc.eop.gov'; 'Burger, James, Mr, DoD OGC'; Harris, Robert K; Brooks, Waldo W; Legal-L-HRR; Jacobson, Linda; Lucas, William E; Johnson, Thomas A; Sicade, Lynn M (DRL); Camponovo, Christopher N (DRL); Noyes, Julieta V (DRL); Witten, Samuel M; Propp, Kenneth R; Kovar, Jeffrey D; Barton, Paula J; DePirro, Velia M; Levin, Jan
Subject: Emailing: Final of proposed UN disapperances treaty text

Final of proposed disapperance...

Attached FYI is final text of the proposed UN forced disappearances convention, completed at the CHR in Geneva this Fall. A fuller e-mail explanation and supporting documents, includuing the strong objections of the United States delegation, and discussion of next steps to follow by separate email.
Happiest holidays, sincerely, Gilda

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

RELEASED IN FULL

E/CN.4/2005/WG.22/WP.1/REV.4
23 September 2005
(*Translated from French*)

GE51A

INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

Preamble

The States Parties to this Convention,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to the Universal Declaration of Human Rights,

Recalling the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and all other relevant international instruments in the fields of human rights, humanitarian law and international criminal law,

Recalling the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992,

Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity,

Determined to prevent enforced disappearances and combat impunity for the crime of enforced disappearance,

Considering the right of any person not to be subjected to an enforced disappearance, the right of victims to justice and to reparation and,

Affirming the right to know the truth about circumstances of an enforced disappearance and the fate of the disappeared person, and the respect of the right to freedom to seek, receive and impart information to this end.

Have agreed as follows:

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Article 1

1. No one shall be subjected to enforced disappearance.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

Article 2

For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article 3

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

Article 4

Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

Article 5

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

Article 6

1. Each State Party shall take the necessary measures to hold criminally responsible at least:

(a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;

(b) The superior who:

(i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;

(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and

(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of the enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

Article 7

1. Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish:

(a) Mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;

(b) Without prejudice to other criminal procedures, aggravating circumstances, in particular in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons.

Article 8

Without prejudice to article 5,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

(a) Is of long duration and is proportionate to the extreme seriousness of this offence;

(b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.

2. Each State Party shall guarantee the right of victims of enforced disappearances to an effective remedy during the term of limitation.

Article 9

1. Each State Party shall take the necessary measures to establish its jurisdiction over the offence of enforced disappearance:

(a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is one of its nationals;

(c) When the disappeared person is one of its nationals and the State Party considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.

Article 10

1. Upon being satisfied, after an examination of the information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an offence of enforced disappearance is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be continued only for such time as is necessary to ensure the person's presence at criminal, surrender or extradition proceedings.

2. A State Party which has taken the measures referred to in paragraph 1 shall immediately carry out a preliminary inquiry or investigations to establish the facts. It shall notify the States Parties referred to in article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention, and the findings of its preliminary inquiry or its investigations, indicating whether it intends to exercise its jurisdiction.

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

Article 11

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.

3. Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trail before a competent, independent and impartial court or tribunal established by law.

Article 12

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where appropriate, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their

defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 shall undertake an investigation, even if there has been no formal complaint.

3. Each State Party shall ensure that the authorities referred to in paragraph 1:

(a) Have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation;

(b) Have access, if necessary with the prior authorization of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present.

4. Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of the investigations. It shall ensure in particular that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of the investigations by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.

Article 13

1. For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused only on these grounds.

2. The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of this Convention.

3. States Parties undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance.

5. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between themselves.

6. Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, in particular, conditions relating to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.

7. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, membership of a particular social group or political opinions, or that compliance with the request would cause harm to that person for any one of these reasons.

Article 14

1. States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.

2. Such legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, in particular, the conditions in relation to the grounds upon which the requested State Party may refuse to grant mutual legal assistance or may make it subject to conditions.

Article 15

States Parties shall cooperate with each other and shall afford one another the greatest measure of assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.

Article 16

1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Article 17

1. No one shall be held in secret detention.

2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:

(a) Establish the conditions under which orders of deprivation of liberty may be given;

(b) Indicate those authorities authorized to order the deprivation of liberty;

(c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;

(d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;

(e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with the prior authorisation of a judicial authority ;

(f) Guarantee that any person deprived of liberty and, in the case of a suspected enforced disappearance, the person deprived of liberty not being able to exercise this right, that any person with a legitimate interest, such as relatives of the person deprived of liberty, their representative or their counsel, in all circumstances, shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the deprivation of liberty and order the release if that deprivation of liberty is not lawful.

3. Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:

(a) The identity of the person deprived of liberty;

(b) The date, time and location where the person was deprived of liberty and the identity of the authority who deprived the person of liberty;

(c) The authority having decided the deprivation of liberty and the reasons for the deprivation of liberty;

(d) The authority controlling the deprivation of liberty;

(e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;

(f) Elements regarding the physical integrity of the person deprived of liberty;

(g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains;

(h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

Article 18

1. Without prejudice to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representative or their counsel, access to at least the following information:

(a) The authority having decided the deprivation of liberty;

(b) The date, time and location where the person was deprived of liberty and admitted to the place of deprivation of liberty;

(c) The authority controlling the deprivation of liberty;

(d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;

(e) The date, time and place of release;

(f) Elements regarding the physical integrity of the person deprived of liberty;

(g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains.

2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

Article 19

1. Personal information, including medical and genetic data, which are collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.

2. The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.

Article 20

1. Only when a person is under the protection of the law and the deprivation of liberty is subject to judicial control, can the right to information referred to in Article 18 be restricted and only on an exceptional basis, where strictly necessary and provided for by law, and if the transmission of the information would undermine the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions to the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.

2. Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1 the right to a prompt and effective judicial remedy as a means of obtaining without delay information

referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.

Article 21

Each State Party shall take the necessary measures to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released. Each State Party shall also take the necessary measures to assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release, without prejudice to any obligations to which such persons may be subject under national law.

Article 22

Without prejudice to article 6, each State Party shall take the necessary measures to prevent and impose sanctions for the following conduct:

(a) Delaying or obstructing the remedies referred to in article 17, paragraph 2 (f), and article 20, paragraph 2;

(b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register and/or records knew or should have known to be inaccurate;

(c) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.

Article 23

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to:

(a) Prevent the involvement of such officials in enforced disappearances;

(b) Emphasize the importance of prevention and investigations in relation to enforced disappearances;

(c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized.

2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished.

3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or organs vested with reviewing or remedial powers.

Article 24

1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as a direct result of an enforced disappearance.

2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

5. The right to obtain reparation referred to in paragraph 4 covers material and psychological harm and, where appropriate, other means of reparation such as:

(a) Restitution;

(b) Rehabilitation;

(c) Satisfaction, including restoration of dignity and reputation;

(d) Guarantees of non-repetition.

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of the disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with contributing to the establishment of the circumstances of

enforced disappearances and the fate of disappeared persons, and with assistance to victims of enforced disappearance.

Article 25

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

(a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

(b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.

3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (a).

4. Given the need to protect the best interests of the children referred to in paragraph 1 (a) and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that stemmed from an enforced disappearance.

5. In all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 26

1. A Committee on Enforced Disappearances (hereafter referred to as the Committee) shall be established to carry out the functions provided for under this Convention. The Committee shall consist of 10 experts of high moral character and recognised competence in the field of human rights, who shall serve in their personal capacity and be independent and impartial. The

members of the Committee shall be elected by the States Parties according to equitable geographical distribution. Consideration shall be given to the usefulness of the participation to the work of the Committee of persons having relevant legal experience and to balanced gender representation.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals, at biennial meetings of States Parties convened by the Secretary General of the United Nations for this purpose. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of votes of the representatives of States Parties present and voting.

3. The initial election shall be held no later than six months after the date of entry into force of this Convention. At least four months before the date of each election, the Secretary General of the United Nations shall address a letter to the States Parties inviting them to submit the nominations within three months. The Secretary General shall prepare a list in alphabetical order of all persons thus nominated, indicating the State Party which nominated each candidate. He/She shall submit this list to all States Parties.

4. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 2 of this article.

5. If a member of the Committee dies or resigns or for any other cause can no longer perform his/her committee duties, the State Party which nominated him/her shall, in accordance with the criteria set out in paragraph 1 of this article, appoint another candidate from among its nationals, to serve for the remainder of his/her term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary General of the United Nations of the proposed appointment.

6. The Committee shall establish its own rules of procedure.

7. The Secretary General of the United Nations shall provide the necessary means, staff and facilities for the effective performance of the functions of the Committee. The Secretary General of the United Nations shall convene the initial meeting of the Committee.

8. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

9. Each State Party shall co-operate with the Committee and assist its members in the fulfilment of their mandate, to the extent of the Committee's functions that the State Party has accepted.

Article 27

A Conference of States Parties will take place at the earliest four years and at the latest six years following the entry into force of this Convention to evaluate the functioning of the Committee and to decide, in accordance with the procedure described in article 44, paragraph 2, whether it is appropriate to transfer to another body – without excluding any possibility - the monitoring of this Convention, in accordance with the functions defined in articles 28 to 36.

Article 28

1. In the framework of the competencies granted by this Convention, the Committee shall co-operate with all relevant organs, offices and specialized agencies and funds of the United Nations, with the treaty bodies instituted by international instruments, with the special procedures of the United Nations, and with the regional intergovernmental organizations or bodies concerned, as well as with all relevant State institutions, agencies or offices working toward the protection of all persons against enforced disappearances.

2. As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations.

Article 29

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its obligations under this Convention, within two years after the entry into force of this Convention for the State Party concerned.

2. The Secretary-General of the United Nations shall make this report available to all States Parties.

3. Each report shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate. The comments, observations or recommendations shall be communicated to the State Party concerned, which may respond to them, on its own initiative or at the request of the Committee.

4. The Committee may also request further information from State Parties relevant to the implementation of this Convention.

Article 30

1. A request that a disappeared person should be sought and found on an urgent basis may be submitted to the Committee by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any other person having a legitimate interest.

2. If the Committee considers that the request for urgent action submitted in pursuance of paragraph 1:

(a) Is not manifestly unfounded;

(b) Does not constitute an abuse of the right of submission of such requests;

(c) Has already been duly presented to the competent bodies of the State Party concerned, such as investigative authorities, when this possibility exists;

(d) Is not incompatible with the provisions of this Convention; and

(e) The same matter is not being examined under another procedure of international investigation or settlement of the same nature;

it shall request the State Party concerned to provide it with information on the situation of the person concerned, within a time limit set by the Committee.

3. In the light of the information provided by the State Party concerned in accordance with paragraph 2, the Committee may transmit recommendations to the State Party including a request that the State Party take all appropriate measures, including interim measures, to locate and protect the person in accordance with this Convention and inform the Committee within a specified period of time, of measures taken, taking into account the urgency of the situation. The Committee shall inform the person submitting the urgent action request of its recommendations and of the information provided to it by the State as it becomes available.

4. The Committee shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved. The person presenting the request shall be kept informed.

Article 31

1. A State Party may at the time of ratification or at any time afterwards declare that it recognises the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of the provisions of this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider a communication inadmissible when:

(a) The communication is anonymous;

(b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;

(c) The same matter is being examined under another procedure of international investigation or settlement; or when

(d) All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged.

3. If the Committee considers that the communication meets the requirements set out in paragraph 2, it shall transmit the communication to the State Party concerned, requesting it to provide observations and comments within a time limit set by the Committee

4. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation. Where the Committee exercises its discretion, this does not imply a determination on admissibility or on the merits of the communication.

5. The Committee shall hold closed meetings when examining communications under the present article. It shall inform the author of the communication of the responses provided by the State Party concerned. When the Committee decides to terminate the procedure it shall communicate its views to the State Party and to the author of the communication.

Article 32

1. If the Committee receives reliable information indicating grave violations by a State Party of this Convention, it may, after consultation with the State Party concerned, request one or more of its members to undertake a visit and report back to it without delay.

2. The Committee shall notify the State Party concerned in writing of its intention to organise a visit, indicating the composition of the delegation and the purpose of the visit. The State Party shall answer the Committee within a reasonable time.

3. Upon a substantiated request by the State Party, the Committee may decide to postpone or cancel its visit.

4. If the State Party agrees to the visit, the Committee and the State Party concerned shall work together to define the modalities of the visit and the State Party shall provide the Committee with all the facilities needed for the successful completion of the visit.

5. Following its visit, the Committee shall communicate to the State Party concerned its observations and recommendations.

Article 33

A State Party to this Convention may at any time declare that it recognises the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. The Committee shall not receive communications concerning a State Party which has not made such a declaration, nor communications from a State Party which has not made such a declaration.

Article 34

If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State Party, it may, after seeking from the State Party concerned all relevant information on the situation, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary General of the United Nations.

Article 35

1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.

2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.

Article 36

1. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

2. Before an observation on a State Party is published in the annual report, the State Party concerned shall be informed in advance and shall be given reasonable time to answer. This State Party may request the publication of its comments or observations in the report.

Article 37

Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in :

a) the law of a State Party;

b) International law in force for that State.

Article 38

1. This Convention is open for signature by all Member States of the United Nations Organisation.

2. This Convention is subject to ratification by all Member States of the United Nations Organisation. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention is open to accession by all Member States of the United Nations Organisation. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 39

1. This Convention shall enter into force on the thirtieth day after the date of deposit of the twentieth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, this Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 40

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

(a) Signatures, ratifications and accessions under article 38;

(b) The date of entry into force of this Convention under article 39.

Article 41

The provisions of this Convention shall extend to all parts of federal States without any limitations or exceptions.

Article 42

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation or by the procedures expressly provided for in this Convention shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organisation of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a declaration.

3. Any State Party having made a declaration in accordance with paragraph 2 of this article may at any time withdraw this declaration by notification to the Secretary-General of the United Nations.

Article 43

This Convention is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the additional protocols thereto of 8 June 1977, or to the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 44

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

3. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have accepted it in accordance with their respective constitutional processes.

4. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted.

Article 45

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

RELEASED IN FULL

GE56

Forced Disappearances Treaty Negotiations September 2005
Guidance for Closing Statement of the United States

- **As the work of the Working Group draws to a close, we express appreciation to the Chair and his team, including the Secretariat, for your enormous dedication, skill, and industriousness during negotiations on a binding instrument to combat this heinous crime.**

- **We also commend the State delegations, the independent experts, the ICRC, and non-governmental organizations for their commitment, expertise, tireless work, and collegiality throughout, and give special thanks to the families of the disappeared for bearing witness to this terrible scourge.**

- **At the same time, as we have said before, in order to produce a document that reflects consensus, treaty negotiations should be deliberate, unhurried, and careful, allowing for full expression of views by all representatives.**

- **All negotiations should additionally be inclusive, allowing full attendance by all delegation members, and transparent, based on a clear draft treaty text which takes account of opposing views.**

- **Deliberate, participatory and transparent negotiating processes are far more likely to result in a carefully drafted and fully vetted document that represents consensus.**

- **We regret that the pace of negotiations, among other factors, has resulted in a document that does not reflect consensus of the Working Group.**

- **Key issues remain disputed, and the United States, for example, continues to have reservations regarding a number of articles or sub-articles including:**

  - **RIGHT TO THE TRUTH - Preamble paragraph 7 and Article 24(2)**
  - **DEFINITION - Article 2**
  - **CRIMINALIZATION - Article 4**
  - **CRIME AGAINST HUMANITY - Article 5**
  - **LACK OF DEFENSE OF SUPERIOR ORDERS - Article 6(2)**
  - **STATUTE OF LIMITATIONS - Article 8**
  - **"FOUND IN" JURISDICTION - Article 9(2)**
  - **NON-REFOULEMENT - Article 16(2) & (3)**
  - **ACCESS TO PLACES OF DETENTION - Article 17, including 17(2)(e) and**
  - **NEW TREATY MONITORY BODY - Article 26 .**

- **We now look to the work that lies ahead, as states consider proposals before UN bodies for adoption of the instrument for adoption by member states.**

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

RELEASED IN FULL GE60

West, Lora

From: Gale, T Hanny
Sent: Wednesday, June 21, 2006 11:53 AM
To: Aswad, Evelyn M; Barton, Paula J; Bentes, Julianna W; Brancato, Gilda M; Gaffney, Francis M; Gheibi, Shahnaz; Harris, Robert K; Kovar, Jeffrey D
Subject: Draft Int'l Conv for the Protection of All Persons from ED.pdf
Attachments: Draft Int'l Conv for the Protection of All Persons from ED.pdf

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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GE60A

INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "

Geneva, 19 June 2006

S.E. M. Kevin E. MOLEY
Mission permanente des Etats-Unis d'Amérique
auprès de l'Officedes Nations Unies à Geneve
Route de Prégny 11
1292 Chambésy

cc: 'Legal'
PSA

fax : 022 74948 80

Your Excellency,

The International Commission of Jurists, AFAD, FEDEFAM, HOM, Human Rights Watch, the International Federation of Human Rights and the International Service for Human Rights have the pleasure to invite you to a conference on the *draft International Convention for the Protection of All Persons from Enforced Disappearance* that will take place on Friday, 23 June from 13:00 to 15:00, Room VIII in Palais des Nations.

This event mostly seeks to promote the prompt adoption of this important legal tool. Amongst others, associations of victims* relatives and ambassadors of countries that have played a major role in this process will speak. For more details, please see the attached programme.

Please accept the assurances of my highest consideration.

Federico Andreu-Guzmán
Deputy Secretary-General
for legal affairs

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

81A, avenue de Châtelaine, P.O. Box 216, 1219 Chatelaine, Geneva, Switzerland
Tel: +41(0) 22 979 3800 – Fax: +41(0) 23 979 3801 Website: http://www.icj.org - E-mail: info@icj.org

UNCLASSIFIED

UNCLASSIFIED
RELEASED IN FULL

GE60B

Asian Federation Against Involuntary Disappearances (AFAD)
Latin-American Federation of Association of Relatives of Disappeared Detainees (FEDEFAM)
Humanist Committee on Human Rights (HOM)
Human Rights Watch
International Commission of Jurists (ICJ)
International Federation of Human Rights (FIDH)
International Service for Human Rights (ISHR)

Have the pleasure to invite you to a meeting on

THE DRAFT INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS AGAINST ENFORCED DISAPPERANCES

A Crucial Tool To Fight Against Enforced Disappearance

on Friday 23rd of June from 13:00 to 15:00
Room VIII, Palais des Nations

The draft Convention against Enforced Disappearance is presently before the Human Rights Council for consideration. This meeting will discuss the draft document and its implications for the fight against this egregious violation of human rights. The meeting also seeks to promote the adoption of the Convention by the Human Rights Council at its first session.

An open letter, signed by eminent persons and organisations from all around the world will be presented to the Chairperson of the Human Rights Council, H.E. Mr. Luis Alfonso de Alba, ambassador of Mexico,

Speakers include;
H.E. Mr, Jean-Maurice Ripert, Ambassador of France
H,E. Mr. Alberto J, Dumont, Ambassador of Argentina
H.E. Mr. Juan Antonio March, Ambassador of Spain
H.E. Mr. Juan Martabit, Ambassador of Chile
Mrs, Xóchitl Galvez, Commission for the development of indigenous peoples, Mexico
Mrs. Mary Aileen D. Bacalso, AFAD
Mrs. Marta Ocampo de Vazquez, FEDEFAM

Moderator: Federico Andreu-Guzmán, International Commission of Jurists

Sandwiches and refreshments will be provided
***Simultaneous** interpretation will be available in Spanish, French and English*

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN.2009 200706444

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RELEASED IN FULL (E6)

West, Lora

From: Gale, T Hanny
Sent: Monday, March 20, 2006 11:51 AM
To: Williams, Kendl ; Aswad, Evelyn M (Washington); Barton, Paula J; Bentes, Julianna W; Brancato, Gilda M; Gaffney, Francis M; Gheibi, Shahnaz; Harris, Robert K; Kovar, Jeffrey D; Prosser, Sarah E; Schou, Nina E
Subject: 17 March 2006 - Ltr from Human Rights Watch asking support - Enforced Disappearances.pdf

17 March 2006 - Ltr from Human...

Kendl,
As mentioned on the phone, attached is a letter from the Human Rights Watch asking US support in favour of a resolution by which the 62nd session of the Commission adopt the Draft Int'l Convention for the Protection of All Persons from Enforced Disappearances.

Hanny

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

RELEASED IN FULL

E62

West, Lora

From: Gale, T Hanny
Sent: Tuesday, October 04, 2005 4:42 PM
To: Brancato, Gilda M
Cc: Kovar, Jeffrey D; Barton, Paula J
Subject: Enforced Disappearances document - 2nd e-mail

Oops,
Please disregard previous e-mail. Attached are all three documents.

23 September 2005 - E.CN.4-200...

23 September 2005 - General St...

23 September 2005 - List of Pa...

T. Hanny Gale
Office of Legal Affairs
U.S. Mission Geneva
Tel: [41](0)22-749-4460
Fax: [41](0)22-749-4343
E-mail: GaleTH@state.gov

"A friend is someone who knows the song in your heart and can sing it back to you when you have forgotten the words..."

"C'est bien agréable d'être important, mais c'est plus important d'être agréable"

This e-mail in unclassified per E.O. 12958

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

RELEASED IN FULL GE62A

West, Lora

From: Gale, T Hanny
Sent: Friday, September 16, 2005 3:42 PM
To: Kovar, Jeffrey D; Brancato, Gilda M; Barton, Paula J
Subject: Gilda's Papers on Enforced Disappearances - 15 September 2005

Importance: High

Gilda Brancato - forced disapp...

Gilda Brancato - fRED LINE for...

T. Hanny Gale
Office of Legal Affairs
U.S. Mission Geneva
Tel: [41](0)22-749-4460
Fax: [41](0)22-749-4343
E-mail: GaleTH@state.gov

"A friend is someone who knows the song in your heart
and can sing it back to you when you have forgotten the words..."

"C'est bien agréable d'être important, mais c'est plus important d'être agréable"

This e-mail in unclassified per E.O. 12958

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

GEb3

West, Lora

From: Harris, Robert K
Sent: Friday, August 18, 2006 2:38 PM
To: Hill, Steven R
Cc: Noyes, Julieta V (DRL); Sicade, Lynn M (DRL); Rohn, Douglas C; Johnson, Thomas A; Kovar, Jeffrey D
Subject: FW: Working Group on Enforced or Involuntary Disappearances

Steve,

When things settle down, can you keep an eye on this account?

Julieta and Doug,

Could you each designate an officer who can work with Steve on this? Thanks.

Bob

From: Mendez Kiel, Paula(Geneva)
Sent: Friday, August 18, 2006 6:59 AM
To: IO-RHS; DRL-MLA-DL; Legal-L-HRR
Subject: Working Group on Enforced or Involuntary Disappearances

08.18.06 WG on Enforced Disapp...

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

UNCLASSIFIED RELEASED IN FULL

NATIONS UNIES
HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME

PROCEDURES SPECIALES ASSUMEES PAR
LE CONSEIL DES DROITS DE L'HOMME

UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES ASSUMED BY THE
HUMAN RIGHTS COUNCIL

Chairman of the Working Group on Enforced or Involuntary Disappearances

GE63A

Téléfax: (41-22)-9 17 9006
Télégrammes: UNATIONS, GENEVE
Telex: 41 29 62
Telephone; (41-22)- 917 9176
Internet : http://www.ohchr.org/english/issues/disappear/index.htm
E-mail: wgeid@ohchr.org

Address:
Palais des Nations
CH-1211 GENEVE 10

REFERENCE: G/SO 217/1USA

10 August 2006

Excellency,

At the request and on behalf of the Chairman of the Working Group on Enforced or Involuntary Disappearances, I have the honour to communicate the following letter addressed to you:

"Excellency,

I have the honour to write to you on behalf of the Working Group on Enforced or Involuntary Disappearances, which held its seventy-ninth session from 24 to 28 July 2006, at the United Nations Office in Geneva.

In the course of the session, the Working Group decided to inform your Government of general allegations it has received in relation to the implementation of the Declaration on the Protection of All Persons from Enforced Disappearances in your country. A summary is attached. Any comments regarding these general allegations should be received by the date given in the next paragraph in order to be included in the Working Group's annual report.

I would like to take this opportunity to remind your Government that the Working Group will hold its eightieth session at the United Nations Office at Geneva from 20 November to 1 December 2006. As such, the Working Group would be grateful if any written information which your Government wishes to submit for the Working Group's consideration, could be received by 2 October 2006. Information may be submitted at any time of the year, and will be reviewed as soon as it can be processed.

../...

H.E. Mr. Warren W. Tichenor
Ambassador
Permanent Mission of the United States of America
to the United Nations Office at Geneva
Route de Pregny 11
1292 Chambesy

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

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In conformity with its usual practice, the Working Group is prepared to receive representatives of interested Governments during the first three days of its next session, from 20 to 22 November 2006. Should your Government wish to be represented at the forthcoming session, please contact the Working Group's secretariat at the United Nations Office of the High Commissioner for Human Rights in Geneva (tel: 022 917 9176, fax: 022 917 9006) to schedule an appointment with the Working Group. The dates of subsequent sessions for the coming year may also be requested or found on the WGEID webpage: http://www.ohchr.org/english/issues/disappear.

I remain,
Excellency,

Yours sincerely,

Santiago Corcuera
Chairman-Rapporteur
Working Group on Enforced
or Involuntary Disappearances"

I remain,
Excellency,

Yours sincerely,

Tanya Smith
Secretary
Working Group on Enforced
or Involuntary Disappearances

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GEL06E

12/06/06
Draft

International Convention on the Protection of all Persons from Enforced Disappearances

The Human Rights Council

PP 1 : *Recalling* General Assembly resolution 47/133 of 18 December 1992, by which the Assembly adopted the Declaration on the Protection of all Persons against Enforced Disappearances as a body of principles for all States,

PP 2 : *Recalling* CHR resolution 2001/46 establishing an intersessional open ended working group to elaborate a draft legally binding instrument for the protection of all persons against enforced disappearances, and its resolution 2005/27,

PP 3 : *Taking note* of the report E/CN.4/2006/57 of the intersessional open ended working group to elaborate a draft legally binding instrument for the protection of all persons against enforced disappearances and the decision of the working group to conclude its work and to transmit the draft International Convention on the Protection of all Persons against Enforced Disappearances to the Commission on Human Rights for adoption,

PP 4 : *Welcoming* the proposal of France to host the signing ceremony of the International Convention on the Protection of all Persons against Enforced Disappearances in Paris (France),

OP 1 : *Adopts* the text of the International Convention on the Protection of all Persons against Enforced Disappearances as contained in the annex to the present resolution,

OP 2 : *Recommends* the International Convention on the Protection of all Persons against Enforced Disappearances to the General Assembly for final adoption at its 61rst session,

OP 3 : *Recommends* that the International Convention on the Protection of all Persons against Enforced Disappearances, following its adoption by the General Assembly, be open for signature at a signing ceremony to be held in Paris (France).

UNITED STATES DEPARTMENT OF STATE
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RELEASED IN FULL GE72A

(Unofficial translation)

Russian Federation Statement on International Convention for the protection of all persons from enforced disappearances

Mr. Chairman,

It is difficult to overvalue the importance of this problem covered by the International Convention for the Protection of All Persons from Enforced Disappearances. It is even more obvious when we learn about similar crimes, including hostage taking or other terrorist acts, taking place literally every day. The latest sad case is the kidnapping and then cold-blooded murder of four workers of the Russian Federation Embassy in Iraq. We consider that kidnapping is a gross violation of human rights and is a direct violation of all forms of individual protection and cannot be justified under any circumstances. In this regard, the Russian Federation is convinced that the Human Rights Council should pay attention to the struggle against hostage taking with same degree of attention given to it by the former Commission on Human Rights. We consider that the Council, like the General Assembly and the Commission on Human Rights, should confirm that every person has an inalienable right to protection from terrorism.

Mr. Chairman,

The Russian Federation expresses gratitude to France for its efforts and contributions in the development of the International Convention for the Protection of All Persons from Enforced Disappearances. We are convinced that the adoption of this document will encourage the strengthening of an international regime for the protection of human rights and freedoms, the eradication of similar crimes, and also will contribute to the global effort in the struggle against terrorism.

We express special satisfaction with the inclusion of the Convention's articles contributing to the further progressive development of the concept of human rights. In particular, it is especially important to us that articles of the [Convention] include the possibility of assigning responsibility for the violation of this right – the right to protection from enforced disappearances – to the so-called "non-State actors." As is known, a significant part of enforced or involuntary disappearances, including kidnappings, are committed by terrorists or terrorist groups, illegal armed formations, and others. In this connection, the Russian Federation welcomes the development of new rights-defending standards that take into account contemporary realities of today's world. It is hoped that adoption of this important document will encourage a change in position of those who, up to this point, maintain that human rights can only be broken exclusively by official states or their official representatives and reject the possibility of assigning appropriate responsibility to non-State actors.

Thank you, Mr. Chairman.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 24 JUN 2009 200706444

GE73A

West, Lora

From: Barton, Paula J
Sent: Friday, July 07, 2006 11:52 AM
To: Brancato, Gilda M
Cc: Kovar, Jeffrey D; Levin, Jan; Gale, T Hanny
Subject: FW: Enforced Disappearance final statement (Canada)

Gilda,

Below is the EOP delivered by Canada at the time of adoption. I'll send the UK statement separately.

Paula

Canada

Statement in Explanation of Position upon adoption of the International Convention for the Protection of All Persons against Enforced Disappearances by the UN Human Rights Council

Mr. President,

Canada has long been committed to combatting enforced disappearance. Canada helped to establish the Working Group on Enforced and Involuntary Disappearances, and supported the adoption of the UN Declaration on the Protection of All Persons from Enforced Disappearance.

Canada actively participated in the negotiation of the new Convention with the objectives of clearly prohibiting enforced disappearances, combatting impunity for such acts, and providing effective protection from this grave human rights violation, which continues to be perpetrated around the world. Canada is pleased to support the adoption of this Convention.

That we succeeded is in large part due to the dedication of the chair, the support of many States where this abhorrent practice was once widespread, and the resolve of many civil society activists, including victims.

While our preference would have been to allocate effective monitoring functions to the Human Rights Committee, as being best placed to provide a comprehensive remedy to victims, Canada joined consensus on the creation of a new body, and contributed to its strengthening. The Convention provides for a future review of the monitoring mechanism, to ensure consistency with efforts to strengthen the human rights treaty body system.

Canada requests that the following statements of understanding be placed on the official record of this meeting:

- The definition in article 2 and all references to crimes or offences in this Convention must be interpreted in light of the element of criminal intent required under domestic law for any criminal offence.

- Articles 5 and 6 must be interpreted consistent with international law, including the Rome Statute of the International Criminal Court.

- The provision in article 7 allowing for the consideration of mitigating circumstances in sentencing cannot be interpreted in any manner that would result in an effective amnesty which would allow impunity for violators, who must be punished with appropriate penalties taking into account the gravity of the offence.

- Article 8 on statutes of limitations must be interpreted as being subject to international law. This provision should never be allowed to operate so as to condone impunity for perpetrators. Further, no statutes of limitations are permitted under international law for any enforced disappearance which constitutes a crime against humanity.

- Article 12, paragraph 3 must be interpreted as permitting States to ensure access by investigating authorities to relevant documentation and other information which are not in the control of the State on the basis of prior authorization of a judicial authority, where necessary.

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- The provisions in article 24 relating to reparation must be interpreted in a manner consistent with international law, including the law of sovereign immunity.

Canada will consider whether to become a party to the new Convention following its adoption by the General Assembly. Canadian law already provides effective protection from the essential elements of enforced disappearance, including the criminalization of enforced disappearance at the level of a crime against humanity.

It is our hope that this new Convention will provide additional protection from enforced disappearance and contribute to ending impunity for this grave human rights violation.

Thank you Mr. President.

RELEASED IN FULL

GE79

West, Lora

From: Brancato, Gilda M [BrancatoGM@state.gov]
Sent: Wednesday, June 21, 2006 6:32 PM
To: Kovar, Jeffrey D; Padmanabhan, Vijay M; Witten, Samuel M; Lagon, Mark P; Barks-Ruggles, Erica J (DRL)
Subject: FW: Enforced Disappearnces informals

FYI.

From: Levin, Jan(Geneva)
Sent: Wednesday, June 21, 2006 12:30 PM
To: Legal-L-HRR
Cc: IO-RHS users; DRL-MLA-DL; DePirro, Velia M; Barton, Paula J; Levin, Jan
Subject: Enforced Disappearnces informals

Please find attached below the new draft resolution from France on Enforced Disappearances. During this morning's informals, there were no strong objections to the Convention expressed. India noted it would have preferred an optional protocol to the ICCPR, but participated constructively in negotiations and still has concerns. No suggestion that they would call for a vote.

Those who announced as co-sponsors were: Chile, Argentina, Switzerland, Spain, Hungary, Ireland, and Estonia.

Those who support: Morocco, Austria, Russia, New Zealand (announced would support during GA when it can participate), Brazil, Canada, Azerbaijan, Mexico, Ukraine and Japan.

France noted it would table the resolution promptly so that it can be translated and distributed, and cosponsors would have time to prepare interpretive statements to be delivered at the time of adoption of the text.

06.12.06 Draft In'tl convention...

UNITED STATES DEPARTMENT OF STATE
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DATE/CASE ID: 24 JUL 2009 200706444

RELEASED IN FULL 6582

West, Lora

From:	Brancato, Gilda M
Sent:	Thursday, June 15, 2006 6:53 PM
To:	Witten, Samuel M; Lagon, Mark P; Johnson, Thomas A; Kovar, Jeffrey D; Levin, Jan; Harris, Robert K; Padmanabhan, Vijay M; Sicade, Lynn M (DRL); Bellinger, John B(Legal); Bettauer, Ronald J
Cc:	Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Noyes, Julieta V (DRL); Legal-L-HRR; Hata, Marianne J; Propp, Kenneth R; Manning, Denise; Dorosin, Joshua L
Subject:	RE: (SBU) Info memo to L/ Draft Disappearances Convention
Attachments:	LEGAL-#26632-v1-Forced_Disappearances_Update_to_JBB.DOC; LEGAL-#18367-v1-Disappearances_treaty_USG_Final_STatement.DOC

Sensitive But Unclassified - John - attached for your information is an update on the proposed Forced Disappearances Convention. Also attached FYI is our Closing Statement delivered at the conclusion of negotiations on the treaty in 2005.

Please let us know if you have any comments or questions.

Marianne - could you ensure that this memorandum gets to John. Thank you!

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

RELEASED IN FULL CE87

West, Lora

From: Brancato, Gilda M
Sent: Monday, April 03, 2006 9:35 PM
To: Kovar, Jeffrey D; Barton, Paula J; DePirro, Velia M; Levin, Jan
Cc: Legal-L-HRR; Johnson, Thomas A; Hammond, Sylvia L; Noyes, Julieta V (DRL); Sicade, Lynn M (DRL); Deeks, Ashley S
Subject: LEGAL-#23727-v1-reply_to_NGOs_on_forced_disappearances_treaty.DOC

LEGAL-#23727-v1-reply_to_NGOs_...

Jeff/Paula/ Velia/Jan - as we discussed, attached is a reply for Mission Geneva, to which our Closing Statement on the proposed Disappearances Convention delivered in September 2005 should be attached.

Thank you, Gilda

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

RELEASED IN FULL

GE98

West, Lora

From: Kovar, Jeffrey D
Sent: Monday, July 24, 2006 4:05 PM
To: DePirro, Velia M
Subject: RE: Disappearances Binder--Foreign Government Statements on Convention

Velia -- I asked Paula to work with Patrick to do this. - Jeff

---

From: Aswad, Evelyn M [mailto:AswadEM@state.gov]
Sent: Friday, July 21, 2006 6:53 PM
To: Aswad, Evelyn M; Johnson, Thomas A
Cc: Kovar, Jeffrey D; DePirro, Velia M; Levin, Jan; Smeller, Patrick; Barton, Paula J
Subject: RE: Disappearances Binder--Foreign Government Statements on Convention

Jeff & Velia – please let us know if you are able to get translations or key points from the Geneva missions for China and Russia. Many thanks! Evelyn

---

From: Aswad, Evelyn M
Sent: Thursday, July 20, 2006 5:32 PM
To: Johnson, Thomas A
Cc: IO-RHS; Kovar, Jeffrey D; DePirro, Velia M; Levin, Jan; Smeller, Patrick; Barton, Paula J
Subject: RE: Disappearances Binder--Foreign Government Statements on Convention

OK – Thanks for looking into this. Evelyn

From: Johnson, Thomas A(Main State Rm 5336)
Sent: Thursday, July 20, 2006 4:08 PM
To: Aswad, Evelyn M
Cc: IO-RHS; Kovar, Jeffrey D; DePirro, Velia M; Levin, Jan; Smeller, Patrick; Barton, Paula J
Subject: Disappearances Binder--Foreign Government Statements on Convention

Evelyn--
There are about 8 Spanish documents that Molly can translate, and 5 in French that Rebecca will translate. But we are being quoted $120 for translation of the Chinese document, and probably about the same for the Russian document. Money is scarce. Let's just live with Geneva (Jeff or others) trying to get an English translation from their Chinese and Russian counterparts, or at least the key points in each statement that are of interest to us.

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RELEASED IN FULL

File: Enforced Dis

GE103

Peay, T Michael

From: Brancato, Gilda M
Sent: Friday, January 09, 2004 4:24 PM
To: Peay, T Michael(Geneva)
Cc: Harris, Robert K; Gale, Teresa H(Geneva); Manning, Denise
Subject: INSTRUCTIONS TO THE UNITED STATES DELEGATION TO THE UNCHR WORKING GROUP SESESION ON FORCED DSIAPPEARANCES:

The attached draft, which I need to review and proofread, contains comments of DOJ/OIA, DOD/GC and L/PM. Will

2G_901!.DOC

incorporate comments of L/LEI in Geneva. See you Monday! Best, Gilda recei

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

COMPILATION DE PROPOSITIONS - 14/12/04

RELEASED IN FULL
GEID9A

Préambule

Les États parties [*au présent instrument*],

Considérant **que la Charte des Nations Unies impose aux Etats l'obligation de promouvoir le respect universel et effectif des droits et des libertés fondamentales de l'Homme,**

Se référant à **la Déclaration universelle des droits de l'Homme,**

Rappelant **le Pacte sur les Droits économiques, sociaux et culturels, le Pacte sur les Droits civils et politiques et les autres instruments internationaux pertinents dans le domaine des Droits de l'homme, du Droit humanitaire et du Droit pénal international,**

Rappelant la Déclaration sur la protection de toutes les personnes contre les disparitions forcées adoptée par l'Assemblée générale des Nations Unies dans sa résolution 47/133 du 18 décembre 1992,

Conscients de l'extrême gravité de la disparition forcée qui constitue un crime et, dans certaines circonstances **définies par le droit international**, un crime contre l'humanité,

Déterminés **à prévenir les disparitions forcées et** à lutter contre l'impunité du crime de disparition forcée,

Affirmant **le droit de toute personne de ne pas être soumise à une disparition forcée et** le droit des victimes de savoir la vérité sur les circonstances d'une disparition forcée et le sort de la personne disparue,

Sont convenus de ce qui suit:

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Article 1 *bis*

1. Nul ne **sera** soumis à une disparition forcée.

2. Aucune circonstance **exceptionnelle**, quelle qu'elle soit, qu'il s'agisse de l'état de guerre ou de menace de guerre, d'instabilité politique intérieure ou de tout autre état d'exception, ne peut être invoquée pour justifier la disparition forcée.

Article 3

Tout État partie prend les mesures nécessaires **pour tenir pénalement responsables :** ~~pour poursuivre et punir ceux qui commettent ou concourent à commettre une disparition forcée.~~

a) ceux qui commettent, commanditent, tentent de commettre une disparition forcée, y participent ou en sont complices.

~~1. Sont punis :~~

~~a) Les auteurs d'une disparition forcée et ceux qui s'en rendent complices ;~~

~~b) La tentative de disparition forcée ;~~

~~c) L'entente en vue de commettre une disparition forcée.~~

~~2. Sont également punis :~~

~~a) Ceux qui ordonnent ou encouragent la commission ou la tentative d'une telle infraction, ceux qui en facilitent la commission ou la tentative en apportant leur aide, leur concours ou tout autre forme d'assistance, y compris en fournissant les moyens de cette commission ou de cette tentative ;~~

b) Le supérieur qui:

i) Savait que des subordonnés placés **sous son autorité et son contrôle effectifs,** commettaient ou allaient commettre une disparition forcée ou a délibérément négligé de tenir compte d'informations qui l'indiquaient clairement; et qui

ii) N'a pas pris toutes les mesures nécessaires et raisonnables qui étaient en son pouvoir pour empêcher ou ~~faire cesser~~ **réprimer** une disparition forcée, ~~ou pour en réprimer l'exécution~~ ou pour en référer aux autorités compétentes aux fins d'enquête et de poursuites.

2. **Aucun ordre ou instruction émanant d'une autorité publique, civile, militaire ou autre, ne peut être invoqué pour justifier une disparition forcée.**

Article 4

1. Tout État partie rend **le crime de** disparition forcée passible de peines appropriées qui prennent en compte son extrême gravité.

2. Tout État partie peut prévoir:

a) Des circonstances atténuantes, notamment en faveur de ceux qui, impliqués dans la commission d'une disparition forcée, auront contribué efficacement à la récupération en vie de la personne disparue ou auront permis d'élucider des cas de disparitions forcées ou d'identifier les auteurs d'une disparition forcée;

b) **Sans préjudice d'autres procédures pénales,** des circonstances aggravantes, notamment en cas de décès de la victime ou envers ceux qui se sont rendus coupables d'une disparition forcée à l'encontre de femmes enceintes, de mineurs ou d'autres personnes particulièrement vulnérables.

Article 9

1. Tout État partie prend les mesures nécessaires pour établir sa compétence aux fins de connaître d'un **crime de** disparition forcée:

a) Quand l'infraction a été commise sur tout territoire sous sa juridiction ou à bord ~~d'un navire battant son pavillon ou d'un~~ aéronefs **ou de navires** immatriculés ~~conformément à sa législation au moment des faits~~ **dans cet Etat** ;

b) Quand l'auteur présumé de l'infraction est l'un de ses ressortissants~~, ou une personne apatride résidant habituellement sur son territoire~~ ;

c) Quand la personne disparue est l'un de ses ressortissants ~~et que cet Etat partie le juge approprié~~ .

2. Tout État partie prend également les mesures nécessaires pour établir sa compétence aux fins de connaître d'un **crime de** disparition forcée quand l'auteur présumé de l'infraction se trouve sur tout territoire relevant de sa juridiction, sauf s'il l'extrade ou le remet à un autre État **conformément à ses obligations internationales, ou** s'il le remet à une juridiction pénale internationale dont il a reconnu la compétence.

3. [*Le présent instrument*] n'écarte aucune compétence pénale **supplémentaire** exercée conformément aux lois nationales.

Article 23

1. Tout État partie prend les mesures nécessaires pour prévenir et réprimer ~~pénalement~~:

a) ~~L'enlèvement ou~~ l'appropriation d'enfants **soumis à une disparition forcée** ~~victimes de disparitions forcées~~, ou dont le père, la mère ~~sont victimes d'une disparition forcée~~ **ou le représentant légal sont soumis à une disparition forcée**, ou d'enfants nés pendant la captivité de leur mère ~~victime d'une disparition forcée~~ **soumise à une disparition forcée** ;

b) La falsification ou la **dissimulation** ~~destruction de documents attestant~~ de la véritable identité des enfants visés à l'alinéa (a).

2. Tout État partie prend les mesures nécessaires pour rechercher et identifier les enfants visés au paragraphe 1 a) ~~et b)~~ **et les rendre à leur famille d'origine**.

Article 25

1. ~~Lorsqu'un enfant enlevé ou approprié dans les conditions de l'article 23 a) est retrouvé sur le territoire d'un Etat partie, la question de son éventuel retour vers sa famille d'origine est réglée soit par la loi nationale de cet Etat partie, soit par l'accord bilatéral ou multilatéral qui le lie avec tout autre Etat dans lequel réside la famille d'origine.~~

2. **Compte tenu de la nécessité de préserver l'intérêt supérieur des enfants visés à l'article 23, § 1 a) et leur droit à préserver leur identité, y compris leur nationalité et leurs liens familiaux reconnus par la loi, il doit être possible, dans les Etats parties qui reconnaissent le système d'adoption, de réviser la procédure d'adoption de ces enfants, et en particulier d'annuler toute adoption qui trouve son origine dans une disparition forcée.** ~~**Une telle adoption peut néanmoins continuer à produire ses effets si les plus proches parents de l'enfant donnent leur consentement au moment de la révision.**~~

3. En toute circonstance, l'intérêt supérieur de l'enfant est une considération primordiale, et l'enfant qui est capable de discernement a le droit d'exprimer librement son opinion, laquelle est dûment prise en compte eu égard à son âge et à son degré de maturité.

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Mission Permanente de la France
auprès des Nations Unies
et des Organisations Internationales
à Genève

L'Ambassadeur

GE110

Genève, le 21 décembre 2004

CC/cd
N° 1588

Chers collègues,

Grâce à votre participation, notre réunion du 9 décembre a permis de faire des progrès dans la discussion du projet d'instrument pour la protection de toutes les personnes contre les disparitions forcées.

Je vous propose que nous nous réunissions à nouveau, toujours de façon informelle, à la mission française

- le 19 janvier à partir de 15h, pour traiter les articles 10, 11, 12, 13, 14, 15, 15bis, 19 et 20 ;

- le 24 janvier toute la journée, pour traiter les articles 16, 16bis, 17, 18 et 22 à partir de 9h, et les parties 2 et 3 à partir de 14h. Une collation sera servie pour le déjeuner.

Avec mes remerciements pour notre fructueuse coopération, je vous présente mes meilleurs vœux pour l'année 2005.

Bien amicalement

Bernard KESSEDJIAN

NB : Merci de bien vouloir informer Mme d'Angelo (022 758 91 42) de votre participation.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

Recipient	Read
Aswad, Evelyn M (L-HRR)	Read: 12/28/2004 4:14 PM
Cassel, Lynn L	Read: 12/28/2004 4:17 PM

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TRADUCTION

GE112A

C.c. DCM
LA

Geneva, 30 November 2004

Subject : Enforced disappearances

Dear Colleagues,

As was envisaged during the last session of our working group on the negotiation of an instrument on enforced disappearances and with a view to making progress before the next session (31 January-11 February 2005), I would like to suggest that we meet on 9 December to work on the text of the draft instrument. During this day, all interested delegations are invited to contribute to the elaboration of formulas to solve certain issues or to facilitate progress. These discussions will of course be informal and friendly.

Work will take place from 9 a.m. to 18 p.m. on 9 December at the French Mission. A light lunch will be served.

I am grateful in advance for your participation in this working meeting and I look forward to seeing you again on this occasion.

PS : Please let Mme d'Angelo (022 758 91 42) know if you plan to attend.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

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GE112B

Mission Permanente de la France
auprès des Nations Unies
et des Organisations Internationales
à Genève

L'Ambassadeur

Genève, le 30 novembre 2004

Objet : Disparitions forcées
N° 1486

Chers collègues,

Ainsi qu'il avait été envisagé au cours de la dernière session de notre groupe de négociation d'un instrument sur les disparitions forcées et afin de faire avancer notre travail en vue de la prochaine session (31 janvier-11 février 2005), je vous propose de nous réunir le 9 décembre, pour une journée de travail sur le texte du projet d'instrument. Au cours de cette journée, l'ensemble des délégations intéressées sont invitées à contribuer à l'élaboration de propositions pour tenter de régler certaines difficultés ou en faire progresser la solution. Ces discussions se dérouleront bien sûr de façon informelle et amicale.

Cette réunion aura lieu le 9 décembre de 9h à 18h, à la mission de France. Une collation sera servie à l'heure du déjeuner.

Je vous remercie par avance de votre participation à cette réunion de travail et je me réjouis de vous revoir à cette occasion.

Bien amicalement

Bernard KESSEDJIAN

NB : Merci d'informer Mme d'Angelo (022 758 91 42) de votre participation.

UNITED STATES DEPARTMENT OF STATE
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DATE/CASE ID: 23 JUN 2009 200706444

36, route de Pregny - 1292 Genève-Chambésy

Peay, T Michael

BE129

From: Brancato, Gilda M
Sent: Tuesday, July 06, 2004 7:17 PM
To: Peay, T Michael
Cc: Solomon, Steven A
Subject: FW: Secret detentions

another article on the disappeared. Mike, have our september one week formal negotiations on the disappearances treaty been scheduled yet? many thanks, gilda

-----Original Message-----
From: Malionek, Tom V
Sent: Monday, June 28, 2004 10:14 AM
To: Alider, Lois L; Blanck Jr, John I; Cook, Daphne W; Dalton, Robert E; Dennis, Michael J; Dolan, JoAnn; Haines, Avril D; Legal-L-HRR-dl
Subject: Secret detentions

UNCLASSIFIED per E.O. 12958

Washington Times, June 28, 2004 - pg. 17

Torturing Suspected Terrorists?

By Nat Hentoff

Much of the media eventually may lose interest in the contention of administration lawyers - in leaked Pentagon and Justice Department reports - that the president, as commander in chief in a war on terrorism, has the authority to justify selective use of torture on prisoners allegedly linked to terrorism. But in a letter to the New York Times, Dr. Allen Kelley, Director of the Bellevue-NYU Program for Survivors of Torture, sounds a warning:

"The notion that torture is justified or effective in eliciting information is misguided and dangerous. Individuals so brutalized will say whatever they think their interrogators want to hear."

Meanwhile, even weeks later, the media has almost entirely ignored the May 16 ABC Television "Nightline" program titled "The Disappeared." It focused not on whether, and when, a congressional statute and international treaties we've signed can be bypassed, but rather, on an operation apparently even more disconnected from our laws.

"Nightline" focused on super-secret CIA interrogation centers overseas. "The inmates are believed to make up a who's who of the top al Qaeda leadership," said reporter Chris Bury. "But even their names are classified. Some of them may never be released. For all practical purposes, they have just disappeared."

Obviously, it's essential to get information from leading terrorists. But, Mr. Bury continued, these prisons "operate entirely outside the U.S. judicial system, according to a set of rules approved by the Justice Department. But like everything else about the CIA's prisons, those rules are also top secret."

As the May 24 edition of Newsweek reported, after the president was assured by his legal advisers that the Geneva Conventions do not apply to the questioning of such terrorist prisoners, his directive "authorized the CIA to set up a series of secret detention facilities outside the United States, and to question those held in them with unprecedented harshness."

"Nightline" broadcast a news clip where the president declared: "You need to have a president who understands

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you can't win this war with legal papers. We've got to use every asset at our disposal."

Though most of the media has ignored this story, there has been some earlier coverage on the secret CIA interrogation centers, such as in the Dec. 26, 2002, story by The Washington Post on prisoners in a CIA facility at Bagram Air Force base in Afghanistan. They were systematically subjected to abuses veering on torture. But that story died soon after.

Mr. Bury, speaking of the series of secret CIA prisons beyond the reach of the American rule of law, asked: "Since when are people in American custody allowed simply to disappear into a black hole?"

Appearing on the program was retired FBI agent Jack Cloonan, on the job for 27 years and the senior agent on the FBI's "bin Laden Squad" in New York. Knowing from experience how vital it is to get information from these high-echelon terrorists, Mr. Cloonan also wonders:

"What are we going to do with these people (in the CIA secret prisons) when we're finished exploiting them? Are they gonna disappear? Are they stateless?Imean, what are we gonna explain to people when they start asking questions about where they are? Are they dead? Are they alive? What oversight does Congress have?"

On the same program, Rep. Jane Harman of California, ranking Democrat on the House Intelligence Committee, said that she wants "to save American lives, but I want to do it within the constraints of U.S. and international law ... I think the oversight process in Congress right now is less than it needs to be.

"The people we're fighting don't abide by the rules. But if we don't follow the rule of law, what are we fighting for?"

"Nightline" reporter John McWethy, the principal reporter on the story, said that "a CIA official claims the prisoners are not being tortured. As for the details of where they are being held, exactly how they are being treated and what the U.S. plans to do with them, that is all a secret. When asked why, an official from the CIA explained, that's a secret, too." Now that George Tenet has resigned as head of the CIA, will he disclose some of those secrets in the interest of justice? After all, international treaties we have signed forbid such bottomless secrecy about such prisoners.

What also concerns me, as a journalist, is why the great majority of the print, broadcast and other media did not quickly follow up on the "Nightline" report. Later, I asked Mr. Bury if he had seen any meaningful coverage of that program. He had not. Neither did I. But recently, other reports were emerging about the secret prisons - especially Human Rights First's documented "Ending Secret Detentions."

We did previously find out from the May 16 New York Times that one of most important al Qaeda prisoners, Khalid Shaikh Mohammed, was somewhere "strapped down forcibly, pushed under water and made to believe he might drown."

I can't say I felt terribly sorry for him; but are we ever going to know what else is being done to him, and to others of the CIA's super-secret prisoners? Should we care whether they entirely disappear? Even these mass murderers?

What do you think?

Tom Malionek
Analyst for Boundaries - Boundary Waters - Conservation - Environment - Fisheries - Human Rights - Maritime Matters
Office of the Assistant Legal Adviser for Treaty Affairs (L/T)
5420 HST
phone 202-647-1336 (direct)
fax 202-736-7541

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GE146B

United States Proposals on "Access to Information" (January 16, 2004)

Article 7

Delete the following sentence: " In particular, the right to obtain accurate and full information on the fate of disappeared persons is guaranteed in all circumstances." *[Unnecessary in light of what follows.]*

Article 12 [as shortened]

1. (same)
2. (same)
3. (same)

New Consolidated Chapter on –"Access to Information"

Article 12 bis [New]

1. Each State Party, *subject to Article12 ter(4))*, shall provide to family members, and to other persons with a legitimate interest, information concerning the whereabouts and fate of a disappeared person, including information resulting from an investigation into the disappearance.

2. *At a minimum, such information shall include:*

(a) The authority to whom the person has been referred;

(b) The whereabouts of the person deprived of liberty, including in case of transfer;

(c) The identity of the person responsible for the deprivation of liberty and of the person in whose hands the person deprived of liberty has been placed. [Former Art. 16(2)]

3. Each State Party shall prepare and maintain one or several official registers of persons deprived of liberty. *[Former Art. 16(3); however, the 2nd sentence would become unnecessary in view of Art. 12 bis.]*

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Article 12 ter [New]

1. In implementing their obligations under this [instrument], States Parties shall respect the fundamental need of family members, and other persons with a legitimate interest, to obtain information promptly and regularly regarding the whereabouts and the fate of a disappeared person.

2. States Parties shall adopt, if they have not yet done so, the necessary domestic legal measures to ensure appropriate access to such information.

3. States Parties shall be guided by the principle that furnishing such information shall in no circumstances be unreasonably denied.

4. Such access shall be subject only to privacy, law enforcement, national security, or other similar considerations duly justified under law.

Article 17

[The necessity of this article would need to be reevaluated, in light of provisions in the new "Access to Information" Chapter].

Article 19 [as revised]

Each State Party shall take the necessary measures to prevent or punish the following conduct:

(a) Any unlawful delay or obstruction in providing the access to information envisioned by Article 12 bis and Article 12 ter. [*delete reference to Art. 17*]
(b) same
(c) same

GE148

Peay, T Michael

To: Moley, Kevin; Cassel, Lynn L
Cc: DeLaurentis, Jeffrey
Subject: Enforced Disappearances Negotiations: Draft Reporting Cable

Reporting Cable
Forced Disappe...

January 27, 2004

Ambassador and DCM:

Per your requests, attached for your information and comment is the current draft text of the reporting cable that has been penned by Gilda Brancato from L/HRR and edited by me to reflect the past two weeks of negotiations on this instrument.

She has not yet drafted a comment, but I can furnish that to you when drafted for your information and comment.

I welcome any reactions you may have.

Mike Peay

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

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GE158

Peay, T Michael

From: Brancato, Gilda M
Sent: Tuesday, December 31, 2002 9:57 PM
To: Surena, Andre M; Manning, Denise; Johnson, Thomas A; Sicade, Lynn M; Camponovo, Christopher N (DRL); Stewart, David P; Dorosin, Joshua L; 'Eliana_davidson@nts.policy.osd.pentagon.smil.mil'
Cc: Witten, Samuel M; Jacobson, Linda; Buchwald, Todd F; Dolan, JoAnn; Hollis, Duncan; Danies, Joel D(Geneva); Peay, T Michael(Geneva); Solomon, Steven A(Geneva); Legal-L-HRR-dl
Subject: ARTICLE BY ARTICLE INSTRUCTIONS TO THE UNITED STATES DELEGATION TO THE UNCHR WORKING GROUP SESESION ON FORCED DSIAPPEARANCES:

Attached for your review is a discussion of the principal sections of the 1998 UNCHR sub-commission draft on forced disappearances. This article by article analysis is intended to supplement the general instructions paper sent to you for clearance on December 234. I would very much appreciate any comments you may have and clearance if possible. However, I realize that time is short and thus you may not have time to do a review by Friday noon (last day in the office before leaving for Geneva). Many thanks, and wishing you a wonderful new year, filled with good health and good events.

28SC01!.doc

Gilda cc by fax - doj/oia - tom burrows

UNITED STATES DEPARTMENT OF STATE
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DATE/CASE ID: 23 JUN 2009 200706444

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UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

GE159

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Draft international convention on the protection of all persons from enforced disappearance

Sub-Commission resolution 1998/25

The Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Recalling General Assembly resolution 47/133 of 18 December 1992 by which the Assembly proclaimed the Declaration on the Protection of All Persons from Enforced Disappearance as a body of principles for all States and urged that all efforts be made so that the Declaration became generally known and implemented,

Recalling also General Assembly resolution 41/120 of 4 December 1986 in which the Assembly recognized the value of continuing efforts to identify specific areas where further international action was required to develop the existing legal framework in the field of human rights,

Recalling further Commission on Human Rights resolution 1997/26 in which the Commission, deeply concerned, in particular, by the intensification of enforced or involuntary disappearances in various regions of the world and by the growing number of reports concerning harassment, ill-treatment and intimidation of witnesses, of disappearances or relatives of persons who have disappeared, took note of the report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1997/34), which at paragraph 31, welcomed the efforts of the Sub-Commission's sessional working group on the administration of justice to prepare a draft international convention on the prevention and punishment of enforced disappearances,

Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of enforced disappearance is of the nature of a crime against humanity,

Recalling that at the forty-seventh session of the Sub-Commission the sessional working group on the administration of justice, had asked its Chairman-Rapporteur, Mr. Louis Joinet, to submit a preliminary draft "international convention on the prevention and punishment of enforced disappearances" which formed the basis for discussion at the working group at its 1996 and 1997 sessions,

Expressing its appreciation, to the Chairman-Rapporteur for having submitted, in time for the Sub-Commission's consideration at its fiftieth session, a text entitled "Draft international convention on the protection of all persons from enforced disappearance" (E/CN.4/Sub.2/1998/19, annex) which was revised by the working group at the current session,

1. Decides to transmit the draft international convention on the protection of all persons from enforced disappearance to the Commission on Human Rights for its consideration, together with the comments of the Sub-Commission thereon as well as those of the sessional working group on the administration of justice (E/CN.4/Sub.2/1998/19, paras. 9-64);

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FP0788

2. Requests the Commission to invite Governments, intergovernmental organizations and non-governmental organizations to provide comments on the draft convention.

35th meeting
26 August 1998
[Adopted without a vote. See chap. XI.]

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Office of the United Nations High Commissioner for Human Rights
Geneva, Switzerland

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(E)(b)(2)(A)

Peay, T Michael

From: Brancato, Gilda M
Sent: Thursday, December 18, 2003 1:16 AM
To: Manning, Denise; Brooks, Waldo W; Peay, T Michael(Geneva); Harris, Robert K; Johnson, Thomas A; Camponovo, Christopher N (DRL); Carlson, Mary Helen; 'James_Burger@nts.policy.osd.pentagon.smil.mil'
Cc: Teel, Wynne M; Dalton, Robert E; Jacobson, Linda; Buchwald, Todd F; Dolan, JoAnn; Cummings, Edward R (Main State); Danies, Joel D(Geneva); Solomon, Steven A(Geneva); DeLaurentis, Jeffrey(Geneva); Legal-L-HRR-dl; Perry, June C; Sicade, Lynn M; Witten, Samuel M
Subject: Draft Instructions for Second Formal Round of Forced Disappearances Treaty Negotiations

Attached for the clearance of those on the TO line are proposed instructions for the US delegation during forced

26_9011.DOC

disappearance treaty negotiations beginning January 12. I had earlier circulated the Chair's 2003 convention text on the unclassified system. Please let me know if you need another copy.
These 27 pages of detailed comments may look daunting, if not excruciating, so to the extent you cleared earlier instructions one year ago on a different treaty text and wish to put down for a draft clearance on this round, please let me know. If you have not yet cleared an iteration of these comments, I would appreciate your doing so, please. This treaty negotiation raises important issues, and DOD and DOJ review in particular is important. Thank you.
L/PIL - you only need to review comments on Article 23-25 on abduction of children of the disappeared.
Thank you all, Gilda

December 2003 Guidance

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REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

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GE165

Document de travail
01/12/03

Partie I

[Chapitre 1. — Définition]

Article premier

Aux fins *[du présent instrument]*, on entend par disparition forcée la privation de liberté d'une personne, sous quelque forme que ce soit, commise par des agents de l'État ou par une organisation politique, ou par des personnes ou des groupes de personnes qui agissent avec l'autorisation, l'appui ou l'acquiescement de l'État ou de l'organisation politique, suivie du déni de la reconnaissance de la privation de liberté ou de la dissimulation du sort réservé à la personne disparue ou du lieu où elle se trouve, la soustrayant ainsi à la protection de la loi.

[Chapitre 2. — Incriminations et sanctions].

Article 2

1. Tout Etat partie prend les mesures nécessaires pour que la disparition forcée, telle qu'elle est définie à l'article 1er, constitue une infraction au regard de son droit pénal.

2. Le présent article est sans préjudice de tout autre instrument international ou de toute loi nationale qui contient ou peut contenir des dispositions de portée plus large.

Article 3

Tout Etat partie prend les mesures nécessaires pour punir :

a) les auteurs d'une disparition forcée et ceux qui s'en rendent complices, soit en ordonnant, sollicitant ou encourageant la commission ou la tentative d'une telle infraction, soit en facilitant la commission ou la tentative d'une telle infraction en apportant leur aide, leur concours ou toute autre forme d'assistance, y compris en fournissant les moyens de cette commission ou de cette tentative,

b) la tentative de disparition forcée,

c) l'entente en vue de commettre une disparition forcée,

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DATE/CASE ID: 23 JUN 2009 200706444

d) le supérieur hiérarchique qui :

(i) savait ou, en raison des circonstances et des informations dont il disposait, aurait dû savoir qu'un subordonné placé sous son autorité ou son contrôle effectifs était en train de commettre ou sur le point de commettre une disparition forcée, et qui :

(ii) n'a pas pris toutes les mesures nécessaires et raisonnables qui étaient en son pouvoir pour empêcher ou faire cesser la disparition forcée, ou pour en réprimer l'exécution ou en référer aux autorités compétentes aux fins d'enquête et de poursuites.

Article 4

1. Tout Etat partie rend la disparition forcée passible de peines appropriées qui prennent en considération sa gravité.

2. Tout Etat partie peut prévoir :

a) des circonstances atténuantes en faveur de ceux qui, impliqués dans la commission d'une disparition forcée, auront contribué efficacement à la récupération en vie de la personne disparue ou auront permis d'élucider des cas de disparitions forcées ou d'identifier les auteurs d'une disparition forcée ;

b) des circonstances aggravantes envers ceux qui se sont rendus coupables d'une disparition forcée à l'encontre d'une personne particulièrement vulnérable.

[Chapitre 3. — Protection contre l'impunité.]

Article 5

1. Tout Etat partie prend les mesures nécessaires pour qu'à l'égard de la disparition forcée, le délai de prescription de l'action pénale :

a) soit égal au délai le plus long prévu dans sa législation ;

b) commence à courir à compter du jour où le sort de la personne disparue est connu avec certitude.

2. Lorsque les recours prévus à l'article 2 § 3 a) du Pacte international relatif aux droits civils et politiques ne sont pas efficaces, la prescription de la disparition forcée est suspendue aussi longtemps que l'efficacité de ces recours n'aura pas été rétablie.

Article 6

L'ordre d'un supérieur ou d'une autorité publique ne peut être invoqué pour justifier une disparition forcée.

Article 7

Tout Etat partie s'assure que les mesures de grâce, d'amnistie et les autres mesures analogues dont peuvent bénéficier les auteurs ou les personnes soupçonnées d'avoir commis une disparition forcée, n'aient pas pour effet d'empêcher l'exercice d'un recours effectif pour l'obtention d'une réparation. Est notamment garanti, en toute circonstance, le droit d'obtenir des informations exactes et complètes sur le sort des personnes disparues.

Article 8

Tout Etat partie considère la disparition forcée comme un crime grave de droit commun, au sens de l'article 1 F b) de la Convention relative au statut des réfugiés du 28 juillet 1951.

[Chapitre 4. — Poursuites au plan national.]

Article 9

1. Tout État partie prend les mesures nécessaires pour établir sa compétence aux fins de connaître d'une disparition forcée, dans les cas suivants :

a) Quand l'infraction a été commise sur tout territoire relevant de sa juridiction ou à bord d'un navire battant son pavillon ou d'un aéronef immatriculé conformément à sa législation au moment des faits ;

b) Quand l'auteur présumé de l'infraction est l'un de ses ressortissants ;

c) Quand la personne disparue est l'un de ses ressortissants ;

d) Quand l'auteur présumé de l'infraction se trouve sur tout territoire relevant de sa juridiction, sauf s'il l'extrade ou s'il le défère devant une juridiction pénale internationale.

2. *[Le présent instrument]* n'écarte aucune compétence pénale exercée conformément aux lois nationales.

Article 10

1. S'il estime que les circonstances le justifient, après avoir examiné les renseignements dont il dispose, tout État partie sur le territoire duquel se trouve une personne soupçonnée d'avoir commis une disparition forcée assure la détention de cette personne ou prend toutes autres mesures juridiques nécessaires pour assurer sa présence. Cette détention et ces mesures doivent être conformes à la législation dudit État partie ; elles ne peuvent être maintenues que pendant le délai nécessaire à l'engagement de poursuites pénales ou d'une procédure d'extradition.

2. L'État partie qui a pris les mesures visées au paragraphe 1 procède immédiatement à une enquête en vue d'établir les faits. Il informe les Etats parties qui pourraient être compétents conformément à l'article 9 § 1 a), b) et c) des mesures qu'il a prises en application du paragraphe 1 et des conclusions de son enquête, en leur indiquant s'il entend exercer sa compétence.

3. Toute personne détenue en application du paragraphe 1 peut communiquer immédiatement avec le plus proche représentant qualifié de l'Etat dont elle a la nationalité ou, s'il s'agit d'une personne apatride, avec le représentant de l'Etat où elle réside habituellement.

Article 11

1. L'État partie sur le territoire sous la juridiction duquel l'auteur présumé d'une disparition forcée est découvert, s'il n'extrade pas ce dernier ou ne le défère pas devant une juridiction pénale internationale, soumet l'affaire à ses autorités compétentes pour l'exercice de l'action pénale.

2. Ces autorités prennent leur décision dans les mêmes conditions que pour toute infraction de droit commun de caractère grave en vertu du droit de cet Etat partie. Dans les cas visés à l'article 9 § 1 d), les règles de preuve qui s'appliquent aux poursuites et à la condamnation ne sont en aucune façon moins rigoureuses que celles qui s'appliquent dans les cas visés à l'article 9 § 1 a), b) et c).

3. Toute personne soupçonnée d'avoir commis une disparition forcée est jugée par une juridiction de droit commun qui offre des garanties de compétence, d'indépendance et d'impartialité et qui respecte les garanties du procès équitable.

Article 12

1. Tout Etat partie assure à quiconque alléguant qu'une personne a été victime d'une disparition forcée le droit de dénoncer les faits devant une autorité compétente, laquelle procède immédiatement et impartialement à une enquête approfondie. Des mesures seront prises pour assurer la protection du plaignant et des témoins contre tout mauvais traitement ou toute intimidation en raison de la plainte déposée ou de toute déposition faite.

2. Lorsqu'il existe des raisons sérieuses de croire qu'une personne a été victime d'une disparition forcée, tout État partie soumet l'affaire à l'autorité visée au paragraphe 1, afin qu'elle ouvre une enquête, même si aucune plainte n'a été officiellement déposée.

3. Tout Etat partie veille à ce que l'autorité visée au paragraphe 1 :

a) dispose des pouvoirs et des ressources nécessaires pour mener l'enquête à bien ;

b) ait communication des documents nécessaires à son enquête ;

c) ait accès à tout lieu où la présence d'une personne disparue est soupçonnée.

4. Tout Etat partie garantit aux personnes qui ont un intérêt légitime le droit d'être informées, à leur demande, des progrès et des résultats de l'enquête ouverte en application des paragraphes 1 ou 2.

5. Sont considérés comme ayant un intérêt légitime, aux fins *[du présent instrument]* :

a) la personne privée de liberté ;

b) le conjoint et les membres de la famille de la personne privée de liberté, son avocat ou son représentant légal ;

c) toute personne mandatée par les personnes visées aux points a) et b).

6. Tout Etat partie prend les mesures nécessaires pour prévenir et sanctionner les actes de nature à entraver le déroulement des enquêtes. Il s'assure notamment que les personnes soupçonnées d'avoir commis une disparition forcée ne soient pas en mesure d'influer sur le cours des enquêtes, par des pressions et des actes d'intimidation ou de représailles exercés sur ceux qui participent à l'enquête, sur les témoins et sur les proches de la personne disparue.

[Chapitre 5. — Coopération internationale]

Article 13

1. Aux effets de l'extradition, la disparition forcée n'est pas considérée comme une infraction politique ou comme une infraction de droit commun commises pour des raisons politiques.

2. La disparition forcée est de plein droit comprise au nombre des infractions donnant lieu à extradition dans tout traité d'extradition conclu entre des États parties.

3. Tout Etat partie s'engage à inclure la disparition forcée au nombre des infractions qui justifient l'extradition dans tout traité d'extradition auquel il souscrit.

4. Tout Etat partie qui assujettit l'extradition à l'existence d'un traité peut, s'il reçoit une demande d'extradition d'un autre État partie auquel il n'est pas lié par un traité, considérer *[le présent instrument]* comme la base juridique nécessaire pour l'extradition en ce qui concerne la disparition forcée.

5. Tout Etat partie qui n'assujettit pas l'extradition à l'existence d'un traité reconnaît la disparition forcée comme susceptible d'extradition.

6. L'extradition est subordonnée aux conditions prévues par le droit de l'Etat partie requis ou par les traités d'extradition applicables, y compris, notamment, aux conditions concernant la peine minimale requise pour extrader et aux motifs pour lesquels l'Etat partie requis peut refuser l'extradition.

7. Aucune disposition *[du présent instrument]* ne doit être interprétée comme faisant obligation à l'Etat partie requis d'extrader s'il a de sérieuses raisons de penser que la demande a été présentée aux fins de poursuivre ou de punir une personne en raison de son sexe, de sa race, de sa religion, de sa nationalité, de son origine ethnique ou de ses opinions politiques, ou que donner suite à cette demande causerait un préjudice à cette personne pour l'une quelconque de ces raisons.

Article 14

1. Les Etats parties s'accordent l'entraide judiciaire la plus large possible dans toute enquête ou procédure pénale relative à une disparition forcée, y compris en ce qui concerne la communication de tous les éléments de preuve dont ils disposent et qui sont nécessaires aux fins de la procédure.

2. L'entraide judiciaire est subordonnée aux conditions prévues par le droit interne de l'Etat partie requis ou par les traités d'entraide judiciaire applicables, y compris, notamment, aux conditions concernant les motifs pour lesquels l'Etat partie requis peut refuser d'accorder l'entraide judiciaire.

3. L'entraide judiciaire peut notamment être refusée si l'Etat partie requis estime que l'exécution de la demande est susceptible de porter atteinte à sa souveraineté, à sa sécurité, à son ordre public ou à d'autres intérêts essentiels.

Article 15

1. Les Etats parties coopèrent entre eux et s'accordent l'entraide la plus large possible dans la recherche, la localisation et la libération des personnes disparues.

2. Les Etats parties s'accordent mutuellement aide et assistance en vue de porter secours aux victimes des disparitions forcées et, en cas de décès des personnes disparues, en vue de la restitution de leurs restes.

[Chapitre 6. — Prévention.]

Article 16

1. Tout Etat partie :

a) désigne les agents de l'Etat habilités à ordonner des privations de liberté ;

b) détermine les conditions dans lesquelles de tels ordres peuvent être donnés ;

c) garantit que toute personne privée de liberté sera placée uniquement dans un lieu officiellement reconnu et contrôlé ;

d) garantit à toute personne privée de liberté, en toute circonstance :

(i) le droit d'introduire un recours devant un tribunal afin que celui-ci statue sans délai sur la légalité de sa privation de liberté et ordonne sa libération si cette privation de liberté est illégale et,

(ii) si la personne privée de liberté est soupçonnée d'avoir commis une infraction pénale, le droit d'être traduit dans le plus court délai devant un juge ou une autre autorité habilitée par la loi à exercer des fonctions judiciaires.

2. Tout Etat partie prend les mesures nécessaires pour que les personnes ayant un intérêt légitime, au sens de l'article 12 § 5, reçoivent communication, lorsqu'ils en font la demande, d'informations sur la situation d'une personne privée de liberté. Ces informations concernent au moins :

a) l'autorité à laquelle la personne a été déférée ;

b) le lieu où se trouve la personne privée de liberté, y compris lorsqu'elle fait l'objet d'un transfert ;

c) l'identité de la personne qui a ordonné la privation de liberté et de celle qui en assure le contrôle.

3. Tout État partie établit et tient à jour un ou plusieurs registres officiels des personnes privées de liberté. Les informations concernant la personne privée de liberté figurant sur ces registres sont tenues à la disposition des personnes et autorités mentionnées aux paragraphes 1 et 2, pour consultation.

Article 17

Sans préjudice de l'examen de la légalité de la privation de liberté d'une personne, les États parties garantissent à toute personne ayant un intérêt légitime, au sens de l'article 12 § 5, le droit à un recours effectif pour obtenir les informations visées à l'article 16 § 2. Ce droit à un recours ne peut être suspendu ou limité en aucune circonstance.

Article 18

Tout État partie prend les mesures nécessaires pour que la remise en liberté d'une personne se déroule selon des modalités qui permettent de vérifier avec certitude que la personne a été effectivement libérée et qu'elle l'a été de telle manière que son intégrité physique et sa faculté d'exercer pleinement ses droits ont été assurées.

Article 19

Tout Etat partie prend les mesures nécessaires pour prévenir et sanctionner les agissements suivants :

a) l'entrave ou l'obstruction au recours visé à l'article 17 ;

b) le manquement à l'obligation d'enregistrement de toute privation de liberté, ainsi que l'enregistrement de toute information dont l'agent responsable du registre officiel connaît ou devrait connaître l'inexactitude ;

c) le refus illégitime opposé par un agent de l'Etat de fournir des informations sur une privation de liberté, ou la fourniture d'informations inexactes.

Article 20

1. Tout Etat partie veille à ce que la formation des agents chargés de l'application de la loi puisse inclure l'apprentissage nécessaire concernant les dispositions *[du présent instrument]*, en vue de :

a) prévenir l'implication de ces agents dans des disparitions forcées ;

b) souligner l'importance de la prévention et des enquêtes en matière de disparition forcée ;

c) veiller à ce que l'urgence de la résolution des cas de disparition forcée soit reconnue.

2. Tout Etat partie veille à ce que soient interdits les ordres ou instructions prescrivant, autorisant ou encourageant une disparition forcée.

3. Tout Etat partie prend les mesures nécessaires pour que les agents chargés de l'application de la loi qui ont des raisons de penser qu'une disparition forcée s'est produite ou est sur le point de se produire signalent le cas à leurs supérieurs et, au besoin, aux autorités ou instances de contrôle ou de recours compétentes.

Article 21

1. Aucun État partie n'expulse, ne refoule ni n'extrade une personne vers un autre État s'il y a des motifs de croire qu'une disparition forcée risque d'être commise à son encontre dans cet Etat.

2. Pour déterminer s'il existe de tels motifs, les autorités compétentes tiendront compte de toutes les considérations pertinentes, y compris, le cas échéant, de l'existence, dans l'Etat intéressé, d'un ensemble de violations systématiques, graves, flagrantes ou massives des droits de l'homme ou du droit humanitaire.

[Chapitre 7. — Victimes.]

Article 22

1. Aux fins *[du présent instrument]*, on entend par victime toute personne physique qui a subi un préjudice en raison de la commission de l'infraction définie à l'article 1er.

2. Tout Etat partie garantit, dans son système juridique, à la victime d'une disparition forcée le droit d'obtenir une réparation des dommages matériels ou moraux qui lui ont été causés.

3. Le droit à réparation visé au paragraphe 2 comprend notamment :

a) l'indemnisation,

b) la restitution,

c) la réadaptation,

d) le rétablissement de la dignité et de la réputation.

[Chapitre 8. — Enfants de personnes disparues.]

Article 23

Tout Etat partie prend les mesures nécessaires pour prévenir et réprimer pénalement :

a) l'enlèvement ou l'appropriation d'enfants dont l'un ou l'autre des parents sont victimes des crime de disparition forcée ;

b) la falsification ou la destruction de documents attestant la véritable identité des enfants visés au a).

Article 24

Les États parties se prêtent mutuellement assistance dans la recherche, l'identification et la détermination du lieu où se trouvent les enfants enlevés ou appropriés dans les conditions de l'article 23 a).

Article 25

1. Lorsqu'un enfant enlevé ou approprié dans les conditions de l'article 23 a) est retrouvé sur le territoire d'un Etat partie, la question de son éventuel retour vers sa famille d'origine est réglée, soit par la loi nationale de cet Etat partie, soit par l'accord bilatéral ou multilatéral qui le lie avec tout autre Etat dans lequel réside la famille d'origine.

2. En toute circonstance, l'intérêt supérieur de l'enfant est une considération primordiale et l'enfant qui est capable de discernement a le droit d'exprimer librement son opinion, laquelle est dûment prise en compte eu égard à son âge et à son degré de maturité.

Partie II

Article II-A

1. Tout Etat partie présente *[à l'organe de suivi]*, par l'entremise du Secrétaire général de l'Organisation des Nations Unies, un rapport sur les mesures prises pour donner effet à ses obligations en vertu *[du présent instrument]*, dans un délai d'un an à compter de l'entrée en vigueur *[du présent instrument]* à son égard.

2. A la suite de la présentation du rapport visé au paragraphe 1, tout Etat partie fournit un rapport complémentaire sur demande *[de l'organe de suivi]*.

3. Le Secrétaire général de l'Organisation des Nations Unies transmet les rapports à tous les États parties.

4. Chaque rapport est étudié par *[l'organe de suivi]*, qui peut faire les commentaires, les observations, les recommandations et les mises en garde qu'il estime appropriés. L'État partie intéressé reçoit communication des commentaires, observations, recommandations et mises en garde, auxquels il peut répondre, de sa propre initiative ou à la demande *[de l'organe de suivi]*..

Article II-B

1. *[L'organe de suivi]* peut être saisi par un État partie, ou par toute personne qui a un intérêt légitime, au sens de l'article 12 § 5, d'une demande visant à chercher et retrouver une personne disparue au sens de l'article 1er.

2. S'il estime que la demande présentée en vertu du paragraphe 1 n'est pas manifestement dépourvue de fondement, qu'elle ne constitue pas un abus de droit et qu'elle n'est pas incompatible avec les dispositions *[du présent instrument]*, *[l'organe de suivi]* demande à tout Etat partie de lui fournir, dans un délai qu'il fixe, des renseignements sur la situation de cette personne.

3. Au vu de la réponse fournie par l'Etat partie intéressé conformément au paragraphe 2, *[l'organe de suivi]* présente à ce dernier une recommandation ou une mise en garde. Il peut aussi lui enjoindre de prendre des mesures adéquates et de lui en faire rapport, dans un délai qu'il fixe.

4. *[L'organe de suivi]* établit les conclusions de son enquête et les communique à l'auteur de la demande visée au paragraphe 1 et à tout Etat partie auquel des renseignements ont été demandés.

5. La procédure visée par le présent article est confidentielle. Toutefois, s'il estime qu'aucune mesure adéquate n'a été prise à la suite d'une demande présentée conformément au paragraphe 3, *[l'organe de suivi]* peut, après avoir mis en demeure les Etats parties concernés, rendre publiques ses conclusions, ainsi que les réponses et renseignements qui lui ont été fournis.

Article II-C

1. S'il estime qu'un déplacement sur le territoire d'un État partie sous la juridiction duquel se trouverait la personne disparue est indispensable pour répondre à la demande dont il est saisi conformément à l'article II-B, *[l'organe de suivi]* peut demander à un ou plusieurs de ses membres de réaliser une mission d'enquête et de l'informer sans retard. Le ou les membres *[de l'organe de suivi]* qui effectuent la mission peuvent se faire accompagner, si nécessaire, par des interprètes, des secrétaires et des experts. Aucun membre de la délégation, à l'exception des interprètes, ne peut être ressortissant de l'État partie dans lequel la visite est effectuée.

2. *[L'organe de suivi]* notifie par écrit à l'État partie concerné son intention d'organiser une mission d'enquête et indique la composition de la délégation. L'Etat partie fait connaître sans retard à *[l'organe de suivi]* son accord ou son opposition à la mission d'enquête sur un territoire sur lequel il exerce sa juridiction.

3. Si l'Etat partie a donné son accord à la mission d'enquête, il fournit *[à l'organe de suivi]* toutes facilités nécessaires à l'accomplissement de cette mission. *[L'organe de suivi]* peut notamment :

a) effectuer les visites qu'il jugera nécessaires pour chercher et retrouver la personne dont la disparition forcée est alléguée ;

b) entrer en contact librement avec toute personne dont il pense qu'elle peut lui fournir des informations utiles sur le sort de la personne dont la disparition forcée est alléguée ;

c) se faire présenter la personne dont la disparition forcée est alléguée et s'entretenir avec elle sans témoin.

4. *[L'organe de suivi]* fait part des constatations faites pendant sa mission d'enquête :

a) à l'auteur de la demande visée à l'article II-B paragraphe 1 ;

b) à l'Etat partie sur le territoire duquel la mission d'enquête a été effectuée.

5. La procédure visée par le présent article est confidentielle. Toutefois, avec l'accord des Etats parties concernés, *[l'organe de suivi]* peut rendre publiques ses constatations

Article II-D

Les membres *[de l'organe de suivi]* et ceux qui les accompagnent en mission sur le territoire des États parties ont droit aux facilités, privilèges et immunités reconnus aux experts en mission pour l'Organisation des Nations Unies, tels qu'ils sont énoncés dans les sections pertinentes de la Convention sur les privilèges et immunités des Nations Unies.

Article II-E

1. *[L'organe de suivi]* n'est compétent qu'à l'égard des privations de liberté ayant débuté postérieurement à l'entrée en vigueur *[du présent instrument]*.

2. Si un Etat devient partie *[au présent instrument]* après l'entrée en vigueur de celui-ci, ses obligations vis-à-vis *[de l'organe de suivi]* ne concernent que les privations de liberté ayant débuté postérieurement à l'entrée en vigueur *[du présent instrument]* à son égard.

Article II-F

1. *[L'organe de suivi]* présente aux États parties et à l'Assemblée générale de l'Organisation des Nations Unies un rapport annuel sur les activités qu'il aura réalisées en application *[du présent instrument]*.

2. Afin d'assurer le suivi de ses observations et de ses recommandations, *[l'organe de suivi]* peut, à sa discrétion, décider de reproduire dans le rapport annuel qu'il établit conformément au paragraphe 1 tous commentaires, observations, recommandations et mises en garde formulés par lui en vertu de l'article II-A, accompagnés des observations reçues des États parties intéressés. Il peut aussi décider de reproduire les conclusions rendues publiques conformément à l'article II-B, paragraphe 5, et les constatations rendues publiques conformément à l'article II-C, paragraphe 5.

Partie III

Article III-A

1. *[Le présent instrument]* est ouvert à la signature de *[...]*.

2. *[Le présent instrument]* est soumis à la ratification de *[...]*. Les instruments de ratification seront déposés auprès du Secrétaire général de l'Organisation des Nations Unies.

3. *[Le présent instrument]* est ouvert à l'adhésion de *[…]*. L'adhésion se fera par le dépôt d'un instrument d'adhésion auprès du Secrétaire général de l'Organisation des Nations Unies.

Article III-B

1. *[Le présent instrument]* entrera en vigueur le trentième jour après la date du dépôt du *[N^ième]* instrument de ratification ou d'adhésion.

2. Pour tout État qui ratifiera *[le présent instrument]* ou y adhérera après le dépôt du dixième instrument de ratification ou d'adhésion, *[le présent instrument]* entrera en vigueur le trentième jour après la date du dépôt par cet État de son instrument de ratification ou d'adhésion.

Article III-C

Le Secrétaire général de l'Organisation des Nations Unies notifiera à tous les États Membres de l'Organisation des Nations Unies et à tous les États qui auront signé *[le présent instrument]* ou y auront adhéré :

a) les signatures, les ratifications et les adhésions reçues en application de l'article III-A ;

b) la date d'entrée en vigueur *[du présent instrument]* en application de l'article III-B.

Article III-D

Les dispositions *[du présent instrument]* s'appliquent, sans limitation ni exception aucune, à toutes les unités constitutives des États fédéraux.

Article III-E

Aucune circonstance exceptionnelle, quelle qu'elle soit, qu'il s'agisse de l'état de guerre ou de menace de guerre, d'instabilité politique intérieure ou de tout autre état d'ex

RELEASED IN FULL

Peay, T Michael

From: Brancato, Gilda M
Sent: Tuesday, December 24, 2002 6:38 AM
To: Surena, Andre M; Gorove, Katherine M; Manning, Denise; Johnson, Thomas A; Sicade, Lyr M; Dorosin, Joshua L; Camponovo, Christopher N (DRL); 'Eliana_Daivdson@nts.policy.osd.pentagon.smil.mil'
Cc: Jacobson, Linda; Dolan, JoAnn; Buchwald, Todd F; Danies, Joel D(Geneva); Peay, T Micha (Geneva); Solomon, Steven A(Geneva); Brancato, Gilda M
Subject: Revised instructions: WG on forced disappearances

Attached for your clearance is a revised set of instructions that take into account comments received from several offic including Justice/OIA. This revision shifts the focus of discussion from domestic constraints to international standards, particularly the ICCPR, to which we are a party. May I have your comments and clearance by Tuesday December 31, please?

I will be circulating next Monday for your clearance a discussion of some of the more problematic articles of the 1998 UNCHR sub-commission draft convention.

2BCK011.DOC

Thank you for your review, and wishing you wonderful holidays. Gilda

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

RELEASED IN FULL
GE 173

U.S. Government's Initial Intervention at
Working Group Negotiations on a Draft
Forced Disappearances Convention
(January 6, 2003)

The United States delegation takes great pleasure Mr. Chairman, in warmly congratulating you on your assumption of the chairmanship of this working group, for all of the reasons that have already been mentioned.

The United States deplores forced disappearances and regards them as a serious violation of human rights and fundamental freedoms, which, as others have correctly pointed out, result in several associated violations of human rights guarantees. These include, for instance, deprivation of the right to liberty and security of the person, the right against arbitrary arrest or detention, and the rights to due process and a fair trial, just to mention a few. Moreover, too often, forced disappearances lead to some of the gravest violations, such as torture and deprivation of the right to life.

So there should be no mistake that the U.S. harbors no toleration for the despicable collection of violations associated with the phenomenon of "forced disappearance."

Nonetheless, the U.S. finds itself in agreement with several delegations that have suggested in various ways that the Working Group has much work ahead of it in order to elaborate a document that could attract widespread acceptance within the international community.

First, for example, reaching consensus on a legal definition of "forced disappearance" that would be precise and not prohibit legitimate law enforcement and military activities presents a daunting challenge for the Working Group. While we recognize the effort invested in the 1998 Sub-Commission draft on forced disappearances, we believe that its definitional section is in several respects far too broad to be workable in the practical sense of defining and penalizing a crime. As we will point out along the way, the draft text contains other deficiencies which will require close scrutiny and revision. In this regard, we believe that the Working Group should make a virtue of precision in our negotiations.

Second, whatever draft instrument results from this process should be compatible with internationally accepted standards and guarantees, such as those contained in the ICCPR.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

Third, we believe the proposed convention should be carefully crafted to target forced disappearances without capturing collateral issues and bodies of law. For example, we believe that existing international humanitarian law should continue to govern and resolve issues arising from armed conflict.

A fourth concern is that, in our view, a convention should place its greatest emphasis on strengthening national laws and law enforcement practices, which is where the problem of forced disappearances is typically confronted.

Fifth, we would not support the creation of a new treaty body to oversee compliance with a new convention. We oppose duplication of the work and the capabilities of existing treaty bodies, and would wish to avoid additional costs and efforts associated with such duplication. For instance, several delegations have made the interesting proposal that we frame this instrument as an optional protocol to the ICCPR. An advantage of so doing may be that the Human Rights Committee could serve as the monitoring mechanism.

A sixth concern relates to provisions that would clearly, from the outset, impede consensus, such as a no-reservations provision and certain other provisions contained in the 1998 draft.

These comments represent some of our initial thoughts. Others will likely be raised in the course of the Working Group's deliberations. We look forward to actively participating in the work of this body.

FP0806

Composite Text of all USG Comments except Rt to [illegible] Mike

Draft Instrument on Forced Disappearances/US Proposed Text

GE175

Article 1.

"For purposes of this instrument, an enforced disappearance is considered to be an arrest, detention or abduction of a person by, or with the authorization, support or acquiescence of, a State, followed by its refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person, with the intention of removing that person from the protection of the law for a prolonged period of time."

[illegible]

Article 2.

Article 2(1): Replace current 2(1) and 3(1)(a)-(c) with the following text:

"Each State Party shall take the necessary measures to ensure that the acts which comprise an enforced disappearance, for purposes of this instrument, constitute a punishable offense or offenses under its criminal law [or alternatively: is subject to criminal sanction under its criminal law]. The same shall apply to an attempt to commit an enforced disappearance and to an act that constitutes complicity or participation in, or a conspiracy to commit, an enforced disappearance."

Article 2bis.

"States Parties shall take all feasible measures to prohibit and criminalize the acts described in Article 1 when committed by private organizations, groups or individuals."

Article 4. Add new Article 4(3):

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"Mitigating and aggravating circumstances shall also be permitted as provided under the domestic law of a State Party unless inconsistent with the object and purposes of this instrument."

Article 9. Replace Article 9(1)© and Article 9(1)(d) with the following.

"In addition, each State party may take the necessary measures to establish jurisdiction in respect of an enforced disappearance in the following instances:

(a) when the disappeared person is one of its nationals;
(b) when the alleged perpetrator of the offense is present in a territory under its jurisdiction, unless the State extradites the alleged perpetrator, or transfers him or her to an international tribunal."

Article 10(3). Preference is to *delete* Article 10(3).

Otherwise reword as follows:

" Any foreign national held in custody pursuant to paragraph one may communicate with an appropriate representative of the State of which he or she is a national in accordance with applicable international legal obligations."

Article 11.

Article 11(3): Substitute "duly constituted under law" for "of general jurisdiction," so that the provision reads as follows.

"Any person alleged to have committed an enforced disappearance shall be tried in a court duly constituted under law which offers guarantees of competence, independence and impartiality and respect for a fair trial."

Article 12.

Article 12 *passim*. Change competent "authority" to "domestic authorities."

Article 12(3): Add at end of chapeau:

", in accordance its domestic law":

Article 12(6): Reword as follows: "Each party shall endeavor to take the necessary measures to prevent or punish acts intended to hinder an investigation."

Article 13(6) and 14(2): Add after "refuse": "or condition".

Article 15.

Add to Article 15(1) and 15(2) after "assistance":

"in appropriate cases."

Chapter 6 should read "Prevention" not "Presentation."

Article 16.
Article 16(1)(d): Add at end of chapeau: "in accordance with the Constitution of the State Party":

Article 19.

Article 19(a): Add "knowing" before "delay."

Article 19(b): Add "knowing" before "Failure."

Article 20.

The United States delegation proposes either the current text or a text that incorporates beneficiaries of training, other than law enforcement personnel, who are referred to in CAT Article 10 (i.e. civil or military, medical personnel, public officials and other persons who may become involved in a situation of enforced disappearance).

Article 21.

Reword text to track CAT Article 3, as follows:

"1. No State Party shall expel, return *("refouler")* or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subject to an enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

Article III-E and III-F.

Article III-E (Non-derogation) may be acceptable provided that Article III-F (Operation of IHL) is clarified, to read as follows:

"Nothing in this instrument shall other others rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions."

21/06/04

RELEASED IN FULL

GE18D

Les indications telles que « nouveau », « restructuré », etc, visent à faciliter la comparaison avec le document E/CN.4/2004/WG22/WP.1/rev.1 du 1er décembre 2003.

Préambule (nouveau)

Les Etats Parties [*au présent instrument*],

Rappelant la Déclaration sur la protection de toutes les personnes contre les disparitions forcées adoptée par l'Assemblée Générale des Nations Unies dans sa résolution 47/133 du 18 décembre 1992,

Conscients de l'extrême gravité de la disparition forcée qui constitue un crime et, dans certaines circonstances, un crime contre l'humanité.

Déterminés à lutter contre l'impunité du crime de disparition forcée,

Affirmant le droit des victimes de savoir la vérité sur les circonstances d'une disparition forcée et le sort de la personne disparue,

Sont convenus de ce qui suit :

Partie I

Article premier

Aux fins *[du présent instrument]*, on entend par disparition forcée la privation de liberté d'une personne sous quelque forme que ce soit, commise par des agents de l'État ou par des personnes ou des groupes de personnes qui agissent avec l'autorisation, l'appui ou l'acquiescement de l'État, suivie du déni de la reconnaissance de la privation de liberté ou de la dissimulation du sort réservé à la personne disparue ou du lieu où elle se trouve, la soustrayant ainsi à la protection de la loi.

Article-1 bis (nouveau)

1. Nul ne peut être soumis à une disparition forcée.

2. ***(repris de l'ancien article III E).*** Aucune circonstance, quelle qu'elle soit, qu'il s'agisse de l'état de guerre ou de menace de guerre, d'instabilité politique intérieure ou de tout autre état d'exception, ne peut être invoquée pour justifier la disparition forcée.

Article 2 (modifié)

1. Tout Etat partie prend les mesures nécessaires pour que la disparition forcée, telle qu'elle est définie à l'article 1er, constitue une infraction au regard de son droit pénal.

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2. Tout Etat partie prend des mesures équivalentes lorsque les agissements définis à l'article 1er sont le fait de personnes ou de groupes de personnes n'ayant pas l'autorisation, l'appui ou l'acquiescement de l'Etat.

Article 2 bis (nouveau)

La pratique généralisée ou systématique de la disparition forcée constitue un crime contre l'humanité et entraîne les conséquences prévues par le droit international.

Article 3 (restructuré)

Tout Etat partie prend les mesures nécessaires pour poursuivre et punir ceux qui commettent ou concourent à commettre une disparition forcée.

1. Sont punis :

a) les auteurs d'une disparition forcée et ceux qui s'en rendent complices.

b) la tentative de disparition forcée,

c) l'entente en vue de commettre une disparition forcée.

2. Sont également punis :

a) ceux qui ordonnent ou encouragent la commission ou la tentative d'une telle infraction, ceux qui en facilitent la commission ou la tentative en apportant leur aide, leur concours ou toute autre forme d'assistance, y compris en fournissant les moyens de cette commission ou de cette tentative,

b) le supérieur hiérarchique qui :

i) savait que ses subordonnés commettaient ou allaient commettre une disparition forcée ou a délibérément négligé de tenir compte d'informations qui l'indiquaient clairement, et qui

ii) n'a pas pris toutes les mesures nécessaires et raisonnables qui étaient en son pouvoir pour empêcher ou faire cesser la disparition forcée, ou pour en réprimer l'exécution ou en référer aux autorités compétentes aux fins d'enquête et de poursuites.

3 ***(ancien article 6)*** L'ordre d'un supérieur hiérarchique ou d'une autorité publique ne peut être invoqué pour justifier une disparition forcée.

Article 4

1. Tout Etat partie rend la disparition forcée passible de peines appropriées qui prennent en compte son extrême gravité.

2. Tout Etat partie peut prévoir :

   a) Des circonstances atténuantes notamment en faveur de ceux qui, impliqués dans la commission d'une disparition forcée, auront contribué efficacement à la récupération en vie de la personne disparue ou auront permis d'élucider des cas de disparitions forcées ou d'identifier les auteurs d'une disparition forcée.

   b) *(complété)* Des circonstances aggravantes, notamment en cas de décès de la victime ou envers ceux qui se sont rendus coupables d'une disparition forcée à l'encontre de femmes enceintes, de mineurs ou d'autres personnes particulièrement vulnérables.

Article 5 (modifié)

Sans préjudice de l'article 2 bis,

1. Tout Etat Partie qui, à l'égard de la disparition forcée, applique un régime de prescription, prend les mesures nécessaires pour que le délai de prescription de l'action pénale :

   a) soit de longue durée et proportionné à l'extrême gravité de cette infraction ;

   b) commence à courir lorsque le crime de disparition forcée cesse et que le sort de la personne disparue est établi.

2. Le délai de prescription de l'action pénale prévue au paragraphe 1 est suspendu aussi longtemps que, dans un Etat partie, toute victime d'une disparition forcée ne dispose pas d'un recours utile.

Article 6 (repris dans art. 3, § 3)

Article 7 (supprimé)

Article 8 (supprimé)

Article 9 (restructuré et modifié)

1. Tout Etat Partie prend les mesures nécessaires pour établir sa compétence aux fins de connaître d'une disparition forcée :

   a) quand l'infraction a été commise sur tout territoire relevant de sa juridiction ou à bord d'un navire battant son pavillon ou d'un aéronef immatriculé conformément à sa législation au moment des faits ;

   b) quand l'auteur présumé de l'infraction est l'un de ses ressortissants, ou une personne apatride résidant habituellement sur son territoire ;

   c) quand la personne disparue est l'un de ses ressortissants et que cet Etat partie le juge approprié ;

2. Tout Etat partie prend également les mesures nécessaires pour établir sa compétence aux fins de connaître d'une disparition forcée quand l'auteur présumé de l'infraction se trouve

sur tout territoire relevant de sa juridiction, sauf s'il l'extrade ou le remet à un autre Etat, ou s'il le remet à une juridiction pénale internationale dont il a reconnu la compétence.

3. *[Le présent instrument]* n'écarte aucune compétence pénale exercée conformément aux lois nationales.

Article 10

1. S'il estime que les circonstances le justifient, après avoir examiné les renseignements dont il dispose, tout Etat partie sur le territoire duquel se trouve une personne soupçonnée d'avoir commis une disparition forcée assure la détention de cette personne ou prend toutes autres mesures juridiques nécessaires pour assurer sa présence. Cette détention et ces mesures doivent être conformes à la législation dudit Etat partie ; elles ne peuvent être maintenues que pendant le délai nécessaire à l'engagement de poursuites pénales ou d'une procédure d'extradition.

2. L'Etat partie qui a pris les mesures visées au paragraphe 1 procède immédiatement à une enquête en vue d'établir les faits. Il informe les Etats parties qui pourraient être compétents conformément à l'article 9, paragraphe 1 des mesures qu'il a prises en application du paragraphe 1 du présent article, notamment la détention et les circonstances qui la justifient, et des conclusions de son enquête, en leur indiquant s'il entend exercer sa compétence.

3. Toute personne détenue en application du paragraphe 1 peut communiquer immédiatement avec le plus proche représentant qualifié de l'Etat dont elle a la nationalité ou, s'il s'agit d'une personne apatride, avec le représentant de l'Etat où elle réside habituellement.

Article 11

1. L'Etat partie sur le territoire sous la juridiction duquel l'auteur présumé d'une disparition forcée est découvert, s'il n'extrade pas ce dernier, ne le remet pas à un autre Etat ou s'il ne le remet pas à une juridiction pénale internationale dont il a reconnu la compétence, soumet l'affaire à ses autorités compétentes pour l'exercice de l'action pénale.

2. Ces autorités prennent leur décision dans les mêmes conditions que pour toute infraction de droit commun de caractère grave en vertu du droit de cet Etat partie. Dans les cas visés à l'article 9, paragraphe 2, les règles de preuve qui s'appliquent aux poursuites et à la condamnation ne sont en aucune façon moins rigoureuses que celles qui s'appliquent dans les cas visés à l'article 9, paragraphe 1.

3. ***(modifié)*** Toute personne poursuivie pour une disparition forcée est jugée par une juridiction compétente, indépendante et impartiale, établie par la loi, et qui respecte les garanties du procès équitable.

4. ***(nouveau)*** Toute personne poursuivie pour une disparition forcée bénéficie de la garantie d'un traitement équitable à tous les stades de la procédure.

Article 12 (modifié)

1. Tout Etat partie assure à quiconque alléguant qu'une personne a été victime d'une disparition forcée le droit de dénoncer les faits devant une autorité compétente, laquelle procède immédiatement à une enquête approfondie et impartiale. Des mesures appropriées sont prises le cas échéant pour assurer la protection du plaignant, des témoins, des proches de la personne disparue et de leurs défenseurs ainsi que de ceux qui participent à l'enquête contre tout mauvais traitement ou toute intimidation en raison de la plainte déposée ou de toute déposition faite.

2. Lorsqu'il existe des motifs raisonnables de croire qu'une personne a été victime d'une disparition forcée, tout État partie soumet l'affaire à l'autorité visée au paragraphe 1, afin qu'elle ouvre une enquête, même si aucune plainte n'a été officiellement déposée.

3. ***(nouveau)*** Tout Etat partie veille à ce que l'autorité visée au paragraphe 1 :

   a) dispose des pouvoirs et des ressources nécessaires pour mener l'enquête à bien, y compris par la comparution de personnes soupçonnées ou de témoins,

   b) ait communication des informations nécessaires à son enquête ;

   c) ait accès à tout lieu où la présence d'une personne disparue est soupçonnée.

4. ***(ancien art. 12, § 6 complété)*** Tout Etat partie prend les mesures nécessaires pour prévenir et sanctionner les actes de nature à entraver le déroulement des enquêtes. Il s'assure notamment que les personnes soupçonnées d'avoir commis une disparition forcée ne soient pas en mesure d'influer sur le cours des enquêtes par des pressions et des actes d'intimidation ou de représailles exercés sur le plaignant, les témoins, les proches de la personne disparue et de leurs défenseurs ainsi que sur ceux qui participent à l'enquête.

5. ***(nouveau)*** L'enquête prévue au présent article est conduite conformément aux principes internationaux en matière d'enquête en cas de violation des droits de l'homme, de torture, de recherche des personnes disparues, d'examen légiste et d'identification.

Article 13 (modifié)

1. Pour les besoins de l'extradition entre États parties, la disparition forcée n'est pas considérée comme une infraction politique, comme une infraction connexe à une infraction politique ou comme une infraction inspirée par des mobiles politiques. En conséquence, une demande d'extradition fondée sur une telle infraction ne peut être refusée pour ce motif.

2. La disparition forcée est de plein droit comprise au nombre des infractions donnant lieu à extradition dans tout traité d'extradition conclu entre des États parties avant l'entrée en vigueur [*du présent instrument*].

3. Les États parties s'engagent à inclure la disparition forcée au nombre des infractions qui justifient l'extradition dans tout traité d'extradition à conclure par la suite entre eux.

4. Tout Etat partie qui assujettit l'extradition à l'existence d'un traité peut, s'il reçoit une demande d'extradition d'un autre État partie auquel il n'est pas lié par un traité, considérer

[*le présent instrument*] comme la base juridique nécessaire pour l'extradition en ce qui concerne la disparition forcée.

5. Tout Etat partie qui n'assujettit pas l'extradition à l'existence d'un traité reconnaît la disparition forcée comme susceptible d'extradition.

6. L'extradition est, dans tous les cas, subordonnée aux conditions prévues par le droit de l'Etat partie requis ou par les traités d'extradition applicables, y compris, notamment, aux conditions concernant la peine minimale requise pour extrader et aux motifs pour lesquels l'Etat partie requis peut refuser l'extradition, ou l'assujettir à certaines conditions.

7. Aucune disposition *[du présent instrument]* ne doit être interprétée comme faisant obligation à l'Etat partie requis d'extrader s'il a de sérieuses raisons de penser que la demande a été présentée aux fins de poursuivre ou de punir une personne en raison de son sexe, de sa race, de sa religion, de sa nationalité, de son origine ethnique ou de ses opinions politiques, ou que donner suite à cette demande causerait un préjudice à cette personne pour l'une quelconque de ces raisons.

Article 14 (modifié)

1. Les Etats parties s'accordent l'entraide judiciaire la plus large possible dans toute enquête ou procédure pénale relative à une disparition forcée, y compris en ce qui concerne la communication de tous les éléments de preuve dont ils disposent et qui sont nécessaires aux fins de la procédure.

2. Cette entraide judiciaire est subordonnée aux conditions prévues par le droit interne de l'Etat partie requis ou par les traités d'entraide judiciaire applicables, y compris, notamment, concernant les motifs pour lesquels l'Etat partie requis peut refuser d'accorder l'entraide judiciaire ou la soumettre à des conditions.

Article 15 (modifié)

Les Etats partie coopèrent entre eux et s'accordent l'entraide la plus large possible pour porter assistance aux victimes des disparitions forcées et dans la recherche, la localisation et la libération des personnes disparues et, en cas de décès, dans l'exhumation, l'identification des personnes disparues et la restitution de leurs restes

Article 15 bis (ancien article 21)

1. Aucun État partie n'expulse, ne refoule ni n'extrade une personne vers un autre État s'il y a des motifs sérieux de croire qu'elle risque d'être victime d'une disparition forcée.

2. Pour déterminer s'il y a de tels motifs, les autorités compétentes tiendront compte de toutes les considérations pertinentes, y compris, le cas échéant, de l'existence, dans l'Etat intéressé, d'un ensemble de violations systématiques des droits de l'homme ou du droit humanitaire, graves, flagrantes ou massives.

Article 16 (restructuré et modifié ; cf. article 16 bis)

1. Tout Etat partie, dans sa législation,

a) désigne les agents de l'Etat habilités à ordonner des privations de liberté ;

b) détermine les conditions dans lesquelles de tels ordres peuvent être donnés ;

c) garantit que toute personne privée de liberté sera placée uniquement dans un lieu officiellement reconnu et contrôlé ;

d) garantit l'accès des autorités judiciaires aux lieux de privation de liberté ;

e) garantit à toute personne privée de liberté, en toute circonstance, le droit d'introduire un recours devant un tribunal afin que celui-ci statue à bref délai sur la légalité de sa privation de liberté et ordonne sa libération si cette privation de liberté est illégale.

2. Tout État partie établit et tient à jour un ou plusieurs registres officiels des personnes privées de liberté. Figurent au moins parmi ces informations :

a) l'identité de la personne privée de liberté,

b) l'autorité ayant décidé la privation de liberté,

c) l'autorité assurant le contrôle de la privation de liberté,

d) le jour et l'heure de l'admission dans le lieu de détention et l'autorité responsable du lieu de détention,

e) le jour et l'heure de la libération ou du transfert vers un autre lieu de détention, la destination et l'autorité chargée du transfert.

Article 16 bis

1 Tout Etat partie garantit à la personne privée de liberté et à ses proches, à leurs représentants légaux, à leurs avocats et à toute personne mandatée par eux ainsi qu'à toute autre personne pouvant arguer d'un intérêt légitime un accès au moins aux informations suivantes :

a) l'autorité à laquelle la personne a été déférée ;

b) l'autorité ayant ordonné la privation de liberté ;

c) l'autorité assurant le contrôle de la personne privée de liberté ;

d) le lieu où se trouve la personne privée de liberté, y compris en cas de transfert ;

e) la date et le lieu de libération ;

f) l'état de santé et, en cas de décès, les circonstances et causes du décès.

2. Des mesures appropriées sont prises le cas échéant pour assurer la protection des personnes visées au paragraphe 1 ainsi que de ceux qui participent à l'enquête contre tout mauvais traitement, toute intimidation ou toute sanction en raison de la recherche d'information concernant une personne privée de liberté.

3. ***(nouveau)*** Afin de ne pas porter atteinte à la vie privée des personnes concernées, les informations fournies conformément au paragraphe 1 du présent article devront être adéquates et pertinentes par rapport à la finalité recherchée et ne devront pas être utilisées à des fins autres que la recherche de la personne privée de liberté.

Article 17

Sans préjudice de l'examen de la légalité de la privation de liberté d'une personne, l'Etat partie garantit aux proches de la personne privée de liberté ou de la personne disparue, aux représentants légaux, aux avocats et à toute personne mandatée par la personne privée de liberté ou par la personne disparue ou par ses proches ainsi qu'à toute autre personne pouvant arguer d'un intérêt légitime le droit à un recours prompt et effectif pour obtenir à bref délai les informations visées à l'article 16 bis. Ce droit à un recours ne peut être suspendu ou limité en aucune circonstance.

Article 18 (complété)

Tout Etat partie prend les mesures nécessaires pour que la remise en liberté d'une personne se déroule selon des modalités qui permettent de vérifier avec certitude qu'elle a été effectivement libérée. Tout Etat partie prend également les mesures nécessaires pour assurer l'intégrité physique et le plein exercice de ses droits à toute personne au moment de sa remise en liberté, sans préjudice des obligations auxquelles elle peut être assujettie en vertu de la loi.

Article 19

Tout Etat partie prend les mesures nécessaires pour prévenir et sanctionner des agissements suivants :

a) l'entrave ou l'obstruction au recours visé à l'article 17 ;

b) le manquement à l'obligation d'enregistrement de toute privation de liberté, ainsi que l'enregistrement de toute information dont l'agent responsable du registre officiel connaît ou devrait connaître l'inexactitude ;

c) le refus opposé par un agent de fournir des informations sur une privation de liberté, ou la fourniture d'informations inexactes, alors même que les conditions légales pour fournir ces informations sont réunies.

Article 20 (complété)

1. Tout Etat partie veille à ce que la formation du personnel civil ou militaire chargé de l'application des lois, du personnel médical, des agents de la fonction publique et des autres personnes qui peuvent intervenir dans la garde ou le traitement de toute personne

privée de liberté, puisse inclure l'enseignement et l'information nécessaires concernant les dispositions [*du présent instrument*], en vue de :

a) prévenir l'implication de ces agents dans des disparitions forcées ;

b) souligner l'importance de la prévention et des enquêtes en matière de disparition forcée ;

c) veiller à ce que l'urgence de la résolution des cas de disparition forcée soit reconnue.

2. Tout Etat veille à ce que soient interdits les ordres ou instructions prescrivant, autorisant ou encourageant une disparition forcée. Tout Etat garantit qu'une personne refusant de se conformer à un tel ordre ne sera pas sanctionnée.

3. Tout Etat partie prend les mesures nécessaires pour que les personnes visées au paragraphe 1 qui ont des raisons de penser qu'une disparition forcée s'est produite ou est projetée signalent le cas à leur supérieurs et, au besoin, aux autorités ou instances de contrôle ou de recours compétentes.

Article 21 (intégré à l'article 15 bis)

Article 22 (modifié et complété)

1. Aux fins du [*présent instrument*], on entend par victime la personne disparue et toute personne physique ayant subi un préjudice direct du fait de cette disparition.

2. Tout Etat partie prend les mesures nécessaires afin que toute victime ait connaissance de la vérité concernant les circonstances de la disparition forcée et le sort de la personne disparue. Il prend en particulier les mesures nécessaires pour la recherche, la localisation et la libération des personnes disparues et, en cas de décès, la restitution de leurs restes.

3. Tout Etat partie garantit à la victime d'une disparition forcée le droit d'obtenir une réparation rapide, équitable et adéquate des dommages qui lui ont été causés.

4. Le droit d'obtenir une réparation visé au paragraphe 3 comprend l'indemnisation intégrale des dommages matériels et moraux. Il peut aussi inclure notamment :

a) la restitution,

b) la réadaptation,

c) la satisfaction,

d) le rétablissement de la dignité et de la réputation.

5. Sans préjudice de l'obligation de poursuivre l'enquête jusqu'à l'élucidation du sort de la personne disparue, tout Etat Partie prend les mesures nécessaires concernant la situation légale des personnes disparues dont le sort n'est pas élucidé et de leurs proches, dans des domaines tels que la protection sociale, les questions financières, la garde des enfants et les droits de propriété.

Article 23 (complété)

1. Tout Etat partie prend les mesures nécessaires pour prévenir et réprimer pénalement :

   a) l'enlèvement ou l'appropriation d'enfants victimes de disparition forcée, d'enfants dont le père ou la mère sont victimes d'une disparition forcée, ou d'enfants nés pendant la captivité de leur mère victime de disparition forcée ;

   b) la falsification ou la destruction de documents attestant la véritable identité des enfants visés au a).

2. Tout Etat partie prend les mesures nécessaires pour rechercher et identifier les enfants visés au paragraphe 1 a) et b).

Article 24

Les Etats parties se prêtent mutuellement assistance dans la recherche, l'identification et la détermination du lieu où se trouvent les enfants visés à l'article 23.

Article 25

1. Lorsqu'un enfant enlevé ou approprié dans les conditions de l'article 23 a) est retrouvé sur le territoire d'un Etat partie, la question de son éventuel retour vers sa famille d'origine est réglée, soit par la loi nationale de cet Etat partie, soit par l'accord bilatéral ou multilatéral qui le lie avec tout autre Etat dans lequel réside la famille d'origine.

2. En toute circonstance, l'intérêt supérieur de l'enfant est une considération primordiale et l'enfant qui est capable de discernement a le droit d'exprimer librement son opinion, laquelle est dûment prise en compte eu égard à son âge et à son degré de maturité.

Partie II

Article II O (nouveau)

1. Un [*organe de suivi]* assure le suivi de la mise en œuvre du présent instrument et du respect par les États parties de leurs engagements.

2. Les membres de [*l'organe de suivi]* bénéficient dans l'exercice de leur mandat des privilèges et immunités tels qu'ils sont énoncés dans la convention sur les privilèges et immunités des Nations Unies.

3. Tout Etat partie s'engage à coopérer avec [*l'organe de suivi]* et à prêter assistance à ses membres dans l'exercice de leur mandat.

Article II-A (modifié)

1. Tout État partie présente [*à l'organe de suivi*], par l'entremise du Secrétaire général de l'Organisation des Nations Unies, un rapport sur les mesures prises pour donner effet à ses obligations en vertu [*du présent instrument*], dans un délai d'un an à compter de l'entrée en vigueur [*du présent instrument*] à son égard.

2. Le Secrétaire général de l'Organisation des Nations Unies transmet les rapports à tous les États parties.

3. Chaque rapport est étudié par [*l'organe de suivi*], qui peut faire les commentaires, les observations, les recommandations et les mises en garde qu'il estime appropriés. L'État partie intéressé reçoit communication des commentaires, observations, recommandations et mises en garde, auxquels il peut répondre, de sa propre initiative ou à la demande [*de l'organe de suivi*].

Article II-B (modifié)

1. [*L'organe de suivi*] peut être saisi par un État partie, ou par les proches de la personne disparue, leurs représentants légaux, leurs avocats et toute personne mandatée par eux ainsi que toute autre personne pouvant arguer d'un intérêt légitime, d'une demande visant à chercher et retrouver une personne disparue au sens de l'article premier.

2. S'il estime que la demande présentée en vertu du paragraphe 1 n'est pas manifestement dépourvue de fondement, qu'elle ne constitue pas un abus de droit et qu'elle n'est pas incompatible avec les dispositions [*du présent instrument*], [*l'organe de suivi*] demande à tout État partie de lui fournir, dans un délai qu'il fixe, des renseignements sur la situation de cette personne.

3. Au vu de la réponse fournie par l'État partie intéressé conformément au paragraphe 2, [*l'organe de suivi*] présente à ce dernier une recommandation ou une mise en garde. Il peut aussi lui enjoindre de prendre des mesures adéquates et de lui en faire rapport, dans un délai qu'il fixe.

4. [*L'organe de suivi*] établit ses conclusions et les communique à tout État partie auquel des renseignements ont été demandés et à l'auteur de la demande visée au paragraphe 1.

5. La procédure visée par le présent article est confidentielle.

Article II-C (modifié)

1. S'il estime qu'un déplacement sur le territoire d'un État partie sous la juridiction duquel se trouverait la personne disparue est indispensable pour répondre à la demande dont il est saisi conformément à l'article II-B, [*l'organe de suivi*] peut demander à un ou plusieurs de ses membres de réaliser une mission d'enquête et de l'informer sans retard. Le ou les membres [*de l'organe de suivi*] qui effectuent la mission peuvent se faire accompagner, si nécessaire, par des interprètes, des secrétaires et des experts. Aucun membre de la délégation, à l'exception des interprètes, ne peut être ressortissant de l'État partie dans lequel la visite est effectuée.

2. [*L'organe de suivi*] notifie par écrit à l'État partie concerné son intention d'organiser une mission d'enquête et indique la composition de la délégation. L'État partie fait connaître sans retard à [*l'organe de suivi*] son accord ou son opposition à la mission d'enquête sur un territoire sur lequel il exerce sa juridiction.

3. Si l'État partie a donné son accord à la mission d'enquête, il fournit [*à l'organe de suivi*] toutes facilités nécessaires à l'accomplissement de cette mission. [*L'organe de suivi*] peut notamment:

   a) Effectuer les visites qu'il jugera nécessaires pour chercher et retrouver la personne disparue ;

   b) Entrer en contact librement avec toute personne dont il pense qu'elle peut lui fournir des informations utiles sur le sort de la personne disparue ;

   c) Se faire présenter la personne dont la disparition forcée est alléguée et s'entretenir avec elle sans témoin et de façon confidentielle.

4. [*L'organe de suivi*] fait part des constatations faites pendant sa mission d'enquête:

   a) À l'État partie sur le territoire duquel la mission d'enquête a été effectuée ;

   b) À l'auteur de la demande visée à l'article II-B, paragraphe 1.

5. La procédure visée par le présent article est confidentielle.

Article II C bis (nouveau)

1. Si [*l'organe de suivi]* reçoit une communication présentée par les proches de la personne disparue, leurs représentants légaux, leurs avocats et toute personne mandatée par eux ainsi que toute autre personne pouvant arguer d'un intérêt légitime, faisant état de graves manquements d'un Etat partie à ses engagements au titre du [*présent instrument*], il peut s'en saisir sauf si :

a) la communication est insuffisamment motivée, ou manifestement dépourvue de fondement ;

b) la même question est en cours d'examen dans une autre instance internationale d'enquête ou de règlement ;

c) le plaignant n'a pas épuisé toutes les voies de recours effectifs internes.

2. S'il estime que la communication est conforme aux conditions fixées au paragraphe 1, *[l'organe de suivi]* transmet à l'Etat partie concerné cette communication et lui demande de lui fournir, dans un délai qu'il fixe, ses observations et commentaires.

3. Au vu de la réponse de l'Etat partie, [*l'organe de suivi]* peut décider :

a) de classer la communication ;

b) de poursuivre son examen ;

c) d'adresser à l'Etat partie une recommandation.

4. [*L'organe de suivi*] met fin à la procédure visée au présent article en communiquant à l'Etat partie concerné et à l'auteur de la communication, les conclusions de son enquête.

5. La procédure visée par le présent article est confidentielle.

Article II C ter (nouveau)

Si [*l'organe de suivi*] reçoit des renseignements qui lui semblent contenir des indications bien fondées selon lesquelles la disparition forcée est pratiquée de manière généralisée ou systématique sur le territoire d'un Etat partie, il peut saisir le Secrétaire Général des Nations Unies, après avoir recherché auprès de l'Etat partie concerné toute information pertinente sur cette situation et sur les mesures prises pour faire cesser immédiatement de telles pratiques

Article II D (intégré à l'article II O § 2)

Article II-E (complété)

1. [*L'organe de suivi*] n'est compétent qu'à l'égard des privations de liberté ayant débuté postérieurement à l'entrée en vigueur [*du présent instrument*].

2. Si un État devient partie [*au présent instrument*] après l'entrée en vigueur de celui-ci, ses obligations vis-à-vis [*de l'organe de suivi*] ne concernent que les privations de liberté ayant débuté postérieurement à l'entrée en vigueur [*du présent instrument*] à son égard.

3. ***(nouveau)*** Tout Etat partie peut, à tout moment, déclarer qu'il reconnaît, pour ce qui le concerne, à [*l'organe de suivi*] une compétence concernant les disparitions forcées ayant débuté antérieurement à l'entrée en vigueur du [*présent instrument*].

Article II-F (modifié)

1. [*L'organe de suivi*] présente aux États parties et à l'Assemblée générale de l'Organisation des Nations Unies un rapport annuel sur les activités qu'il aura réalisées en application [*du présent instrument*].

2. ***(nouveau)*** Si les procédures engagées au titre des article II B et II C bis révèlent un refus manifeste de coopérer de la part de l'Etat partie concerné ou ne se traduisent par aucun résultat effectif, [*l'organe de suivi*] peut décider de rendre publique une observation relative à la question ou à la situation dont il a eu à connaître.

3. ***(nouveau)*** La publication de l'observation visée au § 2 du présent article doit être préalablement annoncée à l'Etat partie concerné et accompagnée des réponses, commentaires ou observations transmis par l'Etat partie à [*l'organe se suivi*] dans le délai que celui-ci aura fixé.

Partie III

Article III-O (ancien article 2 § 2)

[*Le présent instrument*] est sans préjudice de tout autre instrument international ou de toute loi nationale qui contient ou peut contenir des dispositions de portée plus large.

Article III-O bis (nouveau)

Les informations personnelles, y compris les données médicales ou génétiques, qui sont transmises dans le cadre de la recherche d'une personne disparue ne peuvent pas être utilisées à d'autres fins que celle de la recherche de la personne disparue.

Article III-A

1. [*Le présent instrument*] est ouvert à la signature de [...].

2. [*Le présent instrument*] est soumis à la ratification de [...]. Les instruments de ratification seront déposés auprès du Secrétaire général de l'Organisation des Nations Unies.

3. [*Le présent instrument*] est ouvert à l'adhésion de [...]. L'adhésion se fera par le dépôt d'un instrument d'adhésion auprès du Secrétaire général de l'Organisation des Nations Unies.

Article III-B

1. [*Le présent instrument*] entrera en vigueur le trentième jour après la date du dépôt du [*Nème*] instrument de ratification ou d'adhésion.

2. Pour tout État qui ratifiera [*le présent instrument*] ou y adhérera après le dépôt du [*Neme*] instrument de ratification ou d'adhésion, [*le présent instrument*] entrera en vigueur le trentième jour après la date du dépôt par cet État de son instrument de ratification ou d'adhésion.

Article III-C

Le Secrétaire général de l'Organisation des Nations Unies notifiera à tous les États Membres de l'Organisation des Nations Unies et à tous les États qui auront signé [*le présent instrument*] ou y auront adhéré:

a) Les signatures, les ratifications et les adhésions reçues en application de l'article III-;

b) La date d'entrée en vigueur [*du présent instrument*] en application de l'article III-B.

Article III-D

Les dispositions [*du présent instrument*] s'appliquent, sans limitation ni exception aucune, à toutes les unités constitutives des États fédéraux.

Article III- D bis (nouveau)

1. Tout Etat, lors de la signature, de la ratification ou de l'accession, peut déclarer *que [le présent instrument]* s'étendra à tout territoire dont il est responsable au titre des relations internationales. Une telle déclaration prendra effet lorsque [*le présent instrument*] entrera en vigueur pour l'Etat concerné.

2. A tout moment, une telle extension pourra faire l'objet d'une notification adressée au Secrétaire général des Nations Unies et prendra effet, à compter de (...) après le jour de réception par le Secrétaire général des Nations Unïes de cette notification.

Article III-E (intégré à l'article 1 bis § 2)

Article III-F

[*Le présent instrument*] est sans préjudice des dispositions du droit international humanitaire, y compris les obligations des Hautes Parties contractantes des quatre Conventions de Genève du 12 août 1949 et ses protocoles facultatifs du 8 juin 1977, ou de la possibilité qu'a tout Etat d'autoriser le Comité international de la Croix rouge à visiter les lieux de détention dans les cas non prévus par le droit international humanitaire.

Article III- G

1. Tout État partie [*au présent instrument*] peut proposer un amendement et déposer sa proposition auprès du Secrétaire général de l'Organisation des Nations Unies. Le Secrétaire général communique la proposition d'amendement aux États parties *[au présent instrument*] en leur demandant de lui faire savoir s'ils sont favorables à l'organisation d'une conférence d'États parties en vue de l'examen de la proposition et de sa mise aux voix. Si, dans les quatre mois qui suivent la date d'une telle communication, le tiers au moins des États parties se prononce en faveur de la tenue de ladite conférence, le Secrétaire général organise la conférence sous les auspices de l'Organisation des Nations Unies. Tout amendement adopté à la majorité des deux tiers des États parties présents et votants à la conférence sera soumis par le Secrétaire général à l'acceptation de tous les États parties.

2. Un amendement adopté selon les dispositions du paragraphe 1 du présent article entrera en vigueur lorsque les deux tiers des États parties [*au présent instrument*] l'auront accepté conformément à la procédure prévue par leurs constitutions respectives.

3. Lorsque les amendements entreront en vigueur, ils auront force obligatoire pour les États parties qui les auront acceptés, les autres États parties demeurant liés par les dispositions [*du présent instrument*] et par tout amendement antérieur qu'ils auraient accepté.

Article III-H

1. [*Le présent instrument*], dont les textes anglais, arabe, chinois, espagnol, français et russe font également foi, sera déposé auprès du Secrétaire général de l'Organisation des Nations Unies.
2. Le Secrétaire général de l'Organisation des Nations Unies fera tenir une copie certifiée conforme [*du présent instrument*] à tous les États.

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GE 187A

U.S. Government Informal Non-Paper on the Draft Enforced Disappearances Text

In response to the Chairman's kind request for comments on the above-referenced draft text, the U.S. Mission takes pleasure in presenting the following informal comments and observations. These comments are not exhaustive, nor intended to be, but rather highlight the principal issues of greatest concern to us that are raised by the Chairman's draft text ("2003 draft").

At the outset we express appreciation to the Chairman for some very significant proposals in his text, both in terms of what is included and what is omitted. We note in particular that unlike the 1998 Sub-commission forced disappearances text, the Chair's 2003 draft eliminates problematic references to:

--prohibiting the death penalty.
--prohibiting military tribunals.
--prohibiting amnesties and pardons.
--prohibiting treaty reservations.
--requiring criminalization of "crimes against humanity."

Still, as noted above, the 2003 text contains matters of serious concern to the United States. These include, *inter alia*:

ARTICLE ONE. Definition of forced disappearance is far too broad ("*deprivation of a person's liberty through any means whatsoever*") and could not be a basis for a criminal offense under United States law and jurisprudence. Nor, in our view, could that definition provide an appropriate basis for a criminal offense in any country whose jurisprudence requires, as a matter of due process and fairness, that a criminal offense be defined in precise terms. Absent the requisite clarity, such vague definitions would be stricken by the courts for being too broad and vague. The definition regrettably would also cover non-State actors, which the United States firmly opposes.

A possible alternative could be the following:
"the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

ARTICLE TWO. To the extent that the paragraph requires enactment of a specific crime denominated "forced disappearance," as it appears to do, it could make the treaty unworkable under the United States system of federalism. Rather, we would support the formula contained in the Convention against Torture: to require criminalization of "acts" of torture, here "acts of forced disappearance." We fail to see why such a formulation should be regarded as being less effective or appropriate (for both federal and non-federal states) in this context when the international community has widely embraced it to suppress the heinous offense of torture.

ARTICLE FIVE. This provision would require a statute of limitations for disappearances that is "the longest period possible under its domestic law." In the United States this would amount to NO statute of limitations, as for instance is the case with murder in

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several state jurisdictions. To the extent such a period of prescription is considered highly disproportionate to the gravity of the offense under United States law (for example, in the case of a forced disappearance not involving torture or murder), legitimate concerns about fairness and equity would be raised, including due process challenges to the statute of limitations by the defendant.

ARTICLE SIX. Disallows an "obedience to orders" defense. As discussed during earlier negotiating rounds, certain States believe that such a defense could be appropriate in circumstances where the superior order is not manifestly unlawful.

ARTICLE SEVEN. Severely restricts amnesties and pardons and makes them inapplicable to the receipt of compensation. During negotiations, several States wisely voiced the view that amnesties and pardons are peculiarly a matter of domestic law, especially pardons, which are typically subject to the exclusive authority of the President, Governor, or other chief executive authority.

ARTICLES NINE & ELEVEN. Requires four mandatory bases of jurisdiction, including quasi-universal ("present in") jurisdiction. This leaves little flexibility to the States Parties and may require an extra-territorial jurisdictional reach far broader than many States would be willing to exercise.

ARTICLE TWELVE (THREE). The requirement of "access [by an investigator] to all places where the disappeared person may be found" requires serious study and appears problematic under United States law, including anti-terrorism law.

ARTICLE TWELVE (FOUR) and SIXTEEN (TWO) and SEVENTEEN. Requires that information be given about a disappearances investigation to "all persons with a legitimate interest in the matter." This would appear to transgress statutes protecting the confidentiality of law enforcement methods and sources and material witness protections and may intrude upon other privacy protections in the United States.

ARTICLE FIFTEEN. Clarification would be required that these provisions for law enforcement assistance and cooperation would not require cooperation with international tribunals regarding which a State is not legally bound to cooperate.

ARTICLE NINETEEN. Requires criminalization of the failure to provide information and the like; this is a provision that would need to be made substantially more precise and targeted.

ARTICLE TWENTY-ONE. The *non-refoulement* provision needs to be made consistent with applicable standards and principles such as inclusion of the word "substantial" before "reason to believe."

These comments again are not exhaustive but do highlight some of the initial concerns of the United States raised by the 2003 draft, based on an informal translation of that text into English.

Thank you.

December 2, 2003
Geneva

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26/03/2004

GE192

DRAFT

Enforced or involuntary disappearances

The Commission on Human Rights,

Recalling its resolution 20 (XXXVI) of 29 February 1980, in which it decided to establish a working group ~~consisting of five of its members, to serve as experts in their individual capacity~~, to examine questions relevant to enforced or involuntary disappearances, ~~its resolution 1995/75 of 8 March 1995 on cooperation with representatives of UnitedNations human rights organs, and its resolutions 2001/46 of 23 April 2001 and 2002/41 of 23 April 2002,~~

Recalling also GeneralAssembly resolution 47/133 of 18 December 1992, by which theAssembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance as a body of principles for all States, ~~and Assembly resolution 57/215 of18December 2002,~~

~~*Recalling further* Economic and Social Council decision 2001/221 of 4 June 2001 in which the Council endorsed the decision of the Commission to establish an intersessional open-ended working group of the Commission, with the mandate to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance,~~

Deeply concerned in particular by the increase in enforced or involuntary disappearances in various regions of the world, including arrest, detention and abduction, when these are part of or amount to enforced disappearances, and by the growing number of reports concerning harassment, ill-treatment and intimidation of witnesses of disappearances or relatives of persons who have disappeared,

Emphasizing that impunity is simultaneously one of the underlying causes of enforced disappearances and one of the major obstacles to the elucidation of cases thereof and that there is a need for effective measures to combat the problem of impunity,

Acknowledging the fact that acts of enforced disappearance are crimes against humanity, as defined in the Rome Statute of the International Criminal Court (A/CONF.183/9),

1. *Takes note* of the report submitted by the Working Group on Enforced or Involuntary Disappearances (~~E/CN.4/2003/70 and Corr.1 and 2~~)**(E/CN.4/2004/58),** ~~pursuant to Commission resolution 2002/41;~~ ***and notes the recommendations made by the Working Group on the development of national institutions, on preventive measures and on the fight against impunity;***

1bis. Recalls the importance of the implementation of its resolution 2000/109 on the strengthening of the effectiveness of the Commission on Human Rights mechanism;

2. *Stresses* the importance of the work of the Working Group and encourages it in the execution of its mandate:

(*a*) To continue to promote communication between families of disappeared persons and the Governments concerned with a view to ensuring that sufficiently documented and clearly identified individual cases are investigated and to ascertain whether such information falls under its mandate and contains the required elements;

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(*b*) To continue to observe, in its humanitarian task, UnitedNations standards and practices regarding the handling of communications and the consideration of government replies;

(*c*) To continue to consider the question of impunity in the light of the relevant provisions of the Declaration on the Protection of All Persons from Enforced Disappearance and of the final reports submitted by the Special Rapporteur appointed by the Sub-Commission on the Promotion and Protection of Human Rights;

(*d*) To continue to pay particular attention to cases of children subjected to enforced disappearance and children of disappeared persons and to cooperate closely with the Governments concerned in searching for and identifying these children;

(*e*) To pay particular attention to cases transmitted to it that refer to ill-treatment, serious threatening or intimidation of witnesses of enforced or involuntary disappearances or relatives of disappeared persons;

(*f*) To pay particular attention to cases of disappearance of persons working for the promotion and protection of human rights and fundamental freedoms, wherever they occur, and to make appropriate recommendations for preventing such disappearances and improving the protection of such persons;

(*g*) To continue to apply a gender perspective in its reporting process, including in information collection and the formulation of recommendations;

(*h*) To provide appropriate assistance in the implementation by States of the Declaration and of the existing international rules;

(*i*) To continue its deliberations on its working methods and to include these aspects in its report to the Commission at its ~~sixtieth~~ sixty first session;

3. *Deplores* the fact that some Governments have never provided substantive replies concerning the cases of enforced disappearances in their countries ~~or acted on the recommendations concerning them made in the reports of the Working Group~~; ***and have not followed up relevant recommendations concerning this subject in the reports of the Working Group;***

4. *Urges* ~~the Governments concerned~~ ***States:***

(a) To fully implement the Declaration on the protection of all persons against enforced disappearances;

(*a*) To cooperate with the Working Group and help it to carry out its mandate effectively, in particular ~~by inviting it freely to visit~~ ***by welcoming it in*** their countries;

(*b*) To intensify their cooperation with the Working Group on any action taken pursuant to recommendations addressed to them by the Working Group;

(*c*) To take steps to protect witnesses of enforced or involuntary disappearances and the lawyers and families of disappeared persons against any intimidation or ill-treatment to which they might be subjected;

(*d*) ~~That have long had many unresolved cases of disappearances~~, to continue their efforts **to elucidate the fate** of ~~the~~ disappeared ~~concerned and to set appropriate settlement machinery in train with the families of those individuals;~~

(*e*) To make provision in their legal systems for machinery for victims of enforced or involuntary disappearances or their families to seek fair and adequate reparation;

5. *Reminds* Governments:

(*a*) That, as proclaimed in article 2 of the Declaration on the Protection of All Persons from Enforced Disappearance, no State shall practise, permit or tolerate enforced disappearances;

(*b*) That all acts of enforced or involuntary disappearance are crimes punishable by appropriate penalties which should take due account of their extreme seriousness under penallaw;

(*c*) That they should ensure that their competent authorities proceed immediately to conduct impartial inquiries in all circumstances where there is reason to believe that an enforced disappearance has occurred in territory under their jurisdiction;

(*d*) That, if such belief is borne out, all the perpetrators of enforced or involuntary disappearances must be prosecuted;

(*e*) That impunity is simultaneously one of the underlying causes of enforced disappearance and one of the major obstacles to the elucidation of cases thereof;

(*f*) That, as proclaimed in article 11 of the Declaration, all persons deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured;

6. *Expresses*:

(*a*) Its thanks to the many Governments that have cooperated with the Working Group and replied to its requests for information and to the Governments that have ~~invited~~ ***welcomed*** the Working Group ~~to visit~~ ***in*** their countries, asks them to give all necessary attention to the Working Group's recommendations and invites them to inform the Working Group of any action they take on those recommendations;

(*b*) Its appreciation to the Governments that are investigating, have developed or are developing appropriate mechanisms to investigate any cases of enforced disappearance which are brought to their attention, and encourages all the Governments concerned to expand their efforts in this area;

7. *Invites* States to take legislative, administrative, legal and other steps, including when a state of emergency has been declared, to take action at the national and regional levels and in cooperation with the UnitedNations, if appropriate through technical assistance, and to provide the Working Group with concrete information on the measures taken and the obstacles encountered in preventing enforced or involuntary disappearances and in giving effect to the principles set forth in the Declaration;

8. *Takes note* of the assistance provided to the Working Group by non-governmental organizations and their activities in support of the implementation of the Declaration and invites those organizations to continue their cooperation;

9. *Acknowledges with great concern* the difficulties encountered by the Working Group in the accomplishment of its mandate and requests the Secretary-General:

(*a*) To ensure that the Working Group receives all the assistance and resources it requires to perform its function, including supporting the principles of the Declaration, carrying out and following up on missions and holding sessions in countries that are prepared to receiveit;

(*b*) To provide the resources needed to update the database on cases of enforced disappearance;

(*c*) To keep the Working Group and the Commission regularly informed of the steps taken for the wide dissemination and promotion of the Declaration;

10. *Requests* the Working Group to report on its activities to the Commission at its sixtieth session;

~~11. *Takes note* of the report (E/CN.4/2002/71) presented by the independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances to the intersessional working group with the mandate to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, in accordance with Commission resolutions 2001/46 and 2002/41, as well as the contribution of the Chairperson-Rapporteur of the sessional working group on the administration of justice of the Sub-Commission on the Promotion and Protection of Human Rights to the work of the intersessional working group in her capacity as Rapporteur on the question of the draft international convention on the protection of all persons from enforced disappearance (transmitted by the Sub-Commission in its resolution 1998/25 of 26 August 1998;~~

12. ~~*Also*~~ *takes note* of the report of the Intersessional open-ended working group of the Commission to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (~~E/CN.4/2003/71~~ **E/CN.4/2004/59**) and welcomes the substantial progress made during the ~~first~~ ***second*** session of the Intersessional Working Group and, in that context, welcomes the participation of non-governmental organizations;

13. *Requests* the Intersessional Working Group to meet for ~~a period of10working days~~ ***2 formal sessions*** before the ~~sixtieth~~ sixty first session of the Commission ~~in order to continue~~ ***for*** its work~~, in accordance with Commission resolutions 2001/46 and 2002/41~~, and to report to the Commission at its ~~sixtieth~~ sixty first session;

14. *Requests* the Chairperson-Rapporteur of the Intersessional Working Group to undertake informal consultations with all interested parties in order to prepare the next session of the Intersessional Working Group;

15. *Requests* the United Nations High Commissioner for Human Rights to invite ~~the experts mentioned in paragraph 11 above~~ ***the independent expert charged with examining the existing international criminal and the human rights framework for the protection of persons from enforced or involuntary disappearances, the sub commission rapporteur on the question of the draft international convention on the protection of all persons from enforced disappearance (E/CN.4/Sub.2/1998/19, annexe), and also a representative of the Working Group on enforced or involuntary disappearances*** to participate in the activities of the working group;

16. *Decides* to consider this matter at its ~~sixtieth~~ **sixty first** session under the same agenda item.

RELEASED IN FULL

18/03/04

GE193

Question des disparitions forcées ou involontaires

La Commission des droits de l'homme,

Rappelant sa résolution 20 (XXXVI) du 29 février 1980, par laquelle elle a décidé de créer un groupe de travail ~~composé de cinq de ses membres agissant en tant qu'experts nommés à titre personnel~~ pour examiner les questions concernant les disparitions forcées ou involontaires~~, sa résolution 1995/75 du 8 mars 1995 sur la coopération avec les représentants d'organes de l'Organisation des Nations Unies chargés des droits de l'homme, ainsi que ses résolutions 2001/46 du 23 avril 2001 et 2002/41 du 23 avril 2002~~,

Rappelant également la résolution 47/133 de l'Assemblée générale, en date du 18 décembre 1992, par laquelle l'Assemblée a adopté la Déclaration sur la protection de toutes les personnes contre les disparitions forcées, en tant qu'ensemble de principes qui doivent être appliqués par tous les États, ~~ainsi que la résolution 57/215 de l'Assemblée, en date du 18 décembre 2002,~~

~~*Rappelant en outre* la décision 2001/221 du Conseil économique et social, en date du 4 juin 2001, dans laquelle le Conseil a fait sienne la décision de la Commission des droits de l'homme de créer un groupe de travail intersessions à composition non limitée, dont le mandat serait d'élaborer un projet d'instrument normatif contraignant pour la protection de toutes les personnes contre les disparitions forcées,~~

Profondément préoccupée en particulier par la multiplication, dans diverses régions du monde, des disparitions forcées ou involontaires, y compris les arrestations, détentions et enlèvements, lorsque ces actes conduisent à des disparitions forcées ou peuvent y être assimilés, et par le nombre croissant d'informations faisant état de mesures de harcèlement, de mauvais traitements et d'actes d'intimidation à l'encontre des témoins de disparitions ou des familles de personnes disparues,

Soulignant que l'impunité est l'une des causes profondes des disparitions forcées et, en même temps, l'un des obstacles majeurs à l'élucidation de ces cas, et qu'il est nécessaire de prendre des mesures efficaces pour combattre le phénomène de l'impunité,

Considérant que les actes de disparition forcée constituent des crimes contre l'humanité, tels qu'ils sont définis dans le Statut de Rome de la Cour pénale internationale (A/CONF.183/9),

1. ~~1.~~ *Prend acte* du rapport du Groupe de travail sur les disparitions forcées ou involontaires (E/CN.4/~~2003/70~~2004/58)~~, présenté conformément à la résolution 2002/41 de la Commission~~; et note les recommandations du groupe de travail concernant le développement d'institutions nationales, les mesures préventives et la lutte contre l'impunité.

2. *Rappelle l'importance de la mise en œuvre de sa résolution 2000/109 concernant le renforcement de l'efficacité des mécanismes de la Commission des droits de l'homme*

2. *Souligne* l'importance des travaux du Groupe de travail et l'encourage, dans l'accomplissement de son mandat:

a) À continuer de faciliter la communication entre les familles des personnes disparues et les gouvernements concernés, afin de veiller à ce que des cas bien documentés et clairement identifiés fassent l'objet d'enquêtes, et de s'assurer que ces renseignements entrent dans le cadre de son mandat et comportent les éléments requis;

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b) À continuer d'observer, dans sa mission humanitaire, les normes et pratiques de l'Organisation des Nations Unies en ce qui concerne le traitement des communications et l'examen des réponses des gouvernements;

c) À poursuivre sa réflexion sur la question de l'impunité, compte tenu des dispositions pertinentes de la Déclaration sur la protection de toutes les personnes contre les disparitions forcées et des rapports finaux remis par le rapporteur spécial désigné par la Sous-Commission de la promotion et de la protection des droits de l'homme;

d) À continuer de porter une attention toute particulière aux cas d'enfants victimes de disparition forcée et d'enfants de personnes disparues, et de coopérer étroitement avec les gouvernements concernés à la recherche et à l'identification de ces enfants;

e) À suivre avec une attention particulière les cas qui lui sont transmis, faisant état de mauvais traitements, de menaces sérieuses ou d'intimidations à l'encontre des témoins de disparitions forcées ou involontaires ou des familles de personnes disparues;

f) À porter une attention particulière aux cas de disparition des personnes travaillant pour la promotion et la protection des droits de l'homme et des libertés fondamentales, où qu'ils se produisent, et à faire des recommandations appropriées tendant à la prévention de telles disparitions ainsi qu'à l'amélioration de la protection de ces personnes;

g) À poursuivre son approche sexospécifique dans l'élaboration de son rapport, y compris la collecte d'informations et la formulation des recommandations;

h) À fournir l'assistance appropriée à la mise en œuvre, par les États, de la Déclaration et des normes internationales existantes;

i) À poursuivre la réflexion entreprise sur ses méthodes de travail et à intégrer ces éléments dans son rapport à la Commission, à sa ~~soixantième~~ 61 cme session;

3. *Déplore* le fait que certains gouvernements n'ont jamais donné de réponse sur le fond, concernant les cas de disparitions forcées qui se seraient produits dans leur pays, ~~et n'ont pas davantage donné suite aux recommandations pertinentes faites à ce sujet dans les rapports du Groupe de travail;~~ et n'ont pas donné suite aux recommandations pertinentes faites à ce sujet dans les rapports du groupe de travail.

4. *Exhorte* les ~~gouvernements concernés~~Etats:

a) A mettre pleinement en oeuvre la Déclaration sur la protection de toutes les personnes contre les disparitions forcées

a) À coopérer avec le Groupe de travail et à l'aider de façon à ce qu'il puisse s'acquitter efficacement de son mandat, notamment en ~~l'invitant à se rendre librement~~ l'accueillant dans leur pays;

b) À intensifier leur coopération avec le Groupe de travail sur toutes mesures prises en application des recommandations que le Groupe de travail leur a adressées;

c) À prendre des mesures pour protéger les témoins des disparitions forcées ou involontaires, ainsi que les avocats et les familles des personnes disparues, contre toute intimidation ou tout mauvais traitement dont ils pourraient faire l'objet;

d) ~~Ayant depuis longtemps un grand nombre de cas de disparition non résolus,~~ à poursuivre leurs efforts pour que la lumière soit faite sur le sort de ~~ces~~ des personnes disparues ~~et pour que les mécanismes appropriés de règlement de ces cas soient efficacement mis en œuvre avec les familles concernées~~;

e) À prévoir, dans leur système juridique, un mécanisme permettant aux victimes de disparitions forcées ou involontaires ou à leurs familles de rechercher une indemnisation équitable et adéquate;

5. *Rappelle* aux gouvernements:

a) Que, comme il est proclamé à l'article 2 de la Déclaration sur la protection de toutes les personnes contre les disparitions forcées, aucun État ne doit avoir recours à des disparitions forcées, les autoriser ou les tolérer;

b) Que tous les actes de disparition forcée ou involontaire sont des crimes passibles de peines appropriées qui doivent tenir compte de leur extrême gravité au regard de la loi pénale;

c) Qu'ils doivent veiller à ce que leurs autorités compétentes procèdent immédiatement à des enquêtes impartiales, en toutes circonstances, chaque fois qu'il y a des raisons de penser qu'un cas de disparition forcée s'est produit dans un territoire placé sous leur juridiction;

d) Que, si les faits sont vérifiés, tous les auteurs de disparitions forcées ou involontaires doivent être poursuivis;

e) Que l'impunité est l'une des causes fondamentales des disparitions forcées et, en même temps, l'un des principaux obstacles à l'élucidation des cas antérieurs;

f) Que, comme il est proclamé à l'article 11 de la Déclaration sur la protection de toutes les personnes contre les disparitions forcées, toutes les personnes privées de liberté doivent être libérées d'une manière qui permette de vérifier valablement qu'elles ont effectivement été libérées et, par ailleurs, qu'elles ont été libérées dans des conditions qui garantissent leur intégrité physique et la possibilité de faire valoir leurs droits;

6. *Exprime*:

a) Ses remerciements aux nombreux gouvernements qui ont coopéré avec le Groupe de travail et répondu à ses demandes de renseignements, ainsi qu'aux gouvernements qui l'ont ~~invité à se rendre sur place~~accueilli, les prie d'accorder toute l'attention voulue aux recommandations du Groupe de travail et les invite à informer celui-ci de toutes les mesures prises pour y donner suite;

b) Sa satisfaction aux gouvernements qui enquêtent, ont mis ou mettent au point des mécanismes appropriés pour enquêter sur tous les cas de disparition forcée portés à leur attention, et incite tous les gouvernements concernés à développer leur action dans ce domaine;

7. *Invite* les États à prendre des mesures législatives, administratives, judiciaires et autres, y compris lorsqu'un état d'urgence est proclamé, à agir à l'échelon national et régional et en coopération avec l'Organisation des Nations Unies, au besoin par le biais de l'assistance technique, et à donner des informations concrètes au Groupe de travail sur les mesures prises et les obstacles rencontrés pour prévenir les disparitions forcées ou involontaires et mettre en œuvre les principes énoncés dans la Déclaration;

8. *Prend note* de l'aide apportée au Groupe de travail par les organisations non gouvernementales ainsi que de leur action pour favoriser la mise en œuvre de la Déclaration, et les invite à poursuivre cette coopération;

9. *Note avec une grande préoccupation* les difficultés que rencontre le Groupe de travail dans l'accomplissement de son mandat et prie le Secrétaire général:

a) De veiller à ce que le Groupe de travail reçoive toute l'assistance et les ressources dont il a besoin pour s'acquitter de sa tâche, y compris pour apporter son soutien aux principes de la Déclaration, pour effectuer des missions et en assurer le suivi, et pour tenir ses réunions dans les pays qui seraient disposés à l'accueillir;

b) De fournir les moyens nécessaires pour actualiser la base de données sur les cas de disparitions forcées;

c) D'informer régulièrement le Groupe de travail et la Commission des mesures prises pour faire connaître et promouvoir largement la Déclaration;

10. *Prie* le Groupe de travail de lui faire rapport sur ses activités, à sa ~~soixantième~~ 61 ème session;

~~11. *Prend note* du rapport (E/CN.4/2002/71) présenté par l'expert indépendant chargé d'étudier le cadre international actuel en matière pénale et de droits de l'homme pour la protection des personnes contre les disparitions forcées ou involontaires au groupe de travail intersessions ayant pour mandat d'élaborer un projet d'instrument normatif juridiquement contraignant pour la protection de toutes les personnes contre les disparitions forcées, conformément aux résolutions 2001/46 et 2002/41 de la Commission des droits de l'homme,~~

~~ainsi que la contribution du Président-Rapporteur du Groupe de travail de la Sous-Commission de la promotion et de la protection des droits de l'homme sur l'administration de la justice aux travaux du groupe de travail intersessions, en sa qualité de Rapporteur du projet de convention internationale pour la protection de toutes les personnes contre les disparitions forcées (E/CN.4/Sub.2/1998/19, annexe), transmis par la Sous-Commission dans sa résolution 1998/25 du 26 août 1998;~~

12. *Prend note* ~~*également*~~ du rapport du groupe de travail intersessions, à composition non limitée, ayant pour mandat d'élaborer un projet d'instrument normatif juridiquement contraignant pour la protection de toutes les personnes contre les disparitions forcées (~~E/CN.4/2003/71~~ E/CN.4/2004/59) et se félicite des progrès importants réalisés lors de la ~~première~~ deuxième session du Groupe de travail ainsi que de la participation d'organisations non gouvernementales à cet égard;

13. *Demande* au groupe de travail intersessions, à composition non limitée, de se réunir avant la ~~soixantième~~ 61ème session de la Commission pour ~~une durée de 10 jours ouvrables~~deux sessions formelles ~~pour poursuivre~~ conclure ses travaux, ~~conformément aux résolutions 2001/46 et 2002/41 de la Commission des droits de l'homme~~, et de lui faire rapport à sa ~~soixantième~~ 61ème session;

14. *Prie* le Président-Rapporteur du groupe de travail intersessions à composition non limitée d'entreprendre des consultations informelles avec toutes les parties intéressées pour préparer la prochaine session du Groupe de travail;

15. *Prie* le Haut-Commissaire des Nations Unies aux droits de l'homme d'inviter les ~~experts mentionnés au paragraphe 11 ci-dessus~~ l'expert indépendant chargé d'étudier le cadre international actuel en matière pénale et de droits de l'homme pour la protection des personnes contre les disparitions forcées ou involontaires, le Rapporteur du projet de convention internationale pour la protection de toutes les personnes contre les disparitions forcées (E/CN.4/Sub.2/1998/19, annexe), ainsi qu'un représentant du Groupe de travail sur les disparitions forcées ou involontaires à participer aux activités du Groupe de travail intersession;

16. *Décide* d'examiner cette question à sa ~~soixantième~~ 61ème session, au titre du même point de l'ordre du jour.

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GE206

MISSION PERMANENTE DE LA FRANCE
AUPRES DE L'OFFICE DES NATIONS UNIES
A GENEVE

36, route de Pregny
1292 CHAMBESY
Tél (41) 022.758.91.11
Fax. (41) 022.758.91.37
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Télécopie

Genève, le 27 octobre 2003

MESSAGE N° 745

De la part de : Catherine CALOTHY

Destinataire (s) : M. PEAY
Mission Permanente des Etats-Unis
Fax. 022 / 749.43.43.

Prière de communiquer à :

Objet : **Disparitions forcées.**

Le document a déjà été donné à Mme BRANCATO./.

Nombre total de pages : 14

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NON PAPIER
22/10/03

Partie I

Article premier

Aux fins *[du présent instrument]*, on entend par disparition forcée la privation de liberté d'une personne, sous quelque forme que ce soit, commise par des agents de l'État ou par une organisation politique, ou par des personnes ou des groupes de personnes qui agissent avec l'autorisation, l'appui ou l'acquiescement de l'État ou de l'organisation politique, suivie du déni de la reconnaissance de la privation de liberté ou de la dissimulation du sort réservé à la personne disparue ou du lieu où elle se trouve, la soustrayant ainsi à la protection de la loi.

Article 2

1. Tout Etat partie prend les mesures nécessaires pour que la disparition forcée, telle qu'elle est définie à l'article 1er, constitue une infraction au regard de son droit pénal lorsqu'elle est commise intentionnellement.

2. Le présent article est sans préjudice de tout autre instrument international ou de toute loi nationale qui contient ou peut contenir des dispositions de portée plus large.

Article 3

1. Tout Etat partie prend les mesures nécessaires pour punir :

   a) les auteurs d'une disparition forcée et ceux qui s'en rendent complices, soit en ordonnant, sollicitant ou encourageant la commission ou la tentative d'une telle infraction, soit en facilitant la commission ou la tentative d'une telle infraction en apportant leur aide, leur concours ou toute autre forme d'assistance, y compris en fournissant les moyens de cette commission ou de cette tentative,

   b) la tentative de disparition forcée,

   c) l'entente en vue de commettre une disparition forcée.

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2. Tout Etat partie prend les mesures nécessaires pour que la notion de complice, au sens du paragraphe 1 a), englobe le supérieur hiérarchique qui :

a) savait ou, en raison des circonstances et des informations dont il disposait, aurait dû savoir qu'un subordonné placé sous son autorité ou son contrôle effectifs était en train de commettre ou sur le point de commettre une disparition forcée, et qui :

b) n'a pas pris toutes les mesures nécessaires et raisonnables qui étaient en son pouvoir pour empêcher ou faire cesser la disparition forcée, ou pour en réprimer l'exécution ou en référer aux autorités compétentes aux fins d'enquête et de poursuites.

Article 4

1. Tout Etat partie rend la disparition forcée passible de peines appropriées qui prennent en considération sa gravité.

2. Tout Etat partie peut prévoir :

a) des circonstances atténuantes en faveur de ceux qui, impliqués dans la commission d'une disparition forcée, auront contribué efficacement à la récupération en vie de la personne disparue ou auront permis d'élucider des cas de disparitions forcées ou d'identifier les auteurs d'une disparition forcée ;

b) des circonstances aggravantes envers ceux qui se sont rendus coupables d'une disparition forcée à l'encontre d'une personne particulièrement vulnérable, notamment à raison de son âge ou de son état de santé.

Article 5 (SVL)

1. Tout Etat partie prend les mesures nécessaires pour qu'à l'égard de la disparition forcée, le délai de prescription de l'action pénale et des peines :

a) soit égal au délai le plus long prévu dans sa législation ;

b) commence à courir à compter du jour où le sort de la personne disparue est connu avec certitude.

2. Lorsque les recours prévus à l'article 2 § 3 a) du Pacte international relatif aux droits civils et politiques ne sont pas efficaces, la prescription de la disparition forcée est suspendue aussi longtemps que l'efficacité de ces recours n'aura pas été rétablie.

Article 6

Aucun ordre de la loi, aucun ordre ou instruction émanant d'une autorité, de quelque nature que ce soit, ne peut être invoqué pour exonérer l'auteur d'une disparition forcée de sa responsabilité pénale.

Article 7

Tout Etat partie s'assure que les mesures de grâce, d'amnistie et les autres mesures analogues dont peuvent bénéficier les auteurs ou les personnes soupçonnées d'avoir commis une disparition forcée, n'aient pas pour effet d'empêcher l'exercice de tout recours et l'obtention d'une réparation. Est notamment garanti, en toute circonstance, le droit d'obtenir des informations exactes et complètes sur le sort des personnes disparues.

Article 8

Tout Etat partie considère la disparition forcée comme un crime grave de droit commun, au sens de l'article 1 F b) de la Convention relative au statut des réfugiés du 28 juillet 1951.

Article 9

Tout État partie prend les mesures nécessaires pour établir sa compétence, à l'égard d'une disparition forcée, dans les cas suivants :

a) Quand l'infraction a été commise sur tout territoire relevant de sa juridiction ou à bord d'un navire battant son pavillon ou d'un aéronef immatriculé conformément à sa législation au moment des faits ;

b) Quand l'auteur présumé de l'infraction est l'un de ses ressortissants ;

c) Quand la personne disparue est l'un de ses ressortissants ;

d) Quand l'auteur présumé de l'infraction se trouve sur un territoire relevant de sa juridiction et qu'il ne l'extrade pas ou ne le défère pas devant une juridiction pénale internationale.

Article 10

1. S'il estime que les circonstances le justifient, après avoir examiné les renseignements dont il dispose, tout État partie sur le territoire duquel se trouve une personne soupçonnée d'avoir commis une disparition forcée prend toutes les mesures nécessaires pour assurer la présence continue de cette personne sur son territoire et, au besoin, assure sa détention. Cette détention et ces mesures doivent être conformes à la législation dudit État partie ; elles ne peuvent être maintenues que pendant le délai nécessaire à l'engagement de poursuites pénales ou d'une procédure d'extradition.

2. L'État partie qui a pris les mesures visées au paragraphe 1 procède immédiatement à une enquête préliminaire en vue d'établir les faits. Il informe les Etats parties qui pourraient être compétents conformément à l'article 9 a), b) et c) des mesures qu'il a prises en application du paragraphe 1 et des conclusions de son enquête, en leur indiquant s'il entend exercer sa compétence.

3. Toute personne détenue en application du paragraphe 1 peut communiquer immédiatement avec le plus proche représentant qualifié de l'Etat dont elle a la nationalité ou, s'il s'agit d'une personne apatride, avec le représentant de l'Etat où elle réside habituellement.

Article 11

1. L'État partie sur le territoire sous la juridiction duquel l'auteur présumé d'une disparition forcée est découvert, s'il n'extrade pas ce dernier ou ne le défère pas devant une juridiction pénale internationale, soumet l'affaire à ses autorités compétentes pour l'exercice de l'action pénale.

2. Ces autorités prennent leur décision dans les mêmes conditions que pour toute infraction d'une gravité équivalente en vertu du droit de cet Etat partie.

3. Toute personne soupçonnée d'avoir commis une disparition forcée est jugée par une juridiction de droit commun qui offre des garanties de compétence, d'indépendance et d'impartialité et qui respecte les garanties du procès équitable.

Article 12

1. Tout Etat partie assure à quiconque alléguant qu'une personne a été victime d'une disparition forcée le droit de dénoncer les faits devant une autorité compétente et indépendante, laquelle procède immédiatement et impartialement à une enquête approfondie. Des mesures seront prises pour assurer la protection du plaignant et des témoins contre tout mauvais traitement ou toute intimidation en raison de la plainte déposée ou de toute déposition faite.

2. Lorsqu'il existe des raisons sérieuses de croire qu'une personne a été victime d'une disparition forcée, tout État partie soumet l'affaire à l'autorité visée au paragraphe 1, afin qu'elle ouvre une enquête, même si aucune plainte n'a été officiellement déposée.

3. Tout Etat partie veille à ce que l'autorité visée au paragraphe 1 :

a) dispose des pouvoirs et des ressources nécessaires pour mener l'enquête à bien ;

b) ait communication des documents nécessaires à son enquête ;

c) ait accès à tout lieu où la présence d'une personne disparue est soupçonnée.

4. Tout Etat partie garantit aux personnes qui ont un intérêt légitime le droit d'être informées, à leur demande, des progrès et des résultats de l'enquête ouverte en application des paragraphes 1 ou 2.

5. Sont considérés comme ayant un intérêt légitime, aux fins *[du présent instrument]* :

a) la personne privée de liberté ;

b) le conjoint et les membres de la famille de la personne privée de liberté, son avocat ou son représentant légal ;

c) toute personne mandatée par les personnes visées aux points a) et b).

6. Tout Etat partie prend les mesures nécessaires pour prévenir et sanctionner les actes de nature à entraver le déroulement des enquêtes. Il s'assure notamment que les personnes soupçonnées d'avoir commis une disparition forcée ne soient pas en mesure, par leurs fonctions, d'influer sur le cours des enquêtes, par des pressions et des actes d'intimidation ou de représailles exercés sur ceux qui participent à l'enquête et sur les proches de la personne disparue.

Article 13

1. Aux effets de l'extradition, la disparition forcée n'est pas considérée comme une infraction politique ou comme une infraction de droit commun commises pour des raisons politiques.

2. La disparition forcée est de plein droit comprise au nombre des infractions donnant lieu à extradition dans tout traité d'extradition conclu entre des États parties.

3. Tout Etat partie s'engage à inclure la disparition forcée au nombre des infractions qui justifient l'extradition dans tout traité d'extradition auquel il souscrit.

4. Tout Etat partie qui assujettit l'extradition à l'existence d'un traité peut, s'il reçoit une demande d'extradition d'un autre État partie auquel il n'est pas lié par un traité, considérer *[le présent instrument]* comme la base juridique nécessaire pour l'extradition en ce qui concerne la disparition forcée.

5. Tout Etat partie qui n'assujettit pas l'extradition à l'existence d'un traité reconnaît la disparition forcée comme susceptible d'extradition.

6. L'extradition est subordonnée aux conditions prévues par le droit de l'Etat partie requis ou par les traités d'extradition applicables, y compris, notamment, aux conditions concernant la peine minimale requise pour extrader et aux motifs pour lesquels l'Etat partie requis peut refuser l'extradition.

Article 14

1. Les Etats parties s'accordent l'entraide judiciaire la plus large possible dans toute enquête ou procédure pénale relative à une disparition forcée, y compris en ce qui concerne la communication de tous les éléments de preuve dont ils disposent et qui sont nécessaires aux fins de la procédure.

2. L'entraide judiciaire est subordonnée aux conditions prévues par le droit interne de l'Etat partie requis ou par les traités d'entraide judiciaire applicables, y compris, notamment, aux conditions concernant les motifs pour lesquels l'Etat partie requis peut refuser d'accorder l'entraide judiciaire.

Article 15

1. Les Etats parties coopèrent entre eux et s'accordent l'entraide la plus large possible dans la recherche, la localisation et la libération des personnes disparues.

2. Les Etats parties s'accordent mutuellement aide et assistance en vue de porter secours aux victimes des disparitions forcées et, en cas de décès des personnes disparues, en vue de la restitution de leurs restes.

Article 16

1. Tout Etat partie :

a) désigne les agents de l'Etat habilités à ordonner des privations de liberté ;

b) détermine les conditions dans lesquelles de tels ordres peuvent être donnés ;

c) garantit que toute personne privée de liberté sera placée uniquement dans un lieu officiellement reconnu et contrôlé ;

d) garantit à toute personne privée de liberté le droit d'introduire un recours devant un tribunal afin que celui-ci statue sans délai sur la légalité de sa privation de liberté et ordonne sa libération si cette privation de liberté est illégale et, si la personne privée de liberté est soupçonnée d'avoir commis une infraction pénale, le droit d'être traduit dans le plus court délai devant un juge ou une autre autorité habilitée par la loi à exercer des fonctions judiciaires.

2. Tout Etat partie prend les mesures nécessaires pour que les personnes ayant un intérêt légitime, au sens de l'article 12 § 5, reçoivent communication, lorsqu'ils en font la demande, d'informations sur la situation d'une personne privée de liberté. Ces informations concernent au moins :

a) le lieu où se trouve la personne privée de liberté,

b) l'identité des responsables de la privation de liberté,

c) l'autorité à laquelle la personne a été déférée.

3. Tout État partie établit et tient à jour un ou plusieurs registres officiels des personnes privées de liberté. Ces informations figurant sur ces registres sont tenues à la disposition des personnes et autorités mentionnées aux paragraphes 1 et 2, pour consultation.

Article 17

Sans préjudice de l'examen de la légalité de la privation de liberté d'une personne, les États parties garantissent à toute personne ayant un intérêt légitime, au sens de l'article 12 § 5, le droit à un recours effectif pour obtenir les informations visées à l'article 16.2. Ce droit à un recours ne peut être suspendu ou limité en aucune circonstance.

Article 18

Tout État partie prend les mesures nécessaires pour que la remise en liberté d'une personne se déroule selon des modalités qui permettent de vérifier avec certitude que la personne a été effectivement libérée et qu'elle l'a été de telle manière que son intégrité physique et sa faculté d'exercer pleinement ses droits soient assurées.

Article 19

Tout Etat partie prend les mesures nécessaires pour prévenir et sanctionner les agissements suivants :

a) l'entrave ou l'obstruction au recours visé à l'article 17 ;

b) le manquement à l'obligation d'enregistrement de toute privation de liberté, ainsi que l'enregistrement de toute information dont l'agent responsable du registre officiel connaît ou devrait connaître l'inexactitude ;

c) le refus illégitime opposé par un agent de l'Etat de fournir des informations sur une privation de liberté, ou la fourniture d'informations inexactes.

Article 20

1. Tout Etat partie veille à ce que la formation des agents chargés de l'application de la loi puisse inclure l'apprentissage nécessaire concernant les dispositions *[du présent instrument]*, en vue de :

a) prévenir l'implication de ces agents dans des disparitions forcées ;

b) souligner l'importance de la prévention et des enquêtes en matière de disparition forcée ;

c) veiller à ce que l'urgence de la résolution des cas de disparition forcée soit reconnue.

2. Tout Etat partie veille à ce que soient interdits les ordres ou instructions prescrivant, autorisant ou encourageant une disparition forcée.

3. Tout Etat partie prend les mesures nécessaires pour que les agents chargés de l'application de la loi qui ont des raisons de penser qu'une disparition forcée s'est produite ou est sur le point de se produire signalent le cas à leurs supérieurs et, au besoin, aux autorités ou instances de contrôle ou de recours compétentes.

Article 21

1. Aucun État partie n'expulse, ne refoule ni n'extrade une personne vers un autre État s'il y a des motifs de croire qu'une disparition forcée risque d'être commise à son encontre dans cet Etat.

2. Pour déterminer s'il existe de tels motifs, les autorités compétentes tiendront compte de toutes les considérations pertinentes, y compris, le cas échéant, de l'existence, dans l'Etat intéressé, d'un ensemble de violations systématiques des droits de l'homme, graves, flagrantes ou massives.

Article 22

1. Aux fins *[du présent instrument]*, on entend par victime toute personne physique qui a subi un préjudice en raison de la commission de l'infraction définie à l'article 1er.

2. Tout Etat partie garantit, dans son système juridique, à la victime d'une disparition forcée le droit d'obtenir une réparation des dommages qui lui ont été causés.

3. Le droit à réparation visé au paragraphe 2 comprend notamment :

a) l'indemnisation,

b) la réadaptation,

c) la satisfaction,

d) le rétablissement de la dignité et de la réputation.

Article 23

Tout Etat partie prend les mesures nécessaires pour prévenir et réprimer pénalement :

a) l'enlèvement ou l'appropriation d'enfants dont l'un ou l'autre des parents sont victimes des crime de disparition forcée ;

b) la falsification ou la destruction de documents attestant la véritable identité des enfants visés au a).

Article 24

Les États parties se prêtent mutuellement assistance dans la recherche, l'identification et la détermination du lieu où se trouvent les enfants enlevés ou appropriés dans les conditions de l'article 23 a).

Article 25

1. Lorsqu'un enfant enlevé ou approprié dans les conditions de l'article 23 a) est retrouvé sur le territoire d'un Etat partie, la question de son éventuel retour vers sa famille d'origine est réglée, soit par la loi nationale de cet Etat partie, soit par l'accord bilatéral ou multilatéral qui le lie avec tout autre Etat dans lequel réside la famille d'origine.

2. En toute circonstance, l'intérêt supérieur de l'enfant est une considération primordiale et l'enfant qui est capable de discernement a le droit d'exprimer librement son opinion, laquelle est dûment prise en compte eu égard à son âge et à son degré de maturité.

Partie II

Article II-A

1. Tout Etat partie présente *[à l'organe de suivi]*, par l'entremise du Secrétaire général de l'Organisation des Nations Unies, un rapport sur les mesures prises pour donner effet à ses obligations en vertu *[du présent instrument]*, dans un délai d'un an à compter de l'entrée en vigueur *[du présent instrument]* à son égard.

2. A la suite de la présentation du rapport visé au paragraphe 1, tout Etat partie fournit un rapport complémentaire sur demande *[de l'organe de suivi]*.

3. Le Secrétaire général de l'Organisation des Nations Unies transmet les rapports à tous les États parties.

4. Chaque rapport est étudié par *[l'organe de suivi]*, qui peut faire les commentaires, les observations, les recommandations et les mises en garde qu'il estime appropriés. L'État partie intéressé reçoit communication des commentaires, observations, recommandations et mises en garde, auxquels il peut répondre, de sa propre initiative ou à la demande *[de l'organe de suivi]*.

Article II-B

1. *[L'organe de suivi]* peut être saisi par un État partie, ou par toute personne qui a un intérêt légitime, au sens de l'article 12 § 5, d'une demande visant à chercher et retrouver une personne disparue au sens de l'article 1er.

2. S'il estime que la demande présentée en vertu du paragraphe 1 n'est pas manifestement dépourvue de fondement, qu'elle ne constitue pas un abus de droit et qu'elle n'est pas incompatible avec les dispositions *[du présent instrument]*, *[l'organe de suivi]* demande à tout Etat partie de lui fournir, dans un délai qu'il fixe, des renseignements sur la situation de cette personne.

3. Au vu de la réponse fournie par l'Etat partie intéressé conformément au paragraphe 2, *[l'organe de suivi]* présente à ce dernier une recommandation ou une mise en garde. Il peut aussi lui enjoindre de prendre des mesures adéquates et de lui en faire rapport, dans un délai qu'il fixe.

4. *[L'organe de suivi]* établit les conclusions de son enquête et les communique à l'auteur de la demande visée au paragraphe 1 et à tout Etat partie auquel des renseignements ont été demandés.

5. La procédure visée par le présent article est confidentielle. Toutefois, s'il estime qu'aucune mesure adéquate n'a été prise à la suite d'une demande présentée conformément au paragraphe 3, *[l'organe de suivi]* peut, après avoir mis en demeure les Etats parties concernés, rendre publiques ses conclusions, ainsi que les réponses et renseignements qui lui ont été fournis.

Article II-C

1. S'il estime qu'un déplacement sur le territoire d'un État partie sous la juridiction duquel se trouverait la personne disparue est indispensable pour répondre à la demande dont il est saisi conformément à l'article II-B, *[l'organe de suivi]* peut demander à un ou plusieurs de ses membres de réaliser une mission d'enquête et de l'informer sans retard. Le ou les membres *[de l'organe de suivi]* qui effectuent la mission peuvent se faire accompagner, si nécessaire, par des interprètes, des secrétaires et des experts. Aucun membre de la délégation, à l'exception des interprètes, ne peut être ressortissant de l'État partie dans lequel la visite est effectuée.

2. *[L'organe de suivi]* notifie par écrit à l'État partie concerné son intention d'organiser une mission d'enquête et indique la composition de la délégation. L'Etat partie fait connaître sans retard à *[l'organe de suivi]* son accord ou son opposition à la mission d'enquête sur un territoire sur lequel il exerce sa juridiction.

3. Si l'Etat partie a donné son accord à la mission d'enquête, il fournit *[à l'organe de suivi]* toutes facilités nécessaires à l'accomplissement de cette mission. *[L'organe de suivi]* peut notamment :

a) effectuer les visites qu'il jugera nécessaires pour chercher et retrouver la personne dont la disparition forcée est alléguée ;

b) entrer en contact librement avec toute personne dont il pense qu'elle peut lui fournir des informations utiles sur le sort de la personne dont la disparition forcée est alléguée ;

c) se faire présenter la personne dont la disparition forcée est alléguée et s'entretenir avec elle sans témoin.

4. *[L'organe de suivi]* fait part des constatations faites pendant sa mission d'enquête :

a) à l'auteur de la demande visée à l'article II-B paragraphe 1 ;

b) à l'Etat partie sur le territoire duquel la mission d'enquête a été effectuée.

5. La procédure visée par le présent article est confidentielle. Toutefois, avec l'accord des Etats parties concernés, *[l'organe de suivi]* peut rendre publiques ses constatations

Article II-D

Les membres *[de l'organe de suivi]* et ceux qui les accompagnent en mission sur le territoire des États parties ont droit aux facilités, privilèges et immunités reconnus aux experts en mission pour l'Organisation des Nations Unies, tels qu'ils sont énoncés dans les sections pertinentes de la Convention sur les privilèges et immunités des Nations Unies.

Article II-E

1. *[L'organe de suivi]* n'est compétent qu'à l'égard des privations de liberté ayant débuté postérieurement à l'entrée en vigueur *[du présent instrument]*.

2. Si un Etat devient partie *[au présent instrument]* après l'entrée en vigueur de celui-ci, ses obligations vis-à-vis *[de l'organe de suivi]* ne concernent que les privations de liberté ayant débuté postérieurement à l'entrée en vigueur *[du présent instrument]* à son égard.

Article II-F

1. *[L'organe de suivi]* présente aux États parties et à l'Assemblée générale de l'Organisation des Nations Unies un rapport annuel sur les activités qu'il aura réalisées en application *[du présent instrument]*.

2. Afin d'assurer le suivi de ses observations et de ses recommandations, *[l'organe de suivi]* peut, à sa discrétion, décider de reproduire dans le rapport annuel qu'il établit conformément au paragraphe 1 tous commentaires, observations, recommandations et mises en garde formulés par lui en vertu de l'article II-A, accompagnés des observations reçues des États parties intéressés. Il peut aussi décider de reproduire les conclusions

rendues publiques conformément à l'article II-B, paragraphe 5, et les constatations rendues publiques conformément à l'article II-C, paragraphe 5.

Partie III

Article III-A

1. *[Le présent instrument]* est ouvert à la signature de *[...]*.

2. *[Le présent instrument]* est soumis à la ratification de *[...]*. Les instruments de ratification seront déposés auprès du Secrétaire général de l'Organisation des Nations Unies.

3. *[Le présent instrument]* est ouvert à l'adhésion de *[...]*. L'adhésion se fera par le dépôt d'un instrument d'adhésion auprès du Secrétaire général de l'Organisation des Nations Unies.

Article III-B

1. *[Le présent instrument]* entrera en vigueur le trentième jour après la date du dépôt du *[N^ième]* instrument de ratification ou d'adhésion.

2. Pour tout État qui ratifiera *[le présent instrument]* ou y adhérera après le dépôt du dixième instrument de ratification ou d'adhésion, *[le présent instrument]* entrera en vigueur le trentième jour après la date du dépôt par cet État de son instrument de ratification ou d'adhésion.

Article III-C

Le Secrétaire général de l'Organisation des Nations Unies notifiera à tous les États Membres de l'Organisation des Nations Unies et à tous les États qui auront signé *[le présent instrument]* ou y auront adhéré :

a) les signatures, les ratifications et les adhésions reçues en application de l'article III-A ;

b) la date d'entrée en vigueur *[du présent instrument]* en application de l'article III-B.

Article III-D

Les dispositions *[du présent instrument]* s'appliquent, sans limitation ni exception aucune, à toutes les unités constitutives des États fédéraux.

Article III-E

Aucune circonstance, qu'il s'agisse d'instabilité politique intérieure, d'une menace de guerre, d'une guerre ou de toute autre situation d'exception ou de suspension des garanties individuelles, ne peut être invoquée pour se soustraire aux obligations énoncées dans *[le présent instrument]*.

Article III-F

Les dispositions *[du présent instrument]* sont sans effet sur les obligations qui incombent aux États parties en vertu des quatre Conventions de Genève du 12 août 1949 et des Protocoles additionnels du 8 juin 1977 s'y rapportant, ou sur la possibilité qu'a tout État partie d'autoriser le Comité international de la Croix-Rouge à visiter des lieux de détention dans des cas non prévus par le droit international humanitaire.

Article III-G

1. Tout État partie *[au présent instrument]* peut proposer un amendement et déposer sa proposition auprès du Secrétaire général de l'Organisation des Nations Unies. Le Secrétaire général communique la proposition d'amendement aux États parties *[au présent instrument]* en leur demandant de lui faire savoir s'ils sont favorables à l'organisation d'une conférence d'États parties en vue de l'examen de la proposition et de sa mise aux voix. Si, dans les quatre mois qui suivent la date d'une telle communication, le tiers au moins des États parties se prononcent en faveur de la tenue de ladite conférence, le Secrétaire général organise la conférence sous les auspices de l'Organisation des Nations Unies. Tout amendement adopté à la majorité des deux tiers des États parties présents et votants à la conférence sera soumis par le Secrétaire général à l'acceptation de tous les États parties.

2. Un amendement adopté selon les dispositions du paragraphe 1 du présent article entrera en vigueur lorsque les deux tiers des États parties *[au présent instrument]* l'auront accepté conformément à la procédure prévue par leurs constitutions respectives.

3. Lorsque les amendements entreront en vigueur, ils auront force obligatoire pour les États parties qui les auront acceptés, les autres États parties demeurant liés par les dispositions *[du présent instrument]* et par tout amendement antérieur qu'ils auraient accepté.

Article III-H

1. *[Le présent instrument]*, dont les textes anglais, arabe, chinois, espagnol, français et russe font également foi, sera déposé auprès du Secrétaire général de l'Organisation des Nations Unies.

2. Le Secrétaire général de l'Organisation des Nations Unies fera tenir une copie certifiée conforme *[du présent instrument]* à tous les États./.

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file: Enforced Disappearances

- The United States underscores that forced disappearances are a serious human rights violation that deserves universal attention, especially by governments, to prevent, prohibit, and punish forced disappearances.

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- We would like to recognize the leadership, organization, and hard work that allowed the first negotiating session you chaired last January to be highly substantive and collegial.

- In the spirit of the constructive candor that has thus far shaped these negotiations, we find it necessary to voice serious objection to "informal inter-sessional meetings" or "informal drafting group meetings" in negotiations of multilateral instruments such as the one under consideration.

- In the view of my Government, such "informal" inter-sessional treaty meetings -- coming on top of intense substantive and formal two-week negotiating sessions each year - strain personnel and other government resources. In substantive terms, such informal sessions can also result in hastily formulated positions and incomplete analysis of draft instruments before their formal adoption. This inevitably leads to the publication of inherently flawed instruments, which is a result that serves no one's interests.
- The devotion of finite governmental resources to these negotiations must be viewed in the fuller context of each State's other human rights negotiations commitments, as well as human rights reporting commitments, and of course annual resource commitments related to participation in the Commision on Human Rights and the UNGA Third Committee, which themselves demand significant resources and staffing each spring and fall.
- Additionally, "informal" inter-sessional negotiations tend to undermine the principle of universal participation, as not every State is always able to engage fully in such negotiations.
- In short, my Government believes that the multilateral treaty-making process is best served when negotiating procedures allow all States a full and effective opportunity to elaborate the text of an agreement. Experience has shown that single, official sessions, held

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annually, allow States to have the opportunity they need before the next session to review a text and working group report in capitals and to carry out requisite inter-agency and other internal consultations in preparation for the next session.

- Following that past practice, we believe that this negotiation can be well-paced without being hurried. We therefore call upon all parties to these negotiations to refrain from making the mistake of putting them on a "hurried" track.

- For these reasons, despite the fact that my delegation is present today, in the future, the United States will be unable to support "informal" inter-sessionals that seek to advance unhelpfully the pace of these negotiations.

- Turning to the Chairman's paper prepared for this session and the Chairman's report of the first session, those reports do not adequately address the genuine and on-going concerns that some delegations (the U.S. included) have about certain concepts and provisions discussed in these negotiations to date.
- Working group documents should adequately reflect divergent views on issues, particularly where such views are strongly-held by State delegations, as is the case here.
- To this end, we propose that working documents of these negotiations should contain "brackets" around controversial or unagreed concepts, provisions and words to fairly reflect that there are divergent views expressed by delegations and to memorialize different options delegations may wish to consider.

- Turning to substance, we wish to reiterate points raised last January and to highlight major concerns about the following themes and provisions, while reserving until a later date other substantive concerns we wish to raise.

- A legal instrument on "forced disappearance" can, and should, be flexible enough to accommodate States whose criminal statutes already comprehensively cover and punish the offense, without the need to enact additional legislation.

- Bearing this in mind, criminalization of forced disappearances would be better framed in terms of "acts" of forced disappearance, which is similar to the approach taken in penalizing "acts of torture" in the Convention Against Torture (CAT Article 2(1)). Taking this adaptive approach would be both effective and eliminate the need for radical reform of criminal codes (at least for some States) who would otherwise be required to create a newly designated crime of "forced disappearance."

- The proposed definition of "forced disappearance" to include a "deprivation of liberty in whatever form" suffers from being overbroad, vague, and unworkable in the context of defining a criminal offense.
  - The extraordinary breadth of this phrase seems to extend far beyond the deplorable practice of a forced disappearance which is the target of the proposed instrument.
  - The vagueness of the term could cause constitutional problems in certain criminal justice systems and be invalidated by national courts under a "void for vagueness" doctrine.
  - The breadth and vagueness combined would invariably and inappropriately capture within its scope legitimate law enforcement and security activities.
- The definition of forced disappearances should also be limited to State actors, as inclusion of activities by private groups fundamentally alters the scope and nature of the instrument. Although any proposed instrument would contain elements of international criminal law, it is at its core a human rights instrument primarily governing the conduct of States.

- A statute of limitations provision should require that the prescription period "be commensurate with the seriousness of the offense." This formula was also supported by some other delegations last January but was omitted from the Chairman's most recent Report.
- We strongly oppose a provision that would bar special jurisdiction tribunals, including military tribunals or commissions . Among other reasons, such an approach erroneously implies that military proceedings are inferior or are inherently incapable of ensuring minimum standards of due process by comparison to regular civilian courts. Should the instrument contain a prohibition relating to tribunals, it should bar "sham"

proceedings, regardless of their nature, and not target lawful military tribunals in which due process guarantees are provided.

- We would strongly oppose a death penalty provision or any other restrictions on sentencing.
  - We note, in this regard, that other human rights treaties, including the Convention against Torture, do not limit punishments for perpetrators.
  - The focus should be on the human rights of the disappearance victims and their families, not on the perpetrators. In these negotiations, we need to bear in mind that we are not trying to elaborate a criminal law enforcement instrument but rather one that principally addresses human rights.
- We would strongly oppose jurisdictional provisions that reach beyond those contained in, for example, the Optional Protocol to the CRC on Child Sale, Prostitution and Pornography.
  - Article 4 of the Optional Protocol *requires* that a State Party establish jurisdiction over covered offenses committed in its territory (or on board a ship or aircraft) and *permits* jurisdiction for offenses committed by or against nationals.
  - The Optional Protocol also requires States Parties to prosecute alleged offenders "present in" its territory when the State refuses extradition on the ground that the offense has been committed by one of its nationals.
- We would strongly urge excluding from the scope of the instrument any activities governed by international humanitarian law. In addition, a significant overall concern is that the proposed treaty not cover or otherwise prejudice legitimate law enforcement and national security activities.
- Mandatory site visits would be problematic and subject to abuse.
- Any provisions addressing a superior orders defense would have to be closely studied with a view to: a) governing national law and practice on the subject; b) the lawfulness of the orders; c) applicable international law; and d) the need to avoid unfairly accusing innocent subordinate actors by ensuring that each accused had in fact the requisite intent (*mens rea*) to warrant prosecution.
- A provision prohibiting reservations would be unacceptable.

- Such a prohibition is not necessary as reservations that would defeat the object and purpose of the treaty would not be permitted.
- Properly tailored reservations are essential to enable many countries to become party to treaties. Creating a prohibition would thus be counterproductive to the goal of achieving broad international participation in a treaty regime.

- We would oppose the creation of a new treaty monitoring body and believe that existing treaty bodies (e.g., the HRCommittee) should be considered as the appropriate mechanisms for monitoring implementation by States parties.

- These are only the most serious concerns of our Government. Other issues of notable concern are raised by provisions relating to a centralized registers of names, pardons and amnesties, reparations, standing to raise complaints, funding, and entry into force provisions, among others.

- In sum, the Working Group has a formidable task ahead of it to elaborate a document that truly seeks to enjoy widespread acceptance within the international community.

Drafted: L/HRR - Gilda Brancato x 72773 8/26/03 113465

Cleared: L/HRR - Robert Harris - ok
IO/SHA - Tom Johnson - ok
DRL/MLA - Chris Camponovo - ok
US Mission/L - Mike Peay - ok (8/29/03)

Cc: L - Sam Witten
L/LEI - Linda Jacobson
L/PM - Chip Brooks
IO - Jackie Sanders, Mark Lagon
IO/SHA - June Carter Perry
DRL/MLA - Lynn Sicade

U.S. Mission Geneva

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facsimile transmittal

To: L/HRR-Gilda Brancato Fax: 736-7028

From: T. Michael Peay
Legal Adviser

Office 41-22-749-4316
Fax: 41-22-749-4343
E-Mail: PeayTM@state.gov

Date: July 10, 2003

RE: Enforced Disappearances Pages including cover: 25

Additional Notes:

Gilda,

These are the materials referenced in the cable I am about to send you. Best personal regards,

Mike Peay

1. Facsimile Notice from OHCHR (English & French)
2. Faxed Outline of draft instrument (English & French)

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HIGH COMMISSIONER FOR HUMAN RIGHTS

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file: Human Rts: Enforced Disappearances

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FACSIMILE

A / To:	Mr. Michael Peay Permanent Mission of the United States Geneva	De/ From:	Carmen Rueda Castáñon Secretary Committee against Torture
Fax N°: Tel N°:	022 749 4880	Fax N°: Tél N°:	022 917 9022 022 917 9288
Date:	9 July 2003	Nombre de pages y compris la présente : Number of pages including this one :	3
Objet: Subject:	Open-ended working group on a draft legally binding instrument on enforced disappearances		

As requested.

P Willard

Poppy Willard
Secretariat
Support Services Branch

2003 JUL 10 AM 9:00

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Received 9 Jul 2003 17:39

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FACSIMILE

A/ To:	All Permanent Missions of Member States and Observers accredited to the UN Office at Geneva and Missions in New York, as appropriate	De/ From:	Carmen Rueda Castañón Secretary Open-ended working group on a draft legally binding instrument on enforced disappearances
Fax N°: Tel N°:		Fax N°: Tél N°:	022 917 9022 022 917 9288
Date:	23 June 2003	Nombre de pages y compris la présente : Number of pages including this one :	2
Objet: Subject:	Informal consultations		

Please find attached a note verbale.

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CH-1211 GENEVE 10

The Secretariat of the United Nations (High Commissioner for Human Rights) has the honour to refer to Commission on Human Rights resolution 2003/38, entitled "Question of enforced or involuntary disappearances". In paragraph 14 of that resolution, the Commission requests the Chairperson-Rapporteur of the intersessional open-ended working group with the mandate to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, to undertake informal consultations with all interested parties in order to prepare the next session of the working group.

Following that request, the Chairperson-Rapporteur of the working group, Ambassador Bernard Kessedjian, will hold informal consultations at the United Nations Office in Geneva, from 1 to 5 September 2003. Ambassador Kessedjian would like to invite representatives of all Member States to participate in this consultative meeting, and would be grateful if the Permanent Missions could inform the Secretariat of the name of the representative(s) of their Government who would attend the meeting.

23 June 2003

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

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UNITED STATES MISSION TO INTERNATIONAL ORGANIZATIONS
GENEVA, SWITZERLAND

January 23, 2003

GE232

Ms. Catherine Calothy
Counselor (Human Rights)
Mission Permanente de la France
auprès de l'ONU à Genève
Villa "Les Ormeaux"
Route de Pregny 36
1292 Chambesy

Catherine

Dear Ms Calothy:

On behalf of the U.S. delegation, with pleasure, I take this opportunity to again thank the French Mission, Ambassador Kessedjian and his distinguished team for your superlative efforts in bringing a successful conclusion to our initial round of discussions at the Inter-Sessional Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of all Persons from Enforced Disappearances, January 6-17, 2003.

In response to Ambassador Kessedjian's invitation for comments from participating delegations on the Draft Report that will reflect the deliberations of that working group, I take pleasure in enclosing the U.S. delegation's comments on that report. Our comments are in the form of hand-written inserts into the draft report text and have been provided to you in hard photo-copy for your ease of reading. As our delegation indicated during the final afternoon of deliberations on January 17, our comments on the Draft Report are offered to ensure that it reflects accurately and with balance comments made during the formal proceedings regarding a number of key points.

With that understanding, we hope these comments can be incorporated into, and will assist in final preparation of, the report in question. We look forward to working with you and your delegation in the months ahead on this important project.

Sincerely,

T. Michael Peay
Legal Adviser

Attachment:
U.S. Comments on Draft Report

cc: Jeff DeLaurentis
Gilda Brancato

UNITED STATES DEPARTMENT OF STATE
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Peay, T Michael

From: Brancato, Gilda M
Sent: Friday, January 03, 2003 12:02 AM
To: Peay, T Michael(Geneva); Solomon, Steven A(Geneva)
Subject: FW: Memo on Accreditation for WG on Forced Disappearances

Looking forward to working with you both next week and to meeting the team (see accreditation memo below, please). Mike, may I call you Friday to discuss plans for Monday morning, for example, who will be attending the WG session, where to meet, etc. I will be arriving Sunday, staying at the President Wilson. See you soon! Very much looking forward to it. Gilda

-----Original Message-----
From: **Johnson, Thomas A**
Sent: Thursday, January 02, 2003 5:37 PM
To: Muncy, Linda H
Cc: Perry, June C; Brancato, Gilda M; DeLaurentis, Jeffrey(Geneva)
Subject: Memo on Accreditation for WG on Forced Disappearances

Linda--
Please send the attached version of the memo to OIC. Thanks.

memo accreditation forced dis...

UNITED STATES DEPARTMENT OF STATE
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Jun 6-17, 2003 Working Group

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2002/41. Question of enforced or involuntary disappearances

The Commission on Human Rights,

Recalling its resolution 20 (XXXVI) of 29 February 1980, in which it decided to establish a working group consisting of five of its members, to serve as experts in their individual capacity, to examine questions relevant to enforced or involuntary disappearances, its resolution 1995/75 of 8 March 1995 on cooperation with representatives of United Nations human rights organs, and its resolution 2001/46 of 23 April 2001,

Recalling also General Assembly resolution 47/133 of 18 December 1992, by which the Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance as a body of principles for all States, and Assembly resolution 55/103 of 4 December 2000,

Deeply concerned in particular by the increase in enforced or involuntary disappearances in various regions of the world and by the growing number of reports concerning harassment, ill-treatment and intimidation of witnesses of disappearances or relatives of persons who have disappeared,

Emphasizing that impunity is simultaneously one of the underlying causes of enforced disappearances and one of the major obstacles to the elucidation of cases thereof and that there is a need for effective measures to combat the problem of impunity,

Welcoming the fact that acts of enforced disappearance, as defined in the Rome Statute of the International Criminal Court (A/CONF.183/9), come within the jurisdiction of the Court as crimes against humanity,

1. *Takes note* of the report submitted by the Working Group on Enforced or Involuntary Disappearances (E/CN.4/2002/79) pursuant to Commission resolution 2001/46;

2. *Stresses* the importance of the work of the Working Group and encourages it in the execution of its mandate:

(*a*) To continue to promote communication between families of disappeared persons and the Governments concerned with a view to ensuring that sufficiently documented and clearly identified individual cases are investigated and to ascertain whether such information falls under its mandate and contains the required elements;

(*b*) To continue to observe, in its humanitarian task, United Nations standards and practices regarding the handling of communications and the consideration of government replies;

(*c*) To continue to consider the question of impunity in the light of the relevant provisions of the Declaration on the Protection of All Persons from Enforced Disappearance and of the final reports submitted by the Special Rapporteur appointed by the Sub-Commission on the Promotion and Protection of Human Rights;

(*d*) To continue to pay particular attention to cases of children subjected to enforced disappearance and children of disappeared persons and to cooperate closely with the Governments concerned in searching for and identifying these children;

(*e*) To pay particular attention to cases transmitted to it that refer to ill-treatment, serious threatening or intimidation of witnesses of enforced or involuntary disappearances or relatives of disappeared persons;

(*f*) To pay particular attention to cases of disappearance of persons working for the promotion and protection of human rights and fundamental freedoms, wherever they occur, and to make

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appropriate recommendations for preventing such disappearances and improving the protection of such persons;

(*g*) To continue to apply a gender perspective in its reporting process, including in information collection and the formulation of recommendations;

(*h*) To provide appropriate assistance in the implementation by States of the Declaration and of the existing international rules;

(*i*) To continue its deliberations on its working methods and to include these aspects in its report to the Commission at its fifty-ninth session;

3. *Deplores* the fact that some Governments have never provided substantive replies concerning the cases of enforced disappearance in their countries or acted on the recommendations concerning them made in the reports of the Working Group;

4. *Urges* the Governments concerned:

(*a*) To cooperate with the Working Group and help it to carry out its mandate effectively, in particular by inviting it freely to visit their countries;

(*b*) To intensify their cooperation with the Working Group on any action taken pursuant to recommendations addressed to them by the Working Group;

(*c*) To take steps to protect witnesses of enforced or involuntary disappearances and the lawyers and families of disappeared persons against any intimidation or ill-treatment to which they might be subjected;

(*d*) That have long had many unresolved cases of disappearances, to continue their efforts to shed light on the fate of the individuals concerned and to set appropriate settlement machinery in train with the families of those individuals;

(*e*) To make provision in their legal systems for machinery for victims of enforced or involuntary disappearances or their families to seek fair and adequate reparation;

5. *Reminds* Governments:

(*a*) That all acts of enforced or involuntary disappearance are crimes punishable by appropriate penalties which should take due account of their extreme seriousness under penal law;

(*b*) That they should ensure that their competent authorities proceed immediately to conduct impartial inquiries in all circumstances where there is reason to believe that an enforced disappearance has occurred in territory under their jurisdiction;

(*c*) That, if such belief is borne out, all the perpetrators of enforced or involuntary disappearances must be prosecuted;

(*d*) That impunity is simultaneously one of the underlying causes of enforced disappearance and one of the major obstacles to the elucidation of cases thereof;

6. *Expresses*:

(*a*) Its thanks to the many Governments that have cooperated with the Working Group and replied to its requests for information and to the Governments that have invited the Working Group to visit

their countries, asks them to give all necessary attention to the Working Group's recommendations and invites them to inform the Working Group of any action they take on those recommendations;

(*b*) Its satisfaction to the Governments that are investigating, or developing appropriate mechanisms to investigate, any cases of enforced disappearance which are brought to their attention, and encourages all the Governments concerned to expand their efforts in this area;

7. *Invites* States to take legislative, administrative, legal and other steps, including when a state of emergency has been declared, to take action at the national and regional levels and in cooperation with the United Nations, if appropriate through technical assistance, and to provide the Working Group with concrete information on the measures taken and the obstacles encountered in preventing enforced, involuntary or arbitrary disappearances and in giving effect to the principles set forth in the Declaration;

8. *Takes note* of the assistance provided to the Working Group by non-governmental organizations and their activities in support of the implementation of the Declaration and invites those organizations to continue their cooperation;

9. *Acknowledges with great concern* the difficulties encountered by the Working Group in the accomplishment of its mandate and requests the Secretary-General:

(*a*) To ensure that the Working Group receives all the assistance and resources it requires to perform its function, including supporting the principles of the Declaration, carrying out and following up on missions and holding sessions in countries that are prepared to receive it;

(*b*) To provide the resources needed to update the database on cases of enforced disappearance;

(*c*) To keep the Working Group and the Commission regularly informed of the steps he takes for the wide dissemination and promotion of the Declaration;

10. *Requests* the Working Group to report on its activities to the Commission at its fifty-ninth session;

11. *Takes note* of Economic and Social Council decision 2001/221 of 4 June 2001 in which the Council endorsed the decision of the Commission to create an intersessional open-ended working group, with the mandate to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance;

12. *Welcomes*, in this regard, the report of the independent expert (E/CN.4/2002/71), which, in accordance with Commission on Human Rights resolution 2001/46, will be presented to the Intersessional working group established pursuant to that resolution, at its first session;

13. *Requests* the Intersessional working group, which will meet before the fifty-ninth session of the Commission for a period of 10 working days, to prepare, for consideration and adoption by the General Assembly, a draft legally binding normative instrument for the protection of all persons from enforced disappearance, on the basis of the Declaration on the Protection of All Persons from Enforced Disappearance, in the light of the work of the independent expert and taking into account, inter alia, the draft international convention on the protection of all persons from enforced disappearance (E/CN.4/Sub.2/1998/19, annex) transmitted by the Sub-Commission in its resolution 1998/25 of 26 August 1998;

14. *Decides* to consider this matter at its fifty-ninth session under the same agenda item.

51st meeting
23 April 2002
[Adopted without a vote. See chap. XI.]

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UNITED NATIONS HIGH COMMISSIONER
FOR HUMAN RIGHTS

Question of enforced or involuntary disappearances

Commission on Human Rights resolution 2001/46

The Commission on Human Rights,

Recalling its resolution 20 (XXXVI) of 29 February 1980, in which it decided to establish a working group consisting of five of its members, to serve as experts in their individual capacity, to examine questions relevant to enforced or involuntary disappearances, its resolution 1995/75 of 8 March 1995 on cooperation with representatives of United Nations human rights organs, and its resolution 2000/37 of 20 April 2000,

Recalling also General Assembly resolution 47/133 of 18 December 1992, by which the Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance as a body of principles for all States, and Assembly resolution 55/103 of 4 December 2000,

Deeply concerned in particular by the increase in enforced or involuntary disappearances in various regions of the world and by the growing number of reports concerning harassment, ill-treatment and intimidation of witnesses of disappearances or relatives of persons who have disappeared,

Emphasizing that impunity is simultaneously one of the underlying causes of enforced disappearances and one of the major obstacles to the elucidation of cases thereof and that there is a need for effective measures to combat the problem of impunity,

Welcoming the fact that acts of enforced disappearance, as defined in the Rome Statute of the International Criminal Court (A/CONF.183/9), come within the jurisdiction of the Court as crimes against humanity,

1. *Takes note* of the report submitted by the Working Group on Enforced or Involuntary Disappearances (E/CN.4/2001/68) pursuant to Commission resolution 2000/37 and of the replies received by the secretariat on the draft international convention on the protection of all persons from enforced disappearance (E/CN.4/2001/69 and Add.1);

2. *Stresses* the importance of the work of the Working Group and encourages it, in the execution of its mandate:

(*a*) To continue to promote communication between families of disappeared persons and the Governments concerned with a view to ensuring that sufficiently documented and clearly identified individual cases are investigated and to ascertain whether such information falls under its mandate and contains the required elements;

(*b*) To continue to observe, in its humanitarian task, United Nations standards and practices regarding the handling of communications and the consideration of government replies;

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(*c*) To continue to consider the question of impunity in the light of the relevant provisions of the Declaration on the Protection of All Persons from Enforced Disappearance and of the final reports submitted by the Special Rapporteur appointed by the Sub-Commission on the Promotion and Protection of Human Rights;

(*d*) To continue to pay particular attention to cases of children subjected to enforced disappearance and children of disappeared persons and to cooperate closely with the Governments concerned in searching for and identifying these children;

(*e*) To pay particular attention to cases transmitted to it that refer to ill-treatment, serious threatening or intimidation of witnesses of enforced or involuntary disappearances or relatives of disappeared persons;

(*f*) To pay particular attention to cases of disappearance of persons working for the promotion and protection of human rights and fundamental freedoms, wherever they occur, and to make appropriate recommendations for preventing such disappearances and improving the protection of such persons;

(*g*) To continue to apply a gender perspective in its reporting process, including in information collection and the formulation of recommendations;

(*h*) To provide appropriate assistance in the implementation by States of the Declaration and of the existing international rules;

(*i*) To continue its deliberations on its working methods and to include these aspects in its report to the Commission at its fifty-eighth session;

(*j*) To continue to formulate comments on the draft international convention on the protection of all persons from enforced disappearance (E/CN.4/Sub.2/1998/19, annex) transmitted by the Sub-Commission in its resolution 1998/25 of 26 August 1998;

3. *Deplores* the fact that some Governments have never provided substantive replies concerning the cases of enforced disappearances in their countries or acted on the recommendations concerning them made in the reports of the Working Group;

4. *Urges* the Governments concerned:

(*a*) To cooperate with the Working Group and help it to carry out its mandate effectively, in particular by inviting it freely to visit their countries;

(*b*) To intensify their cooperation with the Working Group on any action taken pursuant to recommendations addressed to them by the Working Group;

(*c*) To take steps to protect witnesses of enforced or involuntary disappearances and the lawyers and families of disappeared persons against any intimidation or ill-treatment to which they might be subjected;

(*d*) That have long had many unresolved cases of disappearances, to continue their efforts to shed light on the fate of the individuals concerned and to set appropriate settlement machinery in train with the families of those individuals;

(*e*) To make provision in their legal systems for machinery for victims of enforced or involuntary disappearances or their families to seek fair and adequate reparation;

5. *Reminds* Governments:

(*a*) That all acts of enforced or involuntary disappearance are crimes punishable by appropriate penalties which should take due account of their extreme seriousness under penal law;

(*b*) That they should ensure that their competent authorities proceed immediately to conduct impartial inquiries in all circumstances where there is reason to believe that an enforced disappearance has occurred in territory under their jurisdiction;

(*c*) That, if such belief is borne out, all the perpetrators of enforced or involuntary disappearances must be prosecuted;

(*d*) That impunity is simultaneously one of the underlying causes of enforced disappearances and one of the major obstacles to the elucidation of cases thereof;

6. *Expresses*:

(*a*) Its thanks to the many Governments that have cooperated with the Working Group and replied to its requests for information, and to the Governments that have invited the Working Group to visit their countries, asks them to give all necessary attention to the Working Group's recommendations and invites them to inform the Working Group of any action they take on those recommendations;

(*b*) Its satisfaction to the Governments that are investigating, or developing appropriate mechanisms to investigate, any cases of enforced disappearance which are brought to their attention, and encourages all the Governments concerned to expand their efforts in this area;

7. *Invites* States to take legislative, administrative, legal and other steps, including when a state of emergency has been declared, to take action at the national and regional levels and in cooperation with the United Nations, if appropriate through technical assistance, and to provide the Working Group with concrete information on the measures taken and the obstacles encountered in preventing enforced, involuntary or arbitrary disappearances and in giving effect to the principles set forth in the Declaration;

8. *Takes note* of the assistance provided to the Working Group by non-governmental organizations and their activities in support of the implementation of the Declaration and invites those organizations to continue their cooperation;

9. *Decides* to renew, for a three-year period, the mandate of the Working Group of five independent experts entrusted with the task of investigating enforced or involuntary disappearances;

10. *Requests* the Working Group to report on its activities to the Commission at its fifty-eighth session;

11. *Requests* the Chairperson of the fifty-seventh session of the Commission, after consultations with the Bureau and the regional groups, to appoint an independent expert to examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, taking into account relevant legal instruments at the international and regional levels, intergovernmental arrangements on judicial cooperation, the draft international convention on the protection of all persons from enforced disappearance transmitted by the Sub-Commission in its resolution 1998/25, and also comments of States and intergovernmental and non-governmental organizations, with a view to identifying any gaps in order to ensure full protection from enforced or involuntary disappearance and to report to the Commission at its fifty-eighth session and to the working

group established under paragraph 12 of the present resolution at its first session;

12. *Decides* to establish, at its fifty-eighth session, an inter-sessional open-ended working group of the Commission, with the mandate to elaborate, in the light of the findings of the independent expert, a draft legally binding normative instrument for the protection of all persons from enforced disappearance, taking into account, *inter alia*, the draft international convention on the protection of all persons from enforced disappearance transmitted by the Sub-Commission in its resolution 1998/25, for consideration and adoption by the General Assembly;

13. *Requests* the Secretary-General:

(*a*) To ensure that the Working Group on Enforced Disappearances receives all the assistance and resources it requires to perform its function, including supporting the principles of the Declaration, carrying out and following up on missions and holding sessions in countries that are prepared to receive it;

(*b*) To provide the resources needed to update the database on cases of enforced disappearance;

(*c*) To keep the Working Group and the Commission regularly informed of the steps he takes for the wide dissemination and promotion of the Declaration;

14. *Decides* to consider this matter at its fifty-eighth session under the same agenda item;

15. *Recommends* to the Economic and Social Council the adoption of the following draft decision:

[For the text, see E/CN.4/2001/167 - E/2001/23 chap. I, draft decision 26.]

73rd meeting
23 April 2001
[Adopted without a vote.]

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Geneva, Switzerland

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Groupe de travail intersessions à composition non limitée, chargé d'élaborer un projet d'instrument normatif juridiquement contraignant pour la protection de toutes les personnes contre les disparitions forcées
Première session
Genève, 6-17 janvier 2003

E/CN.4/2003/WG.22/Misc.2

Point 6 de l'ordre du jour

PROJET DE GUIDE DE DISCUSSION
Proposé par le Président

DISPOSITIONS DE SUBSTANCE

1. — Définition.

2. — Incriminations et sanctions.

A. — Incriminations.
Actes et personnes punissables.

B. — Peines encourues.

3. — Protection contre l'impunité.
Questions relatives à la prescription, aux immunités, aux demandes d'asile, à l'amnistie et à la grâce, et autres causes d'exonération ou d'atténuation de la responsabilité pénale.

4. — Poursuites et coopération internationale.

A. — Compétence et poursuites au plan national.

B. — Coopération internationale.
Extradition, entraide judiciaire, entraide humanitaire.

5. — Prévention.

A. — Contrôle des détentions.

B. — Formation des personnels.

6. — Victimes.

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AUPRES DE L'OFFICE DES NATIONS UNIES
A GENEVE

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Virginie Bahnik
36, route de Prégny
1292 CHAMBESY
Tel. (41.22) 758.91.70
Fax (41.22) 758.91.53

Genève, le 9 juillet 2003

TELECOPIE

Message n° 321/C.

De la part de : **Virginie Bahnik**

Destinataire : **M. Mike Peay**

Objet : Preparatory document for the informal session of consultations of the intergovernmental working groupe on enforced disappearances (1-5 september 2003)

As promised, please find enclosed the invitation by the secretariat for the informal consultations as well as the document the Chairman-Rapporteur prepared for September (French and English versions). Do not hesitate to contact us if you have any question or comment. Have a nice day.

Virginie Bahnik

Nombre total de pages (page de garde comprise) : 1 + 22

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PAGES MISSING

Définition

Au sens du présent instrument, la disparition forcée est

- la privation de liberté sous quelque forme que ce soit ;
- suivie de la négation de cette privation de liberté ou la dissimulation du sort réserv · à la personne ;
- avec pour conséquence la soustraction de la personne disparue à la protection de la loi.

Incriminations et sanctions

1- La disparition forcée constitue une infraction pénale

- la disparition forcée est un crime lorsqu'elle est commise par des agents de l'Etat ou par des personnes ou des groupes qui agissent avec l'autorisation, l'appui ou l'acquiescement de l'Etat ou lorsqu'elle est commise par un groupe organisé.
- La disparition forcée est un crime contre l'humanité lorsqu'elle est commise dans le cadre d'une attaque généralisée ou systématique lancée contre toute population civile et en connaissance de cette attaque.

2- Sont aussi des infractions pénales :

- La complicité (exemples : aide matérielle, instigation, etc)
- La tentative
- L'entente en vue de commettre une disparition forcée

3- Le crime de disparition forcée est passible d'une peine appropriée, proportionnelle à sa gravité. L'Etat partie peut prévoir

- des circonstances aggravantes, lorsque le crime est perpétré à l'encontre d'une personne particulièrement vulnérable,
- des circonstances atténuantes, lorsque les personnes impliquée dans la commission du crime contribuent volontairement et efficacement à l'élucidation de cas de disparition forcée.

4- Le supérieur hiérarchique est pénalement responsable des disparitions forcées commises par ses subordonnés.

Protection contre l'impunité

1- La disparition forcée ne peut être justifiée ni par la loi, ni par un ordre, ni par les circonstances.

2- Prescription :

- Les disparitions forcées qui constituent des crimes contre l'humanité sont imprescriptibles.
- Pour les disparitions forcées qui ne constituent pas des crimes contre l'humanité, le délai de prescription commence à courir à partir du jour où le sort de la personne disparue est connu avec certitude.
- Le délai de prescription est au moins égal au délai le plus long prévu dans la législation nationale.
- Le délai de prescription est suspendu en l'absence de recours national judiciaire ou administratif efficace.

3- Les mesures de grâce, d'amnistie et autres mesures de clémence ne privent pas les victimes de la possibilité d'obtenir réparation.

4- Le responsable d'une disparition forcée ne peut pas bénéficier de l'asile ou du statut de refugié.

5- L'Etat partie assure, durant toute la durée de la procédure, la protection des témoins au procès, et notamment des victimes.

6- Les personnes soupçonnées d'être responsables de disparitions forcées sont jugées par des juridictions indépendantes et impartiales, et bénéficient de toutes les garanties d'un procès équitable.

Poursuites au plan national

1- Est compétent pour juger le crime l'Etat partie
- Du territoire où le crime a été commis
- De nationalité de la victime
- De nationalité de l'auteur présumé
- Du territoire où se trouve l'auteur présumé, lorsque l'extradition n'est pas accordée.

2- L'Etat partie sur le territoire duquel se trouve une personne soupçonnée d'avoir commis un crime de disparition forcée s'assure de sa présence, au besoin par la détention.

3- L'Etat partie qui renonce à exercer sa compétence pour juger une personne soupçonnée d'avoir commis une disparition forcée en avise immédiatement les autres Etats potentiellement compétents pour juger le crime.

4- En l'absence d'extradition, l'Etat partie sur le territoire duquel se trouve la personne soupçonnée d'un crime de disparition forcée soumet l'affaire à ses autorités compétentes pour l'exercice de l'action pénale.

5- L'Etat partie
- Reçoit et enregistre toute information ou plainte relative à une disparition forcée
- Ouvre une enquête, sans délai, de son propre chef ou à la demande du plaignant, s'il existe des raisons sérieuses de croire qu'une personne a été victime d'une disparition forcée.

6- L'Etat partie prend les mesures nécessaires pour prévenir et sanctionner tous les actes de nature à entraver le déroulement de l'enquête.

Coopération internationale

1- Les Etats parties s'accordent l'entraide judiciaire la plus large possible dans toute enquête concernant une disparition forcée et dans la recherche des victimes de disparition forcée.

2- Les Etats parties s'accordent l'aide la plus large possible pour porter secours aux victimes de disparitions forcées.

3- Le crime de disparition forcée n'est pas considéré comme une infraction politique aux effets de l'extradition.

4- Le crime de disparition forcée est considéré comme inclus au nombre des crimes donnant lieu à extradition entre les Etats Parties.

5- Les Etats parties se prêtent assistance pour retrouver les enfants enlevés ou appropriés suite à une disparition forcée.

Prévention

1- Les législations des Etats parties définissent les règles à respecter pour ordonner une privation de liberté.

2- Toute personnes privée de liberté ainsi que toute personne ayant un intérêt légitime à le demander a le droit indérogeable d'exercer, selon une procédure d'urgence, un recours effectif pour que soient déterminés le lieu et les motifs de la détention.

3- Les personnes privées de liberté sont déférées sans délai à un juge ou à une autre autorité habilitée par la loi à exercer des fonctions judiciaires.

4- L'avocat et les proches de la personne privée de liberté sont informés sans délai du lieu de détention et des transferts éventuels.

5- Les personnes privées de liberté sont placées uniquement dans des lieux de détention officiels.

6- L'Etat partie tient à jour un ou plusieurs registres officiels des personnes privées de liberté. Ces registres sont accessibles à l'avocat de la personne privée de liberté et aux personnes légitimement fondées à en connaître.

7- La mise en liberté des personnes détenues s'effectue selon des modalités qui permettent de vérifier que la personne a bien été relâchée, dans le plein respect de ses droits.

8- L'Etat partie ne procède pas à une extradition, à un refoulement ou à une expulsion si un crime de disparition forcée risque d'être commis envers la personne extradée, refoulée ou expulsée.

9- Les personnels chargés de l'application des lois sont formés de façon adéquate pour prévenir et remédier aux disparitions forcées.

Victimes

1- Sont victimes d'une disparition forcée
- La personne à l'encontre de laquelle le crime est commis
- Son conjoint
- Ses ascendants
- Ses descendants
- Toute personne à sa charge.

2- Les victimes ont le droit de dénoncer les faits devant l'autorité compétente et d'intervenir ab initio dans la procédure judiciaire mise en oeuvre.

3- Les victimes ont le droit d'être informées des progrès et résultats de l'enquête.

4- Les victimes ont droit à une réparation matérielle et morale des dommages qui leur ont été causés. La réparation comprend notamment l'indemnisation, la réadaptation, la satisfaction, le rétablissement de la dignité et de la réputation.

Enfants de personnes disparues

1- Les Etats parties préviennent et répriment l'enlèvement ou l'appropriation d'un enfant dont le parent a été victime d'une disparition forcée.

2- Des mesures sont prises en vue de permettre, le cas échéant, le retour de l'enfant enlevé ou approprié vers sa famille d'origine. L'intérêt supérieur de l'enfant doit être pris en compte et son opinion doit être recueillie.

Organe de suivi

1- Rôle et compétence

2- Composition et fonctionnement

3- Relations avec les Etats parties : rapports, demandes de renseignements, visites

4- Communications inter-étatiques et individuelles

5- Recherche des personnes disparues.

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Dispositions finales

1. Signature, ratification, entrée en vigueur
2. Dépositaire
3. Réserves
4. Amendements
5. Textes faisant foi

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Submitted/Distributed
Jan. 14, 2003

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GE 253

Proposal of the United States delegation

Concerning Article 19 of the 1998 Draft Convention

States Parties shall ensure that the training of public law enforcement personnel and officials includes the necessary education regarding the provisions of this Convention, with a view to:

(a) preventing the involvement of such personnel and officials in forced disappearances;

(b) ensuring recognition of the importance of prevention and investigation of such disappearances; and

(c) ensuring recognition of the need for urgency in resolving such cases.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

RELEASED IN FULL

Intervención de la República Argentina sobre el Proyecto de Convención para la protección de todas las personas contra las desapariciones forzadas.

1ª sesión del Consejo de Derechos Humanos de las Naciones Unidas

3E254A

27 de junio de 2006.

Señor Presidente:

La Argentina respalda por entero la intervención del GRULAC sobre el proyecto de Convención para la protección de todas las personas contra las desapariciones forzadas.

Esta Delegación desea destacar que en esta materia tan dramática y urgente, la opinión pública mundial espera mucho de las iniciativas de este Consejo de Derechos Humanos.

Los primeros proyectos de convención en la materia se presentaron en los foros internacionales hace ya exactamente 25 años.

En la Organización de las Naciones Unidas se aprobó una Declaración en 1992.

En la Organización de los Estados Americanos se adoptó una Convención en 1994.

A fines de los años 90 el experto Louis Joinet presentó un proyecto de Convención universal a la Subcomisión.

En el año 2003 comenzó sus trabajos el Grupo de Estados de composición abierta, bajo la presidencia del Embajador de Francia Bernard Kesedjian, que culminó exitosamente sus trabajos el 22 de septiembre de 2005 con el proyecto que hoy consideramos, el que fue aprobado por consenso.

La protección contra las desapariciones forzadas es una cuestión clave en la promoción y la defensa de los derechos humanos.

Por ello en el Grupo de Redacción, en medio de la diversidad propia de diferentes regiones y sistemas, hubo coincidencias decisivas, que se afirmaron claramente en la fase final de los trabajos, respecto de cuestiones fundamentales.

El resultado fue un proyecto de convención equilibrado que tiene en cuenta tanto la prevención como la protección contra este flagelo.

Contribuyeron al avance de la redacción los excelentes aportes teóricos y prácticos de organizaciones no gubernamentales de derechos humanos.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

Señor Presidente:

Este proyecto de Convención viene a llenar un vacío que todavía existe en la protección internacional de los derechos y libertades fundamentales.

Baste señalar que esta norma convencional garantiza como un derecho humano, el derecho a conocer la verdad sobre las circunstancias de una desaparición forzada y la suerte de la persona desaparecida, con lo que confirma una evolución reciente del derecho internacional de los derechos humanos en la materia a la que mi país, como es sabido, ha hecho una significativa contribución.

Igualmente en el texto adoptado en septiembre último se previene y sanciona penalmente la apropiación de niños sometidos a desaparición forzada y se reafirma el principio de restitución a la familia de origen.

El proyecto establece, entre otros, un mecanismo novedoso de acciones urgentes para la búsqueda de personas desaparecidas, a veces denominado "habeas corpus internacional".

Esta función estrictamente humanitaria y preventiva es una de las principales atribuciones del Comité sobre la Desaparición Forzada de diez expertos independientes creado por este nuevo instrumento internacional.

Teniendo en cuenta los proyectos de reforma de las Naciones Unidas y de su maquinaria de derechos humanos, el texto prevé la reunión de una Conferencia de Estados Partes, no antes de cuatro años y no más tarde de seis años después de la entrada en vigor de la convención, para evaluar el funcionamiento del Comité y decidir en consecuencia sobre el órgano de aplicación del instrumento.

La adopción del proyecto de convención significará un gran paso, largamente esperado por el movimiento de derechos humanos en el mundo, en la lucha contra la impunidad y en favor de la prevención de esas graves violaciones de los derechos humanos constituidas por las desapariciones forzadas de personas.

Como afirmó en el segmento de alto nivel el canciller argentino Embajador Jorge Taiana el lunes pasado, la Convención está lista para ser adoptada y la República Argentina, como un país que ha contribuido con empeño a su redacción, hace votos para que su adopción sea uno de los principales logros de esta primera sesión del Consejo.

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GE254B
GE245B

ICRC

Statement of the

INTERNATIONAL COMMITTEE OF THE RED CROSS

to the United Nations Human Rights Council

concerning the draft International Convention on the Protection of all Persons from Enforced Disappearance

CHECK AGAINST DELIVERY

Geneva, 27 June 2006

Mr Chairman,

At this first session, an issue comes before Human Rights Council that is of particular importance for the International Committee of the Red Cross (ICRC): the draft *Convention for the Protection of all Persons from Enforced Disappearance.*

The Commission on Human Rights had a long tradition of developing new human rights treaties and norms, and the International Committee of the Red Cross (ICRC) has participated in many of its endeavours. It has followed the drafting of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, of the *Convention against Torture* and of its *Optional Protocol*, to name but a few.

The latest of such instruments is the draft Convention on the Protection of All Persons against Enforced Disappearances that comes before the Human Rights Council at this first session. The ICRC has followed the work of the Working Group mandated to draft the Convention very closely and supports the efforts to adopt the draft.

The ICRC is deeply concerned about the fate of forcibly disappeared persons: they are abducted and detained, sometimes killed, and their families are kept in the dark about their fate.

Enforced disappearance constitutes a violation of international humanitarian law and of human rights, both in international as well as in non-international armed conflict. It violates, or threatens to violate, a number of fundamental customary rules such as the prohibition of arbitrary deprivation of liberty, the prohibition of torture and other cruel and inhuman treatment, and the prohibition of murder. Leaving families without news about the situation and whereabouts of their relatives not only places them in a situation of cruel uncertainty but is a denial of the right to family life and of the families' right to know the fate of their relatives.

The prohibition of enforced disappearance, like all rules of humanitarian law, allows for no exception. No war, no state of exception, no imperative reason of national security can justify enforced disappearance. Just as no State, group or individual is above the law, so no person can be placed outside the law: enforced disappearance tries to do just that.

International Committee of the Red Cross 19 Avenue de la Paix, 1202 Geneva, Switzerland T +41 22 734 6001 F +41 22 733 2057 www.icrc.org

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DATE/CASE ID: 23 JUN 2009 200706444

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Once a person has been caused to disappear, it is often too late. It is beforehand that we must act, that we must prevent persons from disappearing - by registering them, by keeping track of them, by giving news to their families.

This is why the Convention is so important. It will clearly enshrine those legal obligations of States which are critical for the prevention of persons from being caused to disappear. All detained persons must be registered in officially recognised places, have regular contact with their families, and benefit from legal procedural guarantees. For the first time, these obligations will be codified in a legally binding human rights treaty, applicable at all times. It will also enshrine the right of families to know the fate of their relatives, one of the pillars on which all rules on missing persons must rest.

For its part, the ICRC strives to prevent or put an end to disappearances. Regular visits to detention centres are one of the principal means used by the ICRC to achieve this aim. Last year, among the 500'000 detainees who benefited from ICRC detention activities, the ICRC followed more than 46'000 detainees individually in about 2'500 places of detention. About 26'000 were visited for the first time by the ICRC and registered. Our delegates transmitted about 100'000 Red Cross messages between detainees and their families. Bringing news to the families is a standard modality of ICRC's detention work on behalf of detainees.

ICRC registration contributes to prevent disappearance, as it enables us to follow the detainees individually and to search actively for their whereabouts. The ICRC also receives numerous requests from families who are looking for lost relatives and our delegates do everything they can to trace them, re-establish the family link and, in some cases, assist families in their specific needs.

Together with the International Red Cross and Red Crescent Movement, the ICRC also seeks to raise awareness about the tragedy of people unaccounted for as a result of armed conflict or other forms of violence and about the anguish of their families.

Mr Chairman

Much more still needs to be done against enforced disappearance. At the 28th International Conference of the Red Cross and Red Crescent of 2003 the Red Cross and Red Crescent Movement and States committed themselves in the Agenda for Humanitarian Action to respect and restore the dignity of missing persons and their families. The ICRC therefore calls on all States to put even more effort into preventing persons from going missing and alleviating the suffering caused by it.

Enforced disappearance is a phenomenon that still exists in different parts of the world and produces anguish, fear and unspeakable sorrow for thousands of families. The ICRC witnesses this plight everyday in its work. The urgency of the need to eradicate the phenomenon of enforced disappearance is too great to delay the adoption of a new treaty that outlaws it. There can be no doubt that this Convention will contribute to greater legal protection of persons from being caused to disappear, and the ICRC therefore strongly encourages the Human Rights Council to adopt it at its first session.

Thank you for your attention

GE254C

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UNITED NATIONS HUMAN RIGHTS COUNCIL

FIRST SESSION

(Geneva, 19 - 30 June 2006)

Consideration of the report
of the intersessional open-ended Working Group
to elaborate a draft legally binding normative instrument for the
protection of all persons from enforced disappearances

*

* *

Statement by H.E. Ambassador Wolfgang PETRITSCH
Permanent Representative of Austria
on behalf of the European Union

Geneva, 27 June 2006

Check against delivery

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 25 JUN 2009 200706444

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GE254D

Austrian Presidency of the EU
Geneva, 27 June 2006

Mr Chairman,

The European Union would like to thank the president-rapporteur of the working group for his presentation.

The Acceding Countries Bulgaria and Romania, the Candidate Countries Turkey, Croatia and the former Yugoslav Republic of Macedonia*, the Countries of the Stabilisation and Association Process and potential candidates Albania, Bosnia and Herzegovina, Serbia, and the EFTA countries Iceland and Liechtenstein members of the European Economic Area, as well as Ukraine and the Republic of Moldova align themselves with this declaration.

The working group concluded its work in September 2005. It decided that it had finished its work and that the draft Convention on enforced disappearances should be transmitted to the Commission on Human Rights.

The Commission on Human Rights has been working on the issue of enforced disappearances since the beginning of the 1980's. In the course of several decades, we have developed a better understanding of this odious crime ; how it violates a large number of human rights of the victims, how it is linked to torture and arbitrary detention, how it violates also the rights of the relatives of the victim and how it is used to silence and threaten entire populations.

Despite the creation of the working group on enforced and involuntary disappearances and the adoption in 1992 of the Declaration on the Protection of all Persons from enforced disappearances, the phenomenon still persists. It is not a crime of the past. It is not limited to a specific region. Today, on all 5 continents, people disappear and their fate is never elucidated. The need for an international convention is therefore obvious.

The draft Convention represents a step forward for international human rights. It defines the crime of enforced disappearances. It organises the fight against impunity of perpetrators, both at the national and international levels. It also describes which preventive measures must be taken. Finally, it creates a committee of independent experts, to ensure appropriate implementation of the Convention. The European Union believes that the Convention will be a powerful tool to prevent enforced disappearances in the future.

The European Union calls for the prompt adoption of the Convention by the Council and its transfer to the General Assembly this fall.

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* *Croatia and the former Yugoslav Republic of Macedonia continue to be part of the Stabilisation and Association Process.*

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

RELEASED IN PART
B5, B6

GE1

Lee, Michelle G

From: Hutchinson, Yvonne G
Sent: Friday, June 09, 2006 1:02 PM
To: Kovar, Jeffrey D
Subject: RE: Hard Q's and A's for the July hearing before the Human Rights Committee

[redacted] B5

From: Kovar, Jeffrey D
Sent: Friday, June 09, 2006 8:53 AM
To: Barton, Paula J; Hutchinson, Yvonne G
Subject: FW: Hard Q's and A's for the July hearing before the Human Rights Committee

Please look over these and let me know if you can think of additional questions the Committee might ask that we should prepare answers for. Thanks.

From: Schou, Nina E
Sent: Friday, June 09, 2006 2:28 AM
To: [redacted] 'michael.edney@usdoj.gov'; 'Tobi.Longwitz@usdoj.gov'; 'Brent.McIntosh@usdoj.gov'; Waxman, Matthew; Haines, Avril D; 'Mike.Davis@dhs.gov'; 'Thomas.Monheim@usdoj.gov'; 'ron.rosenberg@dhs.gov'; 'Brian.Kelliher1@dhs.gov'; [redacted] Lagon, Mark P; Noyes, Julieta V (DRL); Hodgkinson, [redacted] 'john.torres@dhs.gov'; 'brian.dixon@dhs.gov'; 'michael.davis2@dhs.gov'; 'hainesad[redacted] 'Bradley.Saull@usdoj.gov'; "; 'Brasure, Ian D, Maj, JCS SJS'; 'quintana.carlos@dol.gov'; 'rob.wexler@ed.gov'; 'Laurence.Rothenberg@usdoj.gov'; [redacted] 'Igor.timofeyev@dhs.gov'; [redacted] Kovar, Jeffrey D; 'MaryBeth West'; 'Abdoo, Mark A. (OPHS)'; 'MWynne@OSOPHS.DHHS.GOV'; 'R.Trent.Shores@usdoj.gov'; Ryan, Kelly; Kennelly, Nan E; Lum, Linda L
Cc: Hill, Steven R; Harris, Robert K; 'amsurena[redacted] Bentes, Julianna W; nschou[redacted]
Subject: Hard Q's and A's for the July hearing before the Human Rights Committee

B6

All –

Attached is a list of Hard Q's and A's that we have prepared for use in the ICCPR hearing. As you know, the format of the proceedings are such that we will need to respond to questions posed by the Committee in the same meeting in which the questions are raised. For this reason, we need to prepare as much canned material as possible. We have come up with the following list based in large part on the many NGO submissions the Committee has already received. Julianna already circulated the link to these reports previously but I'm enclosing it again for your reference. [http://www.ohchr.org/english/bodies/hrc/87ngo_info.htm]

In a couple of instances where the issue areas are so vast we have specifically requested particular agencies to provide additional Q's and A's that they think may be necessary. Even if we have not specifically requested it, as we have said before, we would also welcome any additional Q's and A's that agencies may consider relevant, based in part, for example on Congressional, press or NGO inquiries.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 06 AUG 2009 200706444

Requests/Explanations to particular agencies –
NSC – Please forward this to an appropriate contact at HUD and advise them to get in touch directly with me.
DOJ – Many of the questions are directed to you. In a handful of cases we were able to supply answers to DOJ questions based on the CAT questions. We would recommend that you review those answers and supplement as necessary.
DOD -- we have assigned a handful of questions to you on your own. There are also a large number assigned to DOS/DOD, which means that the questions concern DOD programs, but DOS will draft an answer based on material prepared for the CAT hearing. Unfortunately we have not had time to include those answers at this time, but we will be working on that in the coming weeks.
HUD and DoEd – there are a couple of reports concerning homelessness and while these questions may appear tangentially related to the Covenant we nevertheless think it wise to prepare them.
HHS – You will note several questions relating to reproductive health issues in particular. We may ultimately include more.

Timing and clearances --
There will be an opportunity for all agencies to review and clear the entire package of Q's and A's once they are completed. However, if in reviewing the document, a particular agency believes it should weigh in on a question that has been assigned to another agency, please let me know and I will put you in touch with the appropriate agency POC.

As was mentioned at last week's meeting at the NSC, the deadline for submitting answers on these Q's is *Friday, June 29th*.

Please be sure to send your agency's submission to schoune@state.gov, bentesjw@state.gov, amsurena[redacted]hillsr@state.gov, and harrisrk2@state.gov. B6

Once we receive the draft answers, DOS will review them and recirculate the package to you all for final review and clearance.

Thanks for your help,

Nina Schou
Attorney Adviser
U.S. Department of State
Office of the Legal Adviser
Human Rights and Refugees
202-647-4262

<< File: LEGAL-#26442-v1-ICCPR_Hard_Qs_and_As.DOC >>

Lee, Michelle G

RELEASED IN PART B5

From: Schou, Nina E [SchouNE@state.gov]
Sent: Monday, February 13, 2006 5:22 PM
To: Kovar, Jeffrey D; Brancato, Gilda M
Cc: Hill, Steven R; Harris, Robert K
Subject: RE: Daily Telegraph - SRs' report and Guantanamo

cc-ing Steve -- as he is the lead on the law of war/DOD issues for the CAT and ICCPR reports.

From: Kovar, Jeffrey D(Geneva)
Sent: Monday, February 13, 2006 10:16 AM
To: Schou, Nina E; Brancato, Gilda M
Subject: FW: Daily Telegraph - SRs' report and Guantanamo

[redacted] B5

-----Original Message-----
From: Cassidy, Joseph P
Sent: Monday, February 13, 2006 3:59 PM
To: Robinson, Brooks A; Cassel, Lynn L; Campbell, Piper ; DePirro, Velia M; Kovar, Jeffrey D
Subject: RE: Daily Telegraph - SRs' report and Guantanamo

[redacted] B5

-----Original Message-----
From: Robinson, Brooks A
Sent: Monday, February 13, 2006 2:15 PM
To: Cassel, Lynn L; Campbell, Piper ; Cassidy, Joseph P; DePirro, Velia M; Kovar, Jeffrey D; Denig, Paul; Wilbur, Richard M; Vasquez, Edgar J (IO); Grenell, Richard ; Cummings, Monica L; Merante, Joseph
Subject: FW: Daily Telegraph - SRs' report and Guantanamo

UN inquiry demands immediate closure of Guantanamo

http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/02/13/wguan13.xml&sSheet=/portal/2006/02/13/ixportal.html

By Con Coughlin, Defence and Security Editor in New York
(Filed: 13/02/2006)

A United Nations inquiry has called for the immediate closure of America's Guantanamo Bay detention centre and the prosecution of officers and politicians "up to the highest level" who are accused of torturing detainees.

The UN Human Rights Commission report, due to be published this week, concludes that Washington should put the 520 detainees on trial or release them.

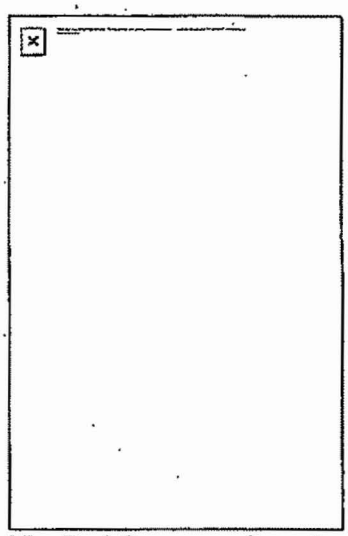
UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUL 2009 200706444

It calls for the United States to halt all "practices amounting to torture", including the force-feeding of inmates who go on hunger strike.

The report wants the Bush administration to ensure that all allegations of torture are investigated by US criminal courts, and that "all perpetrators up to the highest level of military and political command are brought to justice".

It does not specify who it means by "political command" but logically this would include President George W Bush.

The demands are contained in the final report of the commission's working group on arbitrary detention, which will be presented at its Geneva headquarters in the next few days. A copy of the report has been obtained exclusively by The Daily Telegraph.



The Red Cross monitors the centre at Guantanamo monthly

The report is bound to intensify the already strained relations between the US and the UN over the Iraq war.

Washington officials yesterday denounced it as "a hatchet job" when informed of the contents by this newspaper.

"This shows precisely what is wrong with the United Nations today," said a senior official. "These people are supposed to be undertaking a serious investigation of the facts relating to Guantanamo.

"Instead, they deliver a report with a bunch of old allegations from lawyers representing released detainees that are so generalised that you cannot even tell what they are talking about.

"When the UN produces an unprofessional hatchet job like this it discredits the whole organisation."

The Bush administration has repeatedly called for the UN's wholesale reform, and the report is likely to lead to demands from Congress for a freeze on Washington's annual donations.

The authors question the right of America to classify the detainees as "enemy combatants" and argue that the "war on terror" is no justification for holding them indefinitely without charge.

The report is also deeply critical of the US over recent disclosures that some of the detainees have been subjected to force-feeding when they have gone on hunger strike.

The authors argue that force-feeding is akin to torture, and demands that "the authorities in Guantanamo Bay do not force-feed any detainee who is capable of forming a rational judgment and is aware of the consequences of refusing food."

But US officials refuted the suggestion that force-feeding is torture, arguing that they had a duty under international law to protect the lives of the detainees.

"We have a duty to prevent people killing themselves," said an official, "and we are proud of the fact that none of the detainees held at Guantanamo Bay has died since it opened."

The Guantanamo Bay detention centre was adapted to hold hundreds of al-Qa'eda fighters captured during the 2001 war in Afghanistan to overthrow the Taliban.

More than 750 detainees have been processed by the facility during the past four years.

After interrogation by US intelligence officers, some have been released and others returned to their country of origin.

Because the al-Qa'eda fighters do not wear uniforms and have no allegiance to any government they are not covered by the Geneva Conventions.

And while there is insufficient evidence to charge most of the 520 detainees with war crimes, the US insists on the right to detain them to prevent them returning to the battlefield to carry out further attacks against the coalition.

There have already been at least 12 instances where released Guantanamo detainees have resumed attacks against the coalition.

US officials are also prepared to return detainees to their home countries, assuming those countries are prepared to receive them and that they will not be subjected to torture on their return.

While American officials are prepared to concede that there are conflicting interpretations over how the laws governing international conflict should be applied, they are furious at the way the investigation was conducted, especially the evidence that the four "special rapporteurs" who compiled the report have used to reach their conclusions.

Although Washington invited the group to visit Guantanamo at the end of last year to inspect the facility, the rapporteurs rejected the invitation after American officials made it clear that they would not be allowed to meet the detainees.

"They [the rapporteurs] were offered the same access as congressmen responsible for overseeing the facility, but they declined to take up the offer," said a government official. "And then they complain that they had no access to doctors or guards - all of which they were offered."

The Bush administration also challenges whether it is the responsibility of a body such as the UN Human Rights Commission to investigate Guantanamo.

The International Committee of the Red Cross (ICRC), the internationally recognised body responsible for monitoring detention facilities, visits Guantanamo on a monthly basis.

Lee, Michelle G GEIC

RELEASED IN PART
B5, B6

From: Kovar, Jeffrey D
Sent: Friday, April 28, 2006 12:00 PM
To: DePirro, Velia M
Cc: Levin, Jan
Subject: RE: Question for the UK

I think that's what he intended to do.

From: DePirro, Velia M
Sent: Friday, April 28, 2006 9:21 AM
To: Kovar, Jeffrey D
Cc: DePirro, Velia M; Levin, Jan
Subject: RE: Question for the UK

[redacted] B5

Thanks.

Velia De Pirro
Political Counselor
U.S. Mission Geneva
(41) 22-749-4111

From: Kovar, Jeffrey D
Sent: Friday, April 28, 2006 7:10 AM
To: DePirro, Velia M
Subject: FW: Question for the UK

Velia -- Do you know anything about this? It's the first I've heard. I had lunch yesterday with [redacted] and she never mentioned this even though I mentioned we had CAT coming up. Thanks -- Jeff B6

From: Harris, Robert K
Sent: Thursday, April 27, 2006 7:29 PM
To: Lagon, Mark P
Cc: Hill, Steven R; Schou, Nina E; Noyes, Julieta V (DRL); Kovar, Jeffrey D
Subject: Question for the UK

Mark,

[redacted] B5

I will be leaving for Geneva next Tuesday afternoon.

Thanks.

Bob

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 06 AUG 2009 200706444

RELEASED IN PART
B6, B5 GE2A

DePirro, Velia M

From: Kovar, Jeffrey D
Sent: Thursday, March 30, 2006 9:21 AM
To: Johnson, Thomas A; Barton, Paula J
Cc: Harris, Robert K; Lagon, Mark P; Leatham, Rachel M; Rohn, Douglas C; Noyes, Julieta V (DRL); DePirro, Velia M; Levin, Jan
Subject: RE: CAT Hearing--Space for USDEL in Room XVII

Tom -- we'll explore this with the secretariat. My hazy recollection from watching Canada several months ago was that the members of the delegation that spoke, or directly supported the speakers, sat in the inner table with the microphones, with the CAT members sitting around them in the horseshoe. I can't remember the number that can be accommodated there. The rest of the delegation sat in the first inner row of seats, as I recall. Bellinger as HOD plus one or two will sit at the podium. -- Jeff

---

From: Johnson, Thomas A
Sent: Thursday, March 30, 2006 3:42 AM
To: Kovar, Jeffrey D; Barton, Paula J
Cc: Harris, Robert K; Lagon, Mark P; Leatham, Rachel M; Rohn, Douglas C; Noyes, Julieta V (DRL)
Subject: CAT Hearing--Space for USDEL in Room XVII

Jeff/Paula--
One follow-up project from the meeting yesterday is to find out from you how much space the USDEL will have in Room XVII, where I'm told the hearing will be. Everyone understands that our huge delegation cannot all fit in whatever space we are given, but we want to get as much space as we can. We assume that the country making its report either sits on the bottom level of the horseshoe or in a rear side row (as has been done with some guests of CHR), but that would force some CAT members to turn around and makes less sense.

In any event, if the bottom level of the horseshoe is used, can you please explore with the secretariat if we can have one whole desk (i.e., on the side or middle) and seats behind? Using the middle desk on the lowest level of the horseshoe might look symmetric and all that, but aren't there substantially more seats on the sides? If so, can you make a pitch for one of the side desks?

If they use a back side row, why not try for the whole row?

And if you can find a diagram of the room somewhere, can you please send a copy back here? Thanks. Tom

-----Original Message-----
From: Harris, Robert K
Sent: Wednesday, March 29, 2006 7:17 PM
To: Bellinger, John B(Legal); Lowenkron, Barry F (DRL); Barks-Ruggles, Erica J (DRL); Lagon, Mark P
Cc: Noyes, Julieta V (DRL); Johnson, Thomas A; Legal-L-HRR; amsurena[redacted]; Kovar, Jeffrey D; Camponovo, Christopher N.; Sicade, Lynn M (DRL) B6
Subject: FW: CAT hearing PCC meeting - Monday, April 3.

John, Barry, and Mark,

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 07 AUG 2009 200706444

L, DRL and IO had an in-house planning meeting yesterday to continue our planning for the CAT hearing May 5-8. We are expecting additional agency comments on the answers to the 196 questions from the Committee Against Torture, and suggest you might want to look at them once we have incorporated them further.

Highlights:

- We will have a delegation of around 30 officials from State, Justice, DOD, DHS and perhaps the Bureau of Prisons. (This sounds like a lot, but it is roughly the size of the UK's delegation when it defended its CAT report in November 2004. The Committee likes large, high-level delegations as it suggests that the country takes the process seriously.
- A core team will arrive in Geneva on Wednesday to make sure all systems are in place. We will have a delegation meeting on Thursday afternoon. You will need to determine whether you want to arrive Thursday morning or be fresher with a Wednesday arrival.
- We will designate members of the delegation as note takers and as recorders of the questions we are asked to answer over the weekend.
- Subject to your approval, we will have short opening statements from Barry and John. After Barry's opening remarks, John will be the master of ceremonies.
- We will have 90 minutes to deliver our opening statement and to give abbreviated answers to the Committee's questions. The Committee will then ask additional questions, which we can answer on the spot or answer on Monday. (Most countries choose not to answer questions on the spot.)
- Once day one is over, the US delegation will formulate the questions that were asked [redacted] and begin writing answers. B5
- Over the weekend, the delegation will write the answers, seeking Washington guidance or input as needed. The goal, of course, is to get a delegation of sufficient rank that it can clear its own answers.
- Matt Waxman will be in Europe over that weekend and has offered to come to Geneva Sunday afternoon to look at the package we have come up with and come to the Monday session. I told him that we would welcome his fresh eyes and brain, so I think he is planning to come.
- On Monday morning, we will send our answers electronically to the Committee and on Monday afternoon, we will deliver the answers orally. The Committee will then ask follow-up questions, but there is typically not very much time left for this process.
- I am going to stay with a core delegation team on Tuesday to write the reporting cable. We will try to find a way to make sure John and Barry approve it before it is sent.
- Later in the session, the Committee will draft conclusions and recommendations, which they, as a courtesy, will forward to us 24-48 hours in advance. It will issue them at the end of the session, May 19.

At Monday's meeting, we will go through this with the agencies, and ask them to designate a Washington-based team in each agency to assist the delegation.

In case you do not yet have a headache, here is more detailed information about the session, which we received from the UN Secretariat via our Mission in Geneva in February. My points above have included the highlights.

CONDUCT OF THE SESSIONS

The U.S. will have 1 1/2 hours the first morning for its presentation. Morales said this limit will be strictly followed by the Committee so that the members will have the same amount of time to

pose questions.

Morales suggested that not more than 15 minutes be devoted to a head of delegation opening statement. Effective use of this time would be to highlight any new developments, and to give a positive sense for the general U.S. approach to implementation, policy frameworks, etc.

Following the opening statement the remaining time will be devoted to answering the Committee's written questions. This can be used to read the written answers into the record, but in most cases delegations offer summaries of the written answers. Morales noted that some states continue to use the head of delegation for this. Others, like the UK, have turned to the members of the delegation with technical expertise. The head of delegation will control the floor, and there will be several microphones available for members of the delegation, who will therefore not need to come to the podium to provide information.

As for the format of the U.S. replies, Morales and Nataf urged that we stick to the questions the way they are presented. If we present answers that cover more than one question, it is important to indicate precisely which ones are being answered. In that connection, the Committee has reformatted the U.S. report by numbering each paragraph and incorporating the updated Annex presented at the time of the ICCPR Report. It is important for us to refer to our report according to these new paragraph numbers. The reformatted version was provided to us and will be scanned and emailed to you on Monday when the OMS in our section is in the office.

The rest of the session will be devoted to statements and questions from members of the Committee. The delegation may reply to questions on the spot, but most delegations simply take note of them, then prepare responses overnight for presentation the following day. Nataf pointed out that some questions are repetitive and many overlap, and may be regrouped as necessary.

The session will reconvene the following afternoon, and the U.S. will have 45 minutes to reply to the Committee's questions. Morales noted that we would be held pretty strictly to this time limit, so should carefully pace our replies to get them all out. She recommended being concise so that we could cover all points in a balanced way

The Committee may then make statements and pose follow-up questions for 45 minutes, and the U.S. will in principle have a 15 minute right of reply at the end. Morales noted, however, that there is rarely 15 minutes left at the end, and said we should plan for no more than 5 minutes of reply.

At the end, the Committee generally offers the delegation the possibility to submit additional information in the next day or two, but Morales noted that she could never recall a state actually doing so.

The Committee will then provide an advance, unedited version of its concluding comments 24-48 hours before the end of the session. That version will be made public, subject to translation and final clean-up, at the concluding press conference on Friday May 19. There is no requirement for delegations to stay until this event, and local Ambassadors are no longer expected to attend. The Mission can cover it at the appropriate level.

In response to a query whether the Committee would accept audiovisuel or powerpoint presentations, Morales and Nataf replied that they could recall it once at the Committee on the Rights of the Child, but that it had created technical complications and delay. They discouraged it because it could be seen as time waster.

PUBLICATION OF U.S. REPLIES

Morales stated that there are various options for what would go into the record. If the U.S. wishes, it can ask for its written answers to be published in the official records along with the oral statements. However, the U.S. may ask that its written answers not be published or distributed, and the Committee will respect that wish -- in such a case only the oral statements would be

published. Morales stressed that all written replies are embargoed for use only of the Committee members unless expressly authorized for distribution by the state concerned. In response to our query Morales stated that they are not to be given by the Committee to NGOs in advance of the session.

NGO COMMENTS

Morales stated that there would be an organizational session the first week of March for the countries subject to review in May (Peru, Guatemala, Qatar, Republic of Korea, Togo, Georgia, USA). At that time, all NGO submissions would be distributed. After that session we would be able to get any further NGO submissions from the extranet site the Committee will establish for that purpose. There is no deadline for submission of NGO comments. In addition, a closed consultation for NGO's would be conducted by the Committee the evening before the first part of the U.S. oral presentation.

PUBLIC PARTICIPATION/DISSEMINATION

The session is open to the public, and will be held in the Palais des Nations. The local UN-accredited press will have access, as will other press who seek credentials, upon approval by the chair. The sessions are taped recorded for the Committee's use, and the press, NGOs, and governments can ask the Secretariat to make copies if they provide blank audio tapes. TV or video requests must be made through the UN Department of Public Information (DPI). They must be approved by the Chair of the Committee. DPI will ensure they would not be handled in an intrusive way. Morales remarked that during India's presentation there was quite a bit of press and TV participation. In response to our query whether there had ever been a webcast link, Morales said not to her knowledge. She said that a request would have to be considered if it came in, but would not/not originate with the Committee itself ("we will not pick the U.S. to be a guinea pig.").

RAPPORTEURS

Rapporteurs for the U.S. session are Marino and Carrara, who are natives speakers of Spanish and French. Morales requested that, if any of the information to be submitted by the U.S. can also be provided in these two languages, that we do so.

DOCUMENTS

In response to a query whether there were any specific background documents that the Committee expected to be submitted, Morales said that it would be helpful to submit two copies of anything cited in the report. When asked whether a weblink would be adequate, Morales and Nataf were of two minds -- on the one hand a weblink should suffice, but experience was that links are often dead or the Committee has difficulties opening them.

Bob

From: Camponovo, Christopher N. [mailto:Christopher_N._Camponovo@[redacted] B6
Sent: Wednesday, March 29, 2006 6:20 PM
To: schoune@state.gov; amsurena[redacted]; Bourke, Michael P.; Brian.Kelliher1@dhs.gov; [redacted]; daniel.brown@dhs.gov; B6 B6
David_Bernhardt@ios.doi.gov; Diane Beaver; drew.steinberg@dhs.gov; HarrisRK2@state.gov; HodgkinsonSL@state.gov; Igor Timofeyev; johnsonTA2@state.gov; lagonmp@state.gov; laurence.rothenberg@usdoj.gov; matthew.friedrich2@usdoj.gov; Melear, Pamela S.; molly.groom@dhs.gov; nader.baroukh@dhs.gov; noyesjv@state.gov; omar.vargas3@usdoj.gov;

rena.comisac@usdoj.gov; rob.wexler@ed.gov; roger.sagerman@dhs.gov; ron.rosenberg@dhs.gov; Ronald.whitney@dhs.gov
Cc: Melear, Pamela S.
Subject: CAT hearing PCC meeting - Monday, April 3.

We've scheduled a PCC for Monday, April 3 at 2 pm in the EEOB, room 211 on preparations for the upcoming Convention Against Torture hearing. For those of you on this email distribution who represent agencies not involved in the CAT hearing, apologies -- feel free to click delete.

This email is also a reminder that agency comments on the answers to the Committee's questions on our Second Periodic Report re. implementation of the CAT were due by c.o.b. Tuesday, March 28. If you have not already provided your responses to Bob Harris at Harrisrk2@state.gov please do so as soon as possible, cc-ing Schoune@state.gov, HillSR@state.gov, bentesjw@state.gov. In light of all that remains to be done to prepare the U.S. delegation for the hearing, it is all the more critical that we finalize the answers to the Committee's questions as soon as possible and circulate them for final agency clearance.

The PCC is primarily intended to explain the next steps in preparing the delegation and also to explain the actual mechanics of the actual hearing process . An agenda for the meeting is attached. At that meeting State will discuss the actual structure of the hearing, the amount of time allotted for the USG defense of its report, and how the USG will divide its time between opening statements and summaries of answers to the Committee's numerous questions, how to handle the additional questions that the Committee will ask during the course of the hearing, and how to coordinate interagency clearances for such questions. We will also discuss the additional work product that must be prepared and cleared by the interagency to prepare the delegation for the hearing.

Please respond to Pam Melear (cc'd) with clearance info.

In anticipation of the meeting and the materials we will need to prepare shortly thereafter, we ask that each agency:

- Finalize their decisions on who will represent their respective agencies for the hearing. State does not yet have lists for DOJ/CRD and DHS .
- DOJ - please consider whether someone from BOP should be represented on the delegation, or whether support from BOP in Washington should suffice to be responsive to any additional questions that may arise from the Committee.
- Come up with a list of hard questions that have not been addressed thus far, but that we may expect the Committee to ask. To the extent possible, we request that agencies also in a week or two suggest draft answers. (By way of background, the principal USG human rights NGOs have had numerous opportunities to inform the Committee of any concerns they have. Thus, to the extent that US NGOs have raised particular issues with your agency that may have some relevance to the CAT, it would be helpful if you could include those Qs and As.)

RELEASED IN PART
B3, CIA, B6 GES

L Press Guidance
May 6, 2005

United States Periodic Report on the Convention Against Torture

Q: Is it true that the United States recently filed a report on its implementation of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment ("CAT")? What is this report, and why did the United States produce it?

A:

- **On May 6, 2005, the United States submitted to the Committee Against Torture its second periodic report on its implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). The report is a routine periodic update of our Initial Report, which was filed in October 1999.**

- **Article 19 of the CAT provides that all States Parties shall submit to the Committee Against Torture reports on measures they have taken to implement the CAT.**

- **The Convention Against Torture created a body of experts known as the Committee Against Torture (the "Committee"). Among its responsibilities, the Committee reviews reports submitted by CAT States Parties.**

- **The report just filed provides an update since the**

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 06 AUG 2009 200706444

filing of the Initial Report in 1999 on new legislation, caselaw, policies, and programs and other relevant information to update the initial report. The material provided is comprehensive, as the report provides an article-by-article discussion of the various provisions of the CAT.

- The report also contains a lengthy annex on detentions of individuals under the control of U.S. Armed Forces in Afghanistan, Iraq and Guantanamo Bay, Cuba, investigations into abuse allegations arising out of these detentions, and actions to hold personnel of the U.S. armed forces accountable under the military justice system when they have been found to have committed unlawful acts.
- The report has been sent to the Committee Against Torture, which will post it on their website in accordance with their standard practice. We will now post the report on our own website.

Core themes to emphasize:

- This report demonstrates that the United States takes its obligations under the Convention Against Torture seriously.

- Through an extensive inter-agency process we have produced a serious report, consistent with our reporting obligations under the Convention.
- We look forward to engaging in a dialogue on these issues when we present the report orally before the Committee Against Torture at one of its future sessions.
- As the President has clearly stated, "America stands against and will not tolerate torture." We take the prohibition against torture seriously.
    - Every jurisdiction in the United States, at the federal and state level, prohibits torture.
    - We have enacted legislation to ensure that acts of torture committed outside of the United States by U.S. nationals or by foreign nationals subsequently found in the United States acting under color of law are subject to U.S. criminal jurisdiction.
    - U.S. laws also prohibit serious abuses short of torture when they are committed by U.S. officials acting within the United States and within the premises of U.S. military or other United States Government missions or entities in foreign States.

- This report documents this robust legal framework and notes how it has been applied in response to allegations of abuse. This report makes clear that in all cases where allegations of torture or other unlawful treatment of detainees have been made, they will be investigated, and if substantiated, prosecuted.
- In every country in the world there are human rights violations.
    - What is important is having institutions in place to investigate them and to provide for accountability.
    - This report acknowledges serious allegations of abuse by officials acting within the United States and abroad.
    - The United States takes seriously any credible allegation of abuse by any government official, whether at the federal or state level, by the military, or by intelligence agencies.
- This report also acknowledges that allegations have been raised that the United States has transferred individuals to third countries where they have been tortured.
    - The report reiterates the policy that has been

repeatedly reaffirmed at the highest levels of the U.S. government: the United States does not transfer persons to countries where the United States believes it is more likely than not that they will be tortured.

IF ASKED:

Substance of the report:

- Much of the report is focused on the implementation of the CAT in the criminal justice setting.
    - For example, it provides examples of Department of Justice prosecutions of abuses by law enforcement officers since 1999.
    - It also describes new legislation that Congress has passed since 1999 that expands the ability of the United States to prosecute acts of torture as well as other serious abuses that fall short of torture.
- The report also describes how aliens in immigration proceedings are granted protection when it is "more likely than not" that they would face torture in their country of removal, and how this same standard is applied in extradition cases as well.
- It also describes the generous support provided by the

United States to victims of torture or other mistreatment, through assistance to groups working on these issues both domestically and overseas.

Reporting process:

Q. Isn't it true that the United States is many years behind schedule in submitting its report? Doesn't that send a negative signal about the seriousness of its commitment to preventing torture?

A:

- **Yes, the U.S. was behind schedule, but this is not unusual among States Parties.**
- **The United States is strongly committed to preventing torture. The United States condemns the use of torture wherever it occurs.**

If needed:

- **The drafting of a comprehensive report on U.S. implementation of a treaty with the broad scope of the CAT is a complex and ambitious undertaking, which involves contributions by and coordination among many departments within the U.S. government.**
- **Because of the scope of these undertakings, many countries in addition to the United States have found it difficult to submit their treaty reports on time.**

- With respect to national reports on implementation of the CAT, 93 countries are currently overdue in meeting their reporting requirements, including countries such as Australia, Brazil, Chile, China, Costa Rica, El Salvador, Germany, Ireland, Japan, Liechtenstein, New Zealand, Portugal, South Africa, Spain and Sweden.

Q. What happens now that the United States has filed its CAT report?

A:

- The Committee invites States Parties to present their reports to the Committee in oral session in Geneva.
- The United States, for example, appeared before the Committee in May of 2000 to explain its October, 1999 Initial Report.
- The Department of State anticipates that the Committee will schedule such a session on the U.S. report in one of its future sessions.

Q: When does the United States plan to submit its long overdue report on its implementation of the International Covenant on Civil and Political Rights?

A:

- Now that the United States has completed its report on the Convention Against Torture, it is further intensifying its efforts to complete work on its periodic update report on the International Covenant on Civil and Political Rights.

- We anticipate that we will submit that report in the next few months.

Treatment of Terrorist Detainees

Q. Does the U.S. Report discuss the treatment of U.S. detainees overseas captured during operations against the Taliban, al-Qaida and their affiliates and supporters or treatment of detainees in Iraq?

A:

Yes. The U.S. report contains a lengthy Annex describing the treatment of detainees under the control of the U.S. Armed Forces in Afghanistan, Guantanamo, and Iraq.

Q: What does the Report or its annex say about treatment of U.S. detainees In Iraq, Afghanistan and Guantanamo?

A:

- The Annex to the Report describes the background to the war against the Taliban, al-Qaida, and their affiliates and supporters. It describes the status

of the detainees held by U.S. Armed Forces, the combatant status review tribunals, how the U.S. assesses detainees for release and/or transfer, military commissions, and the U.S. court proceedings that are underway. It also addresses generally the issue of treatment of detainees and summarizes the numerous USG reviews and reports that have been released to date addressing DoD treatment.

- The Annex to the Report notes that none of the detailed examinations and reports addressing DoD operations have found a governmental policy that promoted, encouraged, or directed the abuses that took place at Abu Ghraib or elsewhere.
- The report and its annexes underscore that the United States takes all allegations of abuse seriously and investigates them. Those people who are found to have committed unlawful acts are held accountable and disciplined as the circumstances warrant. Investigations are thorough and have high priority.

Q: Does the Report address the CIA's treatment of detainees?

A:

- The report notes that all components of the United States Government are obligated to act in compliance with the law, including all United States constitutional, statutory and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment.
- The U.S. Government does not permit, tolerate, or condone torture, or other unlawful treatment of detainees by its personnel or employees under any circumstances. U.S. laws prohibiting such practices apply when United States government personnel or contractors are operating in the United States and in other parts of the world, although different U.S. laws may apply depending upon the circumstances.
- Allegations regarding the military are discussed in Annex 1. Allegations regarding intelligence activities are currently under review by the Inspector General of the CIA. That office has reported and will continue to report its findings to the Director of the Central Intelligence Agency and the Congressional Intelligence Oversight Committees and will continue to forward substantiated cases of abuse to the Department of Justice for investigation and prosecution.

If Pressed on CIA practices (including specific cases, so-called "ghost detainees," alleged CIA detention facilities)

- We do not comment on intelligence activities. The report speaks for itself.

Renditions/Removals to countries despite fears of torture

Q: Does the report address renditions of persons to countries in which they face torture?

A:

- The report acknowledges that allegations have been raised that the United States has transferred individuals to third countries where they have been tortured.
- The report reiterates the policy that has been repeatedly reaffirmed at the highest levels of the U.S. government: the United States does not transfer persons to countries where the United States believes it is "more likely than not" that they will be tortured.

If pressed on whether this policy applies to the CIA

This policy applies to all components of the United States government.

<u>If pressed on specific allegations of CIA renditions</u>

- **The policy not to return people to countries in which the United States believes it is more likely than not that the person would be tortured applies to all components of the United States government.**
- **In keeping with longstanding practice, we do not comment on intelligence activities.**

<u>If pressed about diplomatic assurances</u>

Q: Does the report address the legality of diplomatic assurances? How is it possible for the U.S. to trust the word of governments that are known human rights violators?

A:

- **The report restates the policy that has been repeatedly reaffirmed at the highest levels of the U.S. government: the United States does not transfer persons to countries where the United States believes it is "more likely than not" that they will be tortured.**

- The United States obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred.
- If assurances were not considered sufficient when balanced against treatment concerns, the U.S. would not transfer the person to the control of that government unless the concerns were satisfactorily resolved.

If pressed on specific interrogation techniques

Q: Does the report address alleged interrogation techniques such as water-boarding, etc.? Are such techniques permissible under the CAT?

A: The report does not address specific interrogation techniques. The report reiterates that the U.S. is committed to complying with all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman, and degrading treatment or punishment and that it does not permit, tolerate, or condone torture or other unlawful treatment by its personnel or employees under any circumstances, regardless of whether the abuse occurred within the United States or overseas.

If asked about specific cases

Q: Does the report address the case of [specific case]?

A:

We will need to get back to you on that. As always, we will not be in a position to comment on cases that are the subject of pending litigation.

L Press Guidance, 4/20/05 Drafted: L/HRR:RKHarris/NSchou 4/18/05
x74262

SBU # 11095

Cleared: L:JBellinger
L:SWitten (o.k.)
L/PM:ADeeks (o.k.)
L/CID:KGorove (o.k.)
L/EUR:DTerrill (o.k.)
DRL/MLA:CCamponovo/LSicade (o.k.)
DRL:GBigler (o.k.)
DRL:MKozak (o.k.)
IO/SHA: WLucas (o.k.)
H: DPetchell (o.k.)
S/WCI: ERichard (o.k.)
S/P:WInboden (o.k.)
D: RWaller (o.k.)
G: Tmittnacht (o.k.)
P: JDeHart (o.k.)
NSC : SHodgkinson (o.k.)
CIA: [redacted] B3
DHS: Nader Baroukh (o.k.)
DOD: [redacted] B6
DOD:
DOJ: PPhilbin (o.k.)

Chambers, Anna L

GE8

RELEASED IN PART
B6, B5

From: DePirro, Velia M
Sent: Monday, December 19, 2005 12:31 PM
To: Levin, Jan; Williams, Kendl
Subject: FW: Dels to defend US reports to human rights/torture treaty bodies

Jan/Kendl:

FYI State's planning for the May and July defenses of U.S. submissions.

Velia De Pirro
Political Counselor
U.S. Mission Geneva
(41) 22-749-4111

-----Original Message-----
From: Harris, Robert K
Sent: Wednesday, December 14, 2005 11:39 PM
To: Kovar, Jeffrey D; DePirro, Velia M; Cassel, Lynn L
Cc: Witten, Samuel M; Bellinger, John B(Legal); Frechette, Alicia A; Legal-L-HRR; Dorosin, Joshua L; Dolan, JoAnn; Andre Surena Final (amsurena[redacted])
Subject: RE: Dels to defend US reports to human rights/torture treaty bodies

B6

LEGAL-#18180-v1-Funding_for_de...

Sam and John,

Mark Lagon's e-mail is very good news, as IO approved the request we wrote for $50,000 to fund the L core team (plus Mark Lagon) for our CAT and ICCPR report hearings. Jeff Kovar tells me that we may need to find money for additional expenditures, such as a bus to carry the delegation, a car for John and Barry etc. (Mark warned me that IO would get "sticker shock" if I asked for more money than I did.) DRL and other bureaus at State will pay their own way to the hearings.

Jeff Kovar earlier today sent me the questions from the Committee Against Torture, which I have not had a chance to yet to read (there are 14 pages of them!). I am attaching them to this message so that L/HRR, L/PM and Andre can look at them. I do not want to circulate these more widely until we've had a chance to see what we think about them and how we would like to task the answers.

14 December 2005 - Unedited ve...

I will keep this group apprised of events related to these hearings as they unfold.

Bob

From: Lagon, Mark P
Sent: Wednesday, December 14, 2005 12:53 PM
To: Harris, Robert K
Cc: Witten, Samuel M; Bellinger, John B(Legal)
Subject: FW: Dels to defend US reports to human rights/torture treaty bodies

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUL 2009 200706444

As your requested, Bob, here is the memo IO considered (with about three non-substantive words tweaked, as I told you). At my urging to Kristen and Philo, IO will provide the entire amount requested. IO/OIC has found money to support (despite it not being a usual "conference")

-----Original Message-----
From: Lagon, Mark P
Sent: Thursday, December 08, 2005 9:57 AM
To: Dibble, Philo L; Tiernan, Thomas J; Williams, Penelope A
Subject: Dels to defend US reports to human rights/torture treaty bodies

B5

Many thanks

-----Original Message-----
From: Harris, Robert K
Sent: Wednesday, December 07, 2005 5:26 PM
To: Lagon, Mark P
Subject:

<< File: LEGAL-#18180-v1-Funding_for_defnse_of_treaty_reports.doc >>

RELEASED IN PART
B5
GE9

From: DePirro, Velia M
Sent: Thursday, December 01, 2005 10:42 AM
To: Williams, Kendl
Subject: FW: Rapid Response 11-30: Euros waiting for answers on prisons
Kendl:

Let's create a press guidance file where we can put all this stuff for when we need it -- like to write statements, etc. thanks

Velia De Pirro
Political Counselor
U.S. Mission Geneva
(41) 22-749-4111

-----Original Message-----
From: Robinson, Brooks A
Sent: Wednesday, November 30, 2005 2:48 PM
To: Moley, Kevin E; Cassel, Lynn L; Lubetkin, Wendy C; Ashley, Chuck; Barton, Paula J; Birdsall, Paul D; Campbell, Piper ; Carle, Lisa M; Cassidy, Joseph P; Chamberlin, John W; DePirro, Velia M; Eshelman, Stephanie K; Hohman, David E; Kehoe, Melissa J; Kovar, Jeffrey D; Kruglikova, Kira G; Kyloh, Nance M; Lee, Donna L; Levin, Jan; Peay, Michael T; Perkins, Katherine K; Rose, Erwin D; Siekert, Magda S
Subject: FW: Rapid Response 11-30: Euros waiting for answers on prisons

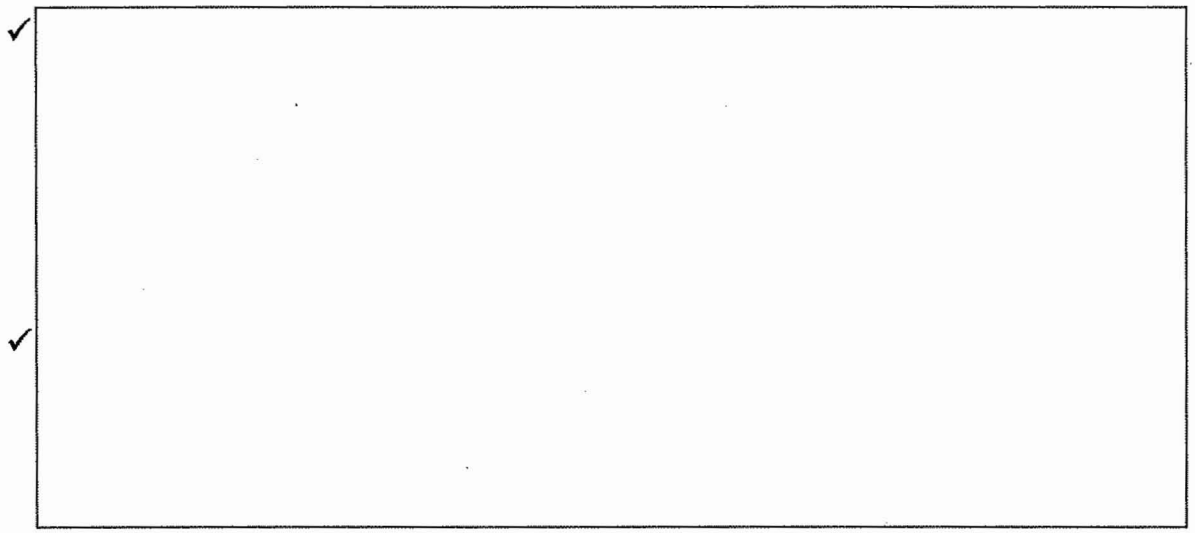
B5

HOT ISSUES

- **Euros Waiting For Answers on Prisons:** Washington's "refusal to confirm or deny" allegations of secret CIA prisons dominates Europe's media. Spain's *El Pais* and *ABC* run Secretary Rice's "promise" to "explain the truth" as their top international stories. A Russian daily observes: "The torture scandal...has seriously damaged U.S.-EU relations and caused mistrust inside Europe." The Secretary's upcoming trip is seen as a "visit of reconciliation."

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 23 JUL 2009 200706444

B5



From: Brancato, Gilda M (L-HRR)
Sent: Tuesday, January 25, 2005 7:19 PM
To: Brancato, Gilda M (L-HRR); Jacobson, Linda (SBU); Manning, Denise (SBU); Brooks, Waldo W (L-PM); Dorosin, Joshua L (L-PM); Johnson, Thomas A; Camponovo, Christopher N (DRL); Sicade, Lynn M (DRL)
Cc: Witten, Samuel M (L); Harris, Robert K (L-HRR); Barton, Paula J; Danies, Joel D; Lucas, William E; Peay, Michael T; Butler, Michael A (DRL)
Subject: RE: FOR COMMENT/enforced disappearances - new proposals

This is a follow-up to my email below and is a LAST CALL for any comments on the new proposals, please, by 3 pm today, as I am in NYC for the remainder of the week for the disabilities treaty negotiations. Disappearances negotiations in Geneva start Monday. Thank you all, Gilda

-----Original Message-----
From: Brancato, Gilda M (L-HRR)
Sent: Tuesday, January 18, 2005 10:18 AM
To: Jacobson, Linda (SBU); Manning, Denise (SBU); Brooks, Waldo W (L-PM); Dorosin, Joshua L (L-PM); Johnson, Thomas A; Camponovo, Christopher N (DRL); Sicade, Lynn M (DRL)
Cc: Witten, Samuel M (L); Harris, Robert K (L-HRR); Barton, Paula J; Danies, Joel D
Subject: FW: FOR COMMENT/enforced disappearances - new proposals

[redacted] B5

-----Original Message-----
From: Danies, Joel D(Geneva)
Sent: Tuesday, January 18, 2005 4:31 AM
To: Brancato, Gilda M (L-HRR); Barton, Paula J; Peay, Michael T
Cc: Lucas, William E; Johnson, Thomas A; Butler, Michael A (DRL); Camponovo, Christopher N (DRL); Harris, Robert K (L-HRR); Mehra, Sasha; Schechter Torres, Julie L (DRL)
Subject: FW: enforced disappearances - consultations on 19 and 24 January

Gilda,

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 06 AUG 2009 200706444

[redacted] B5

-----Original Message-----
From: [redacted] B6
[mailto:[redacted]
Sent: 17 January 2005 15:25
To: Cahalane Brian GENEVA PMUN; [redacted] obemson[redacted]
Subject: enforced disappearances - consultations on 19 and 24 January

Dear regional coordinators,

I would be very thankful if you could forward the following information to the members of your group.

HE Mr Kessedjian has send a letter in December to all delegations inviting them to new informal consultations at the French mission.

- on 19 January, at 3 PM, we will discuss articles 10 to 15bis, 19 and 20

- on 24 January, at 9 AM, we will discuss articles 16, 16bis, 17, 18 and 22

- on 24 January, at 14 PM, we will discuss parts II and III.

For these discussions, we will use the attached documents :
- the chairs draft, that was used as a basis for the October session
- a simplified Part II, dated 1 December 04
- a preliminary compilation dated 2 December 04. This document is an attempt at combining a number of proposals. It does not include all the articles, nor does it reflect all the proposals made by delegations.

During our dicussions, we will try to identify compromise formulas. These formulas will then be presented during our official session, from 31 Januray to 11 February.

I would be very grateful to colleagues who wish to attend these discussions if they could let the French mission know in advance (022 758 91 42 or [redacted]. B6

Many thanks
cc
<<drafteng.doc>>

****
This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify the system manager.

This footnote also confirms that this email message has been swept by

MIMEsweeper for the presence of computer viruses.

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GE18

Comments of the United States of America on the Draft Report of the Working Group on the elaboration of a draft legally binding instrument on protection from Enforced Disappearances

We have reviewed the draft Forced Disappearances Report covering the third session of negotiations held from October 4-8, 2004 and the fourth session held from January 31-February 11, 2005. The following are our comments on this draft:

CRITICAL COMMENTS:

Article 9: The Chair and the Secretariat staff promised the US delegation during negotiations that the final Report would state clearly that one delegation continued to oppose the inclusion of Article 9(2) on "found in" (quasi-universal) jurisdiction. The draft Report does not state this. Please ensure that the final Report expressly includes mention of this opposition of one delegation to Article 9(2).

Article 5: The Report should reflect that at least one delegation believes that there should not be an operative provision in the instrument text on crimes against humanity.

Process: The final Report should include reference to the status of the negotiations at the conclusion of the Fourth session, in particular the following:
(1) the Chair's statement on the final day of the Fourth session that several aspects of the treaty text remain subject to lively debate within the Working Group, including (a) state action, (b) the whole of Part II, Article III- Dbis on "responsibility for international relations", and (c) the format and structure of the instrument (i.e.: whether it is an optional protocol or convention, and whether it will use an existing or new treaty monitoring body); and
(2) while many states intervened to applaud the skill of the Chair and his team, several States added on the last day of the fourth session that the text of the instrument was not yet mature, that consensus was desirable and not reached, and that the 61st CHR should authorize additional treaty negotiations.

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Additional comments:

Article 19: Paragraph 16 in the Report under Article 19 should reflect that at least one delegation underscored that Article 19, as well as similar criminalization provisions, should contain an express requirement of intentionality or knowledge.

Article 22: Paragraph 11 in the Report under Article 22 inaccurately indicates that the proposed Principles and Guidelines on Right to a Remedy contain "obligatory" provisions. Rather, these Principles by their terms (and expressly stated therein) are non-binding. Thus the second sentence in paragraph 11 under Article 22 should be corrected to read as follows: "Other kinds of reparation were just as important to victims' families, and should therefore be treated on a par with compensation in keeping with the Principles and Guidelines on Right to a Remedy currently being worked on at the United Nations."

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 23 JUL 2009 200706444

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B6, B1, 1.4(B), 1.4(D), B5

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GE19

Barton, Paula J

From: Barrios, Stacy M
Sent: Tuesday, February 22, 2005 7:24 PM
To: Brancato, Gilda M; Barton, Paula J; Peay, Michael T
Cc: Danies, Joel D
Subject: FW: Enforced Disappearances: report

Bob shared the UK's comments below....

Stacy M. Barrios
Human Rights Officer
U.S. Mission to UN Organizations
Geneva, Switzerland
41-22-749-4214
41-22-749-4717 (fax)
BarriosSM@state.gov

-----Original Message-----
From: [redacted] B6
Sent: Tuesday, February 22, 2005 6:36 PM
To: Barrios, Stacy M; [redacted] B6
Subject: FW: Enforced Disappearances: report

Dear all

In case you're interested , below are our comments on the report.

best wishes

Bob

-----Original Message-----
From: Bob Last Geneva -Conf
Sent: 22 February 2005 11:32
To: [redacted] B6
Subject: FW: Enforced Disappearances: report

Thanks Jillian

we didn't receive the report or hear about the deadline. I've just sent in our comments.

Bob

-----Original Message-----
From: Bob Last Geneva -Conf
Sent: 22 February 2005 11:30
To: [redacted] B6

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 14 AUG 2009 200706444

Cc: [redacted]

SECRET B6

Subject: Enforced Disappearances: report

Carmen

I hope this is not too late. Here are the UK's comments on the report.

best wishes

Bob

WG.22/CRP 2

[redacted] B1

Bob Last
Human Rights Attaché
Human Rights Section

2/23/2005

[redacted]

www.fco.gov.uk/ukmisgeneva

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B6

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B5
GE22

PRELIMINARY COMPILATION OF PROPOSALS – 02/12/05

Preamble

The States Parties to [this instrument],

Considering **the obligations of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,**

Having regard **to the Universal Declaration of Human Rights,**

Recalling the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992,

Recalling **all other relevant instruments,**

Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances, a crime against humanity,

Determined to **prevent enforced disappearances and** combat impunity for the crime of enforced disappearance,

Affirming **the right of any person not to be subjected to an enforced disappearance** and the right of victims to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person,

Have agreed as follows:

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 23 JUL 2009 200706444

SECRET

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Article 1

For the purposes of [this instrument], enforced disappearance is considered to be the ~~deprivation of a person's liberty, in whatever form,~~ **arrest, detention, abduction or any other deprivation of liberty** committed by agents of ~~the~~ **a** State or by persons or groups of persons acting with the authorization, support or acquiescence of ~~the~~ **a** State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, ~~which places such a person~~ **and where such person is placed** outside the protection of the law.

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OR

For the purpose of [this instrument], enforced disappearance is considered to be the placement of a person outside the protection of the law as a consequence of both his/her deprivation of liberty, including arrest, detention or abduction, committed by agents of a State or by persons or groups of persons acting with the authorization, support or acquiescence of a State, and the refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person.

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Article 3

1. Each State Party shall take the necessary measures to ~~prosecute and punish~~ **hold criminally responsible** ~~those who~~

B5

a) those who attempt to commit and are accomplices or participate in ~~commit or assist in the commission of~~ an enforced disappearance.

~~1. The following shall be punished:~~

~~(a) The perpetrators of an enforced disappearance and those who are accessories to it;~~

~~(b) Attempted enforced disappearance;~~

~~(c) Conspiracy to commit an enforced disappearance.~~

~~2. The following shall also be punished:~~

~~(a) Those who order or encourage the commission or attempted commission of such an offence, and those who facilitate its commission or attempted commission by aiding, abetting or otherwise assisting in it, including by providing the means for its commission or attempted commission;~~

B5

(b) The superior **officer** who:

- (i) Knew, or consciously disregarded information which clearly indicated, that subordinates **under his/her effective authority and control** were committing or about to commit an enforced disappearance **and** ;
- (ii) ~~Failed~~ to take all necessary and reasonable measures within his or her power to prevent or ~~halt~~ **repress** the enforced disappearance or ~~to repress its commission~~ ~~or~~ to submit the matter to the competent authorities for investigation and prosecution.

2. An order from a superior **officer** or a public authority may not be invoked as a justification for enforced disappearance.

Article 4

1. Each State party shall make **the offence of** enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish:

(a) Mitigating circumstances, inter alia for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;

(b) Aggravating circumstances, inter alia in the event of the death of the victim or the commission of an enforced disappearance in respect of pregnant women, minors or other particularly vulnerable persons.

Article 5

Without prejudice to article 2 bis,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings: [redacted] B5

(a) Is ~~substantial~~ **of a long duration** and proportionate to the extreme seriousness of this offence;

(b) Commences from the moment when the offence of enforced disappearance ceases and the fate of the disappeared person is established.

[redacted] B5

2. The term of limitation for criminal proceedings which is provided for in paragraph 1 shall be suspended for as long as no effective remedy is available in ~~a~~ **the** State Party ~~to any victim~~ **in case** of **an** enforced disappearance.

Article 9

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over **the offence of** enforced disappearance:

a) When the offence is committed in any territory under its jurisdiction or on a ship flying its flag or on an aircraft registered in accordance with its legislation at the time of the events;

b) When the alleged offender is one of its nationals or a stateless person usually resident in its territory;

c) **When the alleged offender is a stateless person usually resident in its territory and the State Party considers it appropriate;**

d) When the disappeared person is one of its nationals ~~and the State Party considers it appropriate~~.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over **the offence of** enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or transfers him or her **in accordance with its international obligations** to another State or transfers him or her to an international criminal tribunal whose jurisdiction it has recognized.

3. [This instrument] does not exclude any **additional** criminal jurisdiction exercised in accordance with ~~internal~~ **national** law.

Article 10

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an **offence of** enforced disappearance is present shall take him or her into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State ~~Party~~ but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. A State Party which has taken the measures referred to in paragraph 1 shall immediately carry out an investigation to establish the facts. It shall notify the States Parties ~~which may have jurisdiction in accordance with~~ **referred to in** article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention; and the findings of its investigation, indicating whether it intends to exercise its jurisdiction.

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides

Article 11

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an enforced disappearance is found shall, if it does not extradite that person or transfer him or her **in accordance with its international obligations** to another State or transfer him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with an enforced disappearance shall be ~~tried~~ **entitled to a fair and public hearing** by a competent, independent and impartial ~~court which has been duly established by law and which respects the guarantees of a fair trial~~ **tribunal established by law**.

4. Any person regarding whom proceedings are brought in connection with an enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings

Article 12

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to a competent authority, which shall immediately undertake a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defense counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, ~~each State Party shall refer the matter to~~ the authority referred to in paragraph 1 ~~for~~ **launches** an investigation, even if there has been no formal complaint.

3. Each State Party shall ensure that the authority referred to in paragraph 1:

(a) Has the necessary powers and resources to conduct the investigation effectively, including the power to compel suspects or witnesses to appear before it;

(b) ~~Receives the~~ **Has access to all documents and other** information **relevant for** ~~it needs for~~ its investigation;

(c) Has access to any place **under its jurisdiction** where it is suspected that a disappeared person may be present.

4. Each State Party shall take the necessary measures to prevent and punish acts likely to hinder the conduct of the investigations. It shall ensure in particular that persons suspected of having committed an enforced disappearance are not in a position to influence the progress of the investigations by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defense counsel, or at persons participating in the investigation.

5. The investigation provided for in this article ~~shall~~ **should** be conducted in accordance with ~~the~~ **relevant** international **standards**, principles and **guidelines** ~~relating~~ **applicable** to investigations into human rights violations, **including those on** torture, **and to the prevention of extra-legal, summary or arbitrary executions, as well as** to the search for disappeared persons~~,~~ **and** forensic examinations and identification.

Article 13

1. For the purposes of extradition between States Parties, **the offence of** enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds.

2. **The offence of** enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of [this instrument].

3. States Parties undertake to include **the offence of** enforced disappearance as an extraditable offence in every extradition treaty subsequently to be concluded between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider [this instrument] as the necessary legal basis for extradition in respect of **the offence of** enforced disappearance.

5. A State Party which does not make extradition conditional on the existence of a treaty shall recognize **the offence of** enforced disappearance as an extraditable offence **between States Parties themselves**.

6. Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.

7. Nothing in [this instrument] shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

Article 15 bis

1. No State Party shall expel, return ("*refouler*") , **transfer** or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of humanitarian law.

Article 16

1. Each State Party shall, under its law:

a) Indicate those ~~officials~~ **authorities** authorized to order deprivation of liberty;

b) Establish the conditions under which such orders may be given;

c) Guarantee that any person deprived of liberty shall be held solely in an officially recognized and supervised place;

d) Guarantee that any person deprived of liberty shall be authorized to communicate with a person of his/her choice, when such a communication is not incompatible with the purpose of the detention ;

e) Guarantee access by the judicial authorities to the places where persons are deprived of liberty;

f) Guarantee that any person deprived of liberty shall, in all circumstances, be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the deprivation of liberty and order his or her release if that deprivation of liberty is not lawful.

2. Each State Party shall compile and maintain one or more official registers of persons deprived of liberty. The information contained therein shall include, as a minimum:

a) The identity of the person deprived of liberty;

b) The authority ~~that ordered~~ **having decided** the deprivation of liberty;

c) The authority ~~responsible for supervising~~ **controlling** the deprivation of liberty;

d) The date and time of admission to the place of detention and the authority responsible for the place of detention;

e) The State of health and, in the event of death, the circumstances and cause of death

f) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

Article 16 bis [redacted]

1. Each State Party shall guarantee ~~to the person deprived of liberty and to his or her relatives, their legal representatives, their counsel and any person authorized by them, as well as~~ to any person ~~able to claim~~ **with** a legitimate interest **under this article** ~~,~~ access to at least the following information:

(a) ~~The authority to which the person has been handed over;~~ [redacted] B5

(b) The ~~authority that ordered~~ **having decided** the deprivation of liberty; [redacted] B5

(c) The authority ~~responsible for supervising the person deprived~~ **controlling the deprivation** of liberty ;

(d) The whereabouts of the person deprived of liberty, including in the event of a transfer;

(e) The date and place of release;

(f) **The** state of health and, in the event of death, the circumstances and causes of death.

2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

3. In order not to jeopardize the privacy of the persons concerned, the information provided pursuant to paragraph 1 of this article must be appropriate and relevant for the intended purpose ~~and must not be used for purposes other than~~ **of** the search for the person deprived of liberty.

Article 17

Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the ~~relatives of the person deprived of liberty or of the disappeared person, their legal representatives, their counsel and any person authorized by the person deprived of liberty or by the disappeared person or by his or her relatives, as well as to any other person able to claim a legitimate interest~~ **the persons referred to in Article 16bis 1**, the right to a prompt and effective remedy as a means of obtaining without delay the information referred to in article 16 bis. This right to a remedy may not be suspended or restricted in any circumstances.

Article 19

1. Each State Party shall take the necessary measures to prevent and punish the following conduct:

a) Delaying or obstructing the remedy referred to in **article 16.1 e)** and 17;

b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knows or ought to know to be inaccurate;

2. Refusal by an official to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.

Article 22

1. For the purposes of [this instrument], "victim" means the disappeared person and any ~~individual~~ **natural person** who has suffered ~~direct~~ harm as a **direct** result of ~~that person's~~ **an enforced** disappearance.

2. Each State Party shall take the necessary measures to ensure that every victim knows the truth regarding the circumstances of the enforced disappearance and the fate of the disappeared person. In particular, it shall take the necessary measures to search for, locate and release disappeared persons and, in the event of death, return their remains.

3. Each State Party shall guarantee the right of victims of enforced disappearance to obtain prompt, fair and adequate reparation for the harm caused to them.

4. The right to obtain reparation referred to in paragraph 3 includes full compensation for material and psychological harm. It may also include **other modalities of reparation such as**:

a) Restitution;

b) Rehabilitation;

c) Satisfaction;

d) **Guarantee of non-repetition, including** restoration of honour and reputation

5. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the necessary measures with regard to the legal situation of the disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, custody of children and property rights.

Article 23

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

a) The abduction or appropriation of children who are ~~victims of enforced disappearance~~ **disappeared** , children whose father or mother is a victim of enforced disappearance or children born during the captivity of a mother who is a victim of enforced disappearance;

b) The falsification or destruction of documents attesting to the true identity of the children referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) and (b)

Article 25

1. When a child who has been abducted or appropriated in the circumstances described in article 23, paragraph 1 (a), is found in the territory of a State Party, the question of the child's possible return to his or her family of origin shall be resolved either under the national legislation of that State Party or under a bilateral or multilateral agreement entered into by that State and by the State in which the family of origin resides.

2. In all cases, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

3. **Considering the need to protect the best interests of the children referred to in paragraph 1, there shall be an opportunity, in States Parties which recognize a system of adoption, for a review of the adoption of such children and, in particular, for annulment of any adoption which originated in enforced disappearance. Such adoption should, however, continue to be in force if consent is given, at the time of review, by the child's closest relatives.**

RELEASED IN PART
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GE29

Lee, Michelle G

From: Bellinger, John B(Legal)
Sent: Tuesday, May 02, 2006 1:08 PM
To: Kovar, Jeffrey D; Harris, Robert K; 'Sandra_L._Hodgkinson@nsc.eop.gov'; Waxman, Matthew
Subject: Re: CAT -- NGO briefing Sat May 6

[redacted] B5

-----Original Message-----
From: Kovar, Jeffrey D <KovarJD@state.gov>
To: Harris, Robert K <HarrisRK2@state.gov>; Bellinger, John B(Legal) <BellingerJB@state.gov>
Sent: Tue May 02 03:09:02 2006
Subject: RE: CAT -- NGO briefing Sat May 6

[redacted] B5

From: Harris, Robert K
Sent: Monday, May 01, 2006 9:05 PM
To: Bellinger, John B(Legal); Kovar, Jeffrey D
Subject: FW: CAT -- NGO briefing Sat May 6
Importance: High

[redacted] B5

Jeff,

As you are John's control officer, you might want to contact the Mission's Press office to make sure the scheduling works.

Bob

From: Lagon, Mark P
Sent: Monday, May 01, 2006 2:43 PM
To: Robinson, Brooks A; Lubetkin, Wendy C
Cc: Noyes, Julieta V (DRL); Denig, Paul; Wilbur, Richard M; Harris, Robert K
Subject: RE: CAT -- NGO briefing Sat May 6
Importance: High

[redacted] B5

----> Could you make some specific suggestions for interviews (and potential times -- but I suppose Fri afternoon might be best), and please copy me, Julieta and Bob Harris

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

We'll endeavor to get John to join/lead the NGO briefing too.

-----Original Message-----
From: Robinson, Brooks A(Geneva)
Sent: Monday, May 01, 2006 4:02 AM
To: Noyes, Julieta V (DRL); Lagon, Mark P
Cc: Lubetkin, Wendy C
Subject: RE: CAT -- NGO briefing Sat May 6

[redacted] B5

We'll send out invitations to the NGO briefing saying "the US delegation" will brief.

- Brooks

From: Noyes, Julieta V (DRL)
Sent: Friday, April 28, 2006 9:21 PM
To: Lagon, Mark P; Robinson, Brooks A
Subject: RE: CAT -- NGO briefing Sat May 6

[redacted] B5

From: Lagon, Mark P
Sent: Friday, April 28, 2006 3:07 PM
To: Robinson, Brooks A
Cc: Noyes, Julieta V (DRL)
Subject: RE: CAT -- NGO briefing Sat May 6

J--

[redacted] B5

-----Original Message-----
From: Robinson, Brooks A(Geneva)
Sent: Friday, April 28, 2006 12:29 PM
To: Lagon, Mark P
Cc: Noyes, Julieta V (DRL)
Subject: RE: CAT -- NGO briefing Sat May 6

[redacted] B5

- Brooks

From: Lagon, Mark P
Sent: Friday, April 28, 2006 4:03 PM
To: Robinson, Brooks A
Cc: Noyes, Julieta V (DRL)

Subject: RE: CAT -- NGO briefing Sat May 6

Great

-----Original Message-----
From: Robinson, Brooks A(Geneva)
Sent: Friday, April 28, 2006 8:23 AM
To: Lagon, Mark P; Noyes, Julieta V (DRL)
Cc: Kovar, Jeffrey D; DePirro, Velia M; Lubetkin, Wendy C; Denig, Paul
Subject: FW: CAT -- NGO briefing Sat May 6

Mark / Julieta:

I called a few NGOs this morning. It looks like we can get enough on Saturday to make it worthwhile. Most of them like early afternoon. How about 2:30-3:30 at the Mission? As soon as you confirm we'll get out invitations.

By the way, HR Watch's Jennifer Daskil from Washington and Amnesty International's Daniel Gorevan from London will be in Geneva specifically for the CAT. They would definitely want to attend, in addition to at least some of the Geneva-based staff.

We got the final scenesetter today. We'll wait to hear from you after your Monday planning meeting re: we can send that out, and what other information materials we might have or make. As for outreach to journalists, we will play that by ear and wait to see whether Bellinger and/or Cully want to make a few phone calls at some point; that can be done on very short notice.

- Brooks

P.S. I will be Charge during the CAT, so next week Wendy Lubetkin on my staff will take over coordinating the NGO event.

****
Brooks Anne Robinson
Counselor for Public Affairs
US Mission, Geneva
tel: 41-22-749-4360
http://geneva.usmission.gov

RELEASED IN PART
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GE30

Lee, Michelle G

From: Schou, Nina E
Sent: Tuesday, May 02, 2006 7:44 PM
To: Bellinger, John B(Legal)
Cc: Legal-L-HRR; Haines, Avril D; Dorosin, Joshua L; Kovar, Jeffrey D; Hata, Marianne J; Gale, T Hanny
Subject: FW: LEGAL-#24995-v1-CAT_JBB_open.DOC
Attachments: LEGAL-#24997-v1-CAT_script_5_2_06.DOC; LEGAL-#24995-v1-CAT_JBB_open.DOC

Importance: High

John,

Here are two documents for your review. The first is your opening statement. [redacted] B5

[redacted] B5

The second is the oral script we will use during the first session of the hearing. [redacted]

[redacted]

If possible, we would appreciate your edits to the script, and any additional edits you may have on your opening statement, by midday Geneva time Wednesday so that we may incorporate them. If you would like to email the text, please do so to any of our accounts, and cc Jeff Kovar in Geneva. If you would like to make pen and ink edits, please fax them to Jeff Kovar at the mission (011-41-22-749-4343).

Thanks for your help and your leadership. We'll celebrate when this is over.

Best,
Nina

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 24 JUL 2009 200706444

RELEASED IN PART
B5

GE31

Lee, Michelle G

From: Bellinger, John B(Legal)
Sent: Tuesday, May 02, 2006 10:06 PM
To: Schou, Nina E
Cc: Legal-L-HRR; Haines, Avril D; Dorosin, Joshua L; Kovar, Jeffrey D; Hata, Marianne J; Gale, T Hanny
Subject: Re: LEGAL-#24995-v1-CAT_JBB_open.DOC B5

-----Original Message-----
From: Schou, Nina E <SchouNE@state.gov>
To: Bellinger, John B(Legal) <BellingerJB@state.gov>
CC: Legal-L-HRR <Legal-L-HRR@state.gov>; Haines, Avril D <HainesAD@state.gov>; Dorosin, Joshua L <DorosinJL@state.gov>; Kovar, Jeffrey D <KovarJD@state.gov>; Hata, Marianne J <HataMJ@state.gov>; Gale, T Hanny <GaleTH@state.gov>
Sent: Tue May 02 13:46:50 2006
Subject: RE: LEGAL-#24995-v1-CAT_JBB_open.DOC

We'll do our best. We're leaving shortly. I will discuss with Marianne to see that you have hard copies, and hopefully in your book.

-----Original Message-----
From: Bellinger, John B(Legal)(Room 6423)
Sent: Tuesday, May 02, 2006 1:46 PM
To: Schou, Nina E
Cc: Legal-L-HRR; Haines, Avril D; Dorosin, Joshua L; Kovar, Jeffrey D; Hata, Marianne J; Gale, T Hanny
Subject: Re: LEGAL-#24995-v1-CAT_JBB_open.DOC

Can you print and put in my book? I leave at 200 pm.

-----Original Message-----
From: Schou, Nina E <SchouNE@state.gov>
To: Bellinger, John B(Legal) <BellingerJB@state.gov>
CC: Legal-L-HRR <Legal-L-HRR@state.gov>; Haines, Avril D <HainesAD@state.gov>; Dorosin, Joshua L <DorosinJL@state.gov>; Kovar, Jeffrey D <KovarJD@state.gov>; Hata, Marianne J <HataMJ@state.gov>; Gale, T Hanny <GaleTH@state.gov>
Sent: Tue May 02 13:44:06 2006
Subject: FW: LEGAL-#24995-v1-CAT_JBB_open.DOC

John,

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

Here are two documents for your review. The first is your opening statement. This has been cleared by DOJ and DHS. We hadn't received any comments from DOD.

The second is the oral script we will use during the first session of the hearing. As discussed previously, it is the reduced version of our longer Q's and A's. This has been cleared by DOJ and DHS and the counsel's office for the Joint Chiefs.

If possible, we would appreciate your edits to the script, and any additional edits you may have on your opening statement, by midday Geneva time Wednesday so that we may incorporate them. If you would like to email the text, please do so to any of our accounts, and cc Jeff Kovar in Geneva. If you would like to make pen and ink edits, please fax them to Jeff Kovar at the mission (011-41-22-749-4343).

Thanks for your help and your leadership. We'll celebrate when this is over.

Best,
Nina

<<LEGAL-#24995-v1-CAT_JBB_open.DOC>>

GE32

Lee, Michelle G

RELEASED IN PART
B6

From: Robinson, Brooks A
Sent: Wednesday, May 03, 2006 9:26 AM
To: Kovar, Jeffrey D
Cc: Cassel, Lynn L; Lubetkin, Wendy C; DePirro, Velia M; Barton, Paula J
Subject: FW: AI's CAT briefing - Corrected Version
Attachments: cover.doc; Summary.doc; Main text.doc

YEs, see below.

From: DePirro, Velia M
Sent: Tuesday, May 02, 2006 4:37 PM
To: Robinson, Brooks A
Subject: FW: AI's CAT briefing - Corrected Version

Brooks: here's the latest from Amnesty.

Velia De Pirro
Political Counselor
U.S. Mission Geneva
(41) 22-749-4111

From: [redacted] B6
Sent: Tuesday, May 02, 2006 1:35 PM
To: DePirro, Velia M
Cc: Levin, Jan; Kovar, Jeffrey D; Barton, Paula J; [redacted] B6
Subject: Fw: AI's CAT briefing - Corrected Version

Dear Velia,

I am forwarding below, again for information, a corrected copy of the supplementary brief to the CAT shared with you last week in connection with the forthcoming consideration of the report of the USA.

The corrections pertain to typographical errors in footnotes, the proper name of the British Indian Ocean territory of Diego Garcia, a new Annex II, which reproduces excerpts from the Convention against Torture, and the deletion of the mention of Egypt in the list of countries with secret CIA-run detention facilities on page 19.

With best regards.
Peter

[redacted] B6

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 12 AUG 2009 200706444

Rue du Cendrier 22
CH-1201 Genève
Suisse

[redacted]

B6

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This message has been scanned for viruses by BlackSpider MailControl

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B5

GE34

Lee, Michelle G

From: Hill, Steven R
Sent: Tuesday, July 24, 2007 9:13 PM
To: Kovar, Jeffrey D
Cc: Levin, Jan; Gale, T Hanny; DePirro, Velia M; Bettauer, Ronald J; Legal-HRR-DL; Padmanabhan, Vijay M; Barks-Ruggles, Erica J (DRL); Sicade, Lynn M (DRL); IO-RHS-Human Rights-DL
Subject: CAT - One-Year Follow-Up Document for Transmittal
Attachments: LEGAL-#53330-v1-CAT_One_Year_Update_Transmittal_Letter.DOC; Williamson Declaration.pdf; LEGAL-#51098-v3-CAT_Follow_Up_FINAL.DOC

Jeff:

As discussed, please transmit the attached one-year follow-up (including annexes) to the Committee Against Torture. Since the one year deadline is July 25, please transmit NLT COB tomorrow (Wednesday).

[redacted] B5

A draft cover letter is also attached. The six annexes to the report are listed below. Due to the size of the files, for all but the first item, I'm providing a link to the file in an online location so that you can have them printed them locally. (Be advised that this will take some time due to the length of some documents.)

Please confirm transmittal and forward to us a scanned copy of the signed cover letter.

Thanks very much for your help.

Steve

Annexes

1. Declaration of Clint Williamson (attached)
2. Department of Defense Directive 2310.01E - http://www.defenselink.mil/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf
3. Army Field Manual 2-22.3, Human Intelligence Collector Operations www.fas.org/irp/doddir/army/fm2-22-3.pdf
4. Military Commissions Act of 2006 (P.L. 109-366) - http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf
5. Sexual Violence Reported by Correctional Authorities, 2005 (Department of Justice, Bureau of Justice Statistics) - http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca05.pdf
6. Department of Homeland Security, "Hurricane Katrina: What Government Is Doing" - http://www.dhs.gov/xprepresp/programs/gc_1157649340100.shtm

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 24 JUL 2009 200706444

West, Lora

RELEASED IN PART
B5, B6

From: Brancato, Gilda M
Sent: Monday, June 19, 2006 4:13 PM
To: Brancato, Gilda M; Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Deeks, Ashley S; Manning, Denise; Johnson, Thomas A; Sicade, Lynn M (DRL); McKee, Amy E; Padmanabhan, Vijay M; Williams, Kendl
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Dorosin, Joshua L; Propp, Kenneth R; Noyes, Julieta V (DRL); Legal-L-HRR; Bettauer, Ronald J; Cassel, Lynn L; Leatham, Rachel M
Subject: RE: Final disappearances USG intervention at HRC (written and oral statements)

Attached for your records is the final version of the written and oral USG statements on the forced disappearances convention, with final corrections, and comments from DoD, DoJ, and NSC incorporated. Please discard the versions of

LEGAL-#26706-v1-Oral_Statement... LEGAL-#26432-v1-Statement_at_2...

these two documents distributed on Friday night.
Paula and Jan, I will forward a copy of our written statement to [redacted] of the UK Mission in Geneva and to other missions I have been in contact with on the issue. Thank you. B6

From: Brancato, Gilda M
Sent: Friday, June 16, 2006 7:45 PM
To: Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Padmanabhan, Vijay M; Deeks, Ashley S; Manning, Denise; Johnson, Thomas A; Sicade, Lynn M (DRL); McKee, Amy E
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Dorosin, Joshua L; Propp, Kenneth R; Noyes, Julieta V (DRL); Legal-L-HRR; Bettauer, Ronald J; Cassel, Lynn L; Leatham, Rachel M
Subject: RE: Final disappearances USG intervention at HRC (written and oral statements)

Attached for USG delegation at the HRC are two USG statements on the draft Disappearances Convention, a lengthy written statement for distribution, submission into the record as an official UN document, and for posting on our website, as well as a two pager intended for delivery in the two minutes allotted to us. Also attached for our information is our Closing statement at the 2005 fifth round of negotiations (this has been made public) and an information memo to John Bellinger as background (for internal Department and Mission use only). Thank you, good night and good luck!!~ wish we were there with you all!! << File: LEGAL-#26432-v1-Statement_at_2006_HRC_on_Forced_Disappearances_text.DOC >> << File: LEGAL-#26706-v1-Oral_Statement_on_Disappearances_at_HRC.DOC >> << File: LEGAL-#26632-v1-Forced_Disappearances_Update_to_JBB.DOC >> << File: LEGAL-#18367-v1-Disappearances_treaty_USG_Final_STatement.DOC >>

From: Brancato, Gilda M
Sent: Tuesday, June 13, 2006 6:53 PM
To: Brancato, Gilda M; Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Harris, Robert K; Padmanabhan, Vijay M; Deeks, Ashley S; Manning, Denise; Johnson, Thomas A; Sicade, Lynn M (DRL)
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Dorosin, Joshua L; Propp, Kenneth R; Noyes, Julieta V (DRL); Legal-L-HRR
Subject: RE: Final disappearances text.pdf/for clearance/USG intervention at HRC

As promised, attached for your clearance is an expanded Statement of the USG on the draft Disappearances Convention, to be delivered and entered into the record at the HRC. Please comment and clear by Thursday COB. Thank you very much, Gilda << File: LEGAL-#26432-v1-Statement_at_2006_HRC_on_Forced_Disappearances_text.DOC >>

From: Brancato, Gilda M
Sent: Thursday, June 08, 2006 7:37 PM

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 06 AUG 2009 200706444

To: Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Harris, Robert K; Padmanabhan, Vijay M; Deeks, Ashley S; Manning, Denise; Johnson, Thomas A; Sicade, Lynn M (DRL)
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Dorosin, Joshua L; Propp, Kenneth R; Noyes, Julieta V (DRL); Legal-L-HRR
Subject: Final disappearances text.pdf/for clearance/USG intervention at HRC

<< File: LEGAL-#26432-v1-Statement_at_2006_HRC_on_Forced_Disappearances_text.DOC >> << File: Final disappearances text.pdf >>

	B5

Also attached FYI is the final text of the instrument (Annex I to the Report starting at page 30), the Report of the Fifth and final session of the Working Group (US interventions and objections are noted in paras 86, 94, 100-01, 104, 109, 114, 117, 125, and 126) and our Closing Statement at the Fifth Session on pages 48-49 of the Report.

After I receive Department cleraances I will circulate to DOJ, DoD, and possibly NSC for clearance. Thank you all, Gilda

GE46

West, Lora

From: Brancato, Gilda M
Sent: Saturday, June 17, 2006 1:45 AM
To: Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Padmanabhan, Vijay M; Deeks, Ashley S; Manning, Denise; Johnson, Thomas A; Sicade, Lynn M (DRL); McKee, Amy E
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Dorosin, Joshua L; Propp, Kenneth R; Noyes, Julieta V (DRL); Legal-L-HRR; Bettauer, Ronald J; Cassel, Lynn L; Leatham, Rachel M
Subject: RE: Final disappearances USG intervention at HRC (written and oral statements)

Attached for USG delegation at the HRC are two USG statements on the draft Disappearances Convention, a lengthy written statement for distribution, submission into the record as an official UN document, and for posting on our website, as well as a two pager intended for delivery in the two minutes allotted to us. Also attached for our information is our Closing statement at the 2005 fifth round of negotiations (this has been made public) and an information memo to John Bellinger as background (for internal Department and Mission use only). Thank you, good night and good luck!!~ wish

LEGAL-#26432-v1-Statement_at_2... LEGAL-#26706-v1-Oral_Statement... LEGAL-#26632-v1-Forced_Disappe... LEGAL-#18367-v1-Disappearances...

we were there with you all!!

From: Brancato, Gilda M
Sent: Tuesday, June 13, 2006 6:53 PM
To: Brancato, Gilda M; Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Harris, Robert K; Padmanabhan, Vijay M; Deeks, Ashley S; Manning, Denise; Johnson, Thomas A; Sicade, Lynn M (DRL)
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Dorosin, Joshua L; Propp, Kenneth R; Noyes, Julieta V (DRL); Legal-L-HRR
Subject: RE: Final disappearances text.pdf/for clearance/USG intervention at HRC

As promised, attached for your clearance is an expanded Statement of the USG on the draft Disappearances Convention, to be delivered and entered into the record at the HRC. Please comment and clear by Thursday COB. Thank you very much, Gilda << File: LEGAL-#26432-v1-Statement_at_2006_HRC_on_Forced_Disappearances_text.DOC >>

From: Brancato, Gilda M
Sent: Thursday, June 08, 2006 7:37 PM
To: Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Harris, Robert K; Padmanabhan, Vijay M; Deeks, Ashley S; Manning, Denise; Johnson, Thomas A; Sicade, Lynn M (DRL)
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Dorosin, Joshua L; Propp, Kenneth R; Noyes, Julieta V (DRL); Legal-L-HRR
Subject: Final disappearances text.pdf/for clearance/USG intervention at HRC

<< File: LEGAL-#26432-v1-Statement_at_2006_HRC_on_Forced_Disappearances_text.DOC >> << File: Final disappearances text.pdf >>

B5

Also attached FYI is the final text of the instrument (Annex I to the Report starting at page 30), the Report of the Fifth and final session of the Working Group (US interventions and objections are noted in paras 86, 94, 100-01, 104, 109, 114, 117, 125, and 126) and our Closing Statement at the Fifth Session on pages 48-49 of the Report.

After I receive Department cleraances I will circulate to DOJ, DoD, and possibly NSC for clearance. Thank you all, Gilda

Kovar 2006 Enforced Disappearances 25

UNCLASSIFIED RELEASED IN PART

West, Lora B5 GE47

From: Brancato, Gilda M
Sent: Thursday, June 15, 2006 12:52 AM
To: Brancato, Gilda M; Johnson, Thomas A; Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Harris, Robert K; Padmanabhan, Vijay M; Sicade, Lynn M (DRL); Witten, Samuel M
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Noyes, Julieta V (DRL); Legal-L-HRR
Subject: RE: URGENT/Final disappearances text/for clearance/info memo to L

TO Sam W, Tom J, Lynn S, Jeff K, Bob H: We would like to provide John Bellinger with a short info memo on the disappearances draft convention, so may we have your clearances on the attached one-pager by Thursday COB (so sorry for the short fuse, Bob begins leave this weekend and the convention could be adopted by HRC as early as next week).

LEGAL-#26632-v1-Forced_Disappe...

. All others are copied for their information. Thank you, and again apologies for the short fuse.

From: Brancato, Gilda M
Sent: Wednesday, June 14, 2006 1:23 PM
To: Johnson, Thomas A; Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Harris, Robert K; Padmanabhan, Vijay M; Deeks, Ashley S; Manning, Denise; Sicade, Lynn M (DRL)
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Dorosin, Joshua L; Propp, Kenneth R; Noyes, Julieta V (DRL); Legal-L-HRR
Subject: RE: Final disappearances text.pdf/for clearance/USG intervention at HRC

B5

From: Johnson, Thomas A
Sent: Wednesday, June 14, 2006 11:03 AM
To: Brancato, Gilda M; Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Harris, Robert K; Padmanabhan, Vijay M; Deeks, Ashley S; Manning, Denise; Sicade, Lynn M (DRL)
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Dorosin, Joshua L; Propp, Kenneth R; Noyes, Julieta V (DRL); Legal-L-HRR
Subject: RE: Final disappearances text.pdf/for clearance/USG intervention at HRC

B5

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 06 AUG 2009 200706444

UNCLASSIFIED

B5

[redacted]

-----Original Message-----
From: Brancato, Gilda M
Sent: Tuesday, June 13, 2006 6:53 PM
To: Brancato, Gilda M; Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Harris, Robert K; Padmanabhan, Vijay M; Deeks, Ashley S; Manning, Denise; Johnson, Thomas A; Sicade, Lynn M (DRL)
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Dorosin, Joshua L; Propp, Kenneth R; Noyes, Julieta V (DRL); Legal-L-HRR
Subject: RE: Final disappearances text.pdf/for clearance/USG intervention at HRC

As promised, attached for your clearance is an expanded Statement of the USG on the draft Disappearances Convention, to be delivered and entered into the record at the HRC. Please comment and clear by Thursday COB. Thank you very much, Gilda << File: LEGAL-#26432-v1-Statement_at_2006_HRC_on_Forced_Disappearances_text.DOC >>

From: Brancato, Gilda M
Sent: Thursday, June 08, 2006 7:37 PM
To: Lagon, Mark P; Witten, Samuel M; Kovar, Jeffrey D; Levin, Jan; Harris, Robert K; Padmanabhan, Vijay M; Deeks, Ashley S; Manning, Denise; Johnson, Thomas A; Sicade, Lynn M (DRL)
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Dorosin, Joshua L; Propp, Kenneth R; Noyes, Julieta V (DRL); Legal-L-HRR
Subject: Final disappearances text.pdf/for clearance/USG intervention at HRC

<< File: LEGAL-#26432-v1-Statement_at_2006_HRC_on_Forced_Disappearances_text.DOC >> << File: Final disappearances text.pdf >>

B5

[redacted]

Also attached FYI is the final text of the instrument (Annex I to the Report starting at page 30), the Report of the Fifth and final session of the Working Group (US interventions and objections are noted in paras 86, 94, 100-01, 104, 109, 114, 117, 125, and 126) and our Closing Statement at the Fifth Session on pages 48-49 of the Report.

After I receive Department cleraances I will circulate to DOJ, DoD, and possibly NSC for clearance. Thank you all, Gilda

RELEASED IN PART
B5

QE123

Peay, Michael T

From: Brancato, Gilda M (L-HRR)
Sent: Saturday, September 25, 2004 2:27 AM
To: Witten, Samuel M (SBU); Jacobson, Linda (SBU); Manning, Denise (SBU); Dorosin, Joshua L (L-PM); Brooks, Waldo W (L-PM); Peay, Michael T; Solomon, Steven A; Harris, Robert K (L-HRR); Cummings, Edward R (L-ACV); Gorove, Katherine M (L-HRR); Brancato, Gilda M (L-HRR)
Subject: FW: Latest draft: forced disappearances treaty text

un.forced.disappearance.doc

FYI.

-----Original Message-----
From: Thomas.Burrows@usdoj.gov [mailto:Thomas.Burrows@usdoj.gov]
Sent: Friday, September 24, 2004 5:12 PM
To: 'molly.groom@dhs.gov'; 'BRANCATOGM@state.gov'
Cc: 'Regina.Hart@dhs.gov'; Molly.Warlow@usdoj.gov; 'HarrisRK2@state.gov'
Subject: RE: Latest draft: forced disappearances treaty text

B5

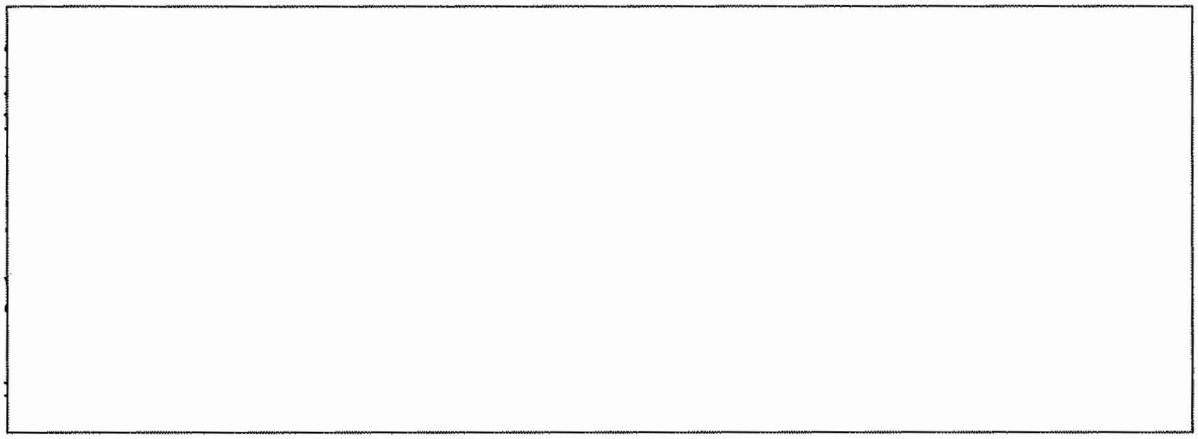
[redacted]

-----Original Message-----
From: BRANCATOGM@state.gov [mailto:BRANCATOGM@state.gov]
Sent: Wednesday, September 08, 2004 12:03 PM
To: Burrows, Thomas; molly.groom@dhs.gov
Cc: HarrisRK2@state.gov
Subject: FW: Latest draft: forced disappearances treaty text

B5

[redacted]

~~UNITED STATES DEPARTMENT OF STATE~~
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444



B5

RELEASED IN PART
B5

SE134

Peay, T. Michael

From: Kovar, Jeffrey D (SBU)
Sent: Tuesday, January 13, 2004 10:18 PM
To: Brancato, Gilda M (SBU); Carlson, Mary H (SBU); Pfund. Peter H(CA/OCS/CI); Mason, Peter W (SBU)
Cc: Peay, T. Michael(Geneva); Harris, Robert K (SBU); Brown, Catherine W (Legal) (SBU); Gaw, Monica A(CA/OCS/PRI); Bernier-Toth, Michelle(CA/OCS/CI); Terrill, Damon A (SBU)
Subject: RE: Child abduction provisions in forced disappearances convention/consular notification provision

[redacted] B5

-----Original Message-----
From: Brancato, Gilda M (SBU)
Sent: Tuesday, January 13, 2004 3:30 PM
To: Carlson, Mary H (SBU); Pfund. Peter H(CA/OCS/CI); Kovar, Jeffrey D (SBU); Mason, Peter W (SBU)
Cc: Peay, T. Michael(Geneva); Harris, Robert K (SBU)
Subject: Child abduction provisions in forced disappearances convention/consular notification provision

[redacted] B5

CHILD ABDUCTION PROVISIONS
ARTICLE 23.
Each state party shall take the necessary measures to prevent and punish under its crimina law:
(a) the abduction or appropriation of children one of whose parents in the victim of an enforced disappearance;
(b) The falsification or destruction of documents attesting to the true identity of the child referred to in para (a).

ARTICLE 24. State parties shall assist one another in the search for and identification and location of minors who have been abducted or appropriated in the circumstances described in article 23(a).

ARTICLE 25.
(1) When a child who has been abducted or appropriated in the circumstances described in article 23(a) is found on the territory of a State party, the question of the child's return to his or her family of origin shall be resolved eithr under the domestic law of that state party, or under bilateral or mulitateral agreements which that State has entered into with another State in which the family of origin lives.
(2) In all cases, the best interests of the child are a primary consdieation, and a child who is capable of judmgent shall have the right to express his or her views freely and to have them given due weight in the light of his or her age and level of maturity.

CONSULAR NOTIFICATION.

[redacted] B5

UNITED STATES DEPARTMENT OF STATE
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DATE/CASE ID: 23 JUN 2009 200706444

Thank you all!

E/CN.4/2004/WG.22/Misc.2

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B5

6E150

Text Proposed by the United States Delegation

[Chapter 2 – Offenses and penalties]

Article 2

B5

1. Each State Party shall take the necessary measures to ensure that [new: the acts which comprise] enforced disappearance, [new: for purposes of this instrument], constitute [new:] a punishable offense under its criminal law [or alternatively: is subject to criminal sanction under its criminal law]. [New sentence: The same shall apply to an attempt to commit an enforced disappearance and to an act that constitutes complicity or participation in, or a conspiracy to commit, an enforced disappearance.]

UNITED STATES DEPARTMENT OF STATE
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DATE/CASE ID: 24 JUL 2009 200706444

E/CN.4/2004/WG.22/Misc.2

GE.151

RELEASED IN PART
B5

Text proposed by United States delegation

Article 1.

"For purposes of this instrument, an enforced disappearance is considered to be an arrest, detention, or abduction of a person by, or with the authorization, support or acquiescence of, a State, followed by its refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person, with the intention of removing that person from the protection of the law for a prolonged period of time."

B5

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 24 JUL 2009 200706444

RELEASED IN PART
B5

GE152

Text proposed by United States delegation

Article 1.

"For purposes of this instrument, an enforced disappearance is considered to be an arrest, detention, or abduction of a person by, or with the authorization, support or acquiescence of, a State, followed by its refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person, with the intention of removing that person from the protection of the law for a prolonged period of time."

B5

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 24 JUL 2009 200706444

RELEASED IN PART
B6, B5

YAHOO! Mail Yahoo! - My Yahoo! - Help YAHOO! Print - Close Window

Subject: Re: Enforced Disappearances Negotiations (12-23 January 2004)
To: "Michael Peay" [redacted] B6
From: "Carmen Rueda [redacted]
Date: Mon, 26 Jan 2004 17:37:07 +0100

GE153

Dear Michael,
Thanks very much for your kind words and for sending me your observations.
It certainly facilitates my work, as it is not always easy to take accurate
notes during the meeting. It is my recollection also that they were accepted by the Chair.
Best regards,
Carmen

Michael Peay [redacted] To: B6
crueda [redacted] hoo.com> cc: B6
peaytm@state.gov, brancatogm@state.gov
Subject: Enforced Disappearances Negotiations (12-23 January 2004)
26.01.2004 13:28

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

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[redacted]

I hope these clarifications will assist you in preparing a final Draft Report. Again, Carmen, I particularly appreciate this opportunity to ensure our interventions are inlcuded for the benefit of all delegations
that will be providing further comments on the Draft Report you are preparing. Please contact me if you have any questions.

Best personal regards to you and your staff.

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COMMISSION ON HUMAN RIGHTS

E/CN.4/2004/WG.22/Misc.38

Working Group on a draft legally binding normative instrument for the protection of all persons from enforced disappearance
Geneva, 12-23 January 2004

20 January 2004

GE155

PROPOSITION DE LA PRESIDENCE

ART.5

A/F

1. Tout Etat partie **qui**, à l'égard de la disparition forcée, **applique un régime de *prescription***, *prend les mesures nécessaires pour* que le délai de prescription de l'action pénale:

B5

   a) **soit de longue durée et proportionné à l'extrême gravité de cette infraction ;**
   b) **ne commence pas à courir tant que les auteurs de la disparition forcée dissimulent le sort réservé à la personne disparue et le lieu où elle se trouve, et que les faits n'ont pas été élucidés.**

2. **Le délai de prescription de l'action pénale prévu au paragraphe 1 est suspendu aussi longtemps que, dans un Etat partie, toute personne dont les droits civils et politiques ont été violés ne dispose pas d'un recours utile.**

*****

1. Each State Party ***who uses a limitation with regard to enforced disappearances*** shall take the necessary measures to ensure that the term of limitation as regards criminal proceedings shall :

   a) **be of a long duration and proportionate to the extreme gravity of the offence;**
   b) **not commence as long as the authors of the enforced disappearance conceal the fate and the whereabouts of the disappeared person and the facts remain unclarified.**

2. **The term of limitation of criminal proceedings, as foreseen in paragraph 1, shall be suspended as long as, within a State Party, any person whose civil and political rights have been violated does not have effective remedy.**

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UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 24 JUL 2009 200706444

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FP0970

GE156

ENFORCED DISAPPEARANCES

Working Lunch
September 24th, 2004

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 24 JUL 2009 200706444

FP0971

- **Part I**
- ***Article 1***
- For the purposes of *[the present instrument]* enforced disappearance is considered to be the deprivation of a person's liberty, in whatever form, committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law. Does not include non-state actors

FP0972

•***Article Ibis (new)***

1. No one shall be subjected to enforced disappearance.

2. *(from former UI-E)* No circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other state of emergency, may be invoked as a justification of enforced disappearance

FP0973

- ***Article 2 (modified)*** *creates stand-alone crime and number 2 addresses non-state actors*

1. Each State Party shall take the necessary measures to ensure that enforced disappearance, as defined in article 1, constitutes an offence under its criminal law.
2. Each State Party shall take equivalent measures when persons or groups of persons acting without the authorization, support or acquiescence of the State are responsible for dealings defined in article 1.

FP0974

•***Article 2 bis (new)***

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity and shall attract the consequences provided for under international law.

FP0975

•*Article 3 (reorganised)*

1. Each State Party shall take the necessary measures to pursue and punish those who commit or contribute to the commission of an enforced disappearance.

2. The following shall be punished :

a) the perpetrators of and accessories in an enforced disappearance.

b) the attempt to commit an enforced disappearance,

c) the conspiracy to commit an enforced disappearance,

FP0976

3. The following shall also be punished :

a) persons who order or encourage the commission or attempted commission of such an offence, and persons who facilitate its commission or attempted commission by aiding, abetting or otherwise assisting in it, including providing the means for its commission or attempted commission, shall be punished,

FP0977

b) a superior officer who:

(i) either knew, or consciously disregarded information which clearly indicated, that subordinates were committing or about to commit an enforced disappearance, and who

(ii) failed to take all necessary and reasonable measures within his or her power to prevent or repress the enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.

FP0978

4. *(former 6)* An order of a superior officer or a public authority may not be invoked as a justification of an enforced disappearance.

FP0979

- ***Article 4***

1. Each State Party shall make enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish:

   a) mitigating circumstances inter alia for persons who, having been involved in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive, or contribute to elucidating cases of enforced disappearance or identifying the perpetrators of an enforced disappearance.

FP0980

a) *(complemented)* Aggravating circumstances inter alia in the event of death of the victim or the commission of an enforced disappearance in respect of pregnant women, minors or other particularly vulnerable persons.

FP0981

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- ***Article5 (modified)***

Without prejudice to article 2 bis,

1. Each State Party which applies a statute of limitations in respect of enforced disappearances shall take the necessary measures to ensure that the term of limitation for criminal proceedings

a) is of long duration and proportionate to the extreme seriousness of the offence;

b) shall commence from the moment when the offence of enforced disappearance ceases and the fate of the disappeared person is established.

FP0982

2. The statute of limitations for criminal proceedings under paragraph 1 shall be suspended in a State Party as long as any victim of enforced disappearance does not have an effective remedy.

Article 6 (see 3,3)

Article 7 (deleted)

Article 8 (deleted)

FP0983

•*Article 9 (reorganized and modified)*

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over an enforced disappearance:

a) when the offence is committed within any territory under its jurisdiction or on board a vessel flying its flag or an aircraft registered in accordance with its law at the time of the facts;

b) when the alleged perpetrator of the offence is one of its nationals or a stateless person habitually residing in its territory;

c) when the disappeared person is one of its nationals and the State deems it appropriate to do so.

FP0984

2. Each State Party shall also take the necessary measures to establish its jurisdiction over an enforced disappearance when the alleged perpetrator of the offence is in a territory under its jurisdiction, unless the State extradites him or her or transfers him or her to another State or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognised.

3. *[The present instrument]* does not exclude any criminal jurisdiction exercised in accordance with national laws.

FP0985

- ***Article 10***

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an enforced disappearance is present, shall take him or her into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

FP0986

2. The State Party which has taken the measures referred to in paragraph 1 shall immediately make an investigation into the facts. It shall notify the States Parties which may have jurisdiction in accordance with paragraph 1 of article 9 of the measures which it has taken under paragraph 1 of this article, particularly of the fact that such person is in custody and of the circumstances which warrant his or her detention, the findings of its investigation and shall indicate to those States whether it intends to exercise jurisdiction.

FP0987

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

FP0988

- ***Article 11***

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any enforced disappearance is found shall, if it does not extradite him or her or transfer him or her to another State or surrender him or her to an international criminal tribunal whose jurisdiction it has recognised, submit the case to its competent authorities for the purpose of prosecution.

FP0989

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in paragraph 2 of article 9, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in paragraph 1 of article 9.

FP0990

3. *(modified)* Any person charged with an offence of enforced disappearance shall be tried by an independent and impartial court, duly established by law, which guarantees the right to a fair trial.

4. *(new)* Any person regarding whom proceedings are brought in connection with an enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings.

FP0991

- ***Article 12 (modified)***

1. Each State Party shall ensure that any person who alleges that someone has been subjected to enforced disappearance has the right to complain to a competent authority, which thoroughly investigates the complaint immediately and impartially. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, the relatives of the disappeared person and their defence counsel as well as those participating in the investigation are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

FP0992

2. Whenever there are reasonable grounds to believe that a person has been subjected to enforced disappearance, any State Party shall refer the matter to the authority referred to in paragraph 1 for it to launch an investigation, even if there has been no formal complaint.

FP0993

3. *(new)* Each State Party shall ensure that the authority referred to in paragraph 1:

a) has the necessary powers and resources to conduct the investigation, including the power to compel suspected perpetrators and witnesses to appear before it,

b) is communicated the necessary information for its investigation;

c) has access to any place where it is suspected that a disappeared person is present.

FP0994

4. *(former 12.6, complemented)* Each State Party shall take the necessary measures to prevent and punish acts of such a kind as to inhibit the progress of investigations. It shall ensure, particularly, that persons suspected of having committed an enforced disappearance are not in a position to influence the progress of the investigations by means of pressure or acts of intimidation or reprisal against the complainant, the witnesses, the relatives of the disappeared person, the defence counsel as well as those participating in the investigation..

FP0995

5. *(new)* The investigation pursuant to the present article shall be conducted in conformity with international principles for investigations on human rights violations, torture, search of disappeared persons, forensic examination and identification.

FP0996

- ***Article 13 (modified)***

1. For purposes of extradition between States Parties, enforced disappearance shall be considered to be neither a political offence, nor an offence related to a political offence or an offence prompted by political motives. Consequently, a request for extradition based on enforced disappearance cannot be refused solely because it concerns a political offence, an offence related to a political offence or an offence prompted by political motives.

FP0997

2. Enforced disappearance shall automatically be included among the extraditable offences in every extradition treaty concluded between States Parties before the entry into force *[of the present instrument]*.

3. States Parties undertake to include the offence of enforced disappearance among the extraditable offences in every extradition treaty to be concluded subsequently between them.

FP0998

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider *[the present instrument]* as the legal basis for extradition in respect of enforced disappearance.

5. Any State Party which does not make extradition conditional on the existence of a treaty shall recognise the offence of enforced disappearance as extraditable.

FP0999

6. Extradition shall, in all cases, be subject to the conditions provided by the law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or subject extradition to conditions.

FP1000

7. No provision *[of the present instrument]* shall be interpreted as imposing an obligation on the requested State Party to extradite if that State has serious grounds to believe that the request was put forward for the purpose of prosecuting or punishing a person on account of his or her gender, race, religion, nationality, ethnic origin or political opinions, or that to allow the request would cause harm to that person for any one of those reasons.

FP1001

- ***Article 14 (modified)***

1. States Parties shall provide one another the greatest measure of legal assistance in connection with any criminal investigation or proceedings brought in respect of enforced disappearance, including the supply of all evidence at their disposal that are necessary for the proceedings.

2. Such legal assistance is subject to the conditions provided by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, particularly, concerning the grounds on which the requested State Party may refuse to provide legal assistance or subject such assistance to conditions.

FP1002

- ***Article 15 (modified)***

States Parties shall co-operate with one another and shall provide one another the greatest measure of assistance with a view to assisting victims of enforced disappearance, and in searching, locating and releasing disappeared persons and, in the event of death, in their exhumation, identification and restitution of their remains.

FP1003

- ***Article 15 bis (former 21)***

1. No State Party shall expel, return *("refouler")* or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to an enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of humanitarian law.

FP1004

- ***Article 16*** *(reorganised and modified, see 16 bis below) National legislation defines victim*

1. Each State Party shall, under its law,

a) indicate those officials who are authorised to order deprivation of liberty;

b) establish the conditions under which such orders may be given;

c) guarantee that any person deprived of liberty shall be held solely in an officially recognised and controlled place;

FP1005

d) guarantee access of the judicial authorities to places of deprivation of liberty;

e) guarantee that any person deprived of liberty, in all circumstances, shall have the right to bring proceedings before a court which shall rule without delay on the lawfulness of the deprivation of liberty and order his or her release if that deprivation of liberty is unlawful.

FP1006

2. Each State Party shall compile and maintain one or several official up-to-date registers of persons deprived of liberty. The information contained in these registers shall include at least the following :

a) the identity of the person deprived of liberty,
b) the authority having decided the deprivation of liberty,
c) the authority controlling the deprivation of liberty,
d) the date and time of admission in the place of detention and the authority responsible for the place of detention,
e) the date and time of liberation or transfer to another place of detention, the destination and authority in charge of the transfer.

FP1007

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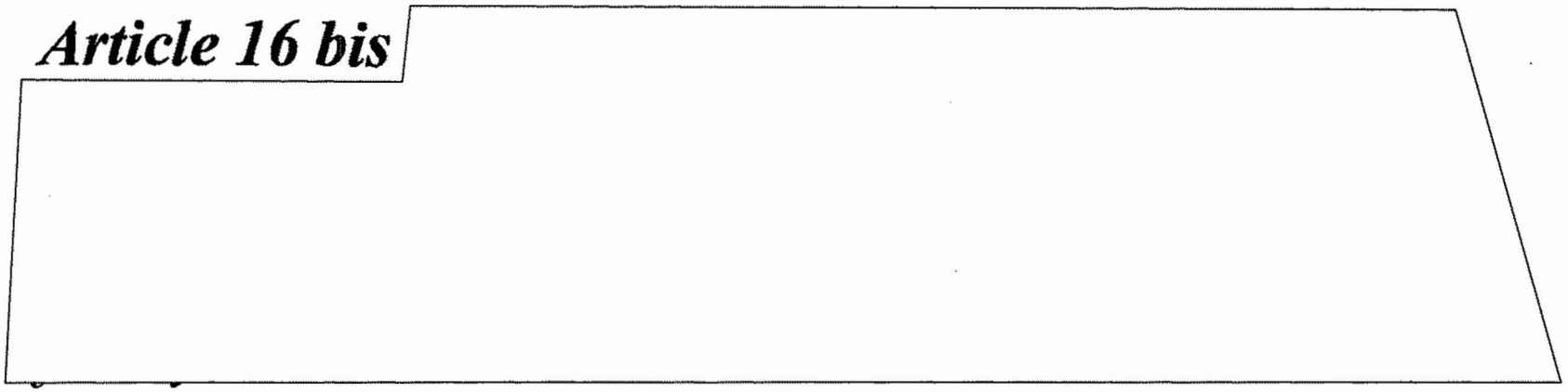
- ***Article 16 bis***



1. Each State Party shall guarantee the person deprived of liberty, his or her relatives, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest access, as a minimum, to the following information:

FP1008

a) the authority to which the person has been handed over;

b) the authority having decided the deprivation of liberty;

c) the authority controlling the person deprived of liberty;

d) the whereabouts of the person deprived of liberty, including in case of transfer;

e) date and place of release;

f) state of health and, in the event of death, circumstances and causes of the death.

FP1009

2. Appropriate measures shall be taken, where necessary, to ensure the protection of the persons mentioned in paragraph 1 as well as the persons participating in the investigation against all ill-treatment; intimidation or any sanction on the grounds of the search of information concerning a person deprived of liberty.

3. (new) In order not to jeopardise the privacy of the persons concerned, the information transmitted pursuant to paragraph 1 of the present article shall be adequate and pertinent with respect to the purpose pursued and shall not be used for other purposes than the search of the person deprived of liberty.

FP1010

•*Article 17*

Without prejudice to consideration of the lawfulness of a deprivation of liberty, States Parties shall guarantee to the relatives of the person deprived of liberty or of a disappeared person, their legal representatives, their counsel and any person authorised by the person deprived of liberty or the disappeared person or by his/her relatives, as well as any other person able to claim a legitimate interest the right to a prompt and effective remedy as a means of obtaining without delay the information referred to article 16 bis. This right to a remedy may not be suspended or restricted in any circumstances.

•*Article 18 (complemented)*

Each State Party shall take the necessary measures to ensure that the release of persons shall proceed in a manner that allows reliable verification that they have actually been released. Each State Party shall also take the necessary measures so that the physical integrity of all such persons and their ability to exercise fully their rights are assured at the time of release, without prejudice to the obligations to which such persons may be subject in accordance with the law.

- ***Article 19***

Each State Party shall take the necessary measures to prevent and punish the following actions:

a) delaying or obstructing the remedy referred to in article 17;

b) failure to the obligation to register every deprivation of liberty and registration of information which the official responsible of the register knows or should known to be inaccurate;

FP1013

c) refusal by an official to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal conditions for this information to be provided have been fulfilled.

- ***Article 20 (complemented)***

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty shall include the necessary education and information on the provisions *[of the present instrument]* , in order to:

a) prevent the involvement of these officials in enforced disappearances;

FP1015

b) draw attention to the importance of prevention and investigations concerning enforced disappearances;

c) ensure that the urgent need to resolve cases of enforced disappearance is acknowledged.

FP1016

2. Each State shall prohibit orders or instructions commanding, authorising or encouraging enforced disappearance. Each State Party shall guarantee that a person refusing to obey such order will not be subject to sanction.

FP1017

3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reasons to believe that act enforced disappearance has occurred or is planned communicate the matter to their superior authorities and, when necessary, to competent authorities or organs with reviewing or remedial power.

FP1018

- ***Article 21 (see 15 bis)***

- ***Article 22 (modified and complemented)***

B5

1. For the purposes of *[the present instrument]*, "victim" means the disappeared person and any natural person who has suffered direct harm as a result of that disappearance.

FP1019

2. Each State Party shall take the necessary measures so that any victim knows the truth concerning the circumstances of the enforced disappearance and the fate of the disappeared person. It shall, in particular, take the necessary measures to search for, locate and release disappeared persons and, in the event of death, return the human remains.

3. Each State Party shall guarantee the right to obtain prompt, fair and adequate reparation for the harm caused to victims of enforced disappearance.

4. The right to obtain reparation referred to in paragraph 3 includes integral compensation for material and non-material damage. It may also include, in particular:

a) restitution,
b) rehabilitation,
c) satisfaction,
d) restoration of honour and reputation.

5. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person is elucidated, each State Party shall take the necessary measures with regard to the legal situation of the disappeared persons who's fate has not been elucidated and of their relatives in fields such as social protection, financial matters, custody of children and property rights. NEW PARAGRAPH

FP1022

- ***Article 23 (complemented)***

1. Each State Party shall'take the necessary measures to prevent and punish in a criminal court:

a) the abduction or appropriation of children victims of enforced disappearance, children whose father or mother is victim of enforced disappearance or children bom during the detention of their disappeared mother;

b) the falsification or suppression of documents attesting to the true identity of a child referred to in subparagraph (a).

FP1023

2. Each State Party shall take the necessary measures to search for and identify children referred to in subparagraph (a) and (b).

•***Article 24***

State Parties grant each other assistance in the search for, the identification and the location of children referred to in article 23.

FP1024

- ***Article 25***

1. When a child who has been abducted or appropriated in the circumstances described in article 23, paragraph (a), is found on the territory of a State party, the question of the child's return to his or her family of origin stall be resolved either under the domestic law of that State party, or under the bilateral or multilateral agreement which that State has entered into with another State in which the family of origin lives.

FP1025

2. In all cases, the best interests of the child are a primary consideration, and a child who is capable of judgement shall have the right to express his or her views freely and to have them given due weight in the light of his or her age and level of maturity.

FP1026

Part II ***Article 0***

(new)

1. A *[monitoring body]* shall ensure the implementation of the *\present instrument]* and the respect by State Parties of their commitments.

2. While exercising their mandate, the members of the *[monitoring body]* shall be entitled to privileges and immunities as laid down in the Convention on Privileges and Immunities of the United Nations.

3. Each State Party shall undertake to co-operate with the *[monitoring body]* and to grant assistance to its members in the exercise of their mandate.

FP1027

- ***Article II-A (modified)***

1. Each State Party shall submit to *[the monitoring body]*, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its undertakings under *[the present instrument]*, within one year after the entry into force *[of the present instrument]* in respect of the State concerned.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

FP1028

3. Each report shall be considered by *[the monitoring body]*, which may make such comments, observations, recommendations and warnings as it considers appropriate. The State Party concerned shall receive communication of such comments, observations, recommendations and warnings, to which that State may respond, on its own initiative or at the request *[of the monitoring body]*.

FP1029

- ***Article II-B (modified)***

1. Each State Party or the relatives of a disappeared person, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest may submit a request to *[the monitoring body]* to seek and find a person who has disappeared within the meaning of article 1.

FP1030

2. Should *[the monitoring body]* consider that a request submitted under paragraph 1 is not manifestly unfounded, that it does not constitute an abuse of the right of submission and that it is not incompatible with the provisions *[of the present instrument] [the monitoring body]* shall request any State Party to provide information on the situation of that person, within a time-limit set by *[the monitoring body]*.

FP1031

3. In the light of the response provided by the State Party concerned in accordance with paragraph 2, *[themonitoring body]* shall make a recommendation or give a warning to that State. *[The monitoring body]* may also instruct that State to take appropriate measures and to report to it on those measures, within a time-limit set by *[the monitoring body]*,

FP1032

4. *[The monitoring body]* shall establish its conclusions and forward them to any State Party which has been requested to provide information and to the author of the request referred to in paragraph 1.

5. The procedure under this article is confidential.

FP1033

- ***Article II-C (modified)***

1. If *[the monitoring body]* considers that a visit to the territory of a State Party under whose jurisdiction a disappeared person could be is essential in order to respond to the request submitted to it in accordance with Article H-B, *[the monitoring body]* may request one or more of its members to undertake an investigation mission and to report back without delay. The member or members *[of .the monitoring body]* conducting the mission may be accompanied if necessary by interpreters, secretaries and experts. No member of the delegation, with the exception of the I nterpreters, may be a national of the State Party to which the visit is to be made.

FP1034

2. *[The monitoring body]* shall notify the State Party concerned in writing of its intention to organise an investigation mission, indicating the composition of the delegation. The State Party shall inform *[the*10 *monitoring body]* without delay of its agreement or opposition to the investigation mission in the territory over which it has jurisdiction.

FP1035

3. If the State Party agrees to the investigation mission, it shall provide *[the monitoring body]* with all the necessary facilities to enable the mission to be carried out. *[The monitoring body]* may, inter alia:

a) make such visits as it may consider necessary to search for and find the person who has disappeared;

b) make contact freely with any person whom it believes may provide useful information on the fate of the person who has disappeared;

c) have the person who has allegedly disappeared brought to it and discuss with "him or her in private.

FP1036

4. *[The monitoring body]* shall inform the following of the findings of the investigation mission:

a) the State Party in whose territory the investigation mission was carried out;

b) the author of the request referred to in paragraph 1 of article II-B.

5. The procedure under this article is confidential.

B5 FP1037

- ***Article II-C bis** (new)*

[The monitoring body] considers a communication presented by the relatives of a disappeared person, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest alleging grave breaches in the implementation of the commitments taken under the *[present instrument]* unless

a) the communication lacks sufficient motivation or is obviously unfounded;
b) the same matter is being examined under another procedure of international investigation or settlement;
c) the complainant has not exhausted all available effective domestic remedies.

FP1038

2. If the *[the monitoring body]* assesses that the communication fulfils the conditions under paragraph 1, *[the monitoring body]* transmits the communication to the State Party concerned and requests this State Party to provide observations and comments within a time-limit set by the *[monitoring body]*.

3. On the basis of the answer of the State Party, *[the monitoring body]* may decide :

a) to close the matter of the communication;
b) to continue its examination;
c) to make a recommendation to the State Party.

FP1039

4. The procedure under the present article comes to an end when the *[monitoring body]* communicates the conclusions of its investigation to the State Party and to the author of the communication.

5. The procedure under this article is confidential.

FP1040

- ***Article II-C ter (new)***

If the *[monitoring body]* receives reliable information which appears to it to contain well-founded indication that enforced disappearance is being practised in a systematic or general manner in the territory of a State Party, the *[monitoring body]* may seize the Secretary General of the United Nations, after having enquired with the State Party concerned about any pertinent information and the measures taken to put an end immediately to such practises.

Article II-D (integrated in II-O§2)

FP1041

- ***Article II-E (complemented)***

1. *[The monitoring body]* has competence solely in respect of deprivations of liberty which commenced after the entry into force *[of this instrument}*.

2. Should a State become party to *[this instrument]* after its entry into force, the obligations of that State towards *[the monitoring body]* concern only deprivations of liberty which commenced after the entry into force *[of this instrument]* in respect of the State concerned.

FP1042

3. *(new)* Each State Party may at any time declare that, in its own respect, it recognises that the *[monitoring body}* has competence in respect of enforced disappearances which commenced before entry into force of the *[present instrument}*.

FP1043

B5

- ***Article II-F (modified)***

1. The *[monitoring body}* shall submit an annual report on its activities *[under the present instrument}* to the States Parties and to the General Assembly of the United Nations.

2. *(new)* If, in the procedures under articles II-B and II-C bis, a State Party concerned obviously refuses to co-operate or if the procedures yield to no effective result, the *[monitoring body}* may decide to make an observation public, with regard to the matter or the situation at stake.

3. *(new)* The State Party concerned shall be informed in advance of the publication of an observation under paragraph 2 of the present article. This observation shall be published together with the answers, comments or observations transmitted by the State Party within the time-limit set by the *[monitoring body}*.

FP1045

Part III

•*Article III-O (former 2.2)*

[The present instrument] is without prejudice to any other international instrument or national legislation that does or may contain provisions of broader application.

•*Article III-O bis (new)*

Personal data, including medical or gene.tic data, which are transmitted in the framework of the search of a disappeared person shall not be used for other purposes than that of the search of the disappeared person.

FP1046

- ***Article III-A***

1. *[Thepresent instrument]* is open for signature by [...].

2. *[the present instrument]* is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. *[The present instrument]* is open to accession by [...]. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

FP1047

- ***Article III-B***

1. *[The present instrument]* shall enter into force on the t hirtieth day after the date of deposit of the *[Xth]* instrument of ratification or accession.

2. For each State ratifying *[the present instrument]* or acceding to it after the deposit of the *[Xth]* instrument of ratification or accession, *[the present instrument]* shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

FP1048

•*Article III-C*

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed [*the present instrument]* or acceded to it of the following:

a) Signatures, ratifications and accessions under article III-A;

b) The date of entry into force of *[the present instrument]* under article III-B.

FP1049

- ***Article III-D***

The provisions of *[the present instrument]* shall apply, without limitation or exception, to all parts of federal States.

- ***Article III-D bis (new)***

1. Any State, upon signature, ratification or accession, may declare that *[the present instrument]* will be extended to any territory for which it is responsible with regard to international relations. Such a declaration will take effect when *[the present instrument]* enters into force for the State concerned.

FP1050

2. At any time, such an extension may be notified to the Secretary General of the United Nations and will take effect (...) days after it has been received by the Secretary General.

- ***Article III-E*** *(integrated in 1 bis, paragraph 2)*

FP1051

•*Article III-F*

[The present instrument] is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, or the option available to any State to authorise the International Committee of the Red Cross to visit places of detention in cases for which international humanitarian law does not provide.

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•*Article III-G*

Any State Party to *[the present instrument]* may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to *[the present instrument]* with a request that they notify him or her whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal.

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In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance

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2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the State Parties to *[the present instrument]* have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties, which have accepted them, other States Parties still being bound by the provisions of *[the present instrument]* and any earlier amendments which they have accepted.

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- ***Article III-H***

1. *[The present instrument]*, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of *[the present instrument]* to all States.

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Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Fiftieth session
Item 9 of the agenda
Working Group on the Administration of Justice

THE ADMINISTRATION OF JUSTICE AND HUMAN RIGHTS

Report of the sessional working group on the administration of justice

Chairman-Rapporteur: Mr. Louis Joinet

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Introduction

1. In accordance with the decision taken by the Sub-Commission on 4 August 1998, a sessional working group of the Sub-Commission on the administration of justice held its first meeting on 4 August 1998. The following experts were appointed as members of the working group on 4 August 1998: Mr. Héctor Fix Zamudio (Latin America), Mr. Rajendra Kalidas Wimala Goonesekere (Asia), Mr. Louis Joinet (Western European and other States), Mr. Joseph Oloka-Onyango (Africa) and Mr. Teimuraz Ramishvili (Eastern Europe).

2. The working group held three public meetings on 4, 7 and 17 August, and two additional meetings, also public but without interpretation, on 11 and 12 August 1998.

3. A representative of the Office of the High Commissioner for Human Rights opened the session of the working group.

4. The working group designated Mr. Louis Joinet as Chairman-Rapporteur for its 1998 session.

5. The following members of the Sub-Commission not members of the working group also took part in the discussion: Mr. Alfonso Martínez (1st, 2nd and 5th meetings), Mr. Eide (1st meeting), Mr. Guissé (1st meeting), Ms. Hampson (1st and 2nd meetings), Mr. Kartashkin (2nd and 5th meetings), Mr. Park (2nd and 5th meetings), Mr. Sik Yuen (2nd and 5th meetings), Mr. Sorabjee (1st meeting), Ms. Warzazi (1st and 2nd meetings), Mr. David Weissbrodt (1st, 2nd, 3rd, 4th and 5th meetings), Mr. Yokota (2nd meeting) and Mr. Zhong (1st, 2nd and 5th meetings).

6. The following non-governmental organizations also made statements: Amnesty International (2nd meeting) and the International Commission of Jurists (2nd and 5th meetings).

7. The working group had before it the following documents relating to its provisional agenda:

Report of the sessional working group on the administration of justice on its 1997 session (E/CN.4/Sub.2/1997/21);

Expanded working paper submitted by Mr. Stanislav Chernichenko in accordance with decision 1996/116 of the Sub-Commission on recognition of gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them as an international crime (E/CN.4/Sub.2/1997/29);

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Working paper submitted by Mr. Miguel Alfonso Martínez concerning the study of the issue of the privatization of prisons (E/CN.4/Sub.2/1991/56);

Outline prepared by Ms. Claire Palley pursuant to Sub-Commission decision 1992/107 on the possible utility, scope and structure of a special study on the issue of privatization of prisons (E/CN.4/Sub.2/1993/21);

Note by the secretariat on juvenile justice (E/CN.4/Sub.2/1996/WG.1/CRP.1);

Conference room paper prepared by the secretariat on habeas corpus, amparo and similar procedures as a non-derogable right (E/CN.4/Sub.2/1998/WG.1/CRP.1);

Note by the secretariat on follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance containing the text of a draft convention on the subject (E/CN.4/Sub.2/1998/WG.1/CRP.2);

Conference room paper prepared by Mr. El-Hadji Guissé on issues related to the deprivation of the right to life (E/CN.4/Sub.2/1998/WG.1/CRP.3).

Adoption of the agenda

8. At its 1st meeting, the working group considered the provisional agenda. At the suggestion of the Chairman-Rapporteur, based on formal and informal consultations with other members of the working group, the working group decided to adopt the following agenda:

1. Follow-up measures to the Declaration on the Protection of all Persons from Enforced Disappearance.

2. Issues related to the deprivation of the right to life, with special reference to:

(a) Imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled;

(b) Summary, arbitrary and extrajudicial executions.

3. Habeas corpus as a non-derogable right [and as one of the requirements for the right to a fair trial].

4. Measures to be taken to give full effect to the Convention on the Prevention and Punishment of the Crime of Genocide.

5. Juvenile justice.

6. Privatization of prisons.

7. Recognition of gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them as an international crime.

8. Provisional agenda for the next session.

9. Adoption of the report of the working group to the Sub-Commission.

I. FOLLOW-UP MEASURES TO THE DECLARATION ON THE PROTECTION

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OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

9. For the benefit of newly-elected members of the Sub-Commission and those participating in the work of the working group for the first time, the Chairman-Rapporteur, Mr. Joinet, went over the background to the preliminary draft international convention for the protection of all persons against forced disappearance (E/CN.4/Sub.2/1998/WG.1/CRP.2) (see annex).

10. The drafting of a convention on forced disappearance was an initiative dating from the 1980s. The Sub-Commission had first asked the working group to prepare a draft declaration on enforced disappearance. After being submitted to the Sub-Commission and then to the Commission on Human Rights and the Economic and Social Council, the draft had been adopted by the General Assembly in its resolution 47/133 of 18 December 1992 entitled "Declaration on the Protection of All Persons from Enforced Disappearance". In June 1994, the General Assembly of the Organization of American States had itself adopted the Inter-American Convention on Forced Disappearance of Persons. The persistence of the practice of enforced disappearance, its complexity and its extreme gravity as a crime meant the need for a universal convention on the question had taken on increasing importance, not to say urgency.

11. At the request of the working group, Mr. Joinet had submitted to it, at its forty-eighth session, a preliminary draft convention in the form of a working paper. However, no text had been proposed for the part concerning the monitoring mechanism, as the Chairman-Rapporteur had taken the view that, given the importance of the question, it would be preferable to wait for the working group itself to consider the various options and decide on the main outline. As a result, the working group had considered only the first part of the preliminary draft and decided to continue consideration of the remaining part at its forty-ninth session (see E/CN.4/Sub.2/1996/16). The working group also requested Mr. Joinet to make the necessary contacts to determine the conditions under which the Centre for Human Rights could organize a meeting of experts on the preliminary draft. Failing that, the Rapporteur would contact Governments and non-governmental organizations with a view to organizing such a meeting.

12. As a number of the difficulties encountered would have prevented the holding of such a meeting within a reasonable time, the Chairman-Rapporteur had approached Amnesty International and the International Commission of Jurists, which had kindly agreed to organize the meeting. The meeting had been held on 16 and 17 June 1996 with the Chairman-Rapporteur attending, together with the persons responsible for the thematic procedures concerned, namely, the Special Rapporteur on the question of torture, Mr. Nigel Rodley (written contribution); the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Ndiaye; the Vice-Chairman of the Working Group on Arbitrary Detention, Mr. Roberto Garretón; and a member of the secretariat of the Working Group on Enforced or Involuntary Disappearances. The meeting had also been attended by a representative of the International Committee of the Red Cross (ICRC) and experts who had taken part in the drafting of the Inter-American Convention on Forced Disappearance of Persons. The short time available for the meeting meant that not all the preliminary draft could be considered.

13. At its forty-ninth session, the working group was informed by the Chairman-Rapporteur of the difficulties encountered and it was decided to postpone consideration of the preliminary draft until the working group's fiftieth session.

14. In November 1997, a meeting on the preliminary draft convention, organized by Amnesty International, the International Commission of Jurists, the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM), and the International Service for Human Rights, had been held in Geneva and attended by the Chairman-Rapporteur. In addition to the non-governmental

organizations invited, and with the Chairman-Rapporteur of the working group, the meeting had been attended by a member of the Working Group on Enforced or Involuntary Disappearances (Mr. Jonas Foli), the Special Rapporteur on the question of torture, the Special Rapporteur on extrajudicial, summary or arbitrary executions, representatives of ICRC and experts who, in the past, had taken part in the drafting of the Inter-American Convention on Forced Disappearance of Persons.

15. The Chairman-Rapporteur recalled that the preliminary draft submitted to the working group at the current session was based largely on the Declaration on the Protection of All Persons From Enforced Disappearance and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, particularly as far as the monitoring mechanism was concerned. Particular care had been taken to ensure that the text of the preliminary draft departed from the wording of the Declaration and the Convention only to take account of the special nature - which had often been emphasized, particularly by the Working Group on Enforced or Involuntary Disappearances -of the practice of enforced disappearance in the light of innovative proposals intended mainly to respond to the international considerations involved in such protection. Mr. Joinet explained that, in preparing the preliminary draft, he had also taken into consideration: (a) the International Covenant on Civil and Political Rights; (b) the Convention on the Elimination of All Forms of Discrimination against Women; (c) the Convention on the Rights of the Child; (d) the Convention on the Prevention and Punishment of the Crime of Genocide; (e) the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; (f) the Convention relating to the Status of Refugees; (g) the Code of Conduct for Law Enforcement Officials; (h) the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment; (i) the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 8 (3) (E/CN.4/1998/42, annex II); and (j) at regional level, the Inter-American Convention on Forced Disappearance of Persons, adopted by the Organization of American States in June 1994.

Preliminary draft of the international convention on the protection of all persons from forced disappearance

16. The Chairman-Rapporteur suggested that the working group should first take up the part of the draft convention which had not yet been considered, concerning the structure, membership and functioning of an implementation and monitoring committee. In view of the presence of a number of newly elected members of the Sub-Commission, the group then decided to re-examine the first part of the preliminary draft by holding additional meetings, which would be public but without interpretation, and to use the second reading to ensure consistency of the substance and, in particular, of the terms used, in the English, French and Spanish versions of that part of the text. The general comments and amendments which produced a consensus at those meetings concerned the following points:

General comments

17. Mr. Weissbrodt expressed concern at the increasing number of reporting procedures of which this draft convention provided an additional one. He mentioned that States already had too many reporting obligations and were considering consolidating treaty reporting obligations rather than focusing on the establishment of new reporting mechanisms. Mr. Weissbrodt also expressed his concern with regard to the means by which the Commission on Human Rights was going to take the draft convention forward in the light of the large number of new drafting exercises it had already been entrusted with, and that it might therefore be useful to have an indication as to whether the Sub-Commission would be ready to undertake the drafting of the convention.

18. With reference to the next steps to be taken at Commission level, Mr. Sang Yong Park wondered whether the view of Governments, other treaty bodies and intergovernmental organizations should be

sought. Mr. Zhong Shukong added firstly that draft conventions were a very serious undertaking and would be legally binding and therefore the views of all Member States should be solicited and secondly that the draft convention should now be transmitted to the Commission on Human Rights for comments by member States and relevant intergovernmental and non-governmental organizations. The Chairman-Rapporteur agreed with Mr. Zhong Shukong. He confirmed that States would of course be consulted, but on the following basis: if the Sub-Commission approved in plenary the preliminary draft adopted by the working group, it could decide to transmit it to the Commission on Human Rights for consideration. The Commission would then itself consult Governments, in accordance with its usual practice. That would be the way in which communication would take place, in accordance with the wish expressed by Mr. Zhong Shukong.

Substance/general comments * The text of the draft convention as adopted appears in the annex.*

19. In order to ensure consistency of the term "forced disappearance" referred to throughout the text of the draft convention, it was suggested that the wording of the title be changed from "enforced disappearance" to "forced disappearance". Mr. Joinet pointed out that the title of the preliminary draft had been chosen to ensure consistency with the terminology used in the Declaration on the Protection of All Persons from Enforced Disappearance, as well as in the Inter-American Convention on Forced Disappearance of Persons.

20. The Chairman-Rapporteur, after verifying the terms used in the Declaration on the Protection of All Persons from Enforced Disappearance, noted the use of the words "crime" in the French version, "offence" in the English version and "delito" in the Spanish version. A number of speakers suggested that "crime" should be used in all three versions, while others proposed the term "infraction criminelle" in the French version, or "delito" or "crimen de lesa humanidad" in the Spanish version. The Chairman-Rapporteur suggested keeping to the terminology of the Declaration so as to facilitate the adoption of the draft convention by the Commission on Human Rights.

Preamble

21. Mr. Sik Yuen proposed that the words "offence to" should be replaced by "outrage to". * All the proposals referred to in this section were adopted by the working group by consensus.*

Article 1

22. Mr. Joinet proposed that the words "especially with regard to forced disappearances perpetrated by groups or individuals other than those referred to in paragraph 1 of this article" should be inserted at the end of paragraph 2.

Article 2

23. Ms. Hampson proposed inserting after the words "the offence of forced disappearance", the words "or of any constituent element of the offence", and inserting the following sentence after the words "shall be punished": "The perpetrators or other participants in a constituent element of the offence as defined in article 1 of the Convention should be charged with a forced disappearance where they knew or ought to have known that the offence was about to be or was in the process of being committed."

24. In order to ensure consistency between the languages, it was suggested that in article 2 (b), the word "association" be replaced with the word "collusion" in the English version.

Article 3

25. Ms. Hampson suggested that current article 3 be renumbered article 3 (1) and new article 3 (2) inserted to read as follows: "Where persons are suspected of having perpetrated or participated in an offence, as defined in articles 1 and 2, they should be charged with a crime against humanity where they knew or ought to have known that this act was part of a systematic or widespread practice of forced disappearances, however limited the character of their participation."

Article 5

26. Ms. Hampson proposed inserting in paragraph 1, line 3, after the words "in article 1 of this Convention" the words "and to define a crime against humanity, as defined in article 3 of this Convention, as a separate offence". She also suggested replacing the words "its extreme gravity" with the words "their extreme gravity".

27. Ms. Hampson suggested deleting paragraph 3.

Article 6

28. In paragraph 1 (b), Ms. Hampson proposed deleting the words "and if any State does not proceed to extradite them" and inserting after the words "where the offence took place" the words "unless the State extradites or transfers them to an international criminal tribunal".

Article 7

29. In paragraph 1 Ms. Hampson suggested inserting, after the words "a person suspected of having committed" the words "a forced disappearance or".

30. In paragraph 1, it was suggested that "continued" should be inserted after the words "necessary measures to ensure the", and the words "in the territory" after the words "of that person".

Article 9

31. In paragraph 3, Mr. Joinet suggested that the word "conclude" be deleted and replaced with the word "know" and the words "might be committed" be replaced with the words "was about to be committed".

Article 10

32. Mr. Joinet suggested replacing the words "without prejudice" in paragraph 2 by "subject".

33. In paragraph 3, Mr. Joinet suggested inserting after the words "from criminal responsibility" the words "including where" and deleting the words "this provision shall be applied even if".

Article 11

34. Ms. Hampson suggested that paragraph 1 end after the words "investigated by that authority" and paragraph 2 begin with the words "Whenever there are grounds to believe" and that the remaining paragraphs be renumbered accordingly.

Article 12

35. Mr. Joinet proposed that, in the French version of paragraph 5, the word "parties" should be inserted after "Les Etats" and "punissable d'extradition" should be replaced by "susceptible d'extradition".

Article 15

36. Mr. Joinet proposed replacing "Aucun Etat" in paragraph 1 by "Aucun Etat partie" and inserting the word "Party" after the words "No State" in the English version.

37. Ms. Hampson suggested inserting the words "or any other serious human rights violation" after "in danger of being subjected to forced disappearance" in paragraph 1.

Article 16

38. The Chairman-Rapporteur proposed reverting to the earlier wording which was more in keeping with the concepts of crime against humanity and statutory limitation. In paragraph 1, statutory limitation applied to crimes of forced disappearance which constituted crimes against humanity. Paragraph 2 referred to crimes of forced disappearance which did not, under article 3 of the Convention, constitute crimes against humanity, and for which the prescription period was to be the longest period laid down in national legislation.

Article 17

39. In paragraph 1, it was suggested that the words "prior to their trial, and where applicable, conviction" should be inserted after the words "from any amnesty measure or similar measures".

40. Mr. Joinet proposed deleting from paragraph 2 the words "which may only be granted for humanitarian reasons after conviction of the person responsible for any of the acts referred to in article 2 of this Convention".

Article 20

41. In paragraph 1, it was suggested that the brackets should be deleted.

Article 21

42. In paragraph 4, Ms. Hampson suggested inserting, after the words "that are recognized", the words "binding upon".

43. In paragraph 6, Mr. Joinet suggested deleting the words "national or international".

Article 22

44. Ms. Hampson suggested that the words "any person deprived of liberty" in paragraph 1 be replaced with the words "where any person is deprived of liberty, he or she".

45. After paragraph 3, Ms. Hampson suggested inserting an additional paragraph which would read as follows: "States Parties shall identify who is the responsible person in national law for the integrity and accuracy of the custody record. Without prejudice to the provisions of articles 1, 2 and 3 of this Convention, States Parties shall make it a criminal offence for the responsible person, as defined in national law, to fail to register the deprivation of liberty of any person or to record information which is

or should be known to be inaccurate in the custody record."

Article 23

46. Mr. Joinet proposed that the words "in a manner" should be replaced by "according to a procedure".

Article 24

47. In paragraph 4, Ms. Hampson suggested inserting, after the words "referred to in article 2", the words "and 3".

Article 25

48. The Chairman-Rapporteur recalled that, in all United Nations human rights Conventions providing for a monitoring mechanism such as a committee, procedural arrangements were entrusted to the Secretary-General of the United Nations as depositary of the instrument in question. In the preliminary draft, the relevant provisions were:

Article 25, paragraphs 3, 4, 5 and 7 (procedure for the election of members of Committee);

Article 26, paragraphs 3 (material assistance) and 4 (convening of the initial meeting);

Article 27, paragraphs 1 and 2 (procedure for the submission of reports by States parties).

49. During the preparation of the preliminary draft, a number of NGOs had expressed the view that, as the High Commissioner for Human Rights was responsible in particular for the question of human rights within the United Nations system, that role should now be assigned to the Office of the High Commissioner. With the agreement of the working group, the Chairman-Rapporteur had held consultations on the legal and other aspects of this question. As a result, the legal implications of this innovative proposal were to be considered in more detail. For example, the depositary of the instrument, as in fact provided in article 39, paragraph 1, of the preliminary draft, was the Secretary-General and not the High Commissioner for Human Rights. This raised the question of coordination between the two mandates which it would be premature to resolve in the consideration of a draft convention, since a general question of principle was involved. Mr. Joinet therefore proposed reverting to the wording currently in effect and replacing the words "High Commissioner for Human Rights" by "Secretary-General of the United Nations" in paragraphs 3 (second line), 4 (third and fifth lines) and 7 (first line) of article 25, and in article 26, paragraphs 3 and 4 (first lines), and article 27, paragraphs 1 (first and second lines) and 2 (first line). It was so decided.

50. In paragraph 1 Ms. Hampson, Mr. Kartashkin, Mr. Goonesekere, Mr. Oloka-Onyango, Mr. Sang Yong Park and Mr. Weissbrodt discussed the interpretation of the words "civil servant" at line 6, the status of which differed from one country to the next. The working group adopted the proposal of Mr. Sik Yuen that the words "the status of civil servant or any other" be deleted from the text so that the sentence reads as follows: "Membership of the Committee is incompatible with any other post or function subject to the hierarchical structure of the executive authority of a State Party."

51. In paragraph 2, line 3, Mr. Weissbrodt proposed that the word "one" be deleted and replaced with the word "three" following the example of the European Court of Human Rights. Mr. Alfonso Martínez stressed the desirability that the State party be in a position to have the option, rather than the obligation, to nominate "up to three persons". Mr. Sik Yuen and Mr. Zhong Shukong made comments in this

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connection. The Chairman-Rapporteur suggested the working group should opt for the text of article 29 of the International Covenant on Civil and Political Rights, which stipulated "Each State Party to the present Covenant may nominate not more than two persons."

52. In paragraph 4, line 8, Mr. Yokota suggested that the word "relevant" be inserted before the words "intergovernmental organizations" and Mr. Weissbrodt suggested that it be inserted before the words "non-governmental organizations".

53. In paragraph 6, Mr. Yokota suggested inserting the words "or her" after the words "perform his" and the words "which nominated him".

Article 26

54. Mr. Joinet suggested that, in paragraphs 3 and 4, the words "High Commissioner for Human Rights" should be replaced by "Secretary-General of the United Nations".

Article 27

55. Mr. Joinet also proposed replacing the words "en question" in the French version of paragraph 1 by "concerné".

56. In paragraph 1, Ms. Hampson suggested replacing the words "the Committee may make a visit to the territory of that State Party" with the words "the Committee may make a visit to the territory under the control of that State".

57. In paragraph 1, Mr. Yokota proposed to insert the following sentence after the second sentence: "The State Party concerned shall provide all the necessary facilities for such a visit including the entry into the country and visiting such places and meeting with such persons as may be required for carrying out the mission of the visit."

Article 28

58. In paragraph 1, Ms. Hampson suggested inserting after the words "in the territory" the words "under the control of".

59. In paragraph 3, Ms. Hampson suggested inserting, after the words "may include a visit to its territory" the words "under its control", and inserting after the words "include visits to the territory" the words "under the control".

60. Mr. Joinet made a proposal concerning paragraph 4 which did not affect the English text.

Article 30

61. Mr. Joinet proposed replacing "petitions" in paragraph 1 by "communications" and changing "communication" in the first line of paragraph 2 to "communications".

Article 36

62. In paragraph 1, Mr. Kartashkin expressed concern that by giving States the option to make reservations concerning the articles which provided for the supervisory mechanism, the effectiveness of the entire draft convention would be called into question. He proposed that no reservations be possible

concerning the articles referring to the competence and functioning of the Committee. Ms. Hampson suggested allowing for reservations under article 30 only, providing for the submission of communications to the Committee concerning a violation of the provisions contained in the draft convention. Mr. Sang Yong Park and Mr. Weissbrodt were also in favour of retaining the clause on reservations in conformity with the text of the draft convention.

63. The Chairman-Rapporteur suggested a compromise text to take account of the discussion on the advisability or otherwise of allowing for reservations in article 36 and of maintaining some degree of flexibility in that respect so as to simplify ratification for some States. The text was drawn from article 20 (2) of the International Convention on the Elimination of All Forms of Racial Discrimination.

64. The working group, after approving the amended draft as a whole by consensus, requested that the Sub-Commission should transmit the revised draft convention, with the comments and suggestions contained in this report, to the Commission on Human Rights.

II. ISSUES RELATED TO THE DEPRIVATION OF THE RIGHT TO LIFE

65. In accordance with the request made by the working group at the Sub-Commission's forty-ninth session, Mr. Guissé submitted a follow-up report on the evolution of the death penalty (E/CN.4/Sub.2/1998/WG.1/CRP.3). He reported on the progress made in the de jure and de facto abolition of the death penalty throughout the world. The information provided by Amnesty International and the International Abolitionist Federation showed that 54 countries had now legally abolished the death penalty; 15 countries had abolished it except for war crimes; and 27 had not imposed it for more than 10 years. He also stressed that the death penalty had been maintained in 97 States. It was applied to vulnerable groups, such as minors, pregnant women, mothers of young children, the mentally ill, the mentally disabled and the elderly. In order to encourage the abolition of the death penalty, he referred to practices guaranteeing a fair trial, such as appointment of counsel by the courts, personality investigations and the abolition of special courts. It would be worthwhile considering, at both national and international levels, possible substitutes for the death penalty in order to assist countries wishing to abolish it.

66. The representative of the Office of the High Commissioner for Human Rights highlighted the need to coordinate the initiatives undertaken on the death penalty by the respective United Nations organs and bodies. He mentioned in particular the quinquennial report on the question of capital punishment prepared by the Centre for International Crime Prevention, the yearly supplement to this quinquennial report prepared by the Office of the High Commissioner, the work of the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the consideration of article 6 of the International Covenant on Civil and Political Rights by the Human Rights Committee. However, he mentioned that the question arises as to which was the preferable forum for consideration of the death penalty issue. In this regard it should be noted that discussing the issue within the context of human rights, and not just criminal justice aspects, could be considered as a positive step towards its abolition.

67. Mr. Alfonso Martínez mentioned that the question of the death penalty was being considered by United Nations bodies in Geneva and Vienna. The bodies in Geneva were focusing on ways by which the death penalty was affecting human rights and more specifically the right to life, whereas those in Vienna were of a more technical and legal nature. There was therefore no duplication of the activities of the respective forums, and means should be sought to ensure complementarity of the activities.

68. Mr. Ramishvili mentioned that it might be useful to reflect the work the Council of Europe was undertaking on the death penalty in Mr. Guissé's report. This would highlight the difficulties

encountered with regard to the abolition of the death penalty in that part of the world and the way it affected the criminal process. The Chairman-Rapporteur asked the secretariat to provide Mr. Guissé with the aforementioned Council of Europe documents.

69. Mrs. WARZAZI suggested that the working group should consider the plight of children whose mothers had been executed. While working for the gradual abolition of the death penalty, it should clearly define the cases for which the death penalty was required.

70. Mr. Sorabjee stated that the death penalty should be abolished in view of the miscarriages of justice which occurred, the use of the death penalty for political ends, recourse to special courts which failed to guarantee due process of law and, above all, in view of the fact that the execution of a death sentence was irrevocable.

71. Mr. Oloka-Onyango agreed with Mr. Sorabjee that in view of the discriminatory manner in which the death penalty was being applied, often disproportionately affecting individuals on the basis of race, ethnicity and economic status, abolition was the only appropriate course of action. He drew attention to the Second Optional Protocol to the International Covenant on Civil and Political Rights, which he suggested the Sub-Commission should encourage States to sign.

72. Ms. Hampson recalled the danger of wrongful convictions, which were all the more likely in cases in which individuals were convicted of terrible criminal offences compounded with pressure of public opinion to punish the perpetrators. She stressed that it was an obligation of States to educate public opinion to fully respect human rights, including the right to life, and due process of law, in conformity with article 6 (6) of the International Covenant on Civil and Political Rights which states that nothing shall be invoked to delay or to prevent the abolition of capital punishment by any State party.

73. Mr. Zhong Shukong highlighted that the abolition of the death penalty should be considered a gradual process, as long as it was carried out in conformity with the rule of law, and that it was important to bear in mind country-specific conditions which might influence the timetable for the abolition of the death penalty.

74. Mr. Alfonso Martínez suggested that paragraphs 18 to 22 of Mr. Guissé's report reflected also an increase in the recourse to the death penalty in cases in which the author of the offence belonged to a vulnerable group and the victim not, particularly in cases when the author was a Black or an immigrant from a third world country.

75. The Chairman-Rapporteur of the working group thanked Mr. Guissé for his excellent report and suggested that he should submit an updated follow-up report at the next session. That report should cover:

The approach specified in Commission on Human Rights resolution 1998/8;

The measures taken by various United Nations bodies, both in Geneva and in Vienna;

Progress in the signing or ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;

Information provided by NGOs on the situation of women and minors sentenced to death or executed.

76. Mr. Guissé thanked the working group for its helpful suggestions and agreed to submit a follow-up report on this important question at the following session.

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III. HABEAS CORPUS AS A NON-DEROGABLE RIGHT

77. Mr. Weissbrodt recalled that in 1993 the Sub-Commission had requested the Secretary-General to send to the Human Rights Committee the draft third optional protocol to the International Covenant on Civil and Political Rights. The Sub-Commission suggested the advisability of elaborating such a protocol to make the right to a fair trial, habeas corpus and amparo non-derogable rights. The Committee responded that perhaps the developing jurisprudence under article 4, which dealt with non-derogable rights contained in the Covenant, and other jurisprudence on articles 9 and 14 would be a more effective way of achieving those objectives. The Sub-Commission suggested that in accordance with decision 1997/115 the Committee consider preparing a revised general comment on article 4 of the Covenant, reaffirming the developing consensus that habeas corpus and the related aspects of amparo should be considered as non-derogable rights. The Committee agreed to this proposal and began a very early process of revising its existing General Comment 5 on article 4 of the Covenant. In his view, this development also demonstrated an increased cooperation between the Sub-Commission and treaty bodies and thus responded to requests made by the Commission on Human Rights to the Sub-Commission during the last three years to enhance cooperation with mechanisms of the Commission and human rights treaty bodies. Therefore, the work of the working group had been successfully completed in this area.

78. Mr. Sorabjee stated that habeas corpus had been the most effective safeguard for life and liberty. Its absence during several months of state of emergency proclaimed in India in 1975 had resulted in a number of arbitrary detentions and various abuses of basic human rights. He was of the opinion that military tribunals should not take the place of non-military courts during periods of emergency, since a court should be an impartial and independent court of justice. This was particularly important because habeas corpus and similar procedures were often the most effective way to protect other rights which could not be derogated from in any circumstances, including a state of emergency. These considerations should be taken into account by the Committee in the process of revising its general comment on article 4.

79. Mr. Guissé pointed out that, even though the term "habeas corpus" did not exist in the francophone African legal system, the principle was applied. For example, constitutions provided detainees with guarantee mechanisms by making detention measures transparent and reducing their length. Similar procedures should also be taken into account in any revision of the general comment on article 4.

IV. MEASURES TO BE TAKEN TO GIVE FULL EFFECT TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

80. Ms. Warzazi noted the adoption of the Statute for the International Criminal Court which would have jurisdiction in the punishment of the crime of genocide. In the light of this, Mr. Eide suggested that the working group address issues pertaining to the administration of justice within the framework of the activities of the International Criminal Court.

81. In the light of the proposals made, the Chairman-Rapporteur suggested that the title of the agenda item should be amended to read "Action to combat genocide: from the 1948 Convention to the International Criminal Court, review and prospects".

V. JUVENILE JUSTICE

82. Mr. Joinet said that, as Ms. Lucy Gwanmesia had not been re-elected as a member of the Sub-Commission, she had been unable to submit a working paper on the topic. He drew attention to Economic and Social Council resolution 1997/30 on the administration of juvenile justice. He stressed the need for better coordination of the activities of the Sub-Commission with those of the Commission on Crime Prevention and Criminal Justice and between their respective secretariats, so as to avoid duplication of their work and to enable each to benefit from the others' experience.

83. Mr. Alfonso Martínez supported this suggestion. However, he drew the attention of the group to the differences between the terms of reference of relevant organs and entities and the large number of activities involved. Coordination of pertinent activities should be further encouraged, described and taken into account by the working group.

84. The representative of the secretariat stated that, in compliance with Economic and Social Council resolution 1997/30 a Coordination Panel on Technical Advice and Assistance in Juvenile Justice was established. The first meeting of the Panel took place on 25 and 26 June 1998 and was opened by the High Commissioner for Human Rights. At the meeting the Office of the High Commissioner for Human Rights presented its preliminary survey on technical advice and assistance under the Convention on the Rights of the Child. In addition, the meeting provided a good framework to establish a link between the work of the Plan of Action regarding its mandate and follow-up of the recommendations of the Committee on the Rights of the Child addressed to States parties, including in the area of juvenile justice. Members of the Panel would take appropriate measures and coordinate their action to establish new and reinforce existing technical assistance projects in the area of juvenile justice. The members of the Panel would review the draft training manual on juvenile justice. At the country level, UNICEF representatives would follow up the recommendations made by the Committee following its consideration of State party reports during its seventeenth and eighteenth sessions, especially in the field of juvenile justice. In view of the many ongoing initiatives in this area, the working group decided to delete this item from its agenda.

VI. PRIVATIZATION OF PRISONS

85. At the first meeting, the Chairman-Rapporteur introduced this agenda item, which had been on the agenda since 1989, by going over the background to it for the benefit of newly-elected members of the working group:

At its forty-first session, by decision 1989/110, the Sub-Commission had requested Mr. Miguel Alfonso Martínez to prepare a working paper which would contain proposals on the best way for the Sub-Commission to study further the issue of privatization of prisons and to submit the working paper to it at its forty-second session;

At its forty-third, forty-fourth and forty-fifth sessions respectively, the Sub-Commission had had before it the working paper submitted by Mr. Alfonso Martínez (E/CN.4/Sub.2/1991/56), a working paper submitted by the Secretary-General (E/CN.4/Sub.2/1992/21) and an outline prepared by Mrs. Claire Palley (E/CN.4/Sub.2/1993/21);
At its forty-fifth session, the Sub-Commission had, in its decision 1993/109, requested the Commission on Human Rights to authorize the Sub-Commission at its forty-sixth session to appoint one of its

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members to undertake a special study;

At its fiftieth session, by decision 1994/103, the Commission had requested the Sub-Commission to reconsider its decisions to recommend new studies and related efforts, including the study mentioned above. The Commission had also decided that it was unnecessary or premature to make any determination on those studies and related efforts and had requested the Sub-Commission to present its recommendations to the Commission at its fifty-first session;

The Sub-Commission had taken no decision on the question at its forty-sixth or forty-eighth sessions;

At its forty-ninth session, the Sub-Commission, in its resolution 1997/26, had decided to request its parent bodies to authorize it to appoint Mr. Ali Khan as special rapporteur in order to undertake an in-depth study on all issues relating to the privatization of prisons, including the obligation to respect and implement the legislation in force in the country concerned and the possible civil responsibility of enterprises and their employees, a study which should be completed in time for consideration by the Sub-Commission at its fifty-second session.

86. The Chairman then read out an excerpt from Commission on Human Rights resolution 1998/32 in which the Commission had requested the Sub-Commission to reconsider its recommendation to appoint a special rapporteur on the privatization of prisons. The Chairman-Rapporteur wondered whether that resolution covered the principle of the study itself or simply the appointment of a rapporteur. Mr. Alfonso Martínez believed that the latter was the case and that the item should therefore be kept on the working group's agenda.

87. Mr. Guissé underlined the importance of the question of privatization of prisons, which involved the abandonment of public service activities linked specifically with the functions of the State. Mr. Alfonso Martínez also supported this point of view and suggested continuing the consideration of this issue.

88. Mr. Zhong Shukong stated that prisons were part of the State structure. This issue needed to be reviewed, but this did not mean approval of the privatization of prisons.

89. The Chairman-Rapporteur suggested that Mr. Alfonso Martínez prepare an annually updated working paper on the privatization of prisons. Both Mr. Alfonso Martínez and the working group approved the suggestion.

90. Ms. Warzazi wondered whether the agenda item should not be broadened to cover other aspects relating to prisons. For example, the working group could look more carefully into the idea of making the material conditions of prisoners, which were linked with the country's level of development, as a separate issue and concentrating on violations of the integrity of the individual (ill-treatment in all its forms), which, by definition, were unrelated to the country's level of development. She suggested that the NGO Observatoire international des prisons, which had the advantage of dealing with all categories of prisoners, including customary-law prisoners, should be approached in that connection. She asked the Chairman-Rapporteur to make the necessary contacts.

91. At the suggestion of the Chairman-Rapporteur, it was then decided to postpone discussion of the item until the end of the session, so as to accord priority to and, if possible, given the time available, complete consideration of the preliminary draft convention on forced disappearance.

92. At the second meeting, the Chairman-Rapporteur informed the working group that he had contacted Observatoire international des prisons, as suggested by Ms. Warzazi. The Chairman of that organization had sent the working group a memorandum containing the following proposals, subject to consultation

with its Executive Council and availability of the necessary funding:

(a) Draw a clearer distinction between prisons in developed countries and those in developing countries, particularly the poorest of those countries;

(b) Adopt a consistently firm stance towards physical or mental ill-treatment, but take account of the poverty factor in assessing prison conditions;

(c) Accord much greater importance to children's issues: child detainees; children born and raised in prison with their detainee mother; visiting rooms where children saw their parents detained in degrading conditions.

VII. RECOGNITION OF GROSS AND MASSIVE VIOLATION OF HUMAN RIGHTS PERPETRATED ON THE ORDERS OF GOVERNMENTS OR SANCTIONED BY THEM AS AN INTERNATIONAL CRIME

93. Mr. Joinet referred to Commission on Human Rights decision 1996/105, by which the Commission decided to postpone the decision on forwarding to the Economic and Social Council the draft decision of the Sub-Commission authorizing the preparation of a report on the subject in order to be able to take into account the work of other United Nations bodies in this field, including that of the International Law Commission. A relevant request was sent to this Commission but the Commission had not replied. In view of the above, the working group decided to delete this item from the agenda.

VIII. PROVISIONAL AGENDA FOR THE NEXT SESSION

94. At its fifth session, the working group considered the provisional agenda for the next session. The Chairman-Rapporteur drew the attention of the group to the wish of Mr. Fix Zamudio to undertake a study entitled "Improvement and efficiency of the judicial instruments for the protection of human rights at the national level and their impact at the international level". The working group agreed that to this end, an additional item with the same title be included in the provisional agenda for the next session, and requested Mr. Fix Zamudio to prepare a working paper on this subject for the next session.

95. At its 3rd meeting, the working group adopted the following provisional agenda for its next session:

1. Election of officers.

2. Adoption of the agenda.

3. Issues related to the deprivation of the right to life, with special reference to:

(a) Imposition of the death penalty;

(b) Summary, arbitrary and extrajudicial executions.

4. Privatization of prisons.

5. Action to combat genocide: from the 1948 Convention to the International Criminal Court, results and

prospects.

6. Improvement and efficiency of the judicial instruments for the protection of human rights at the national level and their impact at the international level.

7. Provisional agenda for the next session.

8. Adoption of the report of the working group to the Sub-Commission.

IX. ADOPTION OF THE REPORT OF THE WORKING GROUP TO THE SUB-COMMISSION

96. At its 5th meeting, on 17 August 1998, the working group unanimously adopted the present report to the Sub-Commission.

Annex

DRAFT INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL PERSONS FROM FORCED DISAPPEARANCE

PREAMBLE

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations and other international instruments, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, B5

Bearing in mind the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Taking into account that any act of forced disappearance of a person constitutes an offence to human dignity, is a denial of the purposes of the Charter and is a gross and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, and reaffirmed and developed in other international instruments in this field,

In view of the fact that any act of forced disappearance of a person constitutes a violation of the rules of international law guaranteeing the right to recognition as a person before the law, the right to liberty and security of the person, and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment,

Considering that forced disappearance undermines the deepest values of any society committed to the respect of the rule of law, human rights and fundamental freedoms, and that the systematic or widespread practice of such acts constitutes a crime against humanity,

Recognizing that forced disappearance violates the right to life or puts it in grave danger and denies individuals the protection of the law,

Taking into account the Declaration on the Protection of All Persons from Enforced Disappearance

adopted by the General Assembly of the United Nations,

Recalling the protection afforded to victims of armed conflicts by the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 1977, B5

Having regard in particular to the relevant articles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which protect the right to life, the right to liberty and security of the person, the right not to be subjected to torture and the right to recognition as a person before the law,

Having regard also to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that States Parties shall take effective measures to prevent and punish acts of torture,

Bearing in mind the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Standard Minimum Rules for the Treatment of Prisoners, and the Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity,

Affirming that, in order to prevent acts that contribute to forced disappearances it is necessary to ensure strict compliance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly on 9 December 1988, and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, endorsed by the General Assembly on 15 December 1989,

Taking into account also the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993,

Wishing to increase the effectiveness of the struggle against forced disappearances of persons throughout the world,

Have agreed as follows:

PART I

Article 1 B5

1. For the purposes of this Convention, forced disappearance is considered to be the deprivation of a person's liberty, in whatever form or for whatever reason, brought about by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by an absence of information, or refusal to acknowledge the deprivation of liberty or information, or concealment of the fate or whereabouts of the disappeared person.

2. This article is without prejudice to any international instrument or national legislation that does or may contain provisions of broader application, especially with regard to forced disappearances perpetrated by groups or individuals other than those referred to at paragraph 1 of this article.

Article 2 B5

1. The perpetrator of and other participants in the offence of forced disappearance or of any constituent element of the offence, as defined in article 1 of this Convention, shall be punished. The perpetrators or other participants in a constituent element of the offence as defined in article 1 of this Convention shall be punished for a forced disappearance where they knew or ought to have known that the offence was about to be or was in the process of being committed. The perpetrator of and other participants in the following acts shall also be punished: [redacted] B5

(a) Instigation, incitement or encouragement of the commission of the offence of forced disappearance;

(b) Conspiracy or collusion to commit an offence of forced disappearance;

(c) Attempt to commit an offence of forced disappearance; and B5

(d) Concealment of an offence of forced disappearance. [redacted]

2. Non-fulfilment of the legal duty to act to prevent a forced disappearance shall also be punished.

[redacted] B5

Article 3

B5 [redacted]

1. The systematic or massive practice of forced disappearance constitutes a crime against humanity.

2. Where persons are suspected of having perpetrated or participated in an offence, as defined in articles 1 and 2 of this Convention, they should be charged with a crime against humanity where they knew or ought to have known that this act was part of a systematic or massive practice of forced disappearances, however limited the character of their participation.

Article 4

1. The States Parties undertake: [redacted] B5

(a) Not to practise, permit or tolerate forced disappearance;

(b) To investigate immediately and swiftly any complaint of forced disappearance and to inform the family of the disappeared person about his or her fate and whereabouts;

(c) To impose sanctions, within their jurisdiction, on the offence of forced disappearance and the acts or omissions referred to in article 2 of this Convention;

(d) To cooperate with each other and with the United Nations to contribute to the prevention, investigation, punishment and eradication of forced disappearance;

(e) To provide prompt and appropriate reparation for the damage caused to the victims of a forced disappearance in the terms described in article 24 of this Convention.

[redacted] B5

2. No circumstance - whether internal political instability, threat of war, state of war, any state of emergency or suspension of individual guarantees -may be invoked in order not to comply with the obligations established in this Convention. [redacted] B5

3. The States Parties undertake to adopt the necessary legislative, administrative, judicial or other measures to fulfil the commitments into which they have entered in this Convention.

Article 5 [redacted] B5

1. The States Parties undertake to adopt the necessary legislative measures to define the forced disappearance of persons as an independent offence, as defined in article 1 of this Convention, and to define a crime against humanity, as defined in article 3 of this Convention, as separate offences, and to impose an appropriate punishment commensurate with their extreme gravity. The death penalty shall not be imposed in any circumstances. This offence is continuous and permanent as long as the fate or whereabouts of the disappeared person have not been determined with certainty.

2. The State Parties may establish mitigating circumstances for persons who, having been implicated in the acts referred to in article 2 of this Convention, effectively contribute to bringing the disappeared person forward alive, or voluntarily provide information that contributes to solving cases of forced disappearance or identifying those responsible for an offence of forced disappearance.

[redacted] B5

Article 6 [redacted] B5

1. Forced disappearance and the other acts referred to in article 2 of this Convention shall be considered as offences in every State Party. Consequently, each State Party shall take the necessary measures to establish jurisdiction in the following instances:

(a) When the offence of forced disappearance was committed within any territory under its jurisdiction;

(b) When the alleged perpetrator or the other alleged participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention are in the territory of the State Party, irrespective of the nationality of the alleged perpetrator or the other alleged participants, or of the nationality of the disappeared person, or of the place or territory where the offence took place unless the State extradites them or transfers them to an international criminal tribunal. [redacted] B5 B5

2. This Convention does not exclude any jurisdiction exercised by an international criminal tribunal. [redacted] B5 B5

Article 7 [redacted]

1. Any State Party on whose territory a person suspected of having committed a forced disappearance or an act referred to in article 2 of this Convention is present shall, if after considering the information at its disposal it deems that the circumstances so warrant, take all necessary measures to ensure the continued presence of that person in the territory and if necessary take him or her into custody. Such detention and measures shall be exercised in conformity with the legislation of that State, and may be continued only for the period necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary investigation of the facts.

3. When a State, pursuant to this article, gathers evidence of a person's responsibility but does not exercise its jurisdiction over the matter, it shall immediately notify the State on whose territory the offence was committed, informing it of the circumstances justifying the presumption of responsibility, in order to allow that State to request extradition.

Article 8 [redacted] B5

1. States Parties shall afford one another the greatest measure of legal assistance in connection with any criminal investigation or proceedings relating to the offence of forced disappearance, including the supply of all the evidence at their disposal that is necessary for the proceedings.

2. States Parties shall cooperate with each other, and shall afford one another the greatest measure of legal assistance in the search for, location, release and rescue of disappeared persons or, in the event of death, in the return of their remains.

3. States Parties shall carry out their obligations under paragraphs 1 and 2 of this article, without prejudice to the obligations arising from any treaties on mutual legal assistance that may exist between them.

Article 9 [redacted] B5

1. No order or instruction of any public authority - civilian, military or other - may be invoked to justify a forced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it. Each State shall prohibit orders or instructions commanding, authorizing or encouraging a forced disappearance. B5

2. Law enforcement officials who have reason to believe that a forced disappearance has occurred or is about to occur shall communicate the matter to their superior authorities and, when necessary, to competent authorities or organs with reviewing or remedial power.

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3. Forced disappearance committed by a subordinate shall not relieve his superiors of criminal responsibility if the latter failed to exercise the powers vested in them to prevent or halt the commission of the crime, if they were in possession of information that enabled them to know that the crime was being or was about to be committed. B5

Article 10 [redacted]

1. The alleged perpetrators of and other participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention shall be tried only in the courts of general jurisdiction of each State, to the exclusion of all courts of special jurisdiction, and particularly military courts. [redacted] B5

2. No privileges, immunities or special exemptions shall be granted in such trials, subject to the provisions of the Vienna Convention on Diplomatic Relations [redacted] B5

3. The perpetrators of and other participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention shall in no case be exempt from criminal responsibility including where such offences or acts were committed in the exercise of military or police duties or in the course of performing these functions. B5

4. The States Parties guarantee a broad legal standing in the judicial process to any wronged party, or any person or national or international organization having a legitimate interest therein. B5

Article 11

B5

1. Each State Party shall ensure that any person who alleges that someone has been subjected to forced disappearance has the right to complain to a competent and independent State authority and to have that complaint immediately, thoroughly and impartially investigated by that authority.

2. Whenever there are grounds to believe that a forced disappearance has been committed, the State shall refer the matter to that authority without delay for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.

3. Each State Party shall ensure that the competent authority has the necessary powers and resources to conduct the investigation, including powers to compel attendance of the alleged perpetrators or other participants in the offence of forced disappearance or other acts referred to in article 2 of this Convention, and of witnesses, and the production of relevant evidence. Each State shall allow immediate and direct access to all documents requested by the competent authority, without exception.

4. Each State Party shall ensure that the competent authority has access, without delay or prior notice, to any place, including those classified as being places of national security or of restricted access, where it is suspected that a victim of forced disappearance may be held.

5. Each State Party shall take steps to ensure that all persons involved in the investigation - including the complainant, the relatives of the disappeared person, legal counsel, witnesses and those conducting the investigation - are protected against ill-treatment and any acts of intimidation or reprisal as a result of the complaint or investigation. Anyone responsible for such acts shall be subject to criminal punishment.
6. The findings of a criminal investigation shall be made available upon request to all persons concerned, unless doing so would gravely hinder an ongoing investigation. However, the competent authority shall communicate regularly and without delay to the relatives of the disappeared person the results of the inquiry into the fate and whereabouts of that person.

B5

7. It must be possible to conduct an investigation, in accordance with the procedures described above, for as long as the fate or whereabouts of the disappeared person have not been established with certainty.

8. The alleged perpetrators of and other participants in the offence of forced disappearance or other acts referred to in article 2 of this Convention shall be suspended from any official duties during the investigation.

B5

Article 12

1. Forced disappearance shall not be considered a political offence for purposes of extradition.

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2. Forced disappearance shall be deemed to be included among the extraditable offences in every extradition treaty entered into between States Parties.

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3. States Parties undertake to include the offence of forced disappearance among the extraditable offences in every extradition treaty they conclude.

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4. Should a State Party that makes extradition conditional on the existence of a treaty receive a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition with respect to the offence of forced disappearance.

B5

5. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the said offence as extraditable. B5

6. Extradition shall be subject to the procedures established in the law of the requested State.

Article 13 B5

When a State Party does not grant the extradition or is not requested to do so, it shall submit the case to its competent authorities as if the offence had been committed within its jurisdiction, for the purposes of investigation and, when appropriate, for criminal proceedings, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State requesting extradition.

Article 14 B5

Forced disappearance shall not be considered a political offence, nor related to a political offence, for purposes of asylum and refuge. States Parties to this Convention shall not grant diplomatic or territorial asylum or refugee status to any person if there are substantiated grounds for believing that he or she has taken part in a forced disappearance. B5

Article 15 B5 B5

1. No State Party shall expel, return (refouler) or extradite a person to another State if there are grounds for believing that he or she would be in danger of being subjected to forced disappearance or any other serious human rights violation in that other State. B5

2. For the purpose of determining whether such grounds exist, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State in question of situations indicating gross, systematic or widespread violations of human rights.

Article 16 B5

1. No statutory limitation shall apply to criminal proceedings and any punishment arising from forced disappearances, when the forced disappearance constitutes a crime against humanity, in accordance with article 3 of this Convention.

2. When the forced disappearance does not constitute a crime against humanity in accordance with article 3 of this Convention, the statute of limitation for the offence and the criminal proceedings shall be equal to the longest period laid down in the law of each State Party, starting from the moment when the fate or whereabouts of the disappeared person is established with certainty. When the remedies B5 described in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the prescription for the offence of forced disappearance shall be suspended until the efficacy of these remedies has been restored.

3. States Parties shall adopt any legislative or other measures necessary to bring their law into conformity with the provisions of the preceding paragraphs.

Article 17 B5

1. The perpetrators or suspected perpetrators of and other participants in the offence of forced disappearance or the acts referred to in article 2 of this Convention shall not benefit from any amnesty measure or similar measures prior to their trial and, where applicable, conviction that would have the effect of exempting them from any criminal action or penalty.

2. The extreme seriousness of the offence of forced disappearance shall be taken into account in the granting of pardon.

Article 18 B5

1. Without prejudice to articles 2 and 5 of this Convention, States Parties shall prevent and punish the abduction of children whose parents are victims of forced disappearance and of children born during their mother's forced disappearance, and shall search for and identify such children. As a general rule, the child will be returned to his or her family of origin. Here the best interests of the child must be taken into account and the views of the child shall be given due weight in accordance with the age and maturity of the child.

2. States Parties shall give each other assistance in the search for, identification, location and return of minors who have been removed to another State or held therein. For these purposes, States shall, as needed, conclude bilateral or multilateral agreements.

3. States Parties whose laws provide for a system of adoption shall establish through their national law the possibility of reviewing adoptions, and in particular the possibility of annulment of any adoption which has arisen from a forced disappearance. Such adoption may, however, continue in force if consent is given, at the time of the review, by the child's closest relatives. In any event, the best interests of the child should prevail and the views of the child should be given due weight in accordance with the age and maturity of the child.

4. States Parties shall impose penalties in their criminal law on the abduction of children whose parents are victims of forced disappearance or of children born during their mother's forced disappearance, and on the falsification or suppression of documents attesting to the child's true identity. The penalties shall take into account the extreme seriousness of these offences.

Article 19 B5

States Parties shall ensure that the training of public law enforcement personnel and officials includes the necessary education on the provisions of this Convention. B5

Article 20

1. Without prejudice to any legal remedies for challenging the lawfulness of a deprivation of liberty, States Parties shall guarantee the right to a prompt, simple and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority that ordered the deprivation of liberty and the authority that carried it out. This remedy, as well as that of habeas corpus and similar remedies, may not be suspended or restricted, even in the circumstances described in article 4, paragraph 2, of this Convention.

2. In the framework of this remedy, and without prejudice to the powers of any judicial authority, judges acting in these cases shall enjoy the power to summon witnesses, to order the production of evidence,

and to have unrestricted access to places where it may be presumed that a person deprived of liberty might be found.

3. Any delay to or obstruction of this remedy shall result in criminal penalties.

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Article 21

1. States Parties shall establish norms under their national law indicating those officials who are authorized to order the deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating the penalties for officials who do not or refuse to provide information on the deprivation of liberty of a person.
2. Each State Party shall likewise ensure strict supervision, in accordance with a clear chain of command, of all officials responsible for apprehensions, arrests, detentions, police custody, transfers and imprisonment, and of all other law enforcement officials.

3. Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by the competent authorities or persons authorized for that purpose.

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4. There shall be no restriction upon or derogation from any of the human rights of persons under any form of deprivation of liberty that are recognized, binding upon or in force in any State pursuant to law, conventions, regulations or custom on the pretext that this Convention does not recognize such rights or that it recognizes them to a lesser extent.

5. Any form of deprivation of liberty and all measures affecting the human rights of a person under any form of deprivation of liberty shall be ordered by, or be subject to the effective control of, a judicial or other competent authority.

6. Competent authorities shall have access to all places where there is reason to believe that persons deprived of their liberty might be found.

B5

Article 22

1. States Parties guarantee that any person deprived of liberty shall be held solely in an officially recognized and controlled place of detention and be brought before a judge or other competent judicial authority without delay, who will also be informed of the place where the person is being deprived of liberty.

2. Accurate information on the deprivation of liberty of any person and on his or her whereabouts, including information on any transfer, the identity of those responsible for the deprivation of liberty, and the authority in whose hands the person has been placed, shall be made immediately available to the person's counsel or to any other persons having a legitimate interest in the information.

3. In every place where persons deprived of liberty are held, States Parties shall maintain an official up-to-date register of such persons. Additionally, they shall maintain similar centralized registers. The information contained in these registers shall be made available to the persons and authorities mentioned in the preceding paragraph.

4. States Parties shall identify who is the responsible person in national law for the integrity and accuracy of the custody record. Without prejudice to the provisions of articles 1, 2 and 3 of this

Convention, States Parties shall make it a criminal offence for the responsible person, as defined in national law, to fail to register the deprivation of liberty of any person or to record information which is or should be known to be inaccurate in the custody record.

5. States Parties shall periodically publish lists that name the places where persons are deprived of liberty. Such places must be visited regularly by qualified and experienced persons named by a competent authority, different from the authority directly in charge of the administration of the place.

Article 23 B5

States Parties guarantee that all persons deprived of liberty shall be released in a manner that allows reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and their ability fully to exercise their rights are assured.

Article 24 B5

1. States Parties guarantee, in all circumstances, the right to reparation for the harm caused to the victims of forced disappearance.

2. For the purposes of this Convention, the right to reparation comprises restitution, compensation, rehabilitation, satisfaction, and the restoration of the honour and reputation of the victims of the offence of forced disappearance. The rehabilitation of victims of forced disappearance will be physical and psychological as well as professional and legal.

3. For the purposes of this Convention, the term "victim of the offence of forced disappearance" means the disappeared person, his or her relatives, any dependant who has a direct relationship with her or him, and anyone who has suffered harm through intervening in order to prevent the forced disappearance or to shed light on the whereabouts of the disappeared person.

4. In addition to such criminal penalties as are applicable, the acts referred to in articles 2 and 3 of this Convention shall render the State liable under civil law, and the State may bring an action against those responsible in order to recover what it has had to pay, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law.

PART II B5

Article 25

1. There shall be established a Committee against Forced Disappearance (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of 10 experts of high moral standing and recognized competence in the field of human rights, who shall serve in a personal and independent capacity. Membership of the Committee is incompatible with any post or function subject to the hierarchical structure of the executive authority of a State Party. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate not more than two persons from among its own nationals.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least eight months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties, the relevant intergovernmental organizations and the relevant non-governmental organizations that enjoy consultative status with the Economic and Social Council.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. The United Nations shall be responsible for the expenses incurred by the application of this Convention.

Article 26

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Six members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. With the approval of the General Assembly, the members of the Committee shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide in the light of the importance of the functions of the Committee.

Article 27

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. In connection with the submission of the first report of each State Party concerned, the Committee may make a visit to the territory under the control of that State Party. The State Party concerned shall provide all the necessary facilities for such a visit including the entry into the country and access to such places and meeting with such persons as may be required for carrying out the mission of the visit. Thereafter the States Parties shall submit supplementary reports at the request of the Committee.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such comments, observations and recommendations as it may consider appropriate and shall forward the said comments, observations and recommendations to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments, observations and recommendations made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 33. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

Article 28

1. If the Committee receives reliable information which appears to it to contain well-founded indications that forced disappearance is being systematically or widely practised in the territory under the control of a State Party, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make an inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the cooperation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to the territory under its control. At least one member of the Committee, who may be accompanied if necessary by interpreters, secretaries and experts, shall be responsible for conducting the missions which include visits to the territory under the control of the State Party. No member of the delegation, with the exception of the interpreters, may be a national of the State to which the visit is to be made.

4. The Committee shall notify the Government of the State Party concerned in writing of its intention to organize a mission, indicating the composition of the delegation. During its mission the Committee may make such visits as it may consider necessary in order to fulfil its commitments. If one of the two parties so desires, the Committee and the State Party concerned may, before a mission is carried out, hold consultations in order to define the practical arrangements for the mission without delay. The consultations concerning the practical arrangements for the mission may not include negotiations

concerning the obligations for a State Party arising out of this Convention.

5. After examining the report submitted by its member or members in accordance with paragraph 2 of this article, the Committee shall transmit its report to the State Party concerned, together with its conclusions, observations and recommendations.

6. After the proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultation with the State Party concerned, include the results of the proceedings together with the conclusions, observations and recommendations in its annual report made in accordance with article 33.

B5

Article 29

A State Party to this Convention may submit to the Committee communications to the effect that another State Party is not fulfilling its obligations under this Convention. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the State Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;

(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within 12 months after the date of receipt of notice under subparagraph (b), submit a report:

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(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solutions reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

Article 30

1. Any person or group of persons under the jurisdiction of a State Party or any non-governmental organization may submit communications to the Committee concerning a violation of the provisions of this Convention by a State Party.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the author of the communication referred to in paragraph 1 and by the State Party concerned. The Committee may, if it deems it necessary, organize hearings and investigation missions. For these purposes the Committee shall be governed by paragraphs 3 and 4 of article 28.

5. The Committee shall not consider any communications from an individual under this article unless it has been ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The author of the communication has exhausted all domestic remedies. This shall not be the rule if, in the domestic legislation of the State Party, there is no effective remedy to protect the right alleged to have been violated, if access to domestic remedies has been prevented, if the application of the remedies is unreasonably prolonged or if it is unlikely that application of the remedies would improve the situation of the person who is the victim of the violation.

6. The Committee shall hold closed meetings when examining communications under this article.

7. In urgent cases the Committee may request the State Party concerned to take whatever protective measures it may deem appropriate, when there is a need to avoid irreparable damage. When the Committee is carrying out its functions of considering communications submitted to it, the request to adopt such measures and their adoption shall not prejudge its final decision.

8. The Committee shall forward its views to the State Party concerned and to the individual.

Article 31

1. The Committee may undertake any effective procedure to seek and find persons who have disappeared within the meaning of this Convention, either on its own initiative or at the request of a State Party, an individual, a group of individuals or a non-governmental organization.

2. The Committee shall consider inadmissible any request received under this article which is anonymous or which it considers to be an abuse of the right of submission of such requests or to be incompatible with the provisions of this Convention. In no case may the exhaustion of domestic remedies be required.

3. The Committee may, if it decides that this is warranted, appoint one or more of its members to undertake an investigation mission and to report to the Committee urgently. The Committee shall be governed by the provisions of paragraphs 3 and 4 of article 28 of this Convention.

4. The Committee shall discharge this function in a strictly neutral and humanitarian capacity.

Article 32

The members of the Committee and persons accompanying them on mission in the territory of the States Parties referred to in articles 28, 29 and 31 shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 33

1. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

2. To ensure that its observations and recommendations are followed up, the Committee shall include in the report referred to in paragraph 1 of this article the measures taken by the States Parties to guarantee effective compliance with the observations and recommendations made in accordance with articles 27, 28, 29, 30 and 31 of this Convention.

PART III

Article 34

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 35

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 36 [redacted] B5

1. No State can, at the time of signature or ratification of this Convention or accession thereto, make reservations concerning articles 1 to 24 and article 31 of this Convention, nor make a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention.

2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

B5

Article 37 [redacted]

1. This Convention shall enter into force on the thirtieth day following the date of deposit of the tenth instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the tenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 38

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

(a) Signatures, ratifications and accessions under articles 34 and 35;

(b) The date of entry into force of this Convention under article 37.

Article 39

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

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Geneva, Switzerland

RELEASED IN PART
B5

21/06/04 – Traduction de courtoisie

Indications such as "new", "complemented", etc, are intended to ease the comparison with document E/CN.4/2004/WG22/WP.1/Rev.1 of 1 december 2003.

B5

GE176

Preamble (new)

The States Parties to the [*present instrument*],

Recalling the Declaration on the Protection of all Persons from Enforced Disappearances adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992;

Conscious of the extreme gravity of enforced disappearance which constitute a crime and, in certain circumstances, a crime against humanity;

Determined to fight against the impunity of the crime of enforced disappearance ;

Affirming the right of victims to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person ;

Have agreed as follows :

Part I

Article 1

For the purposes of [*the present instrument*] enforced disappearance is considered to be the deprivation of a person's liberty, in whatever form, committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law.

Article Ibis (new)

1. No one shall be subjected to enforced disappearance.

2. ***(from former III-E)*** No circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other state of emergency, may be invoked as a justification of enforced disappearance.

Article 2 (modified)

1. Each State Party shall take the necessary measures to ensure that enforced disappearance, as defined in article 1, [redacted] constitutes an offence under its criminal law. B5

2. Each State Party shall take equivalent measures when persons or groups of persons acting without the authorization, support or acquiescence of the State are responsible for [redacted] defined in article 1. B5

[redacted] B5

Article 2 bis (new) [redacted] B5

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity and shall attract the consequences provided for under international law.

Article 3 (reorganised)

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

1. Each State Party shall take the necessary measures to pursue and punish those who commit or contribute to the commission of an enforced disappearance.

2. The following shall be punished [redacted] B5

   a) ~~the~~ perpetrators of and accessories [redacted] an enforced disappearance. B5

   b) ~~the~~ attempts to commit an enforced disappearance [redacted] B5

   c) ~~the~~ conspiracy to commit an enforced disappearance [redacted] B5

3. The following shall also be punished [redacted] with the domestic [redacted] B5 B5

   a) persons who order or [encourage [redacted] he commission or attempted commission of such an offence, and persons who facilitate its commission or attempted commission by aiding, abetting or otherwise assisting in it, including providing the means for its commission or attempted commission, ~~shall be punished~~,] [redacted] B5 B5

   b) a superior officer who:

      (i) either knew, or consciously disregarded information which clearly indicated, that subordinates were committing or about to commit an enforced disappearance, and who

      (ii) failed to take all necessary and reasonable measures within his or her power to prevent or repress the enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.

4. ***(former 6)*** An order of a superior officer or a public authority may not be invoked as a justification of an enforced disappearance.

Article 4

1. Each State Party shall make enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish :

   a) mitigating circumstances inter alia for persons who, having been involved in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive, or contribute to elucidating cases of enforced disappearance or identifying the perpetrators of an enforced disappearance.

   b) ***(complemented)*** Aggravating circumstances inter alia in the event of death of the victim or the commission of an enforced disappearance in respect of pregnant women, minors or other particularly vulnerable persons.

Article5 (modified)

Without prejudice to article 2 [redacted] ~~his~~, B5

1. Each State Party which applies a statute of limitations in respect of enforced disappearances shall take the necessary measures to ensure that the term of limitation for criminal proceedings :

   a) is of long duration and proportionate to the extreme seriousness of the offence;

   b) shall commence from the moment when [the offence of enforced disappearance ceases and] the fate of the disappeared person is established [redacted] B5

2. The statute of limitations for criminal proceedings under paragraph 1 shall be suspended in a State Party as long as any victim of enforced disappearance does not have an effective remedy. B5

Article 6 (see 3,3)

Article 7 (deleted) B5

Article 8 (deleted) B5

Article 9 (reorganised and modified)

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over an enforced disappearance :

   a) when the offence is committed within any territory under its jurisdiction or on board a vessel flying its flag or an aircraft registered in accordance with its law at the time of the ~~facts~~; B5

   b) when the alleged perpetrator of the offence is one of its nationals B5

   c) when the disappeared person is one of its nationals and the State deems it appropriate to do s B5

2. Each State Party shall also take the necessary measures to establish its jurisdiction over an enforced disappearance when the alleged perpetrator of the offence is in a territory under its jurisdiction, unless the State extradites him or her or transfers him or her to another State or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognised.

3. *[The present instrument]* does not exclude any criminal jurisdiction exercised in accordance with national laws.

Article 10 B5

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an enforced disappearance is present, shall take him or her into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. The State Party which has taken the measures referred to in paragraph 1 shall immediately make an investigation into the facts. It shall notify the States Parties which may have jurisdiction in accordance with paragraph 1 of article 9 of the measures which it has taken under paragraph 1 of this article, particularly of the fact that such person is in custody and of the circumstances which warrant his or her detention, the findings of its investigation and shall indicate to those States whether it intends to exercise jurisdiction.

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

Article 11 B5

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any enforced disappearance is found shall, if it does not extradite him or her or transfer him or her to another State or surrender him or her to an international criminal tribunal whose jurisdiction it has recognised, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in paragraph 2 of article 9, the standards of

evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in paragraph 1 of article 9.

3. *(modified)* Any person charged with an offence of enforced disappearance shall be tried by an independent and impartial court, duly established by law, which guarantees the right to a fair trial. B5

4. *(new)* Any person regarding whom proceedings are brought in connection with an enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. B5

Article 12 (modified)

1. Each State Party shall ensure that any person who alleges that someone has been subjected to enforced disappearance has the right to complain to a competent authority, which thoroughly investigates the complaint immediately and impartially. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, the relatives of the disappeared person and their defence counsel as well as those participating in the investigation are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Whenever there are reasonable grounds to believe that a person has been subjected to enforced disappearance, any State Party shall refer the matter to the authority referred to in paragraph 1 for it to launch an investigation, even if there has been no formal complaint.

3. *(new)* Each State Party shall ensure that the [redacted] authority referred to in paragraph 1: B5

   a) has the necessary powers and resources to conduct the investigation, including the power to compel suspected perpetrators and witnesses to appear before it,

   b) is communicated the necessary information for its investigation;

   c) has access to any place where it is suspected that a disappeared person is present.

4. *(former 12.6, complemented)* Each State Party shall take the necessary measures to prevent and punish acts of such a kind as to inhibit the progress of investigations. It shall ensure, particularly, that persons suspected of having committed an enforced disappearance are not in a position to influence the progress of the investigations by means of pressure or acts of intimidation or reprisal against the complainant, the witnesses, the relatives of the disappeared person, the defence counsel as well as those participating in the investigation..

5. *(new)* The investigation pursuant to the present article shall be conducted in conformity with international principles for investigations on human rights violations, torture, search of disappeared persons, forensic examination and identification. B5

Article 13 (modified)

1. For purposes of extradition between States Parties, enforced disappearance shall be considered to be neither a political offence, nor an offence related to a political offence or an offence prompted by political motives. Consequently, a request for extradition based on enforced disappearance cannot be refused solely because it concerns a political offence, an offence related to a political offence or an offence prompted by political motives.

2. Enforced disappearance shall automatically be included among the extraditable offences in every extradition treaty concluded between States Parties before the entry into force [*of the present instrument*].

3. States Parties undertake to include the offence of enforced disappearance among the extraditable offences in every extradition treaty to be concluded subsequently between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider [*the present instrument*] as the legal basis for extradition in respect of enforced disappearance.

5. Any State Party which does not make extradition conditional on the existence of a treaty shall recognise the offence of enforced disappearance as extraditable.

6. Extradition shall, in all cases, be subject to the conditions provided by the law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or subject extradition to conditions.

7. No provision [*of the present instrument*] shall be interpreted as imposing an obligation on the requested State Party to extradite if that State has serious grounds to believe that the request was put forward for the purpose of prosecuting or punishing a person on account of his or her gender, race, religion, nationality, ethnic origin or political opinions, or that to allow the request would cause harm to that person for any one of those reasons.

Article 14 (modified)

1. States Parties shall provide one another the greatest measure of legal assistance in connection with any criminal investigation or proceedings brought in respect of enforced disappearance, including the supply of all evidence at their disposal that are necessary for the proceedings.

2. Such legal assistance is subject to the conditions provided by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, particularly, concerning the grounds on which the requested State Party may refuse to provide legal assistance or subject such assistance to conditions.

Article 15 (modified)

States Parties shall co-operate with one another and shall provide one another the greatest measure of assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in their exhumation, identification and ~~restitution~~ of their remains. B5

Article 15 bis (former 21)

1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to an enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of humanitarian law.

Article 16 (reorganised and modified, see 16 bis below)

1. Each State Party shall, under its law,

   a) indicate those officials who are authorised to order deprivation of liberty;

   b) establish the conditions under which such orders may be given;

   c) guarantee that any person deprived of liberty shall be held solely in an officially recognised and controlled place;

   d) guarantee access ~~of~~ the judicial authorities to places of deprivation of liberty; B5

e) guarantee that any person deprived of liberty, in all circumstances, shall have the right to bring proceedings before a court which shall rule without delay on the lawfulness of the deprivation of liberty and order his or her release if that deprivation of liberty is unlawful.

2. Each State Party shall compile and maintain one or several official up-to-date registers of persons deprived of liberty. The information contained in these registers shall include at least the following :

a) the identity of the person deprived of liberty,

b) the authority having decided the deprivation of liberty,

c) the authority controlling the deprivation of liberty,

d) the date and time of admission in the place of detention and the authority responsible for the place of detention,

e) The date and time of liberation or transfer to another place of detention, the destination and authority in charge of the transfer.

Article 16 bis

1. Each State Party [redacted] shall guarantee the person deprived of liberty, his or her relatives, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest access, as a minimum, to the following information : B5

a) the authority to which the person has been handed over;

b) the authority having decided the deprivation of liberty;

c) the authority controlling the person deprived of liberty;

d) the whereabouts of the person deprived of liberty, including in case of transfer;

e) date and place of release;

f) state of health and, in the event of death, circumstances and causes of the death.

2. Appropriate measures shall be taken, where necessary, to ensure the protection of the persons mentioned in paragraph 1 as well as the persons participating in the investigation against all ill-treatment; intimidation or any sanction on the grounds of the search of information concerning a person deprived of liberty.

3. ***(new)*** In order not to jeopardise the privacy of the persons concerned, the information transmitted pursuant to paragraph 1 of the present article shall [redacted] B5
~~shall~~ not be used for other purposes than the search of the person deprived of liberty. B5

Article 17

Without prejudice to consideration of the lawfulness of a deprivation of liberty, States Parties shall guarantee to the relatives of the person deprived of liberty or of a disappeared person, their legal representatives, their counsel and any person authorised by the person deprived of liberty or the disappeared person or by his/her relatives, as well as any other person able to claim a legitimate interest the right to a prompt and effective remedy as a means of obtaining without delay the information referred to article 16 bis. This right to a remedy may not be suspended or restricted in any circumstances.

Article 18 (complemented)

Each State Party shall take the necessary measures to ensure that the release of persons shall proceed in a manner that allows reliable verification that they have actually been released. Each State Party shall also take

the necessary measures so that the physical integrity of all such persons and their ability to exercise fully their rights are assured at the time of release, without prejudice to the obligations to which such persons may be subject in accordance with the law.

Article 19

Each State Party shall take the necessary measures to prevent and punish the following actions:

a) delaying or obstructing the remedy referred to in article 17;

b) failure to the obligation to register every deprivation of liberty and registration of information which the official responsible of the register knows or should known to be inaccurate;

c) refusal by an official to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal conditions for this information to be provided have been fulfilled.

Article 20 (complemented)

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty shall include the necessary education and information on the provisions [*of the present instrument]* , in order to:

   a) prevent the involvement of these officials in enforced disappearances;

   b) draw attention to the importance of prevention and investigations concerning enforced disappearances;

   c) ensure that the urgent need to resolve cases of enforced disappearance is acknowledged.

2. Each State shall prohibit orders or instructions commanding, authorising or encouraging enforced disappearance. Each State Party shall guarantee that a person refusing to obey such order will not be subject to sanction.

3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reasons to believe that an enforced disappearance has occurred or is planned communicate the matter to their superior authorities and, when necessary, to competent authorities or organs with reviewing or remedial power.

Article 21 (see 15 bis)

Article 22 (modified and complemented)

1. For the purposes of [*the present instrument*], "victim" means the disappeared person and any natural person who has suffered direct harm as a result of that disappearance.

2. Each State Party shall take the necessary measures so that any victim knows the truth concerning the circumstances of the enforced disappearance and the fate of the disappeared person. It shall, in particular, take the necessary measures to search for, locate and release disappeared persons and, in the event of death, return the human remains.

3. Each State Party shall guarantee the right [to obtain] prompt, fair and adequate reparation for the harm caused to victims of enforced disappearance. B5

4. The right to obtain reparation referred to in paragraph 3 includes [integral] compensation for material and non-material damage. It may also include, in particular:

   a) restitution,

b) rehabilitation,

c) satisfaction,

d) restoration of honour and reputation.

5. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person is elucidated, each State Party shall take the necessary measures with regard to the legal situation of the disappeared persons who's fate has not been elucidated and of their relatives in fields such as social protection, financial matters, custody of children and property rights.

Article 23 (complemented)

1. Each State Party shall take the necessary measures to prevent and to [ ] ~~unish in a criminal court~~ : B5

a) the abduction or appropriation of children victims of enforced disappearance, children whose father or mother is victim of enforced disappearance or children born during the detention of their disappeared mother;

b) the falsification or suppression of documents attesting to the true identity of a child referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify children referred to in subparagraph (a) and (b).

Article 24

State Parties [ ] grant each other assistance in the search for, the identification and the location of children referred to in article 23. B5

Article 25

1. When a child who has been abducted or appropriated in the circumstances described in article 23, paragraph (a), is found on the territory of a State party, the question of the child's return to his or her family of origin shall be resolved either under the domestic law of that State party, or under the bilateral or multilateral agreement which that State has entered into with another State in which the family of origin lives.

2. In all cases, the best interests of the child are a primary consideration, and a child who is capable of judgement shall have the right to express his or her views freely and to have them given due weight in the light of his or her age and level of maturity.

Part II

Article 0 (new)

1. A [*monitoring body*] shall be established to assist, as appropriate, in ~~ensure~~ the implementation of the [*present instrument*] ~~and the respect~~ by State Parties of their commitments. [A monitoring [redacted] B5

2. When carrying out their ~~While exercising~~ their mandate [redacted] the members of the [*monitoring body*] shall be entitled to privileges and immunities [redacted] ~~as laid down~~ in the Convention on Privileges and Immunities of the United Nations. B5 B5

3. Each State Party shall undertake to co-operate with the [*monitoring body*] and to grant assistance to its members in the exercise of their mandate.

Article II-A (modified)

1. Each State Party shall submit to [*the monitoring body*], through the Secretary-General of the United Nations, a report on the measures taken [redacted] ~~to give effect to~~ its undertakings under [*the present instrument*], within one year after the entry into force [*of the present instrument]* in respect of the State concerned. B5

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by [*the monitoring body*], which may make such comments, observations, recommendations and warnings as it considers appropriate. The State Party concerned shall receive communication of such comments, observations, recommendations and warnings, to which that State may respond, on its own initiative or at the request [*of the monitoring body*].

Article II-B (modified)

1. Each State Party or the relatives of a disappeared person, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest may submit a request to [*the monitoring body*] to seek and find a person who has disappeared within the meaning of article 1.

2. Should [*the monitoring body*] consider that a request submitted under paragraph 1 is not manifestly unfounded, that it does not constitute an abuse of the right of submission and that it is not incompatible with the provisions [*of the present instrument]* [*the monitoring body*] shall request any State Party to provide information on the situation of that person, within a time-limit set by [*the monitoring body*].

3. In the light of the response provided by the State Party concerned in accordance with paragraph 2, [*the monitoring body*] shall make a recommendation or [redacted] ~~give a warning~~ to that State. [*The monitoring body*] may also [~~instruct~~][urge] that State to take appropriate measures and to report to it on those measures, within a time-limit set by [*the monitoring body*]. B5 B5

4. [*The monitoring body*] shall establish its conclusions and forward them to any State Party which has been requested to provide information and to the author of the request referred to in paragraph 1.

5. The procedure under this article is confidential.

Article II-C (modified) [redacted] B5

1. If [*the monitoring body*] considers that a visit to the territory of a State Party under whose jurisdiction a disappeared person could be is essential in order to respond to the request submitted to it in accordance with Article II-B, [*the monitoring body*] may request one or more of its members to undertake an investigation mission and to report back without delay. The member or members [*of the monitoring body*] conducting the mission may be accompanied if necessary by interpreters, secretaries and experts. No member of the delegation, with the exception of the interpreters, may be a national of the State Party to which the visit is to be made.

2. [*The monitoring body*] shall notify the State Party concerned in writing of its intention to organise an investigation mission, indicating the composition of the delegation. The State Party shall inform [*the monitoring body*] without delay of its agreement or opposition to the investigation mission in the territory over which it has jurisdiction.

3. If the State Party agrees to the investigation mission, it shall provide [*the monitoring body*] with all the necessary facilities to enable the mission to be carried out. [*The monitoring body*] may, inter alia:

   a) make such visits as it may consider necessary to search for and find the person who has disappeared;

   b) make contact freely with any person whom it believes may provide useful information on the fate of the person who has disappeared;

   c) have the person who has allegedly disappeared brought to it and discuss with him or her in private.

4. [*The monitoring body*] shall inform the following of the findings of the investigation mission:

   a) the State Party in whose territory the investigation mission was carried out;

   b) the author of the request referred to in paragraph 1 of article II-B.

5. The procedure under this article is confidential.

Article II-C bis (new)

1. [*The monitoring body*] considers a communication presented by the relatives of a disappeared person, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest alleging grave breaches in the implementation of the commitments taken under the [*present instrument*] unless B5 B5

   a) the communication lacks sufficient motivation or is obviously unfounded;

   b) the same matter is being examined under another procedure of international investigation or settlement;

   c) the complainant has not exhausted all available effective domestic remedies.

2. If the [*the monitoring body*] assesses that the communication fulfils the conditions under paragraph 1, [*the monitoring body*] transmits the communication to the State Party concerned and requests this State Party to provide observations and comments within a time-limit set by the [*monitoring body*].

3. On the basis of the answer of the State Party, [*the monitoring body*] may decide :

   a) to close the matter of the communication;

   b) to continue its examination;

   c) to make a recommendation to the State Party.

4. The procedure under the present article comes to an end when the [*monitoring body*] communicates the conclusions of its investigation to the State Party and to the author of the communication.

5. The procedure under this article is confidential.

Article II-C ter (new)

If the [*monitoring body*] receives reliable information which appears to it to contain well-founded indication that enforced disappearance is being practised in a systematic or general manner in the territory of a State Party, the [*monitoring body*] may seize the Secretary General of the United Nations, after having enquired with the State Party concerned about any pertinent information and the measures taken to put an end immediately to such practises.

Article II-D (integrated in II-O§2)

Article II-E (complemented)

1. [*The monitoring body*] has competence solely in respect of deprivations of liberty which commenced after the entry into force [*of this instrument*].

2. Should a State become party to [*this instrument*] after its entry into force, the obligations of that State towards [*the monitoring body*] concern only deprivations of liberty which commenced after the entry into force [*of this instrument*] in respect of the State concerned.

3. *(new)* Each State Party may at any time declare that, in its own respect, it recognises that the [*monitoring body*] has competence in respect of enforced disappearances which commenced before entry into force of the [*present instrument*].

Article II-F (modified)

1. The [*monitoring body*] shall submit an annual report on its activities [*under the present instrument*] to the States Parties and to the General Assembly of the United Nations.

2. *(new)* If, in the procedures under articles II-B and II-C bis, a State Party concerned obviously refuses to co-operate or if the procedures yield to no effective result, the [*monitoring body*] may decide to make an observation public, with regard to the matter or the situation at stake.

3. *(new)* The State Party concerned shall be informed in advance of the publication of an observation under paragraph 2 of the present article. This observation shall be published together with the answers, comments or observations transmitted by the State Party within the time-limit set by the [*monitoring body*].

PART III

Article III –O (former 2.2)

[*The present instrument*] is without prejudice to any other international instrument or national legislation that does or may contain provisions of broader application.

Article III-O bis (new)

Personal data, including medical or genetic data, which are transmitted in the framework of the search of a disappeared person shall not be used for other purposes than that of the search of the disappeared person.

Article III-A

1. [*The present instrument*] is open for signature by [...].

2. [*the present instrument*] is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. [*The present instrument*] is open to accession by [...]. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article III-B

1. [*The present instrument*] shall enter into force on the thirtieth day after the date of deposit of the [*Xth*] instrument of ratification or accession.

2. For each State ratifying [*the present instrument*] or acceding to it after the deposit of the [*Xth*] instrument of ratification or accession, [*the present instrument*] shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

Article III-C

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed [*the present instrument*] or acceded to it of the following:

a) Signatures, ratifications and accessions under article III-A;

b) The date of entry into force of [*the present instrument*] under article III-B.

Article III-D

The provisions of [*the present instrument*] shall apply, without limitation or exception, to all parts of federal States.

Article III-D bis (new)

1. Any State, upon signature, ratification or accession, may declare that [*the present instrument*] will be extended to any territory for which it is responsible with regard to international relations. Such a declaration will take effect when [*the present instrument*] enters into force for the State concerned.

2. At any time, such an extension may be notified to the Secretary General of the United Nations and will take effect (...) days after it has been received by the Secretary General.

Article III-E (integrated in 1 bis, paragraph 2)

Article III-F

[*The present instrument*] is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, or the option available to any State to authorise the International Committee of the Red Cross to visit places of detention in cases for which international humanitarian law does not provide.

Article III-G

1. Any State Party to [*the present instrument*] may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to [*the present instrument*] with a request that they notify him or her whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the State Parties to [*the present instrument*] have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of [*the present instrument*] and any earlier amendments which they have accepted.

Article III-H

1. [*The present instrument*], of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of [*the present instrument*] to all States.

RELEASED IN PART
B5 UNCLASSIFIED

21/06/04 - Traduction de courtoisie

Indications such as "new", "complemented", etc, are intended to ease the comparison with document E/CN.4/2004/WG22/WP.l/Rev.l of1 december 2003.

Preamble (new)

The States Parties to the *[present instrument]*

Recalling the Declaration on the Protection of all Persons from Enforced Disappearances adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992;

Conscious of the extreme gravity of enforced disappearance which constitute a crime and, in certain circumstances, a crime against humanity;

Determined to fight against the impunity of the crime of enforced disappearance ;

Affirming the right of victims to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person;

Have agreed as follows :

Parti

Article 1

For the purposes of *[the present instrument]* enforced disappearance is considered to be the deprivation of a person's liberty, in whatever form, committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law.

Article Ibis (new)

1. No one shall be subjected to enforced disappearance.

2. *(from former [illegible]-E)* No circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other state of emergency, may be invoked as a justification of enforced disappearance.

Article 2 (modified) creates stand-alone crime and number 2 addresses non-state actors

1. Each State Party shall take the necessary measures to ensure that enforced disappearance, as defined in article 1, constitutes an offence under its criminal law.

2. Each State Party shall take equivalent measures when persons or groups of persons acting without the authorization, support or acquiescence of the State are responsible for dealings defined in article 1.

Article 2 bis (new)

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity and shall attract the consequences provided for under international law.

Article 3 (reorganised)

1. Each State Party shall take the necessary measures to pursue and punish those who commit or contribute to the commission of an enforced disappearance.

2. The following shall be punished :

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 02 JUL 2009 200706444

a) the perpetrators of and accessories in an enforced disappearance.

b) the attempt to commit an enforced disappearance,

c) the conspiracy to commit an enforced disappearance, B5

3. The following shall also be punished :

a) persons who order or encourage the commission or attempted commission of such an offence, and persons who facilitate its commission or attempted commission by aiding, abetting or otherwise assisting in it, including providing the means for its commission or attempted commission, shall be punished,

b) a superior officer who: B5

(i) either knew, or consciously disregarded information which clearly indicated, that subordinates were committing or about to commit an enforced disappearance, and who

(ii) failed to take all necessary and reasonable measures within his or her power to prevent or repress the enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution. B5

4. *(former 6)* An order of a superior officer or a public authority may not be invoked as a justification of an enforced disappearance. B5

Article 4

1. Each State Party shall make enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness. B5

2. Each State Party may establish

a) mitigating circumstances, inter alia for persons who, having been involved in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive, or contribute to elucidating cases of enforced disappearance or identifying the perpetrators of an enforced disappearance. B5

b) *(complemented)* Aggravating circumstances, inter alia in the event or death of the victim or the commission of an enforced disappearance in respect of pregnant women, minors or other particularly vulnerable persons. elderly ;

~~*Articles*~~ B5

Without prejudice to article 2 bis, B5

1. Each State Party which applies a statute of limitations in respect of enforced disappearances shall take the necessary measures to ensure that the term of limitation for criminal proceedings :

a) is of long duration and proportionate to the extreme seriousness of the offence; B5

b) shall commence from the moment when the offence of enforced disappearance ceases and the fate of the disappeared person is established. B5

2. The statute of limitations for criminal proceedings under paragraph 1 shall be suspended in a State Party as long as any victim of enforced disappearance does not have an effective remedy.

Article 6 (see 3,5)

Article 7 (deleted)

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Article 8 (deleted)

Article 9 (reorganised and modified)

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over an enforced disappearance:

   a) when the offence is committed within any territory under its jurisdiction or on board a vessel flying its flag or an aircraft registered in accordance with its law at the time of the facts;

   b) when the alleged perpetrator of the offence is one of its nationals or a stateless person habitually residing in its territory;

   c) when the disappeared person is one of its nationals and the State deems it appropriate to do so.

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2. Each State Party shall also take the necessary measures to establish its jurisdiction over an enforced disappearance when the alleged perpetrator of the offence is in a territory under its jurisdiction, unless the State extradites him or her or transfers him or her to another State or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognised.

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3. *[The present instrument]* does not exclude any criminal jurisdiction exercised in accordance with national laws.

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Article 10

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an enforced disappearance is present, shall take him or her into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

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2. The State Party which has taken the measures referred to in paragraph 1 shall immediately make an investigation into the facts. It shall notify the States Parties which may have jurisdiction in accordance with paragraph 1 of article 9 of the measures which it has taken under paragraph 1 of this article, particularly of the fact that such person is in custody and of the circumstances which warrant his or her detention, the findings of its investigation and shall indicate to those States whether it intends to exercise jurisdiction.

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

Article 11

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any enforced disappearance is found shall, if it does not extradite him or her or transfer him or her to another State or surrender him or her to an international criminal tribunal whose jurisdiction it has recognised, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in paragraph 2 of article 9, the standards of evidence required for prosecution and conviction

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shall in no way be less stringent than those which apply in the cases referred to in paragraph 1 of article 9.

3. *(modified)* Any person charged with an offence of enforced disappearance shall be tried by an independent and impartial court, duly established by law, which guarantees the right to a fair trial.

4. *(new)* Any person regarding whom proceedings are brought in connection with an enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings.

Article 12 (modified)

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1. Each State Party shall ensure that any person who alleges that someone has been subjected to enforced disappearance has the right to complain to a competent authority, which thoroughly investigates the complaint immediately and impartially. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, the relatives of the disappeared person and their defence counsel as well as those participating in the investigation are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

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2. Whenever there are reasonable grounds to believe that a person has been subjected to enforced disappearance, any State Party shall refer the matter to the authority referred to in paragraph 1 for it to launch an investigation, even if there has been no formal complaint.

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3. *(new)* Each State Party shall ensure that the authority referred to in paragraph 1:

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a) has the necessary powers and resources to conduct the investigation, including the power to compel suspected perpetrators and witnesses to appear before it,

b) is communicated the necessary information for its investigation;

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c) has access to any place where it is suspected that a disappeared person is present.

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4. *(former 12.6, complemented)* Each State Party shall take the necessary measures to prevent and punish acts of such a kind as to ~~inhibit~~ the progress of investigations. It shall ensure, particularly, that persons suspected of having committed an enforced disappearance are not in a position to influence the progress of the investigations by means of pressure or acts of intimidation or reprisal against the complainant, the witnesses, the relatives of the disappeared person, the defence counsel as well as those participating in the investigation..

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5. *(new)* The investigation pursuant to the present article shall be conducted in conformity with international principles for investigations on human rights violations, torture, search of disappeared persons, forensic examination and identification.

Article 13 (modified)

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1. For purposes of extradition between States Parties, enforced disappearance shall be considered to be neither a political offence, nor an offence related to a political offence or an offence prompted by political motives. Consequently, a request for extradition based on enforced disappearance cannot be refused solely because it concerns a political offence, an offence related to a political offence or an offence prompted by political motives.

2. Enforced disappearance shall automatically be included among the extraditable offences in every extradition treaty concluded between States Parties before the entry into force *[of the*

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present instrument].

3. States Parties undertake to include the offence of enforced disappearance among the extraditable offences in every extradition treaty to be concluded subsequently between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider *[the present instrument]* as the legal basis for extradition in respect of enforced disappearance.

5. Any State Party which does not make extradition conditional on the existence of a treaty shall recognise the offence of enforced disappearance as extraditable.

6. Extradition shall, in all cases, be subject to the conditions provided by the law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or subject extradition to conditions.

7. No provision *[of the present instrument]* shall be interpreted as imposing an obligation on the requested State Party to extradite if that State has serious grounds to believe that the request was put forward for the purpose of prosecuting or punishing a person on account of his or her gender, race, religion, nationality, ethnic origin or political opinions, or that to allow the request would cause harm to that person for any one of those reasons.

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Article 14 (modified)

1. States Parties shall provide one another the greatest measure of legal assistance in connection with any criminal investigation or proceedings brought in respect of enforced disappearance, including the supply of all evidence at their disposal that are necessary for the proceedings.

2. Such legal assistance is subject to the conditions provided by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, particularly, concerning the grounds on which the requested State Party may refuse to provide legal assistance or subject such assistance to conditions.

Article 15 (modified)

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States Parties shall co-operate with one another and shall provide one another the greatest measure of assistance with a view to assisting victims of enforced disappearance, and in searching, locating and releasing disappeared persons and, in the event of death, in their exhumation, identification and restitution of their remains.

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Article 15 bis (former 21)

1. No State Party shall expel, return (*"refouler"*) or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to an enforced disappearance.

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2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of humanitarian law.

Article 16 (reorganised and modified, see 16 bis below)

1. Each State Party shall, under its law,

a) indicate those officials who are authorised to order deprivation of liberty; B5

b) establish the conditions under which such orders may be given;

c) guarantee that any person deprived of liberty shall be held solely in an officially recognised and controlled place;

d) guarantee access of the judicial authorities to places of deprivation of liberty; B5

e) guarantee that any person deprived of liberty, in all circumstances, shall have the right to bring proceedings before a court which shall rule without delay on the lawfulness of the deprivation of liberty and order his or her release if that deprivation of liberty is unlawful.

2. Each State Party shall compile and maintain one or several official up-to-date registers of persons deprived of liberty. The information contained in these registers shall include at least the following : B5

a) the identity of the person deprived of liberty,

b) the authority having decided the deprivation of liberty,

c) the authority controlling the deprivation of liberty,

d) the date and time of admission in the place of detention and the authority responsible for the place of detention,

e) The date and time of liberation or transfer to another place of detention, the destination and authority in charge of the transfer.

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Article 16 bis

1. Each State Party shall guarantee the person deprived of liberty, his or her relatives, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest access, as a minimum, to the following information:

a) the authority to which the person has been handed over;

b) the authority having decided the deprivation of liberty;

c) the authority controlling the person deprived of liberty;

d) the whereabouts of the person deprived of liberty, including in case of transfer;

e) date and place of release;

f) state of health and, in the event of death, circumstances and causes of the death.

2. Appropriate measures shall be taken, where necessary, to ensure the protection of the persons mentioned in paragraph 1 as well as the persons participating in the investigation against all ill-treatment; intimidation or any sanction on the grounds of the search of information concerning a person deprived of liberty.

3. *(new)* In order not to jeopardise the privacy of the persons concerned, the information

transmitted pursuant to paragraph 1 of the present article shall be adequate and pertinent with respect to the purpose pursued and shall not be used for other purposes [redacted] the search of the person deprived of liberty. [redacted] B5 B5

Article 17

Without prejudice to consideration of the lawfulness of a deprivation of liberty, States Parties shall guarantee to the relatives of the person deprived of liberty or of a disappeared person, their legal representatives, their counsel and any person authorised by the person deprived of liberty or the disappeared person or by his/her relatives, as well as any other person able to claim a legitimate interest the right to a prompt and effective remedy as a means of obtaining without delay the information referred to article 16 bis. This right to a remedy may not be suspended or restricted in any circumstances. [redacted] B5

Article 18 (complemented)

Each State Party shall take the necessary measures to ensure that the release of persons shall proceed in a manner that allows reliable verification that they have actually been released. Each State Party shall also take the necessary measures so that the physical integrity of all such persons and their ability to exercise fully their rights are assured at the time of release, without prejudice to the obligations to which such persons may be subject in accordance with the law.

Article 19 [redacted] B5 B5

[redacted] Each State Party shall take the necessary measures to prevent and punish the following actions:

a) delaying or obstructing the remedy referred to in article 17;

b) failure to the obligation to register every deprivation of liberty and registration of information which the official responsible of the register knows or should known to be inaccurate; [redacted] B5

c) refusal by an official to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal conditions for this information to be provided have been fulfilled.

Article 20 (complemented) [redacted] B5

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty shall include the necessary education and information on the provisions *[of the present instrument]* , in order to:

   a) prevent the involvement of these officials in enforced disappearances;

   b) draw attention to the importance of prevention and investigations concerning enforced disappearances;

   c) ensure that the urgent need to resolve cases of enforced disappearance is acknowledged.

2. Each State shall prohibit orders or instructions commanding, authorising or ~~encouraging~~ enforced disappearance. Each State Party shall guarantee that a person refusing to obey such order will not be subject to sanction. [redacted] B5 B5

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3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reasons to believe that act enforced disappearance has occurred or is planned communicate the matter to their superior authorities and, when necessary, to competent authorities or organs with reviewing or remedial power.

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Article 21 (see 15 bis)

Article 22 (modified and complemented)

1. For the purposes of *[the present instrument]*, "victim" means the disappeared person and any natural person who has suffered direct harm as a result of that disappearance.

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2. Each State Party shall take the necessary measures so that any victim knows the truth concerning the circumstances of the enforced disappearance and the fate of the disappeared person. It shall, in particular, take the necessary measures to search for, locate and release disappeared persons and, in the event of death, return the human remains.

3. Each State Party shall guarantee the right to obtain prompt, fair and adequate reparation for the harm caused to victims of enforced disappearance.

4. The right to obtain reparation referred to in paragraph 3 includes integral compensation for material and non-material damage. It may also include, in particular:

   a) restitution,

   b) rehabilitation,

   c) satisfaction,

   d) restoration of honour and reputation.

5. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person is elucidated, each State Party shall take the necessary measures with regard to the legal situation of the disappeared persons who's fate has not been elucidated and of their relatives in fields such as social protection, financial matters, custody of children and property rights.

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*Article 23 (**complemented**)*

1. Each State Party shall take the necessary measures to prevent and punish in a criminal court:

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   a) the abduction or appropriation of children victims of enforced disappearance, children whose father or mother is victim of enforced disappearance or children born during the detention of their disappeared mother;

   b) the falsification or suppression of documents attesting to the true identity of a child referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify children referred to in subparagraph (a) and (b).

Article 24

State Parties grant each other assistance in the search for, the identification and the location of children referred to in article 23.

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Article 25

1. When a child who has been abducted or appropriated in the circumstances described in article 23, paragraph (a), is found on the territory of a State party, the question of the child's return to his or her family of origin stall be resolved either under the domestic law of that State party, or under the bilateral or multilateral agreement which that State has entered into with another State in which the family of origin lives.

2. In all cases, the best interests of the child are a primary consideration, and a child who is capable of judgement shall have the right to express his or her views freely and to have them given due weight in the light of his or her age and level of maturity.

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[redacted] B5

Article 0

(new)

1. A *[monitoring body]* shall ensure the implementation of the *present instrument]* and the respect by State Parties of their commitments.

2. While exercising their mandate, the members of the *[monitoring body]* shall be entitled to privileges and immunities as laid down in the Convention on Privileges and Immunities of the United Nations.

3. Each State Party shall undertake to co-operate with the *[monitoring body]* and to grant assistance to its members in the exercise of their mandate.

[redacted] B5

Article II-A (modified)

1. Each State Party shall submit to *[the monitoring body]*, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its undertakings under *[the present instrument]*, within one year after the entry into force *[of the present instrument]* in respect of the State concerned.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by *[the monitoring body]*, which may make such comments, observations, recommendations and warnings as it considers appropriate. The State Party concerned shall receive communication of such comments, observations, recommendations and warnings, to which that State may respond, on its own initiative or at the request *[of the monitoring body]*.

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[redacted] B5

Article II-B (modified)

1. Each State Party or the relatives of a disappeared person, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest may submit a request to *[the monitoring body]* to seek and find a person who has disappeared within the meaning of article 1.

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[redacted]

2. Should *[the monitoring body]* consider that a request submitted under paragraph 1 ~~is not manifestly unfounded~~ that it does not constitute an abuse of the right of ~~submission~~ and that it is not incompatible with the provisions *[of the present instrument]* *[the monitoring body]* shall request any State Party to provide information on the situation of that person, within a time-limit set by *[the monitoring body]*.

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3. In the light of the response provided by the State Party concerned in accordance with paragraph 2, *[themonitoring body]* shall make a recommendation or give a warning to that State. *[The monitoring body]* may also instruct that State to take appropriate measures and to report to it on those measures, within a time-limit set by *[the monitoring body]*,

4. *[The monitoring body]* shall establish its conclusions and forward them to any State Party which has been requested to provide information and to the author of the request referred to in paragraph 1.

5. The procedure under this article is confidential.

Article II-C (modified)

1. If *[the monitoring body]* considers that a visit to the territory of a State Party under whose jurisdiction a disappeared person could be is essential in order to respond to the request submitted to it in accordance with Article H-B, *[the monitoring body]* may request one or more of its members to undertake an investigation mission and to report back without delay. The member or members *[of .the monitoring body]* conducting the mission may be accompanied if necessary by interpreters, secretaries and experts. No member of the delegation, with the exception of the interpreters, may be a national of the State Party to which the visit is to be made. B5

2. *[The monitoring body]* shall notify the State Party concerned in writing of its intention to organise an investigation mission, indicating the composition of the delegation. The State Party shall inform *[the10 monitoring body]* without delay of its agreement or opposition to the investigation mission in the territory over which it has jurisdiction. B5

3. If the State Party agrees to the investigation mission, it shall provide *[the monitoring body]* with all the necessary facilities to enable the mission to be carried out. *[The monitoring body]* may, inter alia:

   a) make such visits as it may consider necessary to search for and find the person who has disappeared;

   b) make contact freely with any person whom it believes may provide useful information on the fate of the person who has disappeared;

   c) have the person who has allegedly disappeared brought to it and discuss with "him or her in private.

4. *[The monitoring body]* shall inform the following of the findings of the investigation mission:

   a) the State Party in whose territory the investigation mission was carried out;

   b) the author of the request referred to in paragraph 1 of article II-B.

5. The procedure under this article is confidential.

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Article II-C bis (new)

1. *[The monitoring body]* considers a communication presented by the relatives of a disappeared person, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest alleging grave breaches in the implementation of the commitments taken under the *[present instrument]* unless B5

   a) the communication lacks sufficient motivation or is obviously unfounded;

   b) the same matter is being examined under another procedure of international investigation or

settlement;

c) the complainant has not exhausted all available effective domestic remedies.

2. If the *[the monitoring body]* assesses that the communication fulfils the conditions under paragraph 1, *[the monitoring body]* transmits the communication to the State Party concerned and requests this State Party to provide observations and comments within a time-limit set by the *[monitoring body]*.

3. On the basis of the answer of the State Party, *[the monitoring body]* may decide :

a) to close the matter of the communication;

b) to continue its examination;

c) to make a recommendation to the State Party.

4. The procedure under the present article comes to an end when the *[monitoring body]* communicates the conclusions of its investigation to the State Party and to the author of the communication.

5. The procedure under this article is confidential.

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[redacted]

Article II-C ter (new)

If the *[monitoring body]* receives reliable information which appears to it to contain well-founded indication that enforced disappearance is being practised in a systematic or general manner in the territory of a State Party, the *[monitoring body]* may seize the Secretary General of the United Nations, after having enquired with the State Party concerned about any pertinent information and the measures taken to put an end immediately to such practises.

Article II-D (integrated in II-O§2)

Article II-E (complemented)

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[redacted]

1. *[The monitoring body]* has competence solely in respect of deprivations of liberty which commenced after the entry into force *[of this instrument]*.

2. Should a State become party to *[this instrument]* after its entry into force, the obligations of that State towards *[the monitoring body]* concern only deprivations of liberty which commenced after the entry into force *[of this instrument]* in respect of the State concerned.

3. *(new)* Each State Party may at any time declare that, in its own respect, it recognises that the *[monitoring body]* has competence in respect of enforced disappearances which commenced before entry into force of the *[present instrument]*.

Article II-F (modified)

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[redacted]

1. The *[monitoring body]* shall submit an annual report on its activities *[under the present instrument]* to the States Parties and to the General Assembly of the United Nations.

2. *(new)* If, in the procedures under articles II-B and II-C bis, a State Party concerned obviously refuses to cooperate or if the procedures yield to no effective result, the *[monitoring body]* may decide to make an observation public, with regard to the matter or the situation at stake.

3. *(new)* The State Party concerned shall be informed in advance of the publication of an observation under paragraph 2 of the present article. This observation shall be published together with the answers, comments or observations transmitted by the State Party within the time-limit set by the *[monitoring body]*.

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Article III-O (former 2.2)

[The present instrument] is without prejudice to any other international instrument or national legislation that does or may contain provisions of broader application.

Article III-O bis (new)

Personal data, including medical or gene.tic data, which are transmitted in the framework of the search of a disappeared person shall not be used for other purposes than that of the search of the disappeared person.

Article III-A

1. *[Thepresent instrument]* is open for signature by [...].

2. *[the present instrument]* is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. *[The present instrument]* is open to accession by [...]. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article III-B

1. *[The present instrument]* shall enter into force on the thirtieth day after the date of deposit of the *[Xth]* instrument of ratification or accession.

2. For each State ratifying *[the present instrument]* or acceding to it after the deposit of the *[Xth]* instrument of ratification or accession, *[the present instrument]* shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

Article III-C

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed [*the present instrument]* or acceded to it of the following:

a) Signatures, ratifications and accessions under article III-A;

b) The date of entry into force of *[thepresent instrument]* under article III-B.

Article III-D

The provisions of *[the present instrument]* shall apply, without limitation or exception, to all parts of federal States.

Article III-D bis (new)

1. Any State, upon signature, ratification or accession, may declare that *[the present instrument]*

will be extended to any territory for which it is responsible with regard to international relations. Such a declaration will take effect when *[the present instrument]* enters into force for the State concerned. B5

2. At any time, such an extension may be notified to the Secretary General of the United Nations and will take effect (...) days after it has been received by the Secretary General.

Article III-E (integrated in 1 bis, paragraph 2)

Article III-F

[The present instrument] is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, or the option available to any State to authorise the International Committee of the Red Cross to visit places of detention in cases for which international humanitarian law does not provide.

Article III-G

1. Any State Party to *[the present instrument]* may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to *[the present instrument]* with a request that they notify him or her whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the State Parties to *[the present instrument]* have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties, which have accepted them, other States Parties still being bound by the provisions of *[the present instrument]* and any earlier amendments which they have accepted.

Article III-H

1. *[The present instrument],* of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of *[the present instrument]* to all States.

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21/06/04 - Traduction de courtoisie

Indications such as "new", "complemented", etc, are intended to ease the comparison with document E/CN.4/2004/WG22/WP.1/Rev.1 off december 2003.

GE.179

Preamble (new)

The States Parties to the *[present instrument]* B5

Recalling the Declaration on the Protection of all Persons from Enforced Disappearances adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992;

Conscious of the extreme gravity of enforced disappearance which constitute a crime and, in certain circumstances, a crime against humanity;

Determined to fight against the impunity of the crime of enforced disappearance ;

Affirming the right of victims to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person;

Have agreed as follows :

Parti

Article 1

For the purposes of *[the present instrument]* enforced disappearance is considered to be the deprivation of a person's liberty, in whatever form, committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law B5

Article Ibis (new)

1. No one shall be subjected to enforced disappearance.

2. *(from former UI-E)* No circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other state of emergency, may be invoked as a justification of enforced disappearance.

Article 2 (modified) B5

1. Each State Party shall take the necessary measures to ensure that enforced disappearance, as defined in article 1, constitutes an offence under its criminal law.

2. Each State Party shall take equivalent measures when persons or groups of persons acting without the authorization, support or acquiescence of the State are responsible for dealings defined in article 1.

Article 2 bis (new)

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity and shall attract the consequences provided for under international law.

Article 3 (reorganised)

1. Each State Party shall take the necessary measures to pursue and punish those who commit or contribute to the commission of an enforced disappearance.

2. The following shall be punished :

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTE
DATE/CASE ID: 23 JUN 2009 200706444

a) the perpetrators of and accessories in an enforced disappearance.

b) the attempt to commit an enforced disappearance,

c) the conspiracy to commit an enforced disappearance,

3. The following shall also be punished :

a) persons who order or encourage the commission or attempted commission of such an offence, and persons who facilitate its commission or attempted commission by aiding, abetting or otherwise assisting in it, including providing the means for its commission or attempted commission, shall be punished,

b) a superior officer who:

(i) either knew, or consciously disregarded information which clearly indicated, that subordinates were committing or about to commit an enforced disappearance, and who

(ii) failed to take all necessary and reasonable measures within his or her power to prevent or repress the enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.

4. *(former 6)* An order of a superior officer or a public authority may not be invoked as a justification of an enforced disappearance.

Article 4

1. Each State Party shall make enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish:

a) mitigating circumstances inter alia for persons who, having been involved in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive, or contribute to elucidating cases of enforced disappearance or identifying the perpetrators of an enforced disappearance.

b) *(complemented)* Aggravating circumstances inter alia in the event of death of the victim or the commission of an enforced disappearance in respect of pregnant women, minors or other particularly vulnerable persons.

~~*Articles*~~ *Article5 (modified)* B5

Without prejudice to article 2 bis,

1. Each State Party which applies a statute of limitations in respect of enforced disappearances shall take the necessary measures to ensure that the term of limitation for criminal proceedings :

a) is of long duration and proportionate to the extreme seriousness of the offence;

b) shall commence from the moment when the offence of enforced disappearance ceases and the fate of the disappeared person is established.

2. The statute of limitations for criminal proceedings under paragraph 1 shall be suspended in a State Party as long as any victim of enforced disappearance does not have an effective remedy.

Article 6 (see 3,3)

Article 7 (deleted)

Article 8 (deleted)

Article 9 (reorganised and modified)

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over an enforced disappearance:

   a) when the offence is committed within any territory under its jurisdiction or on board a vessel flying its flag or an aircraft registered in accordance with its law at the time of the facts;

   b) when the alleged perpetrator of the offence is one of its nationals or a stateless person habitually residing in its territory;

   c) when the disappeared person is one of its nationals and the State deems it appropriate to do so.

2. Each State Party shall also take the necessary measures to establish its jurisdiction over an enforced disappearance when the alleged perpetrator of the offence is in a territory under its jurisdiction, unless the State extradites him or her or transfers him or her to another State or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognised.

3. *[The present instrument]* does not exclude any criminal jurisdiction exercised in accordance with national laws.

Article 10

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an enforced disappearance is present, shall take him or her into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. The State Party which has taken the measures referred to in paragraph 1 shall immediately make an investigation into the facts. It shall notify the States Parties which may have jurisdiction in accordance with paragraph 1 of article 9 of the measures which it has taken under paragraph 1 of this article, particularly of the fact that such person is in custody and of the circumstances which warrant his or her detention, the findings of its investigation and shall indicate to those States whether it intends to exercise jurisdiction.

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

Article 11

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any enforced disappearance is found shall, if it does not extradite him or her or transfer him or her to another State or surrender him or her to an international criminal tribunal whose jurisdiction it has recognised, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in paragraph 2 of article 9, the standards of evidence required for prosecution and conviction

shall in no way be less stringent than those which apply in the cases referred to in paragraph 1 of article 9.

3. *(modified)* Any person charged with an offence of enforced disappearance shall be tried by an independent and impartial court, duly established by law, which guarantees the right to a fair trial.

4. *(new)* Any person regarding whom proceedings are brought in connection with an enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings.

Article 12 (modified)

1. Each State Party shall ensure that any person who alleges that someone has been subjected to enforced disappearance has the right to complain to a competent authority, which thoroughly investigates the complaint immediately and impartially. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, the relatives of the disappeared person and their defence counsel as well as those participating in the investigation are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Whenever there are reasonable grounds to believe that a person has been subjected to enforced disappearance, any State Party shall refer the matter to the authority referred to in paragraph 1 for it to launch an investigation, even if there has been no formal complaint.

3. *(new)* Each State Party shall ensure that the authority referred to in paragraph 1:

   a) has the necessary powers and resources to conduct the investigation, including the power to compel suspected perpetrators and witnesses to appear before it,

   b) is communicated the necessary information for its investigation;

   c) has access to any place where it is suspected that a disappeared person is present.

4. *(former 12.6, complemented)* Each State Party shall take the necessary measures to prevent and punish acts of such a kind as to inhibit the progress of investigations. It shall ensure, particularly, that persons suspected of having committed an enforced disappearance are not in a position to influence the progress of the investigations by means of pressure or acts of intimidation or reprisal against the complainant, the witnesses, the relatives of the disappeared person, the defence counsel as well as those participating in the investigation..

5. *(new)* The investigation pursuant to the present article shall be conducted in conformity with international principles for investigations on human rights violations, torture, search of disappeared persons, forensic examination and identification.

Article 13 (modified)

1. For purposes of extradition between States Parties, enforced disappearance shall be considered to be neither a political offence, nor an offence related to a political offence or an offence prompted by political motives. Consequently, a request for extradition based on enforced disappearance cannot be refused solely because it concerns a political offence, an offence related to a political offence or an offence prompted by political motives.

2. Enforced disappearance shall automatically be included among the extraditable offences in every extradition treaty concluded between States Parties before the entry into force *[of the*

present instrument].

3. States Parties undertake to include the offence of enforced disappearance among the extraditable offences in every extradition treaty to be concluded subsequently between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider *[the present instrument]* as the legal basis for extradition in respect of enforced disappearance.

5. Any State Party which does not make extradition conditional on the existence of a treaty shall recognise the offence of enforced disappearance as extraditable.

6. Extradition shall, in all cases, be subject to the conditions provided by the law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or subject extradition to conditions.

7. No provision *[of the present instrument]* shall be interpreted as imposing an obligation on the requested State Party to extradite if that State has serious grounds to believe that the request was put forward for the purpose of prosecuting or punishing a person on account of his or her gender, race, religion, nationality, ethnic origin or political opinions, or that to allow the request would cause harm to that person for any one of those reasons.

Article 14 (modified)

1. States Parties shall provide one another the greatest measure of legal assistance in connection with any criminal investigation or proceedings brought in respect of enforced disappearance, including the supply of all evidence at their disposal that are necessary for the proceedings.

2. Such legal assistance is subject to the conditions provided by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, particularly, concerning the grounds on which the requested State Party may refuse to provide legal assistance or subject such assistance to conditions.

Article 15 (modified)

States Parties shall co-operate with one another and shall provide one another the greatest measure of assistance with a view to assisting victims of enforced disappearance, and in searching, locating and releasing disappeared persons and, in the event of death, in their exhumation, identification and restitution of their remains.

Article 15 bis (former 21)

1. No State Party shall expel, return *("refouler")* or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to an enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of humanitarian law.

Article 16 (reorganised and modified, see 16 bis below) B5

1. Each State Party shall, under its law,

a) indicate those officials who are authorised to order deprivation of liberty;

b) establish the conditions under which such orders may be given;

c) guarantee that any person deprived of liberty shall be held solely in an officially recognised and controlled place;

d) guarantee access of the judicial authorities to places of deprivation of liberty;

e) guarantee that any person deprived of liberty, in all circumstances, shall have the right to bring proceedings before a court which shall rule without delay on the lawfulness of the deprivation of liberty and order his or her release if that deprivation of liberty is unlawful.

2. Each State Party shall compile and maintain one or several official up-to-date registers of persons deprived of liberty. The information contained in these registers shall include at least the following :

a) the identity of the person deprived of liberty,

b) the authority having decided the deprivation of liberty,

c) the authority controlling the deprivation of liberty,

d) the date and time of admission in the place of detention and the authority responsible for the place of detention,

e) The date and time of liberation or transfer to another place of detention, the destination and authority in charge of the transfer.

Article 16 bis B5

1. Each State Party shall guarantee the person deprived of liberty, his or her relatives, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest access, as a minimum, to the following information:

a) the authority to which the person has been handed over;

b) the authority having decided the deprivation of liberty;

c) the authority controlling the person deprived of liberty;

d) the whereabouts of the person deprived of liberty, including in case of transfer;

e) date and place of release;

f) state of health and, in the event of death, circumstances and causes of the death.

2. Appropriate measures shall be taken, where necessary, to ensure the protection of the persons mentioned in paragraph 1 as well as the persons participating in the investigation against all ill-treatment; intimidation or any sanction on the grounds of the search of information concerning a person deprived of liberty.

3. *(new)* In order not to jeopardise the privacy of the persons concerned, the information

transmitted pursuant to paragraph 1 of the present article shall be adequate and pertinent with respect to the purpose pursued and shall not be used for other purposes than the search of the person deprived of liberty.

Article 17

Without prejudice to consideration of the lawfulness of a deprivation of liberty, States Parties shall guarantee to the relatives of the person deprived of liberty or of a disappeared person, their legal representatives, their counsel and any person authorised by the person deprived of liberty or the disappeared person or by his/her relatives, as well as any other person able to claim a legitimate interest the right to a prompt and effective remedy as a means of obtaining without delay the information referred to article 16 bis. This right to a remedy may not be suspended or restricted in any circumstances.

Article 18 (complemented)

Each State Party shall take the necessary measures to ensure that the release of persons shall proceed in a manner that allows reliable verification that they have actually been released. Each State Party shall also take the necessary measures so that the physical integrity of all such persons and their ability to exercise fully their rights are assured at the time of release, without prejudice to the obligations to which such persons may be subject in accordance with the law.

Article 19

Each State Party shall take the necessary measures to prevent and punish the following actions:

a) delaying or obstructing the remedy referred to in article 17;

b) failure to the obligation to register every deprivation of liberty and registration of information which the official responsible of the register knows or should known to be inaccurate;

c) refusal by an official to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal conditions for this information to be provided have been fulfilled.

Article 20 (complemented)

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty shall include the necessary education and information on the provisions *[of the present instrument]* , in order to:

   a) prevent the involvement of these officials in enforced disappearances;

   b) draw attention to the importance of prevention and investigations concerning enforced disappearances;

   c) ensure that the urgent need to resolve cases of enforced disappearance is acknowledged.

2. Each State shall prohibit orders or instructions commanding, authorising or encouraging enforced disappearance. Each State Party shall guarantee that a person refusing to obey such order will not be subject to sanction.

3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reasons to believe that act enforced disappearance has occurred or is planned communicate the matter to their superior authorities and, when necessary, to competent authorities or organs with reviewing or remedial power.

Article 21 (see 15 bis)

Article 22 (modified and complemented) B5

1. For the purposes of *[the present instrument]*, "victim" means the disappeared person and any natural person who has suffered direct harm as a result of that disappearance.

2. Each State Party shall take the necessary measures so that any victim knows the truth concerning the circumstances of the enforced disappearance and the fate of the disappeared person. It shall, in particular, take the necessary measures to search for, locate and release disappeared persons and, in the event of death, return the human remains.

3. Each State Party shall guarantee the right to obtain prompt, fair and adequate reparation for the harm caused to victims of enforced disappearance.

4. The right to obtain reparation referred to in paragraph 3 includes integral compensation for material and non-material damage. It may also include, in particular:

   a) restitution,

   b) rehabilitation,

   c) satisfaction,

   d) restoration of honour and reputation.

5. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person is elucidated, each State Party shall take the necessary measures with regard to the legal situation of the disappeared persons who's fate has not been elucidated and of their relatives in fields such as social protection, financial matters, custody of children and property rights. B5

Article 23 (complemented)

1. Each State Party shall take the necessary measures to prevent and punish in a criminal court:

   a) the abduction or appropriation of children victims of enforced disappearance, children whose father or mother is victim of enforced disappearance or children born during the detention of their disappeared mother;

   b) the falsification or suppression of documents attesting to the true identity of a child referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify children referred to in subparagraph (a) and (b).

Article 24

State Parties grant each other assistance in the search for, the identification and the location of children referred to in article 23.

Article 25

1. When a child who has been abducted or appropriated in the circumstances described in article 23, paragraph (a), is found on the territory of a State party, the question of the child's return to his or her family of origin stall be resolved either under the domestic law of that State party, or under the bilateral or multilateral agreement which that State has entered into with another State in which the family of origin lives.

2. In all cases, the best interests of the child are a primary consideration, and a child who is capable of judgement shall have the right to express his or her views freely and to have them given due weight in the light of his or her age and level of maturity.

B5

Article 0

(new)

1. A *[monitoring body]* shall ensure the implementation of the *\present instrument]* and the respect by State Parties of their commitments.

2. While exercising their mandate, the members of the *[monitoring body]* shall be entitled to privileges and immunities as laid down in the Convention on Privileges and Immunities of the United Nations.

3. Each State Party shall undertake to co-operate with the *[monitoring body]* and to grant assistance to its members in the exercise of their mandate.

Article II-A (modified)

1. Each State Party shall submit to *[the monitoring body]*, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its undertakings under *[the present instrument]*, within one year after the entry into force *[of the present instrument]* in respect of the State concerned.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by *[the monitoring body]*, which may make such comments, observations, recommendations and warnings as it considers appropriate. The State Party concerned shall receive communication of such comments, observations, recommendations and warnings, to which that State may respond, on its own initiative or at the request *[of the monitoring body]*.

Article II-B (modified)

1. Each State Party or the relatives of a disappeared person, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest may submit a request to *[the monitoring body]* to seek and find a person who has disappeared within the meaning of article 1.

2. Should *[the monitoring body]* consider that a request submitted under paragraph 1 is not manifestly unfounded, that it does not constitute an abuse of the right of submission and that it is not incompatible with the provisions *[of the present instrument] [the monitoring body]* shall request any State Party to provide information on the situation of that person, within a time-limit set by *[the monitoring body]*.

3. In the light of the response provided by the State Party concerned in accordance with paragraph 2, *[themonitoring body]* shall make a recommendation or give a warning to that State. *[The monitoring body]* may also instruct that State to take appropriate measures and to report to it on those measures, within a time-limit set by *[the monitoring body],*

4. *[The monitoring body]* shall establish its conclusions and forward them to any State Party which has been requested to provide information and to the author of the request referred to in paragraph 1.

5. The procedure under this article is confidential.

Article II-C (modified)

1. If *[the monitoring body]* considers that a visit to the territory of a State Party under whose jurisdiction a disappeared person could be is essential in order to respond to the request submitted to it in accordance with Article H-B, *[the monitoring body]* may request one or more of its members to undertake an investigation mission and to report back without delay. The member or members *[of .the monitoring body]* conducting the mission may be accompanied if necessary by interpreters, secretaries and experts. No member of the delegation, with the exception of the interpreters, may be a national of the State Party to which the visit is to be made.

2. *[The monitoring body]* shall notify the State Party concerned in writing of its intention to organise an investigation mission, indicating the composition of the delegation. The State Party shall inform *[the*10 *monitoring body]* without delay of its agreement or opposition to the investigation mission in the territory over which it has jurisdiction.

3. If the State Party agrees to the investigation mission, it shall provide *[the monitoring body]* with all the necessary facilities to enable the mission to be carried out. *[The monitoring body]* may, inter alia:

   a) make such visits as it may consider necessary to search for and find the person who has disappeared;

   b) make contact freely with any person whom it believes may provide useful information on the fate of the person who has disappeared;

   c) have the person who has allegedly disappeared brought to it and discuss with "him or her in private.

4. *[The monitoring body]* shall inform the following of the findings of the investigation mission:

   a) the State Party in whose territory the investigation mission was carried out;

   b) the author of the request referred to in paragraph 1 of article II-B.

5. The procedure under this article is confidential.

Article II-C bis (new) [redacted] B5

1. *[The monitoring body]* considers a communication presented by the relatives of a disappeared person, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest alleging grave breaches in the implementation of the commitments taken under the *[present instrument]* unless

   a) the communication lacks sufficient motivation or is obviously unfounded;

   b) the same matter is being examined under another procedure of international investigation or

settlement;

c) the complainant has not exhausted all available effective domestic remedies.

2. If the *[the monitoring body]* assesses that the communication fulfils the conditions under paragraph 1, *[the monitoring body]* transmits the communication to the State Party concerned and requests this State Party to provide observations and comments within a time-limit set by the *[monitoring body]*.

3. On the basis of the answer of the State Party, *[the monitoring body]* may decide :

a) to close the matter of the communication;

b) to continue its examination;

c) to make a recommendation to the State Party.

4. The procedure under the present article comes to an end when the *[monitoring body]* communicates the conclusions of its investigation to the State Party and to the author of the communication.

5. The procedure under this article is confidential.

Article II-C ter (new)

If the *[monitoring body]* receives reliable information which appears to it to contain well-founded indication that enforced disappearance is being practised in a systematic or general manner in the territory of a State Party, the *[monitoring body]* may seize the Secretary General of the United Nations, after having enquired with the State Party concerned about any pertinent information and the measures taken to put an end immediately to such practises.

Article II-D (integrated in II-O§2)

Article II-E (complemented)

1. *[The monitoring body]* has competence solely in respect of deprivations of liberty which commenced after the entry into force *[of this instrument]*.

2. Should a State become party to *[this instrument]* after its entry into force, the obligations of that State towards *[the monitoring body]* concern only deprivations of liberty which commenced after the entry into force *[of this instrument]* in respect of the State concerned.

3. *(new)* Each State Party may at any time declare that, in its own respect, it recognises that the *[monitoring body]* has competence in respect of enforced disappearances which commenced before entry into force of the *[present instrument]*.

Article II-F (modified)

B5

1. The *[monitoring body]* shall submit an annual report on its activities *[under the present instrument]* to the States Parties and to the General Assembly of the United Nations.

2. *(new)* If, in the procedures under articles II-B and II-C bis, a State Party concerned obviously refuses to cooperate or if the procedures yield to no effective result, the *[monitoring body]* may decide to make an observation public, with regard to the matter or the situation at stake.

3. *(new)* The State Party concerned shall be informed in advance of the publication of an observation under paragraph 2 of the present article. This observation shall be published together with the answers, comments or observations transmitted by the State Party within the time-limit set by the *[monitoring body]*.

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Article III-O (former 2.2)

[The present instrument] is without prejudice to any other international instrument or national legislation that does or may contain provisions of broader application.

Article III-O bis (new)

Personal data, including medical or gene.tic data, which are transmitted in the framework of the search of a disappeared person shall not be used for other purposes than that of the search of the disappeared person.

Article III-A

1. *[Thepresent instrument]* is open for signature by [...].

2. *[the present instrument]* is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. *[The present instrument]* is open to accession by [...]. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article III-B

1. *[The present instrument]* shall enter into force on the thirtieth day after the date of deposit of the *[Xth]* instrument of ratification or accession.

2. For each State ratifying *[the present instrument]* or acceding to it after the deposit of the *[Xth]* instrument of ratification or accession, *[the present instrument]* shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

Article III-C

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed [*the present instrument]* or acceded to it of the following:

a) Signatures, ratifications and accessions under article III-A;

b) The date of entry into force of *[thepresent instrument]* under article III-B.

Article III-D

The provisions of *[the present instrument]* shall apply, without limitation or exception, to all parts of federal States.

Article III-D bis (new)

1. Any State, upon signature, ratification or accession, may declare that *[the present instrument]*

will be extended to any territory for which it is responsible with regard to international relations. Such a declaration will take effect when *[the present instrument]* enters into force for the State concerned [redacted] B5

2. At any time, such an extension may be notified to the Secretary General of the United Nations and will take effect (...) days after it has been received by the Secretary General.

Article III-E (integrated in 1 bis, paragraph 2)

Article III-F

[The present instrument] is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, or the option available to any State to authorise the International Committee of the Red Cross to visit places of detention in cases for which international humanitarian law does not provide.

Article III-G

1. Any State Party to *[the present instrument]* may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to *[the present instrument]* with a request that they notify him or her whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the State Parties to *[the present instrument]* have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties, which have accepted them, other States Parties still being bound by the provisions of *[the present instrument]* and any earlier amendments which they have accepted.

Article III-H

1. *[The present instrument]*, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of *[the present instrument]* to all States.

GE181

21/06/04 – Traduction de courtoisie

Indications such as "new", "complemented", etc, are intended to ease the comparison with document E/CN.4/2004/WG22/WP.1/Rev.1 of 1 december 2003.

Preamble (new)

The States Parties to the [*present instrument*],

Recalling the Declaration on the Protection of all Persons from Enforced Disappearances adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992;

Conscious of the extreme gravity of enforced disappearance which constitute a crime and, in certain circumstances, a crime against humanity;

Determined to fight against the impunity of the crime of enforced disappearance ;

Affirming the right of victims to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person ;

Have agreed as follows :

Part I

Article 1

For the purposes of [*the present instrument*] enforced disappearance is considered to be the deprivation of a person's liberty, in whatever form, committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law.

Article Ibis (new)

1. No one shall be subjected to enforced disappearance.

2. ***(from former III-E)*** No circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other state of emergency, may be invoked as a justification of enforced disappearance. B5

Article 2 (modified)

1. Each State Party shall take the necessary measures to ensure that enforced disappearance, as defined in article 1, constitutes an offence under its criminal law.

2. Each State Party shall take equivalent measures when persons or groups of persons acting without the authorization, support or acquiescence of the State are responsible for dealings defined in article 1.

B5

B5

Article 2 bis (new)

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity and shall attract the consequences provided for under international law.

Article 3 (reorganised)

1. Each State Party shall take the necessary measures to pursue and punish those who commit or contribute to the commission of an enforced disappearance.

2. The following shall be punished:

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a) the perpetrators of and accessories to an enforced disappearance.

b) the attempt to commit an enforced disappearance,

c) the conspiracy to commit an enforced disappearance.

3. The following shall also be punished :

a) persons who order or encourage the commission or attempted commission of such an offence, and persons who facilitate its commission or attempted commission by aiding, abetting or otherwise assisting in it, including providing the means for its commission or attempted commission ~~shall be punished.~~

b) a superior officer who:

(i) either knew, or consciously disregarded information which clearly indicated, that subordinates were committing or about to commit an enforced disappearance, and who

(ii) failed to take all necessary and reasonable measures within his or her power to prevent or repress the enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.

4. ***(former 6)*** An order of a superior officer or a public authority may not be invoked as a justification of an enforced disappearance.

Article 4

1. Each State Party shall make enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish :

a) mitigating circumstances inter alia for persons who, having been involved in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive, or contribute to elucidating cases of enforced disappearance or identifying the perpetrators of an enforced disappearance.

b) ***(complemented)*** Aggravating circumstances inter alia in the event of death of the victim or the commission of an enforced disappearance in respect of pregnant women, minors or other particularly vulnerable persons.

Article5 (modified)

Without prejudice to article 2 bis,

1. Each State Party which applies a statute of limitations in respect of enforced disappearances shall take the necessary measures to ensure that the term of limitation for criminal proceedings :

a) is of long duration and proportionate to the extreme seriousness of the offence;

b) shall commence from the moment when the offence of enforced disappearance ceases and the fate of the disappeared person is established.

2. The statute of limitations for criminal proceedings under paragraph 1 shall be suspended in a State Party as long as any victim of enforced disappearance does not have an effective remedy.

Article 6 (see 3,3)

Article 7 (deleted)

Article 8 (deleted) [redacted] B5

Article 9 (reorganised and modified)

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over an enforced disappearance :

[redacted]

a) when the offence is committed within any territory under its jurisdiction or on board a vessel flying its flag or an aircraft registered in accordance with its law at the time of the facts; B5

b) when the alleged perpetrator of the offence is one of its nationals or a stateless person habitually residing in its territory; [redacted] B5

c) when the disappeared person is one of its nationals and the State deems it appropriate to do so. [redacted]

2. Each State Party shall also take the necessary measures to establish its jurisdiction over an enforced disappearance when the alleged perpetrator of the offence is in a territory under its jurisdiction, unless the State extradites him or her or transfers him or her to another State or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognised.

3. *[The present instrument]* does not exclude any criminal jurisdiction exercised in accordance with national laws.

Article 10 [redacted] B5 B5

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an enforced disappearance is present, shall take him or her into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted. [redacted]

2. The State Party which has taken the measures referred to in paragraph 1 shall immediately make an investigation into the facts. It shall notify the States Parties which may have jurisdiction in accordance with paragraph 1 of article 9 of the measures which it has taken under paragraph 1 of this article, particularly of the fact that such person is in custody and of the circumstances which warrant his or her detention, the findings of its investigation and shall indicate to those States whether it intends to exercise jurisdiction.

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

Article 11 [redacted] B5

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any enforced disappearance is found shall, if it does not extradite him or her or transfer him or her to another State or surrender him or her to an international criminal tribunal whose jurisdiction it has recognised, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in paragraph 2 of article 9, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in paragraph 1 of article 9.

[redacted] B5

3. *(modified)* Any person charged with an offence of enforced disappearance shall be tried by an independent and impartial court, duly established by law, which guarantees the right to a fair trial.

4. *(new)* Any person regarding whom proceedings are brought in connection with an enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. [redacted] B5

Article 12 (modified)

B5

1. Each State Party shall ensure that any person who alleges that someone has been subjected to enforced disappearance has the right to complain to a competent authority, which thoroughly investigates the complaint immediately and impartially. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, the relatives of the disappeared person and their defence counsel as well as those participating in the investigation are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Whenever there are reasonable grounds to believe that a person has been subjected to enforced disappearance, any State Party shall refer the matter to the authority referred to in paragraph 1 for it to launch an investigation, even if there has been no formal complaint.

B5

3. *(new)*.Each State Party shall ensure that the authority referred to in paragraph 1:

   a) has the necessary powers and resources to conduct the investigation, including the power to compel suspected perpetrators and witnesses to appear before it,

   b) is communicated the necessary information for its investigation;

   c) has access to any place where it is suspected that a disappeared person is present.

4. *(former 12.6, complemented)* Each State Party shall take the necessary measures to prevent and punish acts of such a kind as to inhibit the progress of investigations. It shall ensure, particularly, that persons suspected of having committed an enforced disappearance are not in a position to influence the progress of the investigations by means of pressure or acts of intimidation or reprisal against the complainant, the witnesses, the relatives of the disappeared person, the defence counsel as well as those participating in the investigation..

B5

5. *(new)* The investigation pursuant to the present article shall be conducted in conformity with international principles for investigations on human rights violations, torture, search of disappeared persons, forensic examination and identification.

Article 13 (modified)

1. For purposes of extradition between States Parties, enforced disappearance shall be considered to be neither a political offence, nor an offence related to a political offence or an offence prompted by political motives. Consequently, a request for extradition based on enforced disappearance cannot be refused solely because it concerns a political offence, an offence related to a political offence or an offence prompted by political motives.

2. Enforced disappearance shall automatically be included among the extraditable offences in every extradition treaty concluded between States Parties before the entry into force [*of the present instrument*].

3. States Parties undertake to include the offence of enforced disappearance among the extraditable offences in every extradition treaty to be concluded subsequently between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider [*the present instrument*] as the legal basis for extradition in respect of enforced disappearance.

5. Any State Party which does not make extradition conditional on the existence of a treaty shall recognise the offence of enforced disappearance as extraditable.

6. Extradition shall, in all cases, be subject to the conditions provided by the law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or subject extradition to conditions.

7. No provision [*of the present instrument]* shall be interpreted as imposing an obligation on the requested State Party to extradite if that State has serious grounds to believe that the request was put forward for the

purpose of prosecuting or punishing a person on account of his or her gender, race, religion, nationality, ethnic origin or political opinions, or that to allow the request would cause harm to that person for any one of those reasons.

Article 14 (modified)

1. States Parties shall provide one another the greatest measure of legal assistance in connection with any criminal investigation or proceedings brought in respect of enforced disappearance, including the supply of all evidence at their disposal that are necessary for the proceedings.

2. Such legal assistance is subject to the conditions provided by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, particularly, concerning the grounds on which the requested State Party may refuse to provide legal assistance or subject such assistance to conditions.

Article 15 (modified)

[redacted] B5

States Parties shall co-operate with one another and shall provide one another the greatest measure of assistance with a view to assisting victims of enforced disappearance, and in searching, locating and releasing disappeared persons and, in the event of death, in their exhumation, identification and ~~restitution~~ of their remains.

[redacted] B5

Article 15 bis (former 21)

1. No State Party shall expel, return (*"refouler"*) or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to an enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of humanitarian law.

Article 16 (reorganised and modified, see 16 bis below)

1. Each State Party shall, under its law,

   a) indicate those officials who are authorised to order deprivation of liberty;

   b) establish the conditions under which such orders may be given;

   c) guarantee that any person deprived of liberty shall be held solely in an officially recognised and controlled place;

   [redacted] B5

   d) guarantee access of the judicial authorities to places of deprivation of liberty;

   e) guarantee that any person deprived of liberty, in all circumstances, shall have the right to bring proceedings before a court which shall rule without delay on the lawfulness of the deprivation of liberty and order his or her release if that deprivation of liberty is unlawful.

2. Each State Party shall compile and maintain one or several official up-to-date registers of persons deprived of liberty. The information contained in these registers shall include at least the following :

   a) the identity of the person deprived of liberty,

   b) the authority having decided the deprivation of liberty,

   c) the authority controlling the deprivation of liberty,

   d) the date and time of admission in the place of detention and the authority responsible for the place of detention,

e) The date and time of liberation or transfer to another place of detention, the destination and authority in charge of the transfer.

Article 16 bis

B5

1. Each State Party shall guarantee the person deprived of liberty, his or her relatives, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest access, as a minimum, to the following information :

   a) the authority to which the person has been handed over;

   b) the authority having decided the deprivation of liberty;

   c) the authority controlling the person deprived of liberty;

   d) the whereabouts of the person deprived of liberty, including in case of transfer;

   e) date and place of release;

   f) state of health and, in the event of death, circumstances and causes of the death.

2. Appropriate measures shall be taken, where necessary, to ensure the protection of the persons mentioned in paragraph 1 as well as the persons participating in the investigation against all ill-treatment; intimidation or any sanction on the grounds of the search of information concerning a person deprived of liberty.

B5

3. *(new)* In order not to jeopardise the privacy of the persons concerned, the information transmitted pursuant to paragraph 1 of the present article shall be adequate and pertinent with respect to the purpose pursued and shall not be used for other purposes than the search of the person deprived of liberty.

Article 17

Without prejudice to consideration of the lawfulness of a deprivation of liberty, States Parties shall guarantee to the relatives of the person deprived of liberty or of a disappeared person, their legal representatives, their counsel and any person authorised by the person deprived of liberty or the disappeared person or by his/her relatives, as well as any other person able to claim a legitimate interest the right to a prompt and effective remedy as a means of obtaining without delay the information referred to article 16 bis. This right to a remedy may not be suspended or restricted in any circumstances.

Article 18 (complemented)

Each State Party shall take the necessary measures to ensure that the release of persons shall proceed in a manner that allows reliable verification that they have actually been released. Each State Party shall also take the necessary measures so that the physical integrity of all such persons and their ability to exercise fully their rights are assured at the time of release, without prejudice to the obligations to which such persons may be subject in accordance with the law.

Article 19

Each State Party shall take the necessary measures to prevent and punish the following actions:

a) delaying or obstructing the remedy referred to in article 17;

b) failure to the obligation to register every deprivation of liberty and registration of information which the official responsible of the register knows or should known to be inaccurate;

c) refusal by an official to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal conditions for this information to be provided have been fulfilled.

Article 20 (complemented)

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty shall include the necessary education and information on the provisions [*of the present instrument*] , in order to:

   a) prevent the involvement of these officials in enforced disappearances;

   b) draw attention to the importance of prevention and investigations concerning enforced disappearances;

   c) ensure that the urgent need to resolve cases of enforced disappearance is acknowledged.

2. Each State shall prohibit orders or instructions commanding, authorising or encouraging enforced disappearance. Each State Party shall guarantee that a person refusing to obey such order will not be subject to sanction.

3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reasons to believe that an enforced disappearance has occurred or is planned communicate the matter to their superior authorities and, when necessary, to competent authorities or organs with reviewing or remedial power.

Article 21 (see 15 bis)

Article 22 (modified and complemented)

1. For the purposes of [*the present instrument*], "victim" means the disappeared person and any natural person who has suffered direct harm as a result of that disappearance.

2. Each State Party shall take the necessary measures so that any victim knows the truth concerning the circumstances of the enforced disappearance and the fate of the disappeared person. It shall, in particular, take the necessary measures to search for, locate and release disappeared persons and, in the event of death, return the human remains.

3. Each State Party shall guarantee the right to obtain prompt, fair and adequate reparation for the harm caused to victims of enforced disappearance.

4. The right to obtain reparation referred to in paragraph 3 includes integral compensation for material and non-material damage. It may also include, in particular:

   a) restitution,

   b) rehabilitation,

   c) satisfaction,

   d) restoration of honour and reputation.

5. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person is elucidated, each State Party shall take the necessary measures with regard to the legal situation of the disappeared persons who's fate has not been elucidated and of their relatives in fields such as social protection, financial matters, custody of children and property rights.

Article 23 (complemented)

1. Each State Party shall take the necessary measures to prevent and punish in a criminal court :

a) the abduction or appropriation of children victims of enforced disappearance, children whose father or mother is victim of enforced disappearance or children born during the detention of their disappeared mother;

b) the falsification or suppression of documents attesting to the true identity of a child referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify children referred to in subparagraph (a) and (b).

Article 24

State Parties grant each other assistance in the search for, the identification and the location of children referred to in article 23.

Article 25

1. When a child who has been abducted or appropriated in the circumstances described in article 23, paragraph (a), is found on the territory of a State party, the question of the child's return to his or her family of origin shall be resolved either under the domestic law of that State party, or under the bilateral or multilateral agreement which that State has entered into with another State in which the family of origin lives.

2. In all cases, the best interests of the child are a primary consideration, and a child who is capable of judgement shall have the right to express his or her views freely and to have them given due weight in the light of his or her age and level of maturity.

Part II [redacted] B5

Article 0 (new)

1. A [*monitoring body*] shall ensure the implementation of the [*present instrument*] and the respect by State Parties of their commitments.

[redacted] B5

2. While exercising their mandate, the members of the [*monitoring body*] shall be entitled to privileges and immunities as laid down in the Convention on Privileges and Immunities of the United Nations.

3. Each State Party shall undertake to co-operate with the [*monitoring body*] and to grant assistance to its members in the exercise of their mandate.

Article II-A (modified)

1. Each State Party shall submit to [*the monitoring body*], through the Secretary-General of the United Nations, a report on the measures taken to give effect to its undertakings under [*the present instrument*], within one year after the entry into force [*of the present instrument]* in respect of the State concerned.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by [*the monitoring body*], which may make such comments, observations, recommendations and warnings as it considers appropriate. The State Party concerned shall receive communication of such comments, observations, recommendations and warnings, to which that State may respond, on its own initiative or at the request [*of the monitoring body*].

Article II-B (modified)

1. Each State Party or the relatives of a disappeared person, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest may submit a request to [*the monitoring body*] to seek and find a person who has disappeared within the meaning of article 1.

2. Should [*the monitoring body*] consider that a request submitted under paragraph 1 is not manifestly unfounded, that it does not constitute an abuse of the right of submission and that it is not incompatible with the provisions [*of the present instrument]* [*the monitoring body*] shall request any State Party to provide information on the situation of that person, within a time-limit set by [*the monitoring body*].

3. In the light of the response provided by the State Party concerned in accordance with paragraph 2, [*the monitoring body*] shall make a recommendation or give a warning to that State. [*The monitoring body*] may also instruct that State to take appropriate measures and to report to it on those measures, within a time-limit set by [*the monitoring body*].

4. [*The monitoring body*] shall establish its conclusions and forward them to any State Party which has been requested to provide information and to the author of the request referred to in paragraph 1.

5. The procedure under this article is confidential.

Article II-C (modified)

1. If [*the monitoring body*] considers that a visit to the territory of a State Party under whose jurisdiction a disappeared person could be is essential in order to respond to the request submitted to it in accordance with Article II-B, [*the monitoring body*] may request one or more of its members to undertake an investigation mission and to report back without delay. The member or members [*of the monitoring body*] conducting the mission may be accompanied if necessary by interpreters, secretaries and experts. No member of the delegation, with the exception of the interpreters, may be a national of the State Party to which the visit is to be made.

[redacted] B5

2. [*The monitoring body*] shall notify the State Party concerned in writing of its intention to organise an investigation mission, indicating the composition of the delegation. The State Party shall inform [*the*

monitoring body] without delay of its agreement or opposition to the investigation mission in the territory over which it has jurisdiction.

3. If the State Party agrees to the investigation mission, it shall provide [*the monitoring body*] with all the necessary facilities to enable the mission to be carried out. [*The monitoring body*] may, inter alia:

   a) make such visits as it may consider necessary to search for and find the person who has disappeared;

   b) make contact freely with any person whom it believes may provide useful information on the fate of the person who has disappeared;

   c) have the person who has allegedly disappeared brought to it and discuss with him or her in private.

4. [*The monitoring body*] shall inform the following of the findings of the investigation mission:

   a) the State Party in whose territory the investigation mission was carried out;

   b) the author of the request referred to in paragraph 1 of article II-B.

5. The procedure under this article is confidential.

Article II-C bis (new)

1. [*The monitoring body*] considers a communication presented by the relatives of a disappeared person, their legal representatives, their counsel, and any person authorised by them, as well as any person able to claim a legitimate interest alleging grave breaches in the implementation of the commitments taken under the [*present instrument*] unless B5 B5

   a) the communication lacks sufficient motivation or is obviously unfounded;

   b) the same matter is being examined under another procedure of international investigation or settlement;

   c) the complainant has not exhausted all available effective domestic remedies.

2. If the [*the monitoring body*] assesses that the communication fulfils the conditions under paragraph 1, [*the monitoring body*] transmits the communication to the State Party concerned and requests this State Party to provide observations and comments within a time-limit set by the [*monitoring body*].

3. On the basis of the answer of the State Party, [*the monitoring body*] may decide :

   a) to close the matter of the communication;

   b) to continue its examination;

   c) to make a recommendation to the State Party.

4. The procedure under the present article comes to an end when the [*monitoring body*] communicates the conclusions of its investigation to the State Party and to the author of the communication.

5. The procedure under this article is confidential.

Article II-C ter (new)

If the [*monitoring body*] receives reliable information which appears to it to contain well-founded indication that enforced disappearance is being practised in a systematic or general manner in the territory of a State Party, the [*monitoring body*] may seize the Secretary General of the United Nations, after having enquired with the State Party concerned about any pertinent information and the measures taken to put an end immediately to such practises.

Article II-D (integrated in II-O§2)

Article II-E (complemented)

1. [*The monitoring body*] has competence solely in respect of deprivations of liberty which commenced after the entry into force [*of this instrument*].

2. Should a State become party to [*this instrument*] after its entry into force, the obligations of that State towards [*the monitoring body*] concern only deprivations of liberty which commenced after the entry into force [*of this instrument*] in respect of the State concerned.

3. ***(new)*** Each State Party may at any time declare that, in its own respect, it recognises that the [*monitoring body*] has competence in respect of enforced disappearances which commenced before entry into force of the [*present instrument*].

Article II-F (modified)

1. The [*monitoring body*] shall submit an annual report on its activities [*under the present instrument*] to the States Parties and to the General Assembly of the United Nations.

2. ***(new)*** If, in the procedures under articles II-B and II-C bis, a State Party concerned obviously refuses to co-operate or if the procedures yield to no effective result, the [*monitoring body*] may decide to make an observation public, with regard to the matter or the situation at stake.

3. ***(new)*** The State Party concerned shall be informed in advance of the publication of an observation under paragraph 2 of the present article. This observation shall be published together with the answers, comments or observations transmitted by the State Party within the time-limit set by the [*monitoring body*].

PART III

[redacted] B5

Article III –O (former 2.2)

[*The present instrument*] is without prejudice to any other international instrument or national legislation that does or may contain provisions of broader application.

[redacted] B5

Article III-O bis (new)

Personal data, including medical or genetic data, which are transmitted in the framework of the search of a disappeared person shall not be used for other purposes than that of the search of the disappeared person.

Article III-A

1. [*The present instrument*] is open for signature by [...].

2. [*the present instrument*] is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. [*The present instrument*] is open to accession by [...]. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article III-B

1. [*The present instrument*] shall enter into force on the thirtieth day after the date of deposit of the [*Xth*] instrument of ratification or accession.

2. For each State ratifying [*the present instrument*] or acceding to it after the deposit of the [*Xth*] instrument of ratification or accession, [*the present instrument*] shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

Article III-C

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed [*the present instrument*] or acceded to it of the following:

a) Signatures, ratifications and accessions under article III-A;

b) The date of entry into force of [*the present instrument*] under article III-B.

Article III-D

The provisions of [*the present instrument*] shall apply, without limitation or exception, to all parts of federal States.

Article III-D bis (new)

1. Any State, upon signature, ratification or accession, may declare that [*the present instrument*] will be extended to any territory for which it is responsible with regard to international relations. Such a declaration will take effect when [*the present instrument*] enters into force for the State concerned.

2. At any time, such an extension may be notified to the Secretary General of the United Nations and will take effect (...) days after it has been received by the Secretary General.

Article III-E (integrated in 1 bis, paragraph 2)

Article III-F

[*The present instrument*] is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, or the option available to any State to authorise the International Committee of the Red Cross to visit places of detention in cases for which international humanitarian law does not provide.

Article III-G

1. Any State Party to [*the present instrument*] may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to [*the present instrument*] with a request that they notify him or her whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the State Parties to [*the present instrument*] have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of [*the present instrument*] and any earlier amendments which they have accepted.

Article III-H

1. [*The present instrument*], of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of [*the present instrument*] to all States.

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B6

GE208

Peay, T. Michael

From: Michael Peay [redacted] B6
Sent: Sunday, November 23, 2003 8:30 PM
To: Pankaj Saran
Subject: Re: Meeting

November 23, 2003

Pankaj,

906-8686

Many thanks for your kind note and suggestion. I would be quite pleased to meet with you to discuss the upcoming WG on Disappearances. Tomorrow, I'll review my office calendar for this upcoming week to see what looks possible. I'm sure it will be useful whenever we are able to meet to exchange views.

I will be away from Geneva on Thursday and Friday, so it'll have to be early in the week. In any event, I look forward to being in touch with you. Best regards,

Michael Peay

--- Pankaj Saran [redacted] B6
> Dear Michael,
>
> I was wondering whether we should not meet, perhaps
> over lunch, to exchange notes on the WG on
> Disappearances.
>
> We could set up something for next week if that is
> OK with you.
>
> Sincerely,
>
> Pankaj Saran,
> Counsellor,
> Indian Mission
>
>
>
>
>
>
> ---------------------------------
> Do you Yahoo!?
> Free Pop-Up Blocker - Get it now

Do you Yahoo!?
Free Pop-Up Blocker - Get it now
http://companion.yahoo.com/

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

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B5

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COMMISSION ON HUMAN RIGHTS
Intersessional open-ended Working Group to elaborate
a draft legally binding normative instrument for the
protection of all persons from enforced disappearance
First session
Geneva, 6-17 January 2003

DRAFT REPORT

VI. DISCUSSION ON SUBSTANTIVE PROVISIONS

A. Definition

1. The delegations took the view that the definition of enforced disappearance should contain at least three constituent elements:

(a) Deprivation of liberty in whatever form;

(b) Refusal to acknowledge that deprivation of liberty;

(c) Removal of the disappeared person from the protection of the law.

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2. The definition must also take into consideration the perpetrators of the enforced disappearance. In this respect, many delegations considered that the instrument should in the first place refer to agents of the State and ~~related~~ persons. Some delegations thought it would be worth examining the role

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and situation of persons commonly called "non-State actors". For most delegations, States bore the prime responsibility for preventing and punishing enforced disappearances, including those perpetrated by non-State actors, [redacted] ensure reparation. B5 B5

3. Other aspects were mentioned: the duration of enforced disappearances, the implementation of the instrument in time of warfare, and [redacted] possible causes of exemption in case of internal disturbances.

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B. Definition of offences and penalties

Enforced disappearance as an independent offence in domestic criminal law

4. According to some delegations, States should ensure that each act leading to an enforced disappearance constitute an offence under their criminal law. In the view of the other participants, States should have to define enforced disappearance as an independent offence in their domestic criminal law. That would better reflect the complexity of enforced disappearances, would make criminal sanctions more effective and would make it easier to establish rules concerning specific aspects on the offence, such as statutory limitation, exemption of responsibility and extradition. It was recalled that the institution of independent offences in domestic law was supported by the Committee against Torture, the Special Rapporteur on torture and the Working Group on Enforced Disappearances.

5. In the opinion of several delegations, the future instrument should take account of the diversity of national law systems. B5

Enforced disappearance as a crime against humanity

6. Most speakers wished that the systematic or massive practice of enforced disappearances should be referred to in the instrument as a crime against humanity. Several speakers pointed out that the systematic nature of violations implied forward planning.

The subjective element as a constituent element of the offence of enforced disappearance

7. According to article 2, paragraph 1, of the Sub-Commission's draft, the perpetrators of the offence of forced disappearance should be punishable only if they knew or ought to have known that the offence was about to be or was in the process of being committed. In the same

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spirit, article 3, paragraph 2, of the draft suggested that the perpetrators of forced disappearances constituting crimes against humanity should be charged only where they knew or ought to have known that the act was part of a systematic or massive practice of forced disappearances. Several speakers took the view that, for the sake of the effectiveness of criminal justice, such limitations should not be included in the future instrument. Other participants, on the other hand, thought that the clause was worth preserving.

8. The Chairperson concluded the debate in the following way:

- Enforced disappearances constitute crimes. However, the question remained of defining the offence of enforced disappearance as an independent offence in domestic law;
- The Working Group will have to specify under what circumstances, if any, certain enforced disappearances should be considered as crimes against humanity (massive, systematic, or widespread character);
- The Working Group identified the main elements of incrimination (attempt, conspiracy, collusion, instigation and incitement). It should ~~consider~~ with greater detail ~~the issues of~~ dissimulation, responsibility incurred for the failure to act, and the responsibility of hierarchical superiors;
- With regard to sanctions, the Working Group might use the sort of wording used in existing texts, and in the Sub-Commission's draft, whereby penalties should be adequate and proportional to the gravity of the offence.

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Geneva, 6-17 January 2003

DRAFT REPORT

VI. DISCUSSION ON SUBSTANTIVE PROVISIONS (continued)

C. Protection against impunity

1. Several speakers asked whether it was possible to include a general clause requiring States to take the necessary steps to combat impunity. In the view of the other participants, it was preferable to indicate clearly in the future instrument the various measures that should be taken in that regard, in order to set out States' obligations clearly.

1. Statute of limitations

2. Emphasis was placed on the non-applicability of statutory limitations to forced disappearances that constituted crimes against humanity.

3. In the case of forced disappearances that did not constitute crimes against humanity, most speakers considered that, in view of the continuing nature of the offence, the limitation period should begin from the moment when the case was clarified. However, some participants considered that the period should run from the moment of commission of the offence. Another delegation considered that, in the case of persons who had revealed their participation in committing the offence, the period should begin from the moment of the confession.

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4. Most of the participants considered that the length of the limitation period should be the longest of those provided for in domestic law. In the view of one delegation, such an approach could be adopted only if forced disappearances were regarded as separate offences in domestic law

5. The need to allow for the possibility of suspending limitation periods, in cases where effective remedies were rendered impossible by the situation in the country, was raised.

2. Immunity and special courts

6. The question was raised of whether the future instrument should ban special courts, especially military courts, from trying cases of forced disappearance. For some delegations, special courts could be useful in speedily resolving cases in certain circumstances, or were acceptable as long as they remained impartial and respected the principles of the right to a fair trial. However, several speakers pointed out that international law was tending increasingly to rule out the use of such courts to try serious violations of human rights. It was underlined that the use of military courts very often led to situations of impunity.

7. The 1992 Declaration and the 1998 draft provided that no privileges, immunities or special exemptions should be admitted in trials of persons responsible for forced disappearances. However, some delegations considered that exceptions should be allowed for perpetrators who agreed to reveal information of use in establishing the truth. One delegation considered that other grounds for plea bargaining available in domestic law might also be used. Several participants considered that plea bargaining should not lead to complete exoneration from responsibility. Lastly, it was noted that some legal systems allowed agreements to be reached between perpetrators and victims. One delegation considered that the future instrument should stipulate that no privileges, immunities or exemptions would be allowed, except insofar as they were in keeping with its aim and purpose, and without prejudice to the privileges, immunities or exemptions recognized in international law, including the Vienna Convention on Diplomatic Relations.

3. Asylum

8. Several delegations emphasized the need to link the obligation not to grant asylum or shelter to persons suspected of participation in a forced disappearance with the obligation not to return (*refouler*) such persons to a State where they would run the risk of being subjected to serious human rights violations. It was pointed out that the draft Convention included such a guarantee. However, some delegations considered that the obligation not to return (*refouler*)

contained in article 15, paragraph 1 of the draft Convention should be limited to cases where there was a risk of enforced disappearance. The risk of grave violations of human rights was considered too large. HCR presented to the working group the exclusion clause contained in article 1F of the 1951 Geneva Convention relating to the Status of Refugees.

9. Some speakers considered that it was difficult to provide for a total ban on the granting of asylum to persons responsible for forced disappearances, particularly in the case of those who agreed to reveal information of use in establishing the truth.

4. Amnesty and pardons

10. Some delegations considered that, instead of banning amnesty for those responsible for forced disappearances, as in the 1998 draft, States should be recommended to take into consideration the extreme seriousness of acts leading to forced disappearances. Several participants said that they were not opposed to amnesty in cases of forced disappearance which did not constitute crimes against humanity. Others, however, considered that before amnesty was granted, a number of conditions must be fulfilled: an inquiry leading to the establishment of the truth; adequate compensation for the victims; and sanctions against the perpetrators.

5. Other grounds for exemption from criminal responsibility, mitigation and aggravation

11. Some delegations considered that it should not be possible for orders from a superior to constitute a ground for exemption from responsibility, nor a mitigating circumstance, either in peacetime or in wartime. Several participants considered that the responsibility of the superior should be established, independently of the subjective element referred to in article 9, paragraph 3 of the draft Convention.

12. One delegation considered that mitigating circumstances might be accepted, but that they should be more strictly defined than in article 5, paragraph 2 of the draft Convention.

13. Some participants considered that severer penalties should be applicable when the victims were vulnerable persons (the disabled, the elderly, pregnant women, children etc.).

14. The Chairperson summed up the discussions as follows:

- It had to be decided whether the instrument should contain a general obligation or more specific protection measures against impunity;

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- There was a strong convergence of views [redacted] statute of limitations on forced disappearances which constituted crimes against humanity. Where offences under the ordinary law were concerned, it seemed no one disputed that the longest limitation period stipulated in domestic law should be applied. There remained the question of the point when the limitation period should begin;

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The Working Group considered that immunity should be restricted to the maximum possible extent. However, the issue of immunities which were based on international law should be [redacted] means of applying immunities which were based on domestic law;

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- Amnesty and pardons should not have the result of preventing fair material compensation and non-pecuniary damages;
- The use of special courts, especially military courts, prompted much concern;
- In the matter of the granting of asylum or shelter to persons suspected of forced disappearances, the Working Group's goal should be to eliminate sanctuaries which could be exploited by those responsible for forced disappearances;
- Several delegations raised the question of measures to be taken in respect of persons who had cooperated with the judicial authorities. That covered both the issue of immunity or reduced sentences and that of territorial asylum;
- It was suggested that the future instrument should set forth a form of "duty to disobey" orders and instructions relating to forced disappearances.

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First session

Geneva, 6-17 January 2003

DRAFT REPORT

VI. DISCUSSION ON SUBSTANTIVE PROVISIONS (continued)

D. Domestic prosecution and international cooperation

1. Establishment of the jurisdiction of domestic courts

1. Several participants came out in favour of the wording contained in articles 6 of the 1998 draft and 5 of the Convention against Torture. That would lead the State to establish its jurisdiction, in the matter of enforced disappearance, in cases where the offence is committed within that State's territory, where the offender or victim is a national of the State, or where the offender is present in the territory of the State and is not being extradited by the latter. This concerns the question of the universal or quasi-universal jurisdiction.

2. Some delegations commented that torture often arose in cases of enforced disappearance. In the future instrument, therefore, the basic rules regarding the jurisdiction of States should at least be similar to those provided in article 5 of the Convention against Torture.

3. Some participants commented that it was always preferable to hold trials in States where the enforced disappearance had occurred, especially for the sake of the victims. The jurisdiction of other States was provided only as an additional facility. States should also be encouraged to investigate and prosecute under their own legislation.

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4. Several delegations made the point that the question of jurisdiction was directly related to that of the definition of the offence of disappearance, and that the group had still not agreed on a position in that respect.

2. Extradition and judicial cooperation

5. Several participants were in favour of including precise rules regarding extradition in the instrument, in order to avoid any possible gaps in that respect and to ensure better application of the principle *aut dedere aut judicare*. It was pointed out that in the draft Convention, the obligation to judge existed, even when no extradition had been requested.

6. According to the draft Convention, enforced disappearance was not considered as a political offence for the purposes of extradition. According to some speakers, even though that clause was not specifically stipulated in the 1992 Declaration, it did appear in many other international and regional instruments. The provision had been drafted because many extradition treaties forbade extraditions for political offences.

7. One delegation stressed the need to discuss the question of death penalty in the context of the debate regarding extradition.

8. Some speakers said that the draft Convention, which restricted judicial cooperation to the penal field, needed improving in that respect. Other areas of cooperation should be added, especially in civil matters (of particular importance for disappeared children). Furthermore, several delegations felt that, as with the provisions on extradition, the future instrument, in the absence of any treaty of judicial cooperation between the States concerned, could serve as a legal basis for such cooperation. It would therefore be worth drawing up a list of minimum investigatory measures which a State party could request of another State party, for instance in terms of gathering evidence, or carrying out searches or seizures. It was also pointed out that the need for judicial cooperation in the area of forced transfrontier disappearances was essential.

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9. The Chairperson summed up the discussion as follows:

- The establishment of the broadest possible jurisdiction for domestic criminal courts with respect to enforced disappearance appeared to be essential if the future instrument was to be effective. Consideration might be given in that respect to the quasi-universal jurisdiction mechanism used by several other multilateral instruments;

- With regard to international cooperation, extradition and judicial cooperation were two basic mechanisms, the use of which should be facilitated and encouraged. In the absence of a bilateral treaty, the future instrument could serve as a legal basis for extradition;
- The principle of *aut dedere aut judicare* was mentioned several times: the idea was to eliminate access to sanctuaries for the perpetrators of forced disappearances.

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First session

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DRAFT REPORT

VI. DISCUSSION ON SUBSTANTIVE PROVISIONS (continued)

D. Prevention

1. Supervision of detentions

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1. On the basis of the draft Convention and the proposals drawn up by the independent expert Manfred Nowak, the participants prepared an initial list of State obligations as regards the supervision of detentions (see below).

Prohibition of incommunicado detention and of secret places of detention

2. The participants considered that this prohibition should be absolute.

Register of detainees

3. Several participants considered that such registers should be made available to anyone with a legitimate interest in obtaining such information.

4. A few delegations pointed out that the specific structure of some States, for example federal States or States which had devolved a certain amount of power to their provinces, might make it difficult to keep a central register. Several solutions were put forward: the registers

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could be maintained by the federated States, or a register of places of detention could be kept at the federal level. In any event, it was vital that registration of detainees should be carried out at two levels, which was the only way to cross-check information, and hence ensure efficient supervision.

Respect for the right of detainees to notify their lawyers, families and any persons with a legitimate interest of their situation

5. A few delegations considered that immediate notification of a lawyer and persons with a legitimate interest, as provided for in the draft Convention, might constitute an excessively onerous requirement, bearing in mind provisions in domestic law that a certain amount of time should elapse between arrest and notification, especially in serious cases. B5

6. A discussion took place on the need to guarantee the right to respect for the privacy of the detainee, without enabling the authorities to conceal the detention, against the wishes of the detainee. Some speakers considered that the right to respect for privacy was not affected insofar as the information was communicated confidentially to specific individuals.

Institution of mechanisms of habeas corpus and other guarantees against arbitrary detention

7. The importance of such mechanisms was emphasized. It was also pointed out that under the draft Convention there was no derogation from the right to a remedy.

8. The importance of judicial supervision of detention was emphasized. The draft Convention provided that other authorities would be competent to perform that function. In that regard, it was suggested that use might be made of the formula "other officer authorized by law to exercise judicial power" from article 9 of the International Covenant on Civil and Political Rights.

Obligation to conduct an investigation

9. Attention was drawn to the special importance of investigations, which could halt the process of disappearance.

10. Several participants considered that it should be possible for the investigation to be initiated not only at the request of the family but also automatically when there were grounds for believing that a person had been the victim of a forced disappearance.

11. According to several speakers, the body responsible for the investigation must be independent from the institution being accused, and must be capable of conducting an impartial investigation. It must be provided with the requisite resources and powers, as well as sufficient

authority to conduct the investigation speedily and efficiently. Lastly, one delegation emphasized that article 11 of the draft Convention, under which the authority receiving the complaint must immediately proceed to an investigation, took no account of the fact that some authorities, such as national parliaments, might not have the power both to receive complaints and to investigate. B5

The need to punish agents of the State who are guilty of obstruction

12. In the view of most of the participants, the penalties laid down could include non-penal sanctions. The draft Convention could also ensure that no objective criminal responsibility on the part of agents was created. B5

The need to suspend persons suspected of forced disappearances from all official duties for the duration of the investigation

13. In the view of several participants, this obligation should take into account the right of the suspected persons to the presumption of innocence. Some delegations pointed out that in the case of high-level personnel such a provision would raise difficulties, bearing in mind the procedures involved, which were sometimes dictated by the Constitution. A more flexible wording, placing an obligation on States to guarantee that investigation procedures would not be influenced by the suspected persons, might be preferable. Several participants emphasized that international law had already adopted the principle that persons who might exercise authority over the complainants, the witnesses and their families, and over the persons carrying out the investigation, should be suspended. There was also a need to ensure that the suspected persons were not in a position to embark on additional violations.

2. Education and training

14. Many speakers emphasized the need to strengthen the draft Convention in this area. It should stipulate that the personnel concerned included police and prison staff as well as judges, procurators and lawyers. The precise aims of training should be spelled out: specific mention was made of preventing the involvement of personnel in acts of forced disappearance, and recognition by the personnel of the importance of preventing such acts, investigating and urgently solving cases of forced disappearance. Agents of the State should also be informed of their duty to disobey and of the unlawfulness of orders to carry out a forced disappearance. Training in the specific features of investigations into forced disappearances should also be provided. Lastly, members of the public as a whole should be informed of their rights, as recognized in international law, but also in domestic law. B5

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15. One delegation submitted the following proposal:

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"States parties shall ensure that the training of public law enforcement staff and supervisors includes the necessary education concerning the provisions of this convention, in order:

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"(a) To prevent the involvement of such staff and supervisors in forced disappearances;

"(b) To ensure that the importance of prevention and of investigations into forced disappearances is recognized;

"(c) To ensure that the urgent need to solve cases of this type is recognized."

16. The Chairperson summed up the discussions as follows:

- In advance of any judicial investigation, provision must be made for the initiation of inquiries into the fate of the person alleged to have disappeared. The question of identifying the independent authorities responsible for such inquiries should be further studied;
- States should guarantee a simple, rapid and effective remedy before a judicial authority. Penal or other sanctions should be laid down for those who hinder access to such remedies;
- All steps should be taken by States to prohibit secret places of detention and incommunicado detention. This implies the taking of an inventory of all detainees and all places of detention. The question arises of how federal States will address this requirement. It will also be necessary to ensure effective supervision of places of detention by the judicial authorities, as well as notification of lawyers and families concerning steps taken with regard to detained persons and the places where they are located;
- The authorities responsible for holding persons in detention should be properly trained. The proposal put forward by one delegation is in keeping with this objective. Mention was made of the need to create awareness among the public concerning the offence of forced disappearance.

July : Enforced Disappearances

Peay, T Michael

Subject: FW: FOR CLEARANCE/Disappearances talking points

GE105

RELEASED IN FULL

-----Original Message-----

From: Brancato, Gilda M (Main State)
Sent: Thursday, June 23, 2005 12:42 AM
To: Kovar, Jeffrey D; Johnson, Thomas A; Camponovo, Christopher N (DRL); Harris, Robert K; Brooks, Waldo W; Manning, Denise; Peay, T Michael
Cc: Barton, Paula J; Danies, Joel D; Gale, Hanny; Witten, Samuel M; Sicade, Lynn M (DRL); Lucas, William E; Brancato, Gilda M (Main State)
Subject: FOR CLEARANCE/Disappearances talking points

LEGAL-#122616-v1
-Talkers-_forc...

Mission Geneva is meeting the French chair of the negotiations on June 24 and requested talking points. The attached paper draws from earlier cleared points prepared for the most recent negotiating round in February 2005. Please provide clearance by Thursday COB, as I will need to send to Geneva Thursday evening. I will provide copies of the February 16, 2005 treaty text on Thursday morning.

Thank you all, Gilda

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
DATE/CASE ID: 18 AUG 2009 200706444

Peay, T Michael

RELEASED IN PART GE139A
B6

From: Brancato, Gilda M
Sent: Friday, August 08, 2003 10:33 PM
To: Johnson, Thomas A; Camponovo, Christopher N (DRL); Brooks, Waldo W; [redacted] B6
Cc: Witten, Samuel M; Harris, Robert K; Gorove, Katherine M; Buchwald, Todd F; Sicade, Lynn M; Jacobson, Linda; Brancato, Gilda M; DeLaurentis, Jeffrey(Geneva); Peay, T Michael (Geneva); Solomon, Steven A(Geneva); [redacted]
Subject: Forced disappearances convention/draft INSTRUCTIONS TO THE UNITED STATES DELEGATION TO THE UNCHR WORKING GROUP SESESION ON FORCED DSIAPPEARANCES:

To those on the "TO" line: The attached draft instructions, which revise and expand instructions prepared for the first session of the Working Group on a Forced Disappearances convention in January 2003, are for your comments and clearance. You may recall that this is a UN exercise to draft a convention to prohibit and prevent forced disappearances. The French Ambassador in Geneva chairs the WG, and Latin states are vocal in support of a broad convention.
Please provide clearance on the attached draft instructions by Tuesday August 26, as the one-week UN session on the proposed convention is scheduled to start in Geneva on Monday September 1. Thank you. Gilda

UNITED STATES DEPARTMENT OF STATE
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DATE/CASE ID: 18 AUG 2009 200706444

RELEASED IN PART GE197
B5

Peay, T Michael

From: Brancato, Gilda M
Sent: Monday, December 16, 2002 9:07 PM
To: Surena, Andre M; Manning, Denise; Johnson, Thomas A; Camponovo, Christopher N (DRL); Danies, Joel D(Geneva)
Cc: Witten, Samuel M; Jacobson, Linda; Dolan, JoAnn; Peay, T Michael(Geneva); Solomon, Steven A(Geneva); Sicade, Lynn M; Legal-L-HRR-dl
Subject: #108020 v1 - Instructions; WG on forced disappearances

The attached is for your clearance, please. I will send to Justice and Defense as well. This draft may serve as a basis for our L meeting tomorrow and for a meeting with Justice tentatively scheduled for Wednesday. May I hear from you by Thursday COB please. Thank you.
As noted earlier, I will circulate shortly for clearance a draft commenting on specific provisions of the 1998 UNHCR sub-commission draft disappearances convention.

[redacted] B5

2BCK01!.doc

[redacted] Thank you all. Gilda

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
DATE/CASE ID: 18 AUG 2009 200706444

Gale, Hanny

GE266

From: Kovar, Jeffrey D
Sent: Friday, August 12, 2005 9:04 PM
To: Gale, Hanny
Subject: One more, please

RELEASED IN FULL

-----Original Message-----
From: Brancato, Gilda M (Main State)
Sent: Thursday, June 23, 2005 7:00 PM
To: Brooks, Waldo W; Kovar, Jeffrey D; Johnson, Thomas A; Camponovo, Christopher N (DRL); Harris, Robert K; Manning, Denise; Peay, T Michael; Jacobson, Linda
Cc: Barton, Paula J; Danies, Joel D; Gale, Hanny; Witten, Samuel M; Sicade, Lynn M (DRL); Lucas, William E; Dalton, Robert E; Legal-L-HRR-dl
Subject: RE: Treaty/Forced Disappearances talking points & Annex

Mike, as requested, Attached are talkers and an Annex addressing outstanding core issues for the USG. Best of luck tomorrow, and please send us an email report.
All the best, Gilda

-----Original Message-----
From: Brooks, Waldo W
Sent: Thursday, June 23, 2005 8:06 AM
To: Brancato, Gilda M (Main State); Kovar, Jeffrey D; Johnson, Thomas A; Camponovo, Christopher N (DRL); Harris, Robert K; Manning, Denise; Peay, T Michael
Cc: Barton, Paula J; Danies, Joel D; Gale, Hanny; Witten, Samuel M; Sicade, Lynn M (DRL); Lucas, William E
Subject: RE: FOR CLEARANCE/Disappearances talking points

Clear.

-----Original Message-----
From: Brancato, Gilda M (Main State)
Sent: Wednesday, June 22, 2005 6:40 PM
To: Kovar, Jeffrey D; Johnson, Thomas A; Camponovo, Christopher N (DRL); Harris, Robert K; Brooks, Waldo W; Manning, Denise; Peay, T Michael
Cc: Barton, Paula J; Danies, Joel D; Gale, Hanny; Witten, Samuel M; Sicade, Lynn M (DRL); Lucas, William E; Brancato, Gilda M (Main State)
Subject: FOR CLEARANCE/Disappearances talking points

<< File: LEGAL-#122616-v1-Talkers-_forced_disappearances_-_June_2005_.doc >> Mission Geneva is meeting the French chair of the negotiations on June 24 and requested talking points. The attached paper draws from earlier cleared points prepared for the most recent negotiating round in February 2005. Please provide clearance by Thursday COB, as I will need to send to Geneva Thursday evening. I will provide copies of the February 16, 2005 treaty text on Thursday morning.

LEGAL-#122616-v1
-Talkers-_forc...

Thank you all, Gilda

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
DATE/CASE ID: 18 AUG 2009 200706444

COMMISSION ON HUMAN RIGHTS

Working Group on a draft legally binding normative instrument for the protection of all persons from enforced disappearance
Geneva, 12-23 January 2004

E/CN.4/2004/WG.22/Misc.21

16 January 2004

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REVIEW AUTHORITY: JOHN S BLODGETT
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 24 AUG 2009 200706444

PROPOSAL OF

THE UNITED STATES

E/CN.4/2004/WG.22/Misc.21 B5

E/CN.4/2004/WG.
16 Janua

United States Proposals on "Access to Information" (January 16, 2004)

Article 7

Delete the following sentence: " In particular, the right to obtain accurate and full information on the fate of disappeared persons is guaranteed in all circumstances." *[Unnecessary in light of what follows.]*

Article 12 [as shortened]

1. (same)
2. (same)
3. (same)

New Consolidated Chapter on –"Access to Information"

Article 12 bis [New]

1. Each State Party, *subject to Article12 ter(4))*, shall provide to family members, and to other persons with a legitimate interest, information concerning the whereabouts and fate of a disappeared person, including information resulting from an investigation into the disappearance.

2. *At a minimum, such informationshall include:*

(a) The authority to whom the person has been referred;

(b) The whereabouts of the person deprived of liberty, including in case of transfer;

(c) The identity of the person responsible for the deprivation of liberty and of the person in whose hands the person deprived of liberty has been placed. [Former Art. 16(2)]

3. Each State Party shall prepare and maintain one or several official registers of persons deprived of liberty. *[Former Art. 16(3); however, the 2nd sentence would become unnecessary in view of Art. 12 bis.]*

[redacted] B5

Article 12 ter [New]

1. In implementing their obligations under this [instrument], States Parties shall respect the fundamental need of family members, and other persons with a legitimate interest, to obtain information promptly and regularly regarding the whereabouts and the fate of a disappeared person.

2. States Parties shall adopt, if they have not yet done so, the necessary domestic legal measures to ensure appropriate access to such information.

3. States Parties shall be guided by the principle that furnishing such information shall in no circumstances be unreasonably denied.

4. Such access shall be subject only to privacy, law enforcement, national security, or other similar considerations duly justified under law.

Article 17

[The necessity of this article would need to be reevaluated, in light of provisions in the new "Access to Information" Chapter].

Article 19 [as revised]

Each State Party shall take the necessary measures to prevent or punish the following conduct:

(a) Any unlawful delay or obstruction in providing the access to information envisioned by Article 12 bis and Article 12 ter. [*delete reference to Art. 17*]
(b) same
(c) same

Article 12 ter [New][01/21/04]

1. In implementing their obligations under [this instrument], States Parties, subject to their constitutional and legal requirements, shall adopt/take such measures as may be necessary that will respect the fundamental need of family members, and other persons with a legitimate interest, to obtain, **upon request**, prompt and regular information regarding the whereabouts and fate of a disappeared person.

2. States Parties shall be guided by the principle that furnishing such information shall in no circumstances be unreasonably denied.

Article 12 ter [New][01/21/04]

1. In implementing their obligations under [this instrument], States Parties, subject to their constitutional and legal requirements, shall adopt/take such measures as may be necessary that will respect the fundamental need of family members, and other persons with a legitimate interest, to obtain, **upon request**, prompt and regular information regarding the whereabouts and fate of a disappeared person.

2. States Parties shall be guided by the principle that furnishing such information shall in no circumstances be unreasonably denied.

[FBIS LOGO]

Document ID: EUP20021015000146
Entry Date: 10/15/2002
Version Number: 01

Region: The Americas, Near East/South Asia

Sub-Region: North America, Near East

Country: Canada, Syria, United States

Topic: HUMAN RIGHTS, INTERNATIONAL POLITICAL, MIGRATION, TERRORISM.911WEB, URGENT

Source-Date: 10/15/2002

US Said To Provide 'Incomplete Information' on Syrian-Canadian Detained in US

EUP20021015000146 Toronto The Globe and Mail (Internet Version-WWW) in English 15 Oct 02 p A5

[Report by Estanislao Oziewicz from the print edition: "Ottawa man feared being sent to Syria, U.S. lawyer says; Arar[0] 'confused' during New York meeting,said he had refused to sign removal paper"]

[FBIS Transcribed Text]
An Ottawa engineer detained by U.S. authorities and accused of having links to al-Qa'ida was terrified that he would be deported to his native Syria, a U.S. lawyer says.

Ottawa is demanding that Washington divulge the whereabouts of Maher Arar[0], a 32-year-old Canadian citizen arrested during a stopover at New York's Kennedy airport on Sept. 26 as he was travelling to Montreal from Tunisia.

Amal Oummih, an Arabic-speaking immigration lawyer based in New York, said yesterday she may have been the last contact the family had with Mr. Arar[0] before he disappeared.

Ms. Oummih spoke to Mr. Arar[0], who was being held at Brooklyn's Metropolitan Detention Center, on Oct. 5 at the request of his family.

"Basically, everything happened so fast that before we could take the next step we couldn't find him and then we heard he was deported."

Ms. Oummih said Mr. Arar[0], a telecommunications engineer, told her that U.S. authorities had asked him to sign a document permitting his deportation to Syria but that he had refused. "He was very, very concerned and worried that he was going to be deported to Syria."

She reassured him that her understanding of U.S. law was that if he was going to be deported he could choose to go to Canada. She also told him that if he feared being deported to Syria he would get a chance to argue his case.

But Ms. Oummih said that opportunity never arose, and Mr. Arar[0] was later interrogated by U.S. officials with no lawyer present. She said she and another New York lawyer involved in the case had no real chance to be present because they were notified by voice-mail message on a Sunday that

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 11 MAR 2009 200706444

the interview was being held that evening.

She said a U.S. Immigration and Naturalization Service document she examined indicated that Mr. Arar[0] was being detained "for allegedly being a member of a terrorist organization, to wit al-Qa'ida."

Mr. Arar[0] "was in very, very bad shape, from my observations," Ms. Oummih said.

"He was very emotional, very scared. He was not doing well at all. I was very concerned about him. . . . He didn't seem to know what was going on. He was very disoriented. He seemed very confused. He was very, very emotional. It wouldn't be an exaggeration to say that about half the time I just had to let him sob and cry."

Riad Saloojee of the Council on American-Islamic Relations Canada has said Mr. Arar's[0] treatment is a breach of Canadian sovereignty.

Mr. Saloojee said Mr. Arar[0], father of two young Canadian-born children, could face severe punishment in Syria because he avoided compulsory military service before leaving the country for Canada as a teenager.

Both Mr. Arar[0] and his wife, Monia, got their postsecondary education in Canada.

Reynald Doiron, a spokesman for the Department of Foreign Affairs, said an INS official provided incomplete information when he contacted the Canadian government about the case on Saturday.

Mr. Doiron said as far as Ottawa knows Mr. Arar[0] was not charged with any offence.

"We need to find out, since he was transitting in the U.S. on a Canadian passport, why it is he was removed to an undisclosed country from the United States."

[Description of Source: Toronto The Globe and Mail (Internet Version-WWW) in English -- centrist daily; leading national newspaper of record]

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INFORMATION MEMORANDUM
S/ES

SENSITIVE BUT UNCLASSIFIED

TO: The Secretary

FROM: L – William H. Taft, IV

SUBJECT: Follow-up from Confirmation Hearing – Detainee Transfers

During your confirmation hearing on January 19, Senator Dodd probed U.S. practices in transferring detainees from U.S. control to third country control, particularly for purposes of interrogation. He cited recent press accounts alleging the transfer of prisoners, primarily by the CIA, to countries where it is believed they were later tortured during interrogation. An article in the New Yorker this week entitled "Outsourcing Torture" details similar allegations.

During your hearing, Senator Dodd also asked your views on a legislative proposal he made last year to require the Secretary of Defense to maintain records of all transfers in order to prevent these renditions from occurring or, at least, determine how the detainees are being treated after transfer. During the hearing, you demurred on the record-keeping proposal "for now" and indicated that you would be prepared to discuss these issues later in closed session.

Attached are background papers on detainee transfers, including the Dodd Amendment and a letter on the subject dated June 25, 2003 from DoD General Counsel Haynes to Senator Leahy.

Tab A– Background on Dodd Amendment Concerning Detainee Transfers

Tab B – Background on Detainee Transfers, including Letter from DOD General Counsel William J. Haynes II dated June 25, 2003

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 04 SEP 2008 200706444

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Drafted: L/PM-JoAnn Dolan X76862
Doc. No. 121090
L Control No: 2005-048

Cleared: L-SMWitten
L/PM-JLDorosin
L/HRR-RKHarris

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REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 04 SEP 2008 200706444

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HUMAN RIGHTS WATCH

FEBRUARY 2007 VOLUME 19, NO. 1(G)

Ghost Prisoner

Two Years in Secret CIA Detention

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Summary

When Marwan Jabour opened his eyes, after a blindfold, a mask, and other coverings were taken off him, he saw soldiers and, on the wall behind them, framed photographs of King Hussein and King Abdullah of Jordan. He was tired and disoriented from his four-hour plane flight and subsequent car trip, but when a guard confirmed that he was being held in Jordan, he felt indescribable relief. In his more than two years of secret detention, nearly all of it in US custody, this was the first time that someone had told him where he was. The date was July 31, 2006.

A few weeks later, in another first, the Jordanians allowed several of Jabour's family members to visit him. "My father cried the whole time," Jabour later remembered.

Marwan Jabour was arrested by Pakistani authorities in Lahore, Pakistan, on May 9, 2004. He was detained there briefly, then moved to the capital, Islamabad, where he was held for more than a month in a secret detention facility operated by both Pakistanis and Americans, and finally flown to a Central Intelligence Agency (CIA) prison in what he believes was Afghanistan. During his ordeal, he later told Human Rights Watch, he was tortured, beaten, forced to stay awake for days, and kept naked and chained to a wall for more than a month. Like an unknown number of Arab men arrested in Pakistan since 2001, he was "disappeared" into US custody: held in unacknowledged detention outside of the protection of the law, without court supervision, and without any contact with his family, legal counsel, or the International Committee of the Red Cross.

The secret prison program under which Jabour was held was established in the wake of the September 11, 2001 terrorist attacks, when US President George W. Bush signed a classified directive authorizing the CIA to hold and interrogate suspected terrorists. Because the entire program was run outside of US territory, it required the support and assistance of other governments, both in handing over detainees and in allowing the prisons to operate.

Pakistan's help was crucial to the program, more crucial than that of any other country. The Pakistani authorities delivered hundreds of prisoners to the United States—some ending up in military custody, others in CIA custody—and it also allowed the United States and other countries to interrogate many of them on Pakistani soil. As the US State Department's annual human rights report for 2004 describes, security forces in Pakistan "held prisoners incommunicado and refused to provide information on their whereabouts, particularly in terrorism and national security cases." What the report does not say is that the Pakistani authorities carried out these abuses with the full knowledge and participation of American intelligence agents. Indeed, the degree of US control may have been so great, in some cases, that it constituted a form of proxy detention.

The possible use of proxy detention facilities is of especial concern now. In early September 2006, 14 detainees were transferred from secret CIA prisons to military custody at Guantanamo Bay. In a televised speech on September 6, President Bush announced that with those 14 transfers, "there are now no terrorists in the CIA program." But he said nothing about what had happened to a number of other prisoners who, up until that point, were believed to have been in the unacknowledged custody of the CIA.

One concern is that the US might have transferred some of the remaining prisoners to foreign prisons where for practical purposes they remain under CIA control. Another worrying possibility is that prisoners were transferred to places where they face a serious risk of torture: indeed, some of the missing prisoners are from Algeria, Egypt, Libya, and Syria.

In a letter to President Bush published in conjunction with this report, Human Rights Watch has provided a list of 16 people who were believed to have been held at one time in secret CIA prisons, and whose whereabouts are currently unknown. Jabour saw or spoke to a number of those people while he was held. The letter also includes a list of 22 people who were possibly held in such prisons, and whose whereabouts are similarly unknown. A copy of the letter is included as an appendix to this report.

Human Rights Watch has called upon the Bush administration to provide a full accounting of every person that the CIA has held since 2001, including their names,

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the dates that they left US custody, and their current locations. If they are being held in proxy detention in a third country, the US government should either transfer them to the United States for prosecution in US courts, or order their release.

To leave these men in hidden limbo violates fundamental human rights norms. It is also extraordinarily cruel to their families. The wife of a man who has not been seen since he was believed to have been taken into CIA custody told Human Rights Watch that she has had to lie to her four children about her husband's absence. She explained that she could not bear telling them that she did not know where he was: "[W]hat I'm hoping is if they find out their father has been detained, that I'll at least be able to tell them what country he's being held in, and in what conditions."[1]

The fate of the missing detainees is one of the main unanswered questions about the CIA's secret prison program, but it is not the only one. Much is still unknown about the scope of the program, the precise locations of the detention facilities, the treatment of detainees, and the cooperation and complicity of other governments. Although confidential sources, including CIA personnel, have described some aspects of the program to journalists, and a small number of former detainees have recounted their experiences, many details of the program remain hidden.

What follows is the most comprehensive account to date of life in a secret CIA prison. Human Rights Watch interviewed Marwan Jabour over several days in December 2006, less than a month after he regained his freedom. He spoke clearly, precisely and in great detail about his experiences, although it was evident that he found some memories upsetting. His testimony is extremely valuable both in describing his own experience of secret detention and in providing information about others who were held with him.

Jabour was arrested in Lahore, he believes by the Pakistani intelligence services, and the worst physical abuses he endured took place while he was in their custody. He alleges that they beat him severely, burnt him with a red hot iron, and tied a tight rubber string around his penis, causing enormous pain. On this third day in Pakistani custody, three people he believes were Americans questioned him; the

[1] Communication to Human Rights Watch, January 24, 2007.

following day he was transferred to a secret facility in Islamabad. This facility had both US and Pakistani personnel, but the Americans seemed to be in charge.

Both in the Lahore facility and in Islamabad, Jabour endured many days of forced sleeplessness and forced standing, with little respite. Twice he collapsed, falling unconscious.

After a month in Islamabad he was flown to a secret prison, which he believes was in Afghanistan, where all of the personnel (except possibly the interpreters) were American. There, he was held completely naked for a month and a half, filmed naked, and interrogated naked. He was chained tightly to the wall of his small cell so he could not stand up, placed in painful stress positions so that he had difficulty breathing, and warned that if he did not cooperate he would be put in a suffocating "dog box."

As the months went by, some aspects of Jabour's treatment improved: his clothes were slowly returned; the physical mistreatment ended; he was placed in a larger cell; he got better food. Other aspects, however, changed slowly or not at all. He spent nearly all of his time alone in a windowless cell. He went a year and a half without a glimpse of sunlight. He wore leg irons for a year and a half. Worst of all, he spent more than two years with almost no contact with any human being besides his captors. Although he worried incessantly about his wife and three young daughters, he was not even allowed to send them a letter to reassure them that he was alive.

Jabour acknowledges that in 1998 he trained in a militant camp in Afghanistan in the hope of fighting in Chechnya, and in 2003 he helped Arab militants and others who had fled Afghanistan for Pakistan. But whether he violated the law should have been a matter for the courts; it was not a justification for abuse.

International human rights law prohibits enforced disappearance: basically, the holding of persons in unacknowledged, incommunicado detention. Such persons, who remain "disappeared" until their fate or whereabouts become known, are also more likely to be subjected to torture and other cruel, inhuman or degrading treatment.

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The US government has long condemned these abusive practices in its policy statements and annual human rights reports; its own use of them severely undermines its moral authority on human rights. Even in wholly practical terms, its reliance on secret detention and abusive interrogation is wrong. The use of these techniques taints any testimony obtained from the persons held, making it difficult to prosecute the perpetrators of terrorist acts in fair proceedings, and to provide the public accounting of these crimes that the victims of terrorism deserve.

Key Recommendations

The US government should:

- Repudiate the use of secret detention and coercive interrogation as counterterrorism tactics and permanently discontinue the CIA's detention and interrogation program;
- Disclose the identities, fate and whereabouts of all detainees previously held at facilities operated or controlled by the CIA since 2001.

Other governments should:

- Refuse to assist or cooperate in any way with CIA detention, interrogation and rendition operations, and disclose any information that they may have about such operations.

The Case of Marwan Jabour

Marwan Ibrahim Ali al-Jabour is a 30-year-old Palestinian who was born in Amman, Jordan, and grew up in Saudi Arabia. In 1994, he moved to Pakistan to continue his studies, and in 1999 he got married. He and his wife have three young daughters.

Detention in Lahore

> The beatings were difficult, but they weren't the worst part .... [The worst] was the fear that I would never see my family.
> —Marwan Jabour, describing how he felt when he was taken into detention

Jabour was arrested after having dinner in Lahore, Pakistan, at the home of a friend, a professor at a university in Lahore, on May 9, 2004. At about 9 p.m., when he was pulling his car out of his friend's garage, a man on the street asked him about his friend. As Jabour responded, he was suddenly surrounded by a large group of Pakistani men in civilian clothing. The men grabbed him and cuffed his hands. They put him in a car and tried to put a sack over his head, but he fought back and they left the sack off.

They also arrested the friend whose house he was visiting, and another friend who was there. All three men were taken to what Jabour believes to be a Lahore station of Pakistan's Inter Services Intelligence (ISI), the country's powerful military intelligence agency; the station was close to the Panorama Centre.[2]

Jabour said that as soon as the men got him inside the station, they started beating him badly. "There were seven or eight officers in the room with me," Jabour told Human Rights Watch. "If I said I didn't know anything, they beat me: they slapped me, kicked me, and hit me with a stick. They insulted and threatened me. They kept me awake all night long."

[2] Panorama Centre is a well known market in Lahore.

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Jabour said that the men also used an electric prod on him, continually questioning him about the whereabouts of suspected terrorists.

At about 6 a.m., he said, they sent him to a cell, leaving him there with shackles on his legs. There were three small cells in a row together. Jabour was alone in his cell, and his two friends were in the other cells. "They had been beaten too, but not as badly as I was," Jabour said. "I was bruised from the beating."

From the questions that Jabour was asked, he knew that his contacts with Arab militants had aroused official interest. Jabour told Human Rights Watch that he had trained in a militant camp in Afghanistan for three months in 1998, had returned to Afghanistan for a couple of weeks after the American bombing campaign started, and in 2003 had assisted Arabs and others who had fled Afghanistan for Pakistan. Because he had lived in Pakistan since 1994 and had studied at a university there, he spoke Urdu fluently and had local contacts. His knowledge of the local environment meant that he was able to arrange for people to get medical care and stay in local homes. Jabour claims that he assisted "unaffiliated mujahideen" —those who did not belong to al Qaeda or other armed groups—and that he was never a member of a terrorist group or in any way involved in terrorist activities.[3]

When the interrogators returned to his cell an hour or two later, they wanted the details of Jabour's activities, including the names of militants he had met, and the addresses where those who had fled Afghanistan were staying. They had already found his cell phone and a diary with phone numbers. They took Jabour back to the interrogation room, where an interrogator was waiting for him. They told him to start making phone calls for them. The police began shouting and beating him. They threatened to arrest his wife. Jabour said: "They told me: 'We'll keep her on her knees in front of you.'" He described the scene:

> We were in a specially made room with iron rings on the wall, and they chained my hands to the ceiling. They also tied a rubber string on my penis that didn't allow me to pee. They left it on the whole time I was with them, except sometimes they would briefly undo it. It was terribly painful.

Jabour said that because he was kept from urinating for nearly four days, except for few brief moments of respite, he now has a problem with his kidneys. He has to urinate frequently, and sometimes there is blood in his urine.

Early in the morning on his third day of detention in Lahore, Jabour said, three people who he believes were Americans came to interrogate him: two women and a man. He was blindfolded the whole time they interrogated him, but he said that their American accents were unmistakable. (They interrogated him in English.) "They told me, 'Marwan, you're at a crossroads: you could spend the rest of your life in prison, or you could cooperate with us against the terrorists. You could be a rich man.'"

Jabour said that nobody physically abused him while the Americans were present, although sometimes he was made to kneel on the floor while he was being questioned. When the Americans once asked him about the bruises on his face, caused from his beating by the Pakistani police, he told them sarcastically, "Oh, we spent a very nice night together, your friends and I."

During the interrogation, the two women did most of the talking. One was friendly, and made some suggestive comments to him; the other was very angry and swore a lot. The angry woman told him that there was a huge American man waiting for him in prison.

The Americans stayed at the police station until about midnight. After the Americans had left, the Pakistani police removed his clothes and showed him a red hot metal rod.

One of them asked me: "Where do you want to be hit with it?" I begged him not to. He burnt my left arm, just above the elbow, and my left leg. I got no medical care for the burns, which bubbled up. They took a month or so to heal. But this seemed minor compared to all the other things in my life at the time.[4]

[3] Although Human Rights Watch cannot corroborate these statements, the fact that in 2006 the US authorities released Jabour without charge suggests that they did not believe he was implicated in acts of terrorism.

[4] A Human Rights Watch researcher was shown the light scars on Jabour's arm and leg when she interviewed him in December 2006.

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Jabour said that on the morning of the fourth day, the Pakistanis transferred him by car to another facility. He had been kept awake nearly the whole time he was detained in Lahore. He estimated that he was allowed a total of about three to four hours' sleep during the nearly four days he was held.[5]

Islamabad: Proxy Detention

> I think it had once been a private home. It was a place of secret detention .... It seemed to me that this place was controlled by Americans. They were in charge.
> —Marwan Jabour, recalling his detention in Islamabad.

Jabour described the detention facility he was transferred to as a "villa": a large private compound that had been renovated to hold prisoners.[6] He was blindfolded when he arrived so he did not see it from the outside, but he heard the Pakistanis who were in the car with him say that they were going to Islamabad.[7] The drive from Lahore took three-and-a-half to four hours.[8]

[5] Moazzam Begg, a British citizen who was imprisoned for two years at Guantanamo, described how when he was in ISI detention in early 2002, he witnessed other prisoners being beaten and deprived of sleep for days. Moazzam Begg, *Enemy Combatant: A British Muslim's Journey to Guantánamo and Back* (London: The Free Press, 2006), pp. 15-17.

[6] He was held on the ground floor, but he was under the impression that the building had a second story.

[7] The other prisoners who Jabour met in the facility confirmed that it was in Islamabad. Moreover, there are many other accounts of "disappeared" prisoners have been held in Islamabad or brought there for questioning. For example, a recent letter describing people recently released from secret detention in Pakistan states that among the detention centers where people were held was "a Safe House near Islamabad Airport." Letter from Amina Masood, Defense of Human Rights, to the Honorable Chief Justice of Pakistan, December 19, 2006. See also "FBI questions al-Qa'eda man in Pakistan," *Daily Telegraph* (U.K.), March 17, 2003 ("[Officials] said Yasir al-Jaziri, a Moroccan educated in America, was moved to the capital, Islamabad, for questioning after he was captured in a raid"); and "9 aides to Osama Yousef arrested," *Daily Times* (Pakistan), August 12, 2003 ("Sources also said Osama Bin Yousaf had been taken to Islamabad where a foreign investigation team would see him").

Abdullah Khadr, a Canadian citizen arrested in Pakistan in October 2004, states that he too was held in secret detention in Islamabad, and was interrogated by both American and Pakistani personnel. See Affidavit of Abdullah Khadr, United States v. Khadr, Action No. EX0057/05, Superior Court of Justice, Toronto, 2006, pp. 25-27.

Moazzam Begg states that immediately after being arrested in early 2002 he was held in a house in Islamabad. He described it as a "very grand" house, like the house of a wealthy person, in what he thought was the G10 district of the city. Although he was held in a room, he saw several cells in another part of the house. Moazzam Begg, *Enemy Combatant*, pp. 6-13.

Finally, at least one detainee who is currently being held at Guantanamo stated in an administrative hearing that after being arrested he and a few others were brought to Lahore, interrogated there by American civilians, and then brought to Islamabad, where they spent two months in detention before being transported to Bagram air base in Afghanistan. Fahmi Abdullah Ahmed (ISN 688), Combatant Status Review Tribunal Transcript, US Department of Defense, set 4, pp. 425-26 (released March 3, 2006). Ahmed was arrested some time after February 2002; it is unclear when.

[8] This is roughly the time it takes to make the trip using the Lahore-Islamabad motorway.

The forced sleeplessness that Jabour endured in Lahore continued in Islamabad. Jabour told Human Rights Watch that during his first seven days in Islamabad his captors did not allow him to sleep, except for the occasional hour-long doze. "It was a continuous investigation," he said.

"The Americans were almost always around," he told Human Rights Watch. "I wasn't wearing a blindfold after I arrived there, so I could see them. I saw three American women and a man, plus about five or six Pakistanis." Speaking of the Americans, he said: "I think it was the same man who questioned me in Lahore, and at least one different woman." Jabour said that the Americans were dressed in regular Western clothes, and one of the women said that her name was Mary. They did not say what government agency they were from.

Jabour said that the Americans appeared to be in charge of the facility. They would question him during the day, sometimes showing him photos of suspected militants, and after midnight the Pakistanis would take over. At first Jabour was held alone in a cell that was like a room, and was attached to the wall by a chain about two meters long.

"The Pakistanis beat me almost every night," he said. "Once they threatened to pull out my fingernails. Other times they would be friendly, and promise to release me if I talked." He was forced to stand for long periods.

The Americans did not beat Jabour, but they made him stay awake. "They would say: 'If you cooperate, we'll let you sleep.' And: 'If you work with us, we'll make you really rich.' They never threatened to take me to Guantanamo, but they did say that I'd be taken away somewhere and would never see my children again. I was thinking that my life was finished."

"I was thinking about my oldest daughter the whole time," he said. "I thought that I'd never see her again. I was afraid that I'd be sent to Guantánamo."

Jabour told Human Rights Watch that all of the Americans he saw at the facility were relatively young: in their late twenties or early thirties. He said that the man who questioned him was about age 28-30, with thinning hair, and the woman who called

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herself Mary was tall, with medium length, light colored hair. Another woman was always angry and swore a lot. (Jabour believes this is the same woman who swore at him in Lahore.) Once, in Arabic, she told Jabour "Fuck Allah in the ass."

Jabour collapsed twice during this first week in Islamabad; he believes that he had two heart attacks. The first time was on his fourth day of detention; the second time was at the end of seven days. "I fell unconscious both times, with my heart pounding out of my chest," he said. The doctor, a Pakistani, checked his heart and gave him something called "glivet."

After Jabour's first collapse, they moved him to a cell with another prisoner, an Algerian named Adnan, who took care of him. (Jabour knew him as Adnan "al-Jazeeri," or Adnan the Algerian.) Jabour was in such bad shape that he could not walk or feed himself. He was allowed to sleep for about four hours.

After his second collapse, three days later, he was allowed an entire day's rest. "After the second collapse, I was hysterical," he said.

A number of other prisoners were held in the cell block with him, which he described as a new addition to the main house. The cell block was stiflingly hot and the air was stale. There were two facing rows of three cells, each of which had a barred door facing the corridor. In front of the barred doors were wooden doors, but they were almost always left open. When the prisoners were walked down the corridor to use the toilet, they could see each other.

Jabour said that one cell held a 16-year-old boy named Khalid. Khalid, who was Egyptian, said that he had been arrested six months previously during military operations in Waziristan, in northwest Pakistan bordering Afghanistan. He was apparently badly injured during his arrest, and Jabour could hear him crying and moaning in pain at night. "He was suffering badly," Jabour recalled. Another 16-year-old who was held in the facility was an Iraqi named Tha'er, who said that he had been arrested in mid-2003. Tha'er told Jabour that he had an Australian travel document, and that the Australians had visited him the previous year, interrogating

him and making a video of the interrogation. Tha'er also said that Abu Zubaydah and members of his group had been held in this same facility.[9]

The facility also held a Yemeni detainee who had been arrested in late 2003; a Libyan named Ayoub who had been arrested in early 2004; an Afghan known as Mohammed al Afghani, who was born in Saudi Arabia, and a Palestinian who had been arrested in early 2004. The latter two prisoners had been transferred from Peshawar prison to Islamabad the same day that Jabour had arrived. There were also three Pakistanis who were accused of involvement in the attempted kidnapping of an ISI general; they said that they had been held for a year without being charged. A fourth Pakistani was also held there; he was released a few days after Jabour arrived. Jabour said that this fourth man had been badly tortured: "you can't imagine how much they were hurting him."

Jabour said that the Pakistani prisoners told him that a Pakistani named Majid Khan had previously been held there with them.[10]

Jabour was held in the Islamabad facility for more than a month. He was never brought before a judge, charged with any offense, or allowed to see a lawyer. While he was there, another prisoner, the Yemeni, was moved from the facility, supposedly for Yemen. The day before Jabour was transferred, three other prisoners—the two 16-year-old boys, and the Algerian man—were taken away.

[9] Zine Abd el Dine, aka Abu Zubaydah, is currently incarcerated at Guantanamo. He was among the 14 detainees transferred from CIA custody in early September 2006. It is believed that he was badly tortured during his detention. See, for example, Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of its Enemies since 9/11*(New York: Simon & Schuster, 2006), pp. 115-18.

[10] Majid Khan is currently incarcerated at Guantanamo. He was among the 14 detainees transferred from CIA custody in early September 2006.

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Secret CIA Detention

> It was a grave.
> —Marwan Jabour, recalling his two years in secret CIA detention.

Jabour was transferred out of the Islamabad facility on the evening of June 16, 2004. The Pakistanis brought Jabour and three other prisoners (the Palestinian, the Afghan, and the Libyan) to the airport. The prisoners were blindfolded; their hands were cuffed, and their legs shackled. Jabour said that the drive to the airport took less than 20 minutes.

Before he was put on the plane, Jabour was led to the bathroom, where the Americans took off his blindfold. "I saw Americans in front of me, talking in sign language. A doctor was there, and he took my blood pressure and gave me an injection. I knew it was the end of my life." Then the Americans put a sack over his head and changed his handcuffs. The injection made him a bit woozy, but he did not pass out.

Jabour said everyone entered the plane through the back, using what seemed like the door of a military plane. The plane seemed fairly small, like it could hold perhaps 20 to 30 people. The prisoners were on one side, with a seat between them. Their hands were cuffed behind their backs, and their legs were cuffed and shackled to the floor. There were four prisoners and about a dozen other people on the plane.

Jabour believes that the secret prison facility he was brought to was located in Afghanistan. He enumerated several reasons for this belief. First, the time spent flying: the flight lasted a maximum of two hours.[11] Second, the food served at the prison: during the Eid al-Fitr holiday,[12] the prisoners were given typical Afghan food, and near the end of his stay they were fed typical Afghan bread with regular meals. Third, facts gleaned from his captors: an officer at the prison once let slip that after the earthquake in Pakistan relief supplies were flown "from here" to Pakistan.[13] Fourth, the weather: it was extremely cold in the winter (colder than in most parts of Pakistan); one wall of his cell would be freezing to the touch. Fifth, the languages: the first director of the prison spoke fluent Farsi (Persian), suggesting that the prison was in a region where such language skills were useful.[14]

Jabour said he thinks that everyone at the prison was American—the guards, interrogators, prison directors, and medical personnel—except possibly the Arabic-speaking translators. Not only did the prison staff say they were American—informing Jabour that he was in U.S. custody—they spoke American-accented English.

The First Six Months

After the plane landed, the transfer team put Jabour and another prisoner in the back of a jeep, handling them roughly. The jeep then drove down an unpaved road to the prison.

When the group reached the prison, two guards brought Jabour inside. After they put him in a cell, by himself, they cut off all his clothes, leaving him naked. They released one of his hands from the handcuffs, and cuffed the other hand to a ring in the cell wall. It wasn't possible for him to stand because the ring was near the floor, and he was attached to it via a short chain.

The cell was just over 1 meter wide by almost 2 meters long. It was roughly the size of a single mattress, but it did not have a mattress. The only objects inside the cell were a bucket and two coarse blankets.

The cell had two video cameras near the ceiling, too high for a standing person to reach. There were also speakers and a listening device built into the wall.

[11] This is more than enough time to get to Kabul from Islamabad.

[12] The Muslim holiday of Eid al-Fitr (the Festival of Fast-Breaking) is a three-day celebration at the end of Ramadan.

[13] The US military sent relief flights from Afghanistan to assist people affected by the 2005 earthquake in Pakistan. See Embassy of the United States in Islamabad, Press Release, "250th Relief Flight Unloaded by the U.S. Military," November 29, 2005.

[14] Farsi and closely related languages are spoken in much of Afghanistan in addition to Iran.

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This cell, as well as other cells that Jabour saw later, had double steel doors that were very close to each other. (In other words, to exit the cell it was necessary to go through one door and then the next.) The door that opened into the cell had a small glass window (about 40 cm by 30 cm) and a food slot below. Except for the door, the cell had no windows, but the lights were left on all the time, including at night.

Jabour said that he thought the structure of the building was old, but the cells were new and modern. Everything was metal and seemed very new.

The guards let Jabour sleep the first night (or let him try to sleep) and returned early in the morning. No one said a word to him, but they shaved his head, and also shaved off his beard and moustache. Then, without giving him any clothes to wear, they took him to an interrogation room. In retrospect, Jabour finds it hard to believe that he was paraded around naked in front of a group of men and women, but at the time he was so disoriented and upset that his lack of clothing seemed relatively minor.

The interrogation room was a relatively big room and it held about ten people, including guards and people who appeared to be doctors. Some members of the group were women. They put him a chair, shackling his hands and legs to the chair. A doctor came and another person made a video recording of Jabour's body.

A bearded man, whom Jabour had seen at the airport in Islamabad, began to talk in American-accented English. He said he was the "emir" (director) of the facility. He said Jabour had only one option: to cooperate. He promised that if Jabour cooperated, he would be treated well.

During this interrogation and countless future interrogations, his questioners asked about Jabour's activities in Pakistan, the people he had met, and his knowledge of terrorist groups. He was shown many hundreds of photos, some of people who were obviously in detention (they were wearing prison jumpsuits and showing a plaque with numbers).

During the first six months that Jabour was being interrogated, a huge, muscular man—whom Jabour called a "Marine" because of his build—would sometimes stand

behind the interrogator and act intimidating. Jabour was also frightened by an object that the interrogators called the "dog box." It was a wooden box, about 1 meter by 1 meter in size, and the Americans told him that they put people inside it. "They said that KSM [Khalid Sheikh Mohammed] had spent some time in the dog box and then he talked. They kept threatening me: 'We could do this to you.'"[15]

Jabour said that he was slapped a few times at the beginning of his stay, but was not beaten while held in the secret facility. Instead, when the interrogators felt he was not cooperating, they would chain him up in extremely uncomfortable positions, which would become painful over time.[16] His hands would be attached to his ankles, and to the floor, and he would be left like that for a half hour to an hour. "At times it was difficult to breathe," he explained. In all, he estimates that he was put in these stress positions a total of 15 to 20 times.

Jabour said that during the first six months he was held at the secret prison they would sometimes play rock music at ear-blasting levels, which could last an hour, a day, a few days, or even a week. "It was loud, awful music," he said, "like the soundtrack from a horror movie."

Besides the music, there was also a constant, low-level, white noise; Jabour said that it sounded like a generator. Jabour thinks that one of the main reasons for the noise was to prevent prisoners from communicating with each other.

Two weeks after Jabour arrived at the prison, he was provided with a Koran. After three-and-a-half months, he was given a prayer mat.

Jabour said that the food was awful. It was almost all canned food (often tuna or sardines): uncooked, very bland and bad-smelling. "It was like dog food," he

[15] KSM is a shorthand used by US officials for Khalid Sheikh Mohammed, alleged to be the architect of the September 11 attacks. Mohammed was held in secret CIA custody for three-and-a-half years. He was among the 14 detainees transferred from CIA custody to Guantanamo in early September 2006.

[16] Numerous detainees at Guantanamo and elsewhere have reported being put in "stress positions" as punishment. In December 2002, Secretary of Defense Donald Rumsfeld issued new interrogation rules for Guantanamo, authorizing "stress positions," removal of clothing, prolonged isolation, sensory deprivation, and forced grooming (like forced shaving of facial hair), among other interrogation techniques. In September 2003, Army Lt. Gen. Ricardo Sanchez authorized new interrogation techniques for use in Iraq, including the use of stress positions. Memorandum from Lt. Gen. Ricardo Sanchez to Commander, US Central Command, regarding "CJTF-7 Interrogation and Counter-Resistance Policy," September 14, 2003.

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remembered. During his first several months at the prison, his weight dropped considerably. Whereas he had previously weighed 93 kilograms, his weight fell to 58 kilograms. (They weighed him every week.) "I felt weak, dizzy, unbalanced all the time, like I was on a ship."

Jabour received his clothes back piece by piece over time. First, after a month and a half at the prison, he was given a pair of pants. Then, after about three-and-a-half months, he was given a tee-shirt. Finally, after about eight months, he was given a pair of shoes.

Jabour told Human Rights Watch that his legs were left shackled to each other for one and a half years. During the time his legs were shackled, he could only take small steps; the chain running from one of his ankles to the other was about 75 centimeters long. Whenever he was taken out of the cell and brought to another room for interrogation, he was blindfolded.

The Remaining 19 Months

Jabour's treatment improved considerably after the initial six-month period of detention, and continued improving in stages after that. The first major change was a transfer to a much larger cell.

To bring Jabour to the new cell, the guards blindfolded him and walked him around a long, complicated route, in and out of different rooms, confusing his sense of direction. When they reached the cell and removed his blindfold, Jabour found himself in a room that was about 5 meters by 7 meters in size, with a mattress, a pillow, a sink, some books of Koranic interpretation, and some strawberries. The big cell was also quieter than his previous, small cell, and the lights were turned off from 11 p.m. to 4 a.m.

Jabour was kept in the new cell for three days, then he was sent back briefly to his previous cell. "They told me I could take one thing with me," Jabour recalled. "I wanted both the mattress and a book, but I chose the book."

On December 18, 2004, Jabour was moved to a large cell in a separate building. When the guards moved him to that building, they took him outside; he estimates that the second building was 70 meters from the first one. His new cell number was B1.[17] Like his first cell, it had no windows and no natural light.

While he stayed in the second building, he was allowed to shower once a week, on Saturdays.

Not long after he was moved into the second building he was given a watch, a calendar and a prayer schedule. He remembers that in summer the dawn prayers would be held as early as 3:25 a.m., whereas in winter the dawn prayers would be as late as 5:15 or 5:25 a.m., times that correspond to prayer times in Afghanistan.[18]

Except for interrogations, solo exercise, and his weekly shower, Jabour spent all his time confined within the four walls of his cell. With nothing else to occupy his mind, Jabour poured his energy into decorating his cell. After a year had gone by, the Americans gave him a map of the world, and later they gave him pictures of fish and animals. "I had asked them for a plant, which they didn't give me, so I drew a big tree, with leaves colored on it," he remembered. "I cut it out and taped it up on the wall." He also made grass out of strips of paper. "I drew flowers, and I stood on my chair and stuck them to the ceiling." Sometimes the Americans would take photos of his cell.

A year into his detention, the Americans started allowing Jabour to watch a movie once a week. The facility had a list of 200-250 films, including big-budget Hollywood films, documentaries, cartoons, sports, horror movies, and wrestling.

After a year and a half, an officer taught Jabour how to play chess. Jabour drew a chess board and made chess pieces out of paper. He also played checkers and cards with some of the women interrogators. About four months before he left, he was given a computer chess set, and a small video game.

[17] He was never told the cell number of his first cell.

[18] See Islamic Finder (http://www.islamicfinder.org/) (providing prayer times around the world).

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Jabour spent much of his time reading. The prison had a big library with hundreds of books and finally, by the time he left, more than a thousand books in a variety of languages. The majority were in Arabic, but there were also books in languages such as Urdu, Persian, Indonesian and English.

One of the most momentous occasions for Jabour was when he was allowed to see sunlight. He had spent a year and a half in captivity without even a glimpse of natural light. One day the Americans opened up a skylight in his building. "They brought me a chair and let me sit under the skylight," he remembered. "I was so happy. I joked with them, pretending to call outside, 'Help! Someone help me! Let me out!'"

The second building he was held in had an exercise area, about 5 by 6 meters in size, in which Jabour was allowed to kick a soccer ball by himself. Near the very end of Jabour's captivity, he was allowed to use a large gymnastics room: about 8 by 15 meters in size. The ceiling of the room was quite high up, and for a short while one of the prison subdirectors uncovered windows on the ceiling, through which Jabour could see sunlight and the sky. Jabour expressed warm feelings for the person who instituted these improvements, describing him as "a very good man."

The food also improved toward the end of his more than two-year confinement. He started receiving Afghan bread with his meals, and toward the very end his meal would arrive heated. He was also very occasionally given Western food like pizza and hamburgers, as well as cookies and candy.[19]

Jabour was never permitted to contact his family, the hope for which never left him. "I told the kind 'emir' [a prison subdirector] that I was worried about my family," Jabour recalled. "He said, 'There's some things we can do, but some things we can't do.' He said he couldn't allow me to contact them."

[19] He remembers receiving chocolate bars like Snickers, Twix, Bounty, and Kit-Kats.

Secret Prison Staff

Jabour estimates that in the more than two years he was held at the prison, he saw a total of about 70 staff, consisting of some 25 guards and 45 civilian staff, including interrogators, supervisory staff, three or four doctors, and a few psychologists. He said everyone was American except for the translators, who he said were mostly Arabs. (They could have been Arab-Americans.) He said there was an Iraqi translator, three Egyptians, and a Lebanese woman.

The prison had three "emirs," or directors, during this period. The first was a bearded man, who Jabour estimates was about 40 years old; the second was a man with a shaved head who was about 38 years old (with whom Jabour played chess on occasion); and the third was an older man, about 55, who arrived in May 2006. There were also five people who seemed to have the position of subdirector. Two of them called themselves Mr. Charlie and Mr. Warren.

Jabour said that every few months he would see a psychologist. One was a man about 50 years old. Another was a woman about 55 years old; Jabour said that he spent an hour with her on one occasion.

The translators, the doctors, and the interrogators all wore normal civilian clothing. The guards, who were all men, wore black uniforms and gloves, and had black plastic masks covering their eyes. They did not carry weapons and they did not speak, except at the very end of Jabour's imprisonment, when they spoke to him in American-accented English.

Other Prisoners

Given the size of the prison where he was held, Jabour estimates that it had a capacity of 30-35 detainees. His estimate is further supported by the hundreds of books and videos in the prison library, and the large number of personnel who worked there.

Nearly all of Jabour's contact with other prisoners occurred in the first month of his captivity. He estimates that there were about 12-15 detainees held in the same area

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as him during that time. "They used to bang hard on our cell doors when they brought our meals," he said. "At the beginning, they knocked on about 12-15 doors."

Jabour found a name written on the wall in his cell: Marwan al-Adeni. He also heard what he described as "terrible shouting"—"someone saying 'Help! Help!'"—during the first three days. On the third day, in a brief moment when the white noise had stopped (Jabour believes that it was a break between two generators), Jabour heard someone call out to him in Arabic: "Who are you? Don't be afraid, talk." Although Jabour had been warned not to talk to anyone, he conversed with this prisoner whenever the generator was quiet. The man said his name was Marwan al-Adeni, and that he had been held there for two months. He said that he had been arrested the previous year, and that the Americans had kept him in a secret prison that had Russian guards.[20] He said that he and six other prisoners had been brought together from that prison to the present one.

Jabour said that the two of them spoke every day for three days, until a guard came and punished them: he left Jabour shackled for an hour is a painful stress position. Jabour never spoke to Marwan al-Adeni again, but a year later, he found his name written on a mattress, and once he found his name written on a shirt. Also, during an interrogation when Jabour was first in custody, an interrogator showed him a photo that he said was of al-Adeni.[21]

Jabour also heard other prisoners talking during this time, again in the brief moment when it seemed like the generators were being switched. Several people gave their names, including Hudaifa, Adnan, Abdul Basit, and Abu Yassir al-Jazeeri. And once, during that first month, Jabour heard Ayoub al-Libi (whom he had been held with in Pakistan) calling him.

Another prisoner with whom Jabour had more indirect contact was Majid Khan, currently incarcerated at Guantanamo.[22] On December 18, 2004, the day Jabour was

[20] It should be noted that unless the prisoners spoke Russian themselves, they might have mistaken a related language for Russian. Also, there could be Russian-speaking guards in certain countries in Central Asia.

[21] Human Rights Watch has not found other sources with information about this prisoner.

[22] See discussion above.

transferred to the large cell, he found an inscription below the cell's sink. It said: "Majid Kahn, 15 December 2004, American-Pakistani." He also received a book in May 2006 from the prison library that may have been meant for Khan. He had not requested the book, and believes it was given him by accident; inside it had a note written in good English that said: "I'm feeling depressed and upset. I want to go home to Pakistan. And I want the newspaper every day."

Cell B1, where Jabour was held for about a year and a half, was on a corridor with two other cells. For nearly a year, Jabour said—from December 2004 until late the following year—two Somalis were held in the cells next to his. He could sometimes hear them speaking to each other in Somali. When the two Somalis were moved, at least one other prisoner replaced them, but that prisoner never spoke and Jabour does not know who he was.

Twice when he was confined in that cell he heard a prisoner yelling, sounding very upset.[23] Jabour believes that both times it was a prisoner who was being led down the corridor: the sound approached and then it receded.

Jabour saw only a single other prisoner during his entire time at the secret prison. The circumstances of his meeting were surprising. At the end of February 2006, the prison subdirector, whom Jabour liked, told Jabour that he had good news. "He said they'd let me sit with another brother," Jabour recalled. "I said I don't believe you. He asked me who did I want to sit with: Someone religious? Someone funny? I said I wanted a funny guy who likes to joke. He said they had just the guy for me, a good guy: Yassir al-Jazeeri."[24]

He met al-Jazeeri the next day. Al-Jazeeri told Jabour that he had arrived at the prison in April 2004. "I think he was part of the group of six prisoners who were transferred with Marwan al-Adeni," said Jabour. Al-Jazeeri told Jabour that he had been in a place where they beat him badly, doing permanent damage to his arm. Once they

[23] He remembers that one of those instances was in February or March 2006.

[24] Yassir al-Jazeeri was among the 26 people on Human Rights Watch's November 2005 list of "ghost prisoners" believed to be in CIA custody. Human Rights Watch, "List of 'Ghost Prisoners' Possibly in CIA Custody," November 30, 2005 (http://hrw.org/english/docs/2005/12/30/usdom12109.htm).

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played loud music for four months straight.[25] He said that the guards were Russian but the interrogators were American. He also said that there were a lot of prisoners at that prison, and the prisoners could speak to each other.

Jabour was allowed to sit and talk to Yassir al-Jazeeri about eight times, sometimes once a week, sometime once a month. Once their meetings were suspended for a month after al-Jazeeri told Jabour that some Americans had entered his room at 3 a.m. to show him photos of Abu Musaab al-Zarqawi, who was dead.[26] The two were not supposed to talk about such things. The last time Jabour spoke to al-Jazeeri was in July 2006, a week before Jabour left the facility.

Jabour also learned of other detainees in US custody via his interrogations. An interrogator showed him a photo of a Somali man whom Jabour had known previously; the photo had been taken in Jabour's cell (the first small cell). Also in US custody was an African man named Speen Ghul; the Americans showed Jabour photos of him both before and after his arrest. Other detainees that Jabour remembers seeing photos of were two men named Retha al-Tunisi and Talaha.[27]

One photo that surprised Jabour was of a boy named Talha, who appeared to be nine or ten years old.[28] His father was said to be Hamza al-Jofi, a militant leader in Waziristan.[29] When Jabour saw the photo of Talha, who was apparently in custody, he expressed amazement that the United States was holding someone so young.

[25] Al-Jazeeri also reportedly told Jabour that once, when a Lebanese interrogator visited that prison, they played Arab music for a full day.

[26] Abu Musab al-Zarqawi was the Jordanian who led Al-Qaeda in Iraq until his death in June 2006.

[27] From Jabour's description of Talaha, it seems very likely that he is Mohammed Naeem Noor Khan, also known as Abu Talaha. Jabour said that Talaha was in his mid-to-late 20s, that he was a Pakistani but had lived in Britain; that he was quite tall, and somewhat heavy-set; that he spoke Urdu, English, and Arabic; and that he was originally from Karachi. He also said that he thought Talaha was arrested in about July 2004, because that's when the Americans began asking Jabour about him. All of these characteristics describe Noor Khan, who was on Human Rights Watch's November 2005 list of 26 people who were possibly in CIA custody. More than two-and-a-half years after his arrest, Noor Khan's whereabouts are still unknown; his father has filed suit in Pakistan demanding information about what happened to him.

[28] This is a different person than the man named Talaha, mentioned above.

[29] American interrogators allegedly questioned Abdullah Khadr about al-Jofi while Khadr was being held in secret detention in Islamabad in October 2004. See Affidavit of Abdullah Khadr, United States v. Khadr, Action No. EX0037/05, Superior Court of Justice, Toronto, 2006, pp. 25-27. Human Rights Watch has no information about his son.

Release

As the months and years passed, Jabour lost all hope of leaving prison. But on the evening of July 30, 2006, without warning, the subdirector of the prison informed Jabour that Jabour would be leaving the following day. Notably, this announcement came just one month after the US Supreme Court's landmark ruling in *Hamdan v. Rumsfeld*, in which the Court held that detainees held as enemy combatants were protected under the Geneva Conventions.[30]

Transfer to Jordan

The prison subdirector said he knew where Jabour was going to be sent, but that he could not tell him. He said there was no toilet in the plane so Jabour would have to wear diapers, and that they would make a video of his naked body to show that his body had not been harmed. He told Jabour to be ready to leave at 6 p.m.

The transfer team picked him up the next evening. They put cotton over his eyes, cotton in his ears, and rubber over that. Then they put a band around his head, a mask over his face, and head phones over his ears. His hands were cuffed in front and his legs were shackled. A belt was put around his legs, above the knees, and his handcuffs were attached to it. "I felt like a mummy," Jabour said.

They brought Jabour outside to a car, and laid him down in it. Jabour is fairly certain that another prisoner was next to him. The car drove for about an hour.

Jabour was brought outside and put in a chair, and he heard three shots. "I was afraid," he said. "I thought they were shooting people." The team was very aggressive with him, increasing his fear.

Suddenly they removed all of his wrappings and took off all his clothes. When his eyes opened, he saw a man pointing a video camera at him. Then the transfer team put a diaper on him, and put the same outfit back on, except this time they used plastic handcuffs.

[30] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

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He could only feel the airplane; he could not see it, but it seemed to him to be a small civilian jet. The seats faced forward, as in a normal passenger aircraft. In the plane, during the flight, a doctor took his blood pressure. The flight lasted about three-and-a-half to four hours.

Detention in Jordan and Israel

After the plane landed, Jabour was driven in a car for about 40 minutes and then brought inside a building. His handlers sat him down and began taking off the wrappings that covered him. Someone said to him in Arabic, "Keep your eyes closed. Now open them slowly."

When Jabour opened his eyes he saw uniformed soldiers as well as men in civilian clothing. He could also see framed photos of King Hussein and King Abdullah, and he guessed that he was in Jordan. After questioning, he was sent to a cell, where a guard finally told him that he was in Amman, Jordan. Jabour later found out that he was being held at the headquarters of the Jordanian intelligence services.

A couple of weeks later, on about August 14, he was visited by a representative of the International Committee of the Red Cross (ICRC). The ICRC representative was the first independent monitor that Jabour had seen in two-and-a-half years of imprisonment. "He was very surprised by my story," Jabour said. Jabour gave the ICRC representative the contact information for relatives who lived in Jordan. Two weeks later, a group of Jabour's family members, some of whom had flown in from abroad, came to the detention facility on visiting day and were allowed to speak to Jabour for a short while. "I was overjoyed to see them," Jabour later told Human Rights Watch.

While in Jordanian custody, Jabour was also allowed to send letters to his wife and children, his first contact with them in more than two years.

On September 18, 2006, the Jordanians transferred Jabour to Israeli custody. That morning, they told Jabour that he was being released. "They said congratulations, I was free," Jabour said. "But I was still in handcuffs. And then they took me to a car and drove me to the King Hussein Bridge [on the border of Jordan and the Israeli-occupied West Bank]." Israeli agents were waiting for Jabour at the bridge, and the Jordanians handed him over to them.

A few days after his transfer to Israel, Jabour was allowed to see a lawyer, and soon after that he was brought before a judge. After six weeks in Israeli custody, he was released into Gaza, where some of his family members lived. Two-and-a-half years after he was first arrested, he was finally able to speak to his wife and children on the phone.

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The CIA's Secret Detention Program

The detention and interrogation program in which Jabour was held was operated by the US Central Intelligence Agency (CIA). It was authorized under a classified September 17, 2001 presidential directive, and operated in close secrecy for nearly five years.[31]

As Jabour's case illustrates, prisoners in the CIA program have been "disappeared," held in acknowledged detention in secret facilities, and barred from communicating with family members, legal counsel, or anyone outside. Although the International Committee of the Red Cross has repeatedly expressed concern about being denied access to detainees in CIA custody, the US government has refused to allow them to visit such facilities.[32]

In a televised speech in September 2006, just before the anniversary of the September 11 terrorist attacks, President George W. Bush publicly acknowledged that the CIA had been secretly detaining suspected terrorists in facilities outside of the United States. The president said that he could not reveal "the specifics of this program, including where these detainees have been held and the details of their confinement." Instead, he dedicated most of the speech to lauding the program's accomplishments. While making the increasingly hollow claim that "the United States does not use torture," he described several cases where the CIA used "an alternative set of procedures" to obtain information from detainees who were resisting interrogation. Bush said: "I cannot describe the specific methods used—I think you understand why—if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks

[31] In response to a lawsuit filed by the American Civil Liberties Union (ACLU), the US government recently acknowledged the existence of the September 17 directive, after having for several years refused to confirm or deny that such a document existed. See ACLU, "CIA Finally Acknowledges Existence of Presidential Order on Detention Facilities Abroad," November 14, 2006. It has refused to make the document public, however, or even provide it to members of Congress. See "Leahy 'brushed off' on secret terror docs," UPI, January 3, 2007.

[32] See "US bars access to terror suspects," BBC News, December 9, 2003; ICRC, "Developments in US policy and legislation towards detainees: the ICRC position," October 25, 2006 (ICRC President Jakob Kellenberger stating that "the ICRC had repeatedly expressed concern about detainees in undisclosed detention and had requested access to them").

on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary."[33]

As discussed below, interrogation methods reportedly used in CIA secret prisons included torture and other cruel and inhuman treatment—and were anything but lawful.

Discovering the Program

President Bush's speech was the most important official acknowledgement of the CIA's detention program, but it was not the first time that information about secret CIA detention had been made public. Indeed, reports that suspected al Qaeda operatives were being held by the CIA in "undisclosed locations abroad" began circulating in 2002.[34]

The first official acknowledgement that such reports were true came with the federal prosecution of Zacarias Moussaoui for the September 11 attacks.[35] In February 2003, the federal district judge hearing the Moussaoui case ruled that the government had to allow Moussaoui's lawyers to question Ramzi bin al-Shibh, who was allegedly a key figure in the September 11 attacks, and who had information that tended to exculpate Moussaoui from responsibility in the attacks. Because defendants have a constitutional right of access to exculpatory witnesses in the government's custody, the government had to admit that it was holding bin al-Shibh in a secret location overseas. The government argued, however, that allowing Moussaoui's counsel to question bin al-Shibh would seriously interfere with bin al-Shibh's interrogation. Although the district court rejected the government's claim, ruling that questioning via closed-circuit video should be allowed, the Court of Appeals for the Fourth Circuit

[33] White House, Office of the Press Secretary, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," September 6, 2006.

[34] See, for example, "Getting al Qaeda to talk," CNN.com, September 17, 2002 (discussing the detention of Ramzi bin al-Shibh and Omar al-Faruq); "'Appropriate pressure' being put on al Qaeda leader," CNN.com, March 3, 2003 (stating that CIA had brought Khalid Shaikh Mohammed, who was arrested in Pakistan, to an undisclosed location outside of the United States).

[35] Moussaoui, a French citizen of Moroccan descent, was indicted in December 2001 on charges of conspiring with other members of al Qaeda to hijack planes and fly them into the World Trade Center and the Pentagon. He later pleaded guilty and was sentenced to life in prison.

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later reversed the district court's decision and barred all access to bin al-Shibh.[36] A similar issue later arose in the federal prosecution of Uzair Paracha.[37]

More detailed and direct accounts of the CIA's secret detention and interrogation program emerged in 2004 and 2005 from former detainees. Most notably, in June 2004, Khaled el-Masri, a German citizen of Lebanese descent, told German police about his kidnapping, abuse, and secret detention. El-Masri was arrested by Macedonian agents on December 31, 2003, on the Serbia-Macedonia border, held secretly for nearly a month in a hotel in Skopje, then picked up by US agents and flown to Afghanistan, where he spent four months in unacknowledged detention. At the time the story was made public, el-Masri's lawyer said that he believed el-Masri had been held by the CIA. When journalists interviewed CIA officials regarding el-Masri's claims, the officials refused to either confirm or deny that he had been held.[38]

Later in 2005, three Yemeni former detainees told Amnesty International about their experiences in CIA detention, and a number of Guantanamo detainees told their legal counsel that prior to their transfer to Guantanamo they had been held in a secret "dark prison" in Kabul, Afghanistan.[39] All of these accounts had certain common characteristics, including descriptions of interrogators and prison directors who spoke American-accented English, black uniformed and masked guards, flights in which the detainee was placed in diapers and wrapped up like a package, and various forms of physical and mental abuse.

[36] The access question eventually involved several other suspected members of al Qaeda (including Khalid Sheikh Mohammed and Tawfiq bin Attash), all of whom were transferred to Guantanamo in September 2006. The US government was so worried that the courts might grant Moussaoui's counsel some form of access to these detainees that it cited the Moussaoui case as a reason for denying detainee access to the 9/11 Commission. See Thomas H. Kean and Lee H. Hamilton, *Without Precedent: The Inside Story of the 9/11 Commission* (New York: Alfred A. Knopf, 2006), p. 121.

[37] In the Paracha prosecution, the defendant sought access to Majid Khan and Ammar al-Baluchi, both of whom were transferred to Guantanamo in September 2006. The defendant was convicted in November 2005 of providing material support to al Qaeda.

[38] Don Van Natta Jr. and Souad Mekhennet, "German's Claim of Kidnapping Brings Investigation of US Link," *New York Times*, January 9, 2005.

[39] Amnesty International issued a series of reports based on the Yemenis' description of their experiences. See, for example, Amnesty International, "USA/Yemen: Secret Detention in CIA 'Black Sites,'" AMR 51/177/2005 (November 2005). And Human Rights Watch issued a press release about the "dark prison." Human Rights Watch, "US Operated Secret 'Dark Prison' in Kabul," December 19, 2005.

Relying on flight logs and information from plane spotters (people who watch aircraft arrivals and departures at airports), journalists and human rights investigators were able to trace a number of the flights by which the CIA allegedly transported prisoners.[40]

Yet, despite mounting evidence of the CIA's secret prison program, the Bush administration refused to discuss its operations. Indeed, it was reported that the administration did not describe the program in any real detail to the congressional intelligence committees tasked with providing oversight of the CIA's activities.[41] Even when the *Washington Post* published a front-page news story describing the history and scope of the detention program in November 2005 a piece reportedly based on accounts by current and former intelligence officials—not a single administration official spoke about the program on the record.[42]

According to the *Washington Post*, the secret detention program had at various times included sites in eight countries, including Thailand, Afghanistan and several democracies in Eastern Europe. Although at the request of the US government the *Washington Post* did not name the Eastern European countries where the prisons were located, Human Rights Watch released information pointing to Poland and Romania as among the sites of detention facilities.[43] A few weeks later, ABC News reported that at least 11 "High Value Targets" had been held in CIA custody in Poland.[44]

Based on information from current and former intelligence sources, a number of journalists have described the interrogation methods used in CIA facilities. These

[40] The plane that brought el-Masri from Skopje to Kabul, for example, was a Boeing Business Jet whose registration number was N313P. For detailed accounts of how the CIA used civilian jets to transport prisoners both to its own prisons and to foreign prisons, see Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St. Martin's Press, 2006), and Trevor Paglen and A.C. Thompson, *Torture Taxi: On the Trail of the CIA's Rendition Flights* (Hoboken, Melville House Publishing, 2006).

[41] Congressional intelligence committees were reportedly briefed about the existence of the CIA detention program, but they were not, for example, informed of the locations of the prisons. "Bush defends secret prisons, harsh interrogations," Asheville Global Report, September 14-20, 2006. Notably, in response to President Bush's September 6, 2006 speech, Senator John D. Rockefeller IV, vice-chairman of the Senate Intelligence Committee, complained that Bush had "withheld details of the CIA detention and interrogation program from the congressional intelligence committees." Press Statement, "Rockefeller Responds to President's Decision to Bring Captured Al-Qaeda Terrorists to Trial," September 6, 2006.

[42] Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *Washington Post*, November 2, 2005. Priest later won a Pulitzer prize for her reporting on the CIA's secret prison program.

[43] Human Rights Watch, "Statement on US Secret Detention Facilities in Europe," November 7, 2005.

[44] See "List of 12 Operatives Held in CIA Prisons," ABC News, December 5, 2005 (stating that, among others, Khalid Sheikh Mohammed, Hassan Ghul, and Mohammed Omar Abdel-Rahman were held in Poland).

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"enhanced interrogation techniques," as the CIA reportedly called them, included extended sleep deprivation combined with forced standing, as well as exposure to extreme cold.[45] The CIA also reportedly employed waterboarding, a torture method by which the prisoner is strapped to a board and made to feel like he is drowning. It is believed that several of the 14 prisoners transferred to Guantanamo in September were subject to waterboarding.[46]

The Pakistan Connection

Jabour's experience of arrest in Pakistan and subsequent "disappearance" into CIA custody was far from unique. Indeed, it appears that a large majority of the prisoners held by the CIA were originally arrested in Pakistan, often during joint U.S.-Pakistani operations. Of the 14 high-level CIA detainees transferred to Guantanamo in September 2006, for example, nine were picked up in Pakistan.[47] And most of the other people who are thought to have been in CIA custody were arrested in Pakistan.

The Pakistani authorities have made no secret of the fact that they have handed over several hundred terrorism suspects to the United States, boasting of the arrests and transfers as proof of Pakistan's cooperation in US counterterrorism efforts.[48] While the majority of these detainees were transferred into US military custody in Afghanistan or at Guantanamo,[49] or were transported to third countries via the CIA's rendition program,[50] some substantial number of them disappeared into CIA custody.[51] Family members have filed suit in the Pakistani courts in some cases, but without knowing whether their relatives remain in Pakistani custody, are in US custody, or are being held elsewhere.[52]

[45] See Brian Ross and Richard Esposito, "CIA's Harsh Interrogation Techniques Described," ABC News, November 15, 2005. ABC News reported that these techniques were first authorized in mid-March 2002.

[46] See Ibid.; Suskind, *The One Percent Doctrine*, p. 115.

[47] They are: Zayn Abd El Dine (aka Abu Zubaydah), Ramzi bin al-Shibh, Mustafa Ahmed al-Hawsawi, Khalid Sheikh Mohammed, Majid Khan, Ali Abd al-Aziz Ali (aka Ammar al-Baluchi), Walid bin Attash (aka Khallad), Ahmed Khalfan Ghailani, and Abu Faraj al-Libbi.

[48] Available information indicates that somewhere between 400 and 800 people were transferred from Pakistani to US custody between late 2001 and the end of 2005. See, for example, South Asia Terrorism Portal, "443 Al Qaeda suspects handed over to US," January 7, 2005; Dr. Shoaib Suddle, Director General, National Police Bureau of Pakistan, "Fighting International Terrorism: The Role of Pakistan as a Frontline State," February 13-14, 2006. President Pervez Musharraf himself has acknowledged that Pakistan handed over 369 detainees. Pervez Musharraf, *In the Line of Fire* (New York: Free Press, 2006).

[49] According to one study, at least 36 percent of the detainees brought to Guantanamo (that is, 270 people) were arrested in Pakistan, and possibly as many as half (i.e., 380 or more people) were arrested there. Mark Denbeaux and Joshua Denbeaux, "Report on Guantanamo Detainees," Seton Hall Public Law Research Paper No. 46, February 2006, p. 14.

[50] Much has been written about the CIA's rendition program (its program of delivering detainees without legal process to countries where they often face torture), which is closely related to its secret prison program. See, for example, Stephen Grey, *Ghost Plane*; Jane Mayer, "Outsourcing torture: The secret history of America's 'extraordinary rendition' program," *New Yorker*, February 14, 2005; Amnesty International, "Below the radar: Secret flights to torture and 'disappearance,'" AMR 51/051/2006, April 5, 2006; Editorial, "Torture by Proxy," *New York Times*, March 8, 2005.

[51] Human Rights Watch has the names of dozens of people who were arrested in Pakistan and may have been handed over to the CIA.

[52] Some cases have involved more than one missing person, including people who were believed to have "disappeared" into CIA custody, at least for a time, people in Pakistani custody, and people who have since turned up at Guantanamo. For example, the sister of Khalid Sheikh Muhammed filed suit seeking information about her brother Khalid, her son Ali Abdul Aziz Ali, her nephew Mussab Aruchi (aka Abdul Karim Mehmood), and other family members. The first two men are now known to be at Guantanamo, after having spent years in CIA custody. Aruchi's whereabouts are unknown, although it is thought that he was in CIA detention for a time. See "Interior ministry not aware of Khalid Sheikh's whereabouts," *The News* (Pakistan), January 26, 2007.

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Former Detainees: Where Are They Now?

It is not known precisely how many detainees had been held in the CIA's secret prison program at some point prior to September 2006, but it is certain that there were many more than 14 of them.

Estimates of the number of detainees held by the CIA over the course of the program vary. The *Washington Post* described a two-tier system of detention, with some 30 "major terrorism suspects" being held at high-security prisons operated exclusively by CIA personnel, and an additional 70 less important suspects being transferred to prisons run by other countries' intelligence services.[53] The major suspects, also known as "High Value Targets," were alleged top al-Qaeda leaders, not "foot soldiers."[54]

The picture emerging from detainee accounts, however, suggests that these numbers are understated, and that the true picture is more complex. For example, at the prison in Afghanistan where Khaled el-Masri was held, the guards were Afghan, but the interrogators, the main director, and the people in charge of prisoner transport appeared to be CIA.[55] So while the prisoners had daily contact with Afghan personnel, all of the important decisions regarding detention, treatment, and release were made by Americans.

And at the so-called Dark Prison in Afghanistan, which appears to have been operated solely by CIA personnel, there were a substantial number of detainees who were not top terrorism suspects. Human Rights Watch knows of some 20 prisoners previously held at that facility who are currently held at Guantanamo, as well as a former detainee who was released from Guantanamo in 2004.[56] The majority of

[53] Stephen Grey estimates that hundreds of detainees were handed over to other countries, while "less than three dozen at any time" were held in CIA prisons. *Ghost Plane*, p. 240.

[54] High Value Target (HVT) is a US military term. The loss of High-Value Targets "would be expected to seriously degrade important enemy functions throughout the friendly commander's area of interest." Defense Technical Information Center (undated) (available at: http://www.dtic.mil/). Most of the 14 detainees in CIA custody who were transferred to Guantanamo in September 2006 had been deemed High Value Targets.

[55] Human Rights Watch interview with Khaled el-Masri, Ulm, Germany, May 26, 2006.

[56] This group includes Mohammed Nasir Yahya Khusruf (who is about 60 years old), Abd al-Salam al-Hila, Musab Omar Ali Al Mudwani, and Bashir Nasir Ali Al Marwalah, among others.

these prisoners (and obviously the one who was released) would not be considered major suspects.

Similarly, prisoners such as Marwan Jabour and the three Yemeni former detainees interviewed in 2005 by Amnesty International were far from top suspects—they were eventually released without charge. Yet they too were held in prisons that seemed to have only American staff, as well as the extreme high-security arrangements characteristic of the CIA.

Missing Detainees

There is no comprehensive accounting of CIA detainees. But based on detainee testimony, press articles, and other sources, Human Rights Watch has put together a list of 16 people whom we believe were once held in CIA prisons and whose current whereabouts are unknown. We have also compiled a separate list of 22 people who were possibly once held in CIA prisons and whose current whereabouts are unknown.[57]

The people listed below—by name, nationality, and presumed place and date of arrest—are believed to have once been held in secret CIA prisons:

1. Ibn al-Shaykh al-Libi (Libyan) (Pakistan, 11/01)[58]
2. Mohammed Omar Abdel-Rahman (aka Asadallah) (Egyptian) (Quetta, Pakistan, 2/03)
3. Yassir al-Jazeeri (Algerian) (Lahore, Pakistan, 3/03)
4. Suleiman Abdalla Salim (Kenyan) (Mogadishu, Somalia, 3/03)
5. Marwan al-Adeni (Yemeni) (arrested in approximately 5/03)
6. Ali Abd al Rahman al Faqasi al Ghamdi (aka Abu Bakr al Azdi) (Saudi) (Medina, Saudi Arabia, 6/03)
7. Hassan Ghul (Pakistani) (northern Iraq, 1/04)
8. Ayoub al-Libi (Libyan) (Peshawar, Pakistan, 1/04)
9. Mohammed al Afghani (Afghan born in Saudi Arabia) (Peshawar, Pakistan, 5/04)
10. Abdul Basit (probably Saudi or Yemeni) (arrested before 6/04)

[57] It should be emphasized that the level of secrecy surrounding the CIA's prison program remains extremely high, and the obstacles to obtaining this type of information are daunting. In short, there may well be many other former CIA detainees of whose existence nobody outside the program knows.

[58] It is believed that al-Libi was transferred from CIA custody to Libya in early 2006, but this has not been confirmed.

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11. Adnan (arrested before 6/04)
12. Hudeifa (arrested before 6/04)
13. Mohammed Naeem Noor Khan (aka Abu Talaha) (Pakistani) (Lahore, Pakistan, 7/04)
14. Muhammad Setmarian Naser (Syrian/Spanish) (Quetta, Pakistan, 11/05)
15. Unnamed Somali (possibly Shoeab as-Somali or Rethwan as-Somali)
16. Unnamed Somali (possibly Shoeab as-Somali or Rethwan as-Somali)

In addition, the following people may have once been held in secret CIA prisons:

1. Abd al-Hadi al-Iraqi (presumably Iraqi) (1/02)
2. Anas al-Liby (Libyan) (Khartoum, Sudan, 2/02)
3. Retha al-Tunisi (Tunisian) (Karachi, Pakistan, early- to mid-2002)
4. Sheikh Ahmed Salim (aka Swedan) (Tanzanian) (Kharadar, Pakistan, 7/02)
5. Saif al islam el Masry (Egyptian) (Pankisi Gorge, Georgia, 9/02)
6. Amin al-Yafia (Yemeni) (Iran, 2002)
7. _al-Rubaia (Iraqi) (Iran, 2002)
8. Aafia Siddiqui (Pakistani) (Karachi, Pakistan, 3/03)
9. Jawad al-Bashar (Egyptian) (Vindher, Balochistan, Pakistan, 5/03)
10. Safwan al-Hasham (aka Haffan al-Hasham) (Saudi) (Hyderabad, Pakistan, 5/03)
11. Abu Naseem (Tunisian) (Peshawar, Pakistan, 6/03)
12. Walid bin Azmi (unknown nationality) (Karachi, Pakistan, 1/04)
13. Ibad Al Yaquti al Sheikh al Sufiyan (Saudi) (Karachi, Pakistan, 1/04)
14. Amir Hussein Abdullah al-Misri (aka Fazal Mohammad Abdullah al-Misri) (Egyptian) (Karachi, Pakistan, 1/04)
15. Khalid al-Zawahiri (Egyptian) (South Waziristan, Pakistan, 2/04)
16. Musaab Aruchi (aka al-Baluchi) (Pakistani) (Karachi, Pakistan, 6/04)
17. Qari Saifullah Akhtar (Pakistani) (arrested in the UAE, 8/04)
18. Mustafa Mohamed Fadhil (Kenyan/Egyptian) (eastern Punjab, Pakistan, 8/04)
19. Sharif al-Masri (Egyptian) (Pakistan border, 8/04)
20. Osama Nazir (Pakistani) (Faisalabad, Pakistan, 11/04)
21. Osama bin Yousaf (Pakistani) (Faisalabad, Pakistan, 8/05)
22. Speen Ghul (from Africa) (Pakistan)

The crucial, unanswered question is: where are all these detainees now? One concern is that the US may have transferred some of them to foreign prisons where for practical purposes they remain under CIA control. Another worrying possibility is that prisoners were transferred from CIA custody to places where they face a serious risk of torture, in violation of the fundamental prohibition on returns to torture. On the latter question, it is worth noting that some of the missing prisoners are from Algeria, Egypt, Libya, and Syria, countries where the torture of terrorism suspects is common.

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The CIA Program and Human Rights Violations

In his September 6, 2006 speech, President Bush stated that the CIA's detention and interrogation program had been "subject to multiple legal reviews by the Department of Justice and CIA lawyers," and had "received strict oversight by the CIA's Inspector General." But if the CIA program passed scrutiny, as the President suggested, then that raises serious questions about the legal review provided by the responsible government agencies on matters of national and international consequence. By international human right or humanitarian law standards, the CIA program was illegal to its core.

In secretly detaining and abusing prisoners like Marwan Jabour, the US government violated a host of fundamental human rights norms. Enforced disappearance—encompassing arbitrary, secret and incommunicado detention—and torture and other cruel, inhuman and degrading treatment are all prohibited under international human rights law.

Enforced Disappearance

The International Convention for the Protection of All Persons from Enforced Disappearance (the Convention on Enforced Disappearance) defines "enforced disappearance" as:

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[59]

[59] International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the U.N. General Assembly on December 20, 2006, opened for signature on February 6, 2007, art. 2. The treaty will enter into force 30 days after 20 states have ratified it.

Although the newly adopted convention has yet to enter into force, its definition of enforced disappearance is consistent with definitions contained in a number of earlier international instruments.[60]

When the Convention on Enforced Disappearance was opened for signature on February 6, 2007, 57 countries signed immediately. Yet, although it had actively participated in the drafting of the convention, the United States was not among the signatories. State Department spokesman Sean McCormack said that the United States had not signed because the convention as adopted "was not one that met our needs and expectations," but he did not further elaborate.[61]

International law bans "disappearances" in all circumstances. The Convention on Enforced Disappearance states that, "No exceptional circumstances whatsoever, whether a state of war or a threat of war . . . or any other public emergency, may be invoked as a justification for enforced disappearance." The convention bars secret detention and requires states parties to hold all detainees in officially recognized places of detention, maintain detailed official records of all detainees, authorize detainees to communicate with their families and legal counsel, and give competent authorities access to detainees.

The practice of enforced disappearance constitutes a grave threat to a number of human rights, including the right to life, the prohibition on torture and cruel, inhuman, and degrading treatment, the right to liberty and security of the person, and the right to a fair and public trial.[62] The UN Working Group on Enforced

[60] See "Report Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, pursuant to Paragraph 11 of Commission Resolution 2001/46 (Geneva: United Nations, 2002) E/CN.4/2002/71. For example, the Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the U.N. General Assembly in 1992, states that enforced disappearances occur when:

> persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.

[61] US State Department, Daily Press Briefing, February 6, 2007.

[62] See International Covenant on Civil and Political Rights, articles 6(1), 7, 9, and 14(1). For a detailed discussion of the human rights violations committed by "disappearances," see United Nations Commission on Human Rights, "Report submitted January 8, 2002, by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, pursuant to paragraph 11 of Commission resolution 2001/46," E/CN.4/2002/71, p. 36.

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Disappearances has long recognized that the crime of enforced disappearance "is a continuous crime until the fate or whereabouts of the disappeared person becomes known."[63] Therefore, persons "disappeared" in US custody who have since been transferred elsewhere remain the legal obligation of the United States so long as their fate or whereabouts remain unknown.

Moreover, enforced disappearance not only violates the basic rights of the "disappeared" person, it inflicts severe mental pain and suffering on members of that person's family.[64] Besides harming Jabour himself, his secret detention meant that his three children were left not knowing whether they still had a father, and his wife not knowing whether she still had a husband. This uncertainty compounds the impact of the loss.

Notably, the UN Working Group on Arbitrary Detention has expressed grave concern about the US government's use of secret prisons to hold suspected terrorists, concluding that detention under such conditions is "a serious denial of [the detainees'] basic human rights and is incompatible with both international humanitarian law and human rights law."[65]

To help guarantee their protection from abuse, detainees should be held in officially recognized places of detention. The prisoners' names and the place of their detention, as well as the names of the persons responsible for their detention, should be kept in registers readily available and accessible to concerned persons, including relatives and friends. In addition, "accurate information on [the prisoners'] custody and whereabouts, including transfers, [should be] made promptly available to their relatives and lawyers or other persons of confidence."[66] Finally, the time and place of all interrogations should

[63] See, for example, Report of the Working Group on Enforced or Involuntary Disappearances, Commission on Human Rights, E/CN.4/2006/56, December 27, 2005, para. 10.

[64] For this reason, the Human Rights Committee, the U.N. body charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), has found that enforced disappearances violate article 7 of the ICCPR, which prohibits torture and cruel, inhuman or degrading treatment or punishment. See *Elena Quinteros Almeida v. Uruguay*, Communication No. 107/1981, para. 14 (July 21, 1983). Similarly, the European Court of Human Rights found that the extreme pain and suffering experienced by the mother of a "disappeared" person constituted a violation of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits torture and inhuman or degrading treatment. *Kurt v. Turkey*, Judgment, Eur. Ct. Hum. Rts, Case No. 15/1997/799/1002, para. 134 (May 25, 1998).

[65] Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2006/7, December 12, 2005.

[66] Principle 6 of the U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

be recorded, together with the names of all those present, and this information should be available for purposes of judicial or administrative proceedings.[67]

International law also bars incommunicado detention, even when it does not constitute "disappearance."[68] And according to the Restatement (Third) of Foreign Relations Law of the United States, a state violates international law if, as a matter of state policy, it practices, encourages, or condones prolonged arbitrary detention.[69]

Torture and Other Ill-Treatment

International human rights law prohibits torture and other mistreatment of persons in custody in all circumstances, during wartime as well as peacetime. Among the relevant treaties are the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), both of which the United States has ratified.

Prohibitions on torture and other ill-treatment are also found in other international documents, such as the Universal Declaration of Human Rights, the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the UN Standard Minimum Rules for the Treatment of Prisoners.

International humanitarian law (the laws of war) also prohibits torture and coerced interrogations at all times during armed conflict. This prohibition, which is found in the Geneva Conventions[70] as well as customary laws of war,[71] is reflected in US military field manuals and training manuals.[72]

[67] "ICCPR General Comment 20 (Forty-fourth Session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment," A/47/40 (1992) 193, para. 11.

[68] "ICCPR General Comment 20 (Forty-fourth Session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment," A/47/40 (1992) 193, para. 11.

[69] Restatement (Third) of Foreign Relations Law, § 702, comment e.

[70] See, for example, Common Article 3 to the Geneva Conventions of 1949.

[71] See International Committee of the Red Cross, *Customary International Humanitarian Law*, (Cambridge: Cambridge Univ. Press, 2005), rule 90.

[72] See, for example, US Army Field Manual 27-10, Law of Land Warfare (1956), secs. 11 and 502.

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On December 2, 2002, Secretary of Defense Donald Rumsfeld approved 16 methods for use in interrogations at Guantánamo Bay, including "stress positions," hooding, isolation, stripping, deprivation of light, removal of religious items, forced grooming (shaving of facial hair), and use of dogs. On January 15, 2003, following criticism from the Navy general counsel, Rumsfeld rescinded the December 2 guidelines, stating that the harsher techniques in those guidelines could be used only with his approval. Rumsfeld then established a working group to examine which interrogation techniques should be allowed for prisoners in Guantánamo. This study led to Rumsfeld's promulgation, on April 16, 2003, of a memo outlining techniques that could only be applied to interrogations of "unlawful combatants" held at Guantánamo. Stress positions, stripping and the use of dogs were no longer authorized.[73]

These interrogation techniques "migrated" —in the words of the Schlesinger report—to Iraq and Afghanistan, where they were regularly applied by US personnel to detainees.[74] After the Abu Ghraib photos were made public in April 2004, the Bush administration repudiated and eventually replaced the August 1, 2002 Department of Justice memo that had provided the legal rationale for the approved interrogation methods.

Nevertheless, such restrictions on interrogation methods apparently did not apply to the CIA. The Bush administration and the Justice Department reportedly gave the CIA the authority to use additional techniques, including "waterboarding" (mock drowning).[75] In January 2005, Attorney General-designate Alberto Gonzales claimed in a written response during confirmation hearings that the international legal prohibition on cruel, inhuman or degrading (CID) treatment did not apply to US personnel in the treatment of non-citizens abroad, indicating that no law would prohibit the CIA from engaging in CID treatment when it interrogates non-Americans outside the United States.

In December 2005 Congress enacted—over the Bush administration's objections—the Detainee Treatment Act, which included the "McCain amendment" that prohibits the use of cruel, inhuman, or degrading treatment by any US official operating

[73] See generally, Human Rights Watch, "Getting Away with Torture?," vol. 17, no. 1(G), pp. 11-13.

[74] James R. Schlesinger, Harold Brown, Tillie K. Fowler, Gen. Charles A. Horner, and Dr. James A. Blackwell, Jr., *Final Report of the Independent Panel to Review DoD Detention Operations* ("Schlesinger report"), August 2004, p. 7.

[75] Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004; James Risen, David Johnston and Neil A. Lewis, "Harsh CIA Methods Cited in Top Qaeda Interrogations," *The New York Times*, May 13, 2004.

anywhere in the world. And in June 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the US government was required to treat al Qaeda detainees humanely in accordance with the provisions of Common Article 3 to the Geneva Conventions.

The Defense Department then ordered the military to ensure that all its practices complied with these standards and announced new rules repudiating many abusive interrogation methods, including "waterboarding," painful stress positions, and prolonged sleep deprivation or exposure to cold. However, the Bush administration simultaneously proposed legislation effectively rewriting the humane treatment standards of Common Article 3 to permit the CIA to continue using the abusive interrogation techniques now banned by the Pentagon. Congress ultimately rejected the administration's proposal, but with mixed results. In the Military Commissions Act of 2006, Congress retained most of the War Crimes Act of 1996, which exposes interrogators to criminal prosecution for torture and "cruel and inhuman treatment" (defined as conduct that causes serious physical or mental pain or suffering). However, the law narrowed prosecutable offenses under the War Crimes Act by creating a higher threshold for inflicting serious physical pain or suffering, preventing prosecution of interrogators for non-prolonged mental abuse occurring prior to the new law.

Notably, even though the US authorities have claimed that detainees in CIA custody were treated in accordance with the law, they have been taking aggressive steps to ensure that the details of their treatment are not disclosed. The government has, to date, barred legal access to Majid Khan, one of the 14 detainees transferred to Guantanamo last September, claiming that because he was previously in CIA custody he may have "come into possession of [classified] information, including locations of detention, conditions of detention, and alternative interrogation techniques."[76] Similarly, the Military Commissions Act of 2006 and its Rules of Evidence and Procedure contain a number of provisions meant to protect the CIA's "methods and activities" from disclosure: methods and activities that are known to include "disappearance," torture, and other abuses.

[76] In other words, the government is claiming that because Khan was held in a secret detention center, and "alternative" interrogation techniques were used on him, he should be barred from telling his lawyer about his experiences.

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Conclusion

When President Bush announced in September 2006 that, as of that moment, there were no prisoners in CIA custody, he did not say that the CIA's prison program was closing permanently. Indeed, the apparent purpose of his speech was the opposite: he argued that "as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical--and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information."[77] And when he signed the Military Commissions Act into law a few weeks later, he asserted that the legislation would "allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives."[78]

President Bush is wrong on the law. Under any reasonable reading of the Detainee Treatment Act and the Military Commissions Act, the abusive treatment of detainees that characterized the CIA's detention and interrogation program is illegal. But perhaps as worrying as the President's misinterpretation of legal standards is his disregard of basic principles.

The CIA program--and the civilian leaders who created it--have inflicted tremendous harm on the reputation, moral standing, and integrity of the United States. It is time, now, to repudiate that program, and to take steps to repair the damage it has caused.

[77] The White House, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," September 6, 2006.

[78] Office of the Press Secretary, The White House, "President Bush Signs Military Commissions Act of 2006," October 17, 2006. The President also said: "When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test."

Recommendations

The US government should:

- Repudiate the use of secret detention and coercive interrogation as tactics in fighting terrorism, and announce that the CIA's detention and interrogation program is being permanently discontinued;
- Disclose the location and current status of the detention facilities where Marwan Jabour was held, as well as the location and current status of all other secret detention facilities used by the CIA since 2001;
- Disclose the identities, fate, and current whereabouts of all prisoners held for any period of time at facilities operated or controlled by the CIA since 2001, and, for prisoners transferred to the custody of another government, disclose the date and location of the transfer;
- Order the release of any prisoner held in another country's prisons at the behest of the United States, or, if evidence exists of a prisoner's involvement in criminal offenses, transfer the prisoner to the United States for prosecution in US courts in accordance with internationally recognized fair trial standards;
- Hold terrorist suspects only in officially recognized places of detention where they are registered and have access to family members, lawyers, and courts; treat them in accordance with international standards on the treatment of prisoners, and either charge them promptly or release them;
- Acknowledge publicly that US domestic law (including the Detainee Treatment Act, the Military Commissions Act, and the *Hamdan* decision) bars the use of abusive interrogation techiques such as

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"waterboarding," extended sleep deprivation, and forced exposure to extremes of heat and cold;

- Sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance;

- Ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other mistreatment.

The US Congress should:

- Hold hearings to investigate the CIA's secret detention program, with the goal of ascertaining the scope of the program, the manner in which detainees were treated (including the interrogation methods employed on them), and the fate and current whereabouts of every person ever held in the program;

- Compel the White House to provide the House and Senate intelligence committees with the September 17, 2001 presidential finding that authorized the CIA to initiate its program of secret detention and interrogation;

- Repeal the Military Commissions Act of 2006 or, at a minimum, amend it to:

  - ensure that all detainees in US custody, whether held on US territory or abroad, are guaranteed the right to habeas corpus;

  - reform the law's protections on classified "methods and activities" so that these provisions cannot be used to protect the CIA's coercive interrogation methods against disclosure;

  - bar the use of statements obtained as result of coercion from military commission trials.

- Pass legislation to ensure that all secret detention centers are shut down permanently and that no one is forcibly disappeared into US custody or otherwise held incommunicado;

- Pass legislation to prohibit the return or transfer of persons to countries where they are at risk of torture or other abusive treatment, and to bar the government from relying on "diplomatic assurances" to justify such transfers;

- Press the Department of Justice to vigorously prosecute civilians—including those at high levels of authority—who are responsible for engaging in, authorizing or condoning the mistreatment of detainees.

The government of Pakistan should:

- Close any secret detention facilities that may be operating in Pakistan, register all prisoners in Pakistani custody (including those in the custody of the intelligence services), and ensure that all prisoners are brought before a judge within a short time of their arrest;

- Transfer prisoners to the US authorities in accordance with Pakistani law and only after obtaining written assurances that the prisoners will be brought before US courts, promptly charged or released, and will not be placed in indefinite detention at Guantanamo or elsewhere;

- Initiate a parliamentary investigation of the government's role in supporting and assisting CIA abuses in Pakistan.

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L Press Guidance
October 26, 2004

IRAQ: TRANSFER OF DETAINEES

Q: What role did the State Department play in determining the DOJ legal opinion that certain detainees in Iraq are not covered by the Geneva Conventions?

A:

- **THE STATE DEPARTMENT REVIEWED THE MEMORANDUM DISCUSSED IN TODAY'S ARTICLE AND PROVIDED COMMENTS TO THE JUSTICE DEPARTMENT.**
- **WE REFER YOU TO THE DEPARTMENT OF JUSTICE FOR ANY FURTHER QUESTIONS REGARDING THAT MEMORANDUM.**

Background: The Washington Post reported on Sunday that DOJ's Office of Legal Counsel had drafted a confidential memo authorizing the CIA to transfer certain detainees out of Iraq for interrogation purposes. The article indicates that the CIA relied on the legal authority in this draft memo to transport up to twelve detainees out of Iraq for questioning.

The New York Times reported today on another memorandum that DOJ issued on the same topic, and which was finalized. The Times reports that the second memorandum concluded that some individuals located in Iraq—specifically, non-Iraqis who are suspected to be members of Al Qaeda or other terrorist organizations and who traveled to Iraq after the U.S. invasion to engage in terrorism—were not "protected persons" and therefore would not fall within the protections of the Fourth Geneva Convention. Article 49 of the Fourth Geneva Convention prohibits "individual or mass forcible transfers, as well as deportations

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 04 SEP 2008 200706444

of protected persons from occupied territory," regardless of the motive for the transfer.

Given the sensitive nature of the two memoranda at issue and the fact that DOJ produced the memos, DOJ is in the best position to answer any questions about them.

Drafted: L/PM: A Deeks x77177
Cleared: L: J Thessin (ok)
L/PM: J Dorosin (ok)
S/WCI: R Miller (ok)
PRM/MCE: C Santos (ok)

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SENSITIVE

DEPT FOR EUR/AGS, EUR/ERA, EUR/RPM

E.O. 12958: N/A
TAGS: NATO, PTER, COE, AF, GM
SUBJECT: RUMORS OF SECRET DETENTION FACILITIES TO BE RAISED AT NATO-PA AND COUNCIL OF EUROPE MEETINGS:

1. (SBU) ACCORDING TO THE SOCIAL DEMOCRATIC PARTY (SPD) STAFFER RESPONSIBLE FOR NATO PARLIAMENTARY ASSEMBLY (PA) ISSUES, THE GERMAN DELEGATION TO THE PA IS LIKELY TO RAISE THE ISSUE OF RUMORS OF SECRET DETENTION FACILITIES IN EASTERN EUROPE AT THE UPCOMING NOVEMBER 11-15 PA

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DATE/CASE ID: 06 AUG 2009 200706444

MEETING IN COPENHAGEN. THE STAFFER, WHO IS CLOSE TO GERMAN PA DELEGATION HEAD BUNDESTAG MEMBER MARKUS MECKEL, PREDICTS THAT THE ISSUE WILL BE HIGHLY CONTROVERSIAL, ESPECIALLY IN THE CONTEXT OF PA DISAPPOINTMENTS/FRUSTRATION OVER CONGRESSMAN HEFLEY'S INABILITY TO FULFILL A PRIOR PROMISE TO ARRANGE A PA VISIT TO GUANTANAMO. (THE STAFFER BELIEVES THAT THE PENTAGON REFUSED TO AUTHORIZE THE PA VISIT.) THE STAFFER ALSO PREDICTS A HEFTY DEBATE ON THE ISSUE AT THE NOVEMBER 25 MEETING OF THE COUNCIL OF EUROPE, AND OPINED THAT - IF PRESS REPORTS ARE PROVEN ACCURATE - IT WOULD CONSTITUTE A MAJOR VIOLATION OF COUNCIL OF EUROPE REGULATIONS AGAINST ALLOWING SUCH INSTALLATIONS ON THE TERRITORY OF MEMBER STATES.

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AMEMBASSY PARIS
SECSTATE WASHDC IMMEDIATE
INFO EUROPEAN POLITICAL COLLECTIVE PRIORITY
AMCONSUL STRASBOURG PRIORITY

E.O. 12958: N/A
TAGS: PREL, PINR, PINS, FR
SUBJECT: ACTION REQUEST: GUIDANCE ON RESPONSE TO COE INVESTIGATION

1. (U) This is an action request. See para 3.

2. (U) Amb. Stapleton received by fax a letter (full text para 4) from Dick Marty, whom the Council of Europe Parliamentary Assembly has appointed to investigate the allegations of CIA secret detention centers in CoE member countries. The key phrase reads, "I would very much appreciate receiving from your authorities any pertinent information they may be able to provide me with on this subject."

3. (U) ACTION REQUEST: Please provide authorized language for use by Ambassador and Strasbourg consulate in response to COE requests.

4. (U) Text of Marty letter:

Parliamentary Assembly
The Council of Europe
Committee on Legal Affairs and Human Rights
The Chairperson

14 November 2005

Dear Mr. Roberts Stapleton,

I address this letter to you in your capacity as Permanent Observer of the United States of America to the Council of Europe.

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As you are no doubt aware, I have recently been instructed by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights to collect information on "alleged secret detention centres in Council of Europe member states" as a result of communications received on this subject from a number of sources, especially Human Rights Watch.

With this in mind, and in particular the existence of serious allegations concerning your country's involvement in such activities in Council of Europe member States as of 2001, I would very much appreciate receiving from your authorities any pertinent information they may be able to provide me with on this subject.

I look forward to receiving a reply to my request at your earliest convenience and thank you for your cooperation.

Yours Sincerely,

Dick Marty

END LETTER TEXT

Please visit Paris' Classified Website at:
http://www.state.sgov.gov/p/eur/paris/index.cfm
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Assemblée parlementaire

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AS/Jur (2006) 03 rev
22 January 2006
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Committee on Legal Affairs and Human Rights

Alleged secret detentions in Council of Europe member states

Information Memorandum II

Rapporteur: Mr Dick Marty, Switzerland, Alliance of Liberals and Democrats for Europe

A. Introduction

B. Steps taken to date

C. Criminal investigations and other reactions

a. Council of Europe member countries
i. Overview
ii. The more detailed cases of Italy and Switzerland
- Italy
- Switzerland

b. Debate in North America

D. Reminder: anti-terrorist action must respect human rights

E. Preliminary analysis of the information already obtained

a. Awareness of Council of Europe member states?
b. *Extraordinary rendition* and torture - a link known and accepted?
c. Secret detention centres
d. Kosovo and Chechnya

F. Looking ahead to the continuing investigation

APPENDICES
Appendix I: Alleged secret detentions in Council of Europe member states: Background information
Appendix II: Letter of 19 December 2005 from Mr Dick Marty, Chairperson of the Committee on Legal Affairs and Human Rights to the Chairpersons of the National Delegations
Appendix III: Letter of 15 December 2005 from Mr Dick Marty, Chairperson of the Committee on Legal Affairs and Human Rights to Mr Antonio La Pergola, President of the European Commission for Democracy through Law
Appendix IV: Communication of 21 November 2005 from the Secretary General of the Council of Europe to the Contracting Parties to the European Convention on Human Rights

F – 67075 Strasbourg Cedex, tel: +33 3 88 41 20 00, fax: +33 3 88 41 27 02, http://assembly.coe.int, e-mail: assembly@coe.int

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REVIEW AUTHORITY: ARCHIE M BOLSTER
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A. Introduction

1. First of all, it is necessary to set this work in context in terms of both facts and chronology (the latter being of some significance in this affair). I would stress that the allegations that are now receiving media coverage worldwide were already known and were condemned by the Council of Europe Parliamentary Assembly in a report on the "Lawfulness of detentions by the United States in Guantánamo Bay" presented by my colleague Kevin McNamara, to which I shall refer in this memorandum[1]. In his report he condemned the illegal practice of "extraordinary rendition" and recommended that Council of Europe member states "*ensure that their territory and facilities [were] not used in connection with practices of secret detention or rendition in possible violation of international human rights law*"[2].

2. At the time, the issue did not elicit the same media coverage as it is now receiving. We may well ask why it is only now that the allegations concerning secret detention centres in Europe are triggering a proper debate and public shock and indignation at the reports of ill-treatment and even torture in this connection. In countries that pride themselves in being long-standing democracies that protect human rights, the revelation of these allegations should have sparked off reactions and categorical condemnation several months ago, and yet this was not the case, with a few exceptions, such as the article by the writer and journalist Stephen Grey ("United States: trade in torture", *Le Monde diplomatique*, April 2005) and the articles by Guido Olimpio in the *Corriere della Sera* and his book *Operazione Hotel California* (Feltrinelli, October 2005).

3. I am particularly struck by the fact that it is in the United States that the discussions first really took off. Following an article in *The Washington Post* and a report by *Human Rights Watch* (HRW) published in early November, the international media have reported allegations that the CIA is or was running a system of secret prisons, including prisons in certain "central and east European democracies". Numerous aircraft chartered by the CIA allegedly flew over, to and from European territory (benefiting, therefore, from airport facilities in Council of Europe member states) in order to transport suspects, completely illegally, to these secret centres.

4. Whereas *The Washington Post* did not mention any countries by name (further to an agreement entered into with the United States Government, which, to my mind, suggests that the reports are true), HRW expressly mentioned Poland and Romania. The press reports also quote denials by officials from Poland[3] and Romania, but also Latvia, the Czech Republic, Georgia, Armenia and Bulgaria.

5. Since then, recent further information has extended the list of countries allegedly concerned by the existence of secret detention centres. According to a fax from the Egyptian Ministry of European Affairs to the Egyptian Embassy in London, intercepted by the Swiss intelligence services, such centres existed in Romania, Bulgaria, Macedonia, Kosovo and Ukraine.

6. On 5 December 2005 ABC reported, in turn, the existence of secret prisons in Poland and Romania that had apparently been closed following *The Washington Post*'s revelations. According to ABC, eleven suspects detained in these centres were then transferred to CIA facilities in North Africa. They were allegedly submitted to the harshest interrogation techniques (so-called "enhanced interrogation techniques"). I would point out that the ABC article confirming the use of secret detention camps in Poland and Romania by the CIA was available on the Internet for only a very short time before being withdrawn. This strikes me as a telling indication of the pressure put on the media in this affair (in this particular case, the pressure was apparently brought to bear direct by the CIA).

---

[1] See Doc.10497, report by the Committee on Legal Affairs and Human Rights (Rapporteur: McNamara) and Resolution 1433 (2005), on the *lawfulness of detentions by the United States in Guantánamo Bay*.

[2] Above-mentioned Resolution 1433 (2005), § 10.vii.

[3] A denial that was firmly reiterated by President Aleksander Kwasniewski on 7 December 2005.

7. It would seem from confidential contacts that the information revealed by *The Washington Post*, HRW and ABC came from different sources, probably all well-informed official sources. This is clearly a factor that adds to the credibility of the allegations, since the media concerned have not simply taken information from one another.

8. In an interview broadcast by the American channel ABC on 29 November 2005, the Director of the United States Central Intelligence Agency, Porter Goss, did not deny the existence of CIA secret prisons in various parts of the world where people suspected of terrorism were held. He did, however, categorically deny that the United States used torture, while refusing to pass judgment on certain interrogation techniques used by its services.

9. On 5 December 2005, Condoleezza Rice, the American Secretary of State, made a statement addressed to Europeans in which she did not, at any point, deny the existence of the alleged centres, or of the flights transporting detainees, but reaffirmed the need to resort to "extraordinary renditions" in the context of efforts to counter terrorism. The only thing that Ms Rice categorically denied was the use of torture.

10. On 3 November Mr Friso Roscam Abbing, spokesman for Franco Frattini, Vice-President of the European Commission and Commissioner for Justice, Freedom and Security, said that the Commission would be seeking further information, on the grounds that such secret detention centres would be a violation of the founding principles of the European Union. On 4 November he said that the Commission had no reason to doubt the denials by the Polish and Romanian Governments. On 14 November Mr Frattini told the European Parliament that he welcomed the investigation initiated by the Council of Europe and that his departments would be following it closely. On 7 December 2005 Mr Frattini wrote to his colleagues Jacques Barrot and Benita Ferrero-Waldner asking them to support the requests the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly had submitted to Eurocontrol and the European Union Satellite Centre (EUSC). On 28 November 2005 the British Foreign Secretary, Jack Straw, asked the American authorities, on behalf of the European Union, for explanations of the alleged stopovers in Europe of aircraft chartered by the CIA.

11. On 4 November Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, called for an investigation into the allegations.

12. The same day, the President of the Parliamentary Assembly, René van der Linden, asked the Committee on Legal Affairs and Human Rights, in a press release, to look into the allegations, stating that, if such detention centres did in fact exist, it would be a violation of the principles of both the European Convention on Human Rights and the European Convention for the Prevention of Torture.

13. Mention should also be made of the stand taken by the United Nations High Commissioner for Human Rights, Ms Louise Arbour, who said in an article in *Le Monde* published on 7 December 2005 that secret detention was a form of torture in itself, for the person detained, who was at the mercy of the detaining authorities, and, worse still, for the families, who were faced with a situation that amounted to that of a missing person.

14. On 15 December the European Parliament agreed, in principle, to set up a temporary committee to investigate the alleged illegal transfer of detainees and the suspected existence of secret CIA detention facilities in the European Union and in candidate countries. On 12 January 2006 the European parliamentarians decided to go ahead and set up such a committee. On 18 January the European Parliament, sitting in Strasbourg, approved the mandate and membership suggested by the Conference of Presidents of the Political Groups for its temporary 46-member committee, which is to investigate the allegations of CIA prisons in Europe where persons suspected of terrorism have allegedly been detained and tortured. I am highly satisfied to note that the work of this committee explicitly reflects a continued desire to co-operate fully with our investigation.

15. In November and December 2005 the Committee on Legal Affairs and Human Rights was particularly active in connection with this affair. At its meeting on 7 November 2005, following President van der Linden's request, it discussed the matter, including the possibility of inviting the Secretary General of the Council of Europe to ask all Contracting Parties to the European Convention on Human Rights for information about the allegations, in accordance with the procedure provided for in Article 52 of the Convention. At the next meeting, on 22 November, I presented the information I had been able to obtain and my preliminary conclusions[4]. At its meeting on 13 December 2005 the committee:

- appointed me Rapporteur
- decided to ask the European Commission for Democracy through Law (Venice Commission) to prepare a legal opinion assessing the legality of secret detention in the light of Council of Europe member states' international obligations, in particular the European Convention on Human Rights and the European Convention for the Prevention of Torture, and expressed the wish that this opinion be submitted as soon as possible;
- instructed its Chair to submit to the Bureau a request for an urgent procedure debate on the allegations of secret detention in Council of Europe member states at the January 2006 part-session of the Assembly;
- extended the Rapporteur's mandate to visit the headquarters of the European institutions and make fact-finding visits to certain Council of Europe member states if he deemed it necessary;
- was informed by the Deputy Secretary General of the initiatives taken by the Secretary General in accordance with Article 52 of the ECHR.

16. On behalf of the Committee on Legal Affairs and Human Rights, I submitted a request to the Bureau for a debate under urgent procedure on the allegations of secret detention in Council of Europe member states at the January 2006 part-session of the Assembly. I was informed that, as the deadline for States' replies under the procedure set in motion under Article 52 ECHR was not until 21 February, the Assembly Bureau had decided, at its meeting on 9 January 2006, to suggest holding a current affairs debate, ie a debate without a report, which nevertheless leaves me free to submit this information memorandum to the Committee on Legal Affairs and Human Rights.

B. Steps taken to date

17. Following the Committee's meeting on 7 November, on 14 November 2005 requests for information were sent to the Polish and Romanian delegations to the Council of Europe Parliamentary Assembly and to the United States Permanent Observer to the Council of Europe.

18. On 21 November 2005, the Secretary General of the Council of Europe sent a request for information to the States Parties to the European Convention on Human Rights, in accordance with the procedure provided for in Article 52, asking them to reply by 21 February 2006 (see Appendix IV).

19. Letters were sent to the EU Satellite Centre and Eurocontrol on 29 November 2005, asking them to provide technical assistance with the preparation of the prospective report by forwarding certain information concerning flights and satellite pictures of certain sites, taken on different dates.

[4] See document AS/Jur (2005) 52 rev 2, Information Memorandum presented by the Rapporteur. See also the statement *on alleged secret detention centres in Council of Europe member States* adopted by the Assembly's Standing Committee at its meeting in Bucharest on 25 November 2005 (Synopsis No.2005/130).

20. The Venice Commission, for its part, was informed at its meeting on 15 December 2005 of the request from the Committee on Legal Affairs and Human Rights for an opinion. It decided to instruct several of its members to start work on the matter (see Appendix III).

21. In a letter dated 10 January 2006, the Secretary of the Venice Commission informed me that work was already under way. The Venice Commission has instructed a working group comprising six eminent experts to draft an opinion for approval at its next plenary session, on 17 and 18 March 2006.

22. A questionnaire was forwarded to all the leaders of national delegations to the Parliamentary Assembly on 19 December 2005 so that the parliamentarians would put questions to their governments within their own parliaments, making use of their twofold mandate as national parliamentarians and members of the Assembly (see Appendix II).

23. On 5 January 2006, I met the prosecutor responsible for the Abu Omar case, Mr Armando Spataro, in Milan. He told me about one of the most comprehensive judicial inquiries so far carried out in Europe into a kidnapping carried out as part of an "extraordinary rendition" operation by the services of a foreign country.

24. I also had various meetings with NGO representatives and investigative journalists specialising in terrorism.

C. Criminal investigations and other reactions

a. Council of Europe member countries

i. Overview

25. In two countries (**Italy** and **Germany**) judicial investigations have begun into "abduction" of persons subsequently transported to Guantànamo, Afghanistan and other detention centres by means of aircraft belonging to entities with hidden direct or indirect links to the CIA. The Italian prosecution service has even issued arrest warrants against CIA agents after the violent abduction of a Muslim, Abu Omar, in a Milan street in February 2003. The German judicial authorities are taking part in the investigation and have themselves begun investigating the case of a German citizen of Lebanese origin, Khaled al Masri. After being arrested by mistake in Macedonia he was reportedly taken to Kabul for interrogation[5]. Lastly, a **Spanish** judge is enquiring into whether the CIA used Son Sant Joan airport in Majorca as a base for transport of Muslim suspects, as announced by the Spanish minister of internal affairs, José Antonio Alonso, on 15 November 2005. The same aircraft as transported Abu Omar landed at least three times in Spain (and in other European countries).

26. The **Polish** Government ordered an enquiry into the alleged existence in Poland of secret CIA detention centres. The findings were to have been made known in December, but so far none have been published (although a parliamentary committee had been informed of these findings). On 21 December 2005, I wrote to the head of the Polish delegation to the Parliamentary Assembly, Mr Iwinski, asking him to let me have the findings as soon as possible.

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[5] A reporter working for the German television channel ZDF, Mr Brase, has passed onto me a certain amount of information and contact details of people involved locally, which I shall follow up in the next stages of my own enquiry.

27. On 6 December 2005, at the instigation of the opposition, the **Romanian** Parliament set up a commission to investigate the alleged existence of a secret detention centre on Romanian territory which the American secret services were said to have used for torture. A non-governmental human rights organisation (OADO – Organizaţia Pentru Apărarea Drepturilor Omului) sent specialists to all the places specifically mentioned in recent months as possible sites of secret detention centres. Their conclusions do not seem to provide any evidence of such centres. Traces of destroyed temporary structures are visible near Babadag training camp, Feteşti airbase and Mihail Kogălniceanu army base, but seemingly they were used in connection with international military exercises in the 2003-2005 period; American military personnel in transit were apparently accommodated there in May and June 2003. OADO stresses the absence of any basis for the allegations. On 20 January 2006 the head of the Romanian delegation to the Assembly wrote to me forwarding his delegation's replies to my 19 December 2005 questionnaire to heads of PACE delegations. The replies give general information about agreements between the United States and Romania on secret-service co-operation and NATO agreements. The bilateral agreement signed on 6 December 2005 (and not yet ratified) provides in its preamble that the parties are to respect national sovereignty, the United Nations Charter, human rights and their international obligations. The replies stress that no official Romanian authority was aware of any secret detention centre on Romanian territory. Nor have the Romanian authorities received any request for overflight of Romanian territory or use of Romanian airports by aircraft suspected of belonging to the CIA. They also state that military airfields have not been used by civil aircraft. The government has not asked for any further explanations, saying that it is satisfied with those given by Condoleezza Rice.

28. In the **United Kingdom** the NGO Liberty threatened the government with legal action for facilitating and colluding in use of torture if there was not an immediate enquiry into the very large number of flights and overflights by CIA-chartered planes and the possible use of certain United Kingdom airports. In reply to a parliamentary question on the subject, the United Kingdom foreign affairs minister, Jack Straw, stated in December 2005 that a thorough search of the relevant logs had not found any CIA request to use British airports in connection with transport of suspects. According to an internal memorandum dated December 2005, attributed to the private office of the foreign affairs minister and published by the *New Statesman* on 19 January 2006, the British Government intends to take the following approach to the problem: extraordinary renditions are usually illegal, but complete confidence should be placed in the assurances provided by Ms Condoleezza Rise during her trip to Europe. The British press made a point of accusing the Government of duplicity. It remains to be seen whether the memorandum does indeed reflect the Government's official attitude. On 20 January I also received, from Mr Angus Robertson MP, a detailed report of numerous suspect movements of aircraft transiting through Scotland.

29. Further to questions to the government in the Bundestag from the leftwing and Liberal groups, the **German** Government asked the American authorities for information about CIA use, or not, of Frankfurt and Ramstein airports. In answer to most of the questions from the two groups, the government stated that it could provide replies only to the committee specially authorised to oversee the secret services. Asked whether the government or the German secret services knew of the existence of any secret detention centres on German or European territory, the government categorically denied any knowledge of such centres on national territory; with regard to the remainder of the question, it referred to its objection of principle that it was the special committee which had jurisdiction in the matter. In answer to a question from the leftwing group, the German air traffic safety office provided a detailed list of flights by two aircraft apparently chartered by the CIA which had landed at airports in Germany in 2002 and 2003, 137 and 146 times respectively and mainly at Frankfurt, Berlin and the US Ramstein base. However, the office was unable to provide the members of parliament with information as to the identity of any passengers. On 17 January 2006 the German members of parliament decided to set up a committee of enquiry to report back as soon as possible on the role of the intelligence services (BND) in Baghdad and on certain aspects of anti-terrorist action (including allegations of flights and overflights of German territory by CIA-chartered aircraft). Discussions are still under way as there seem to be

misgivings in some political circles about setting up a committee that might undermine the operational capacity of the BND.

30. The **Armenian** parliamentary delegation forwarded to the head of internal security services the questionnaire which was sent on 19 December 2005 to heads of national delegations to the Parliamentary Assembly. The replies received shed no further light.

31. In response to parliamentary questions, the **Belgian** Government has launched an enquiry into flights and over-flights by CIA-chartered aircraft. So far, no stopover at a military airport has been discovered.

32. With regard to **Bosnia and Herzegovina**, their American lawyer[6] has sent me a detailed account of the case of six Bosnians abducted by American agents on Bosnian soil and taken to Guantànamo Bay, despite a Bosnia and Herzegovina Federal Supreme Court judgment ordering their release after police investigation had failed to uncover the slightest evidence against them. I shall be following developments in the case as part of my further investigations.

33. In a letter dated 19 January 2006, the leader of the **Cypriot** delegation to the Assembly forwarded to me his government's replies to the questionnaire I sent to the leaders of national delegations to the Assembly on 19 December 2005. The replies mention several landings in Cypriot airports, all of a technical nature (and therefore not subject to authorisation), of aircraft on the list forwarded to national delegations. The Cypriot Government states that it has no knowledge of secret detention centres on the part of national territory that is actually controlled by the Republic of Cyprus. It stresses that it is in its interests that full light should be shed on the matter and that it intends to use diplomatic channels to obtain explanations from the American authorities.

34. The **Danish** Government has asked the American authorities for explanations about CIA-chartered flights for alleged transport of prisoners over Danish territory.

35. The **Finnish** security services have reportedly asked the CIA for information about any passengers aboard a cargo plane which made a stop at Helsinki in 2003.

36. The **French** foreign affairs ministry has stated that it is checking with the civil aviation authorities on two flights which made stops in French territory and had apparently been chartered by the CIA.

37. In reply to a question from a European Parliament member, **Greece** is looking into the alleged existence of a secret prison at Souda naval base in Crete where persons suspected of involvement in the attacks on the London underground were allegedly subjected to violent interrogation by British agents.

38. The head of the **Irish** delegation to the Parliamentary Assembly informed me of the many questions to the government in the Irish Parliament, and of the replies received. In substance, the government expressed total condemnation of the practice of "extraordinary renditions" and stated that it had never authorised any overflights of Irish territory by chartered aircraft for that purpose.

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6 Stephen H. Oleskey, of the law company WilmerHale.

39. The **Norwegian** Government apparently asked the American embassy for information about a plane which landed at Oslo on 20 July 2005 and was allegedly used by the American authorities for transport of suspected extremists.

40. The **Swedish** Government has instructed the relevant department and the civil aviation authority to look into flights to and from Swedish airports by United-States-registered aircraft since 2002.

ii. The more detailed cases of Italy and Switzerland

- **Italy**

41. At midday on 17 June 2003 an Egyptian citizen, Hassam Osama Mustafa Nasr, known as Abu Omar, was abducted in the middle of Milan. Thanks to an outstanding and tenacious investigation by the Milan judiciary and the DIGOS police services, Abu Omar's is undoubtedly the best known and best documented case of "extraordinary rendition"[7].

42. Via the military airbases at Aviano (Italy) and Ramstein (Germany) Abu Omar was flown to Egypt, where he was tortured before being released and re-arrested. To my knowledge no proceedings were brought against Omar in Egypt.

43. The Italian judicial investigation established, beyond all reasonable doubt, that the operation was carried out by the CIA (which has not issued any denials). The Italian investigators likewise established that the presumed leader of the abduction operation – who had worked as the American consul in Milan – was in Egypt for two weeks immediately after Omar was handed over to the Egyptian authorities. It may safely be inferred that he took part, in one way or another, in Omar's interrogation.

44. The proceedings instituted in Milan are concerned with 25 American agents, against 22 of whom the Italian authorities have issued arrest warrants.

45. Abu Omar was a political refugee. Suspected of Islamic militancy, he had been under surveillance by the Milan police and judicial authorities. As a result of the surveillance operation, the Italian police were probably on the point of uncovering an activist network operating in northern Italy. Abu Omar's abduction, as the Milan judicial authorities expressly point out, sabotaged the Italian surveillance operation and thereby dealt a blow to anti-terrorist action.

46. Is it conceivable or possible that an operation of that kind, with deployment of resources on that scale in a friendly country that was an ally (being a member of the coalition in Iraq), was carried out without the national authorities – or at least Italian opposite numbers – being informed? The Italian Government has denied having been informed. The presence on Italian territory of at least 25 foreign agents who abducted someone who had been granted political asylum and was already under police surveillance might have been expected, if not to create a diplomatic incident, then at least to trigger a sharp response from the national authorities. As far as I know, there was no such response. A further interesting point is that the Italian justice minister has so far not forwarded to the American authorities the Milan judicial authorities' requests for assistance and extradition.

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7 I have met the prosecutor who headed the investigation, Armando Spataro, and was able to obtain as full information as confidentiality and procedural requirements permitted. The Abu Omar case is likewise described in the book, already referred to, by the *Corriere della Sera* journalist Guido Olimpio, *Operazione Hotel California*, Feltrinelli, October 2005.

47. Abu Omar's abduction is a perfect illustration of "extraordinary rendition". It is a clear indication that the method exists, together with complex logistic support in various parts of Europe and considerable deployment of personnel. It also plants doubts and raises the question of involvement of national authorities at one or other level.

- **Switzerland**

48. The methods used to counter the terrorist threat are also under debate in Switzerland.

49. In May 2002 an American citizen, José Padilla, was placed under close surveillance by the Swiss federal police and US agents when he flew into Zurich from Pakistan. Padilla was suspected of wanting to introduce a "dirty" bomb into the United States and explode it. Apparently the Swiss police even questioned him before he flew on to Chicago, where he was arrested. Since then Padilla has been in detention without any detailed charges being brought against him and is considered an "enemy combatant". It was only quite recently that he was handed over to the civil justice authorities to avoid the Supreme Court's ordering his release. Visiting Switzerland in June 2002, the United States justice minister, John Ashcroft, warmly congratulated the Swiss authorities on the valuable part they had played in Padilla's arrest. However, the case has sparked controversy in Switzerland, to such an extent that a parliamentary committee has begun an enquiry, for it would seem that the police co-operated closely with the American services without notifying the competent judge, or at any rate informed him after the event, when Padilla had already been arrested in the United States. If notification had been made in time – as procedure requires – Padilla would most likely have been arrested and handed over to the American authorities in accordance with the procedure laid down and with the safeguards which operate in cases of judicial assistance and extradition (which are not applied to so-called "enemy combatants"). My request to consult the parliamentary committee's report was refused on the justice ministry's advice, on the ground that the file contained material "concerning third parties and potentially harmful to relations with another country".

50. In June 2005 the Swiss press, in connection with what it called the "Guantànamo Express", mentioned several aircraft which had temporarily landed in Switzerland and were suspected of carrying prisoners. On a visit to the United States in late June 2005, the Swiss foreign affairs minister asked his opposite number for explanations. To date, and despite a repeat request to the United States ambassador in Bern in December, no reply has been forthcoming from the American authorities.

51. The Egyptian Abu Omar, abducted by the CIA in Milan on 17 February 2003 (see the above section on Italy), was flown from the Italian base at Aviano to Ramstein in Germany, and then on to Cairo. The Italian judicial authorities have identified the aircraft used. The data, when compared with data held by Swiss air traffic control, indicate that he was flown through Swiss air space, which has prompted the federal prosecution authorities to institute an enquiry (the prosecution authorities at Zweibrücken, within whose jurisdiction the Ramstein base is located, have done likewise).

52. On 8 January the Swiss newspaper *Sonntagsblick* stated that, during the night of 11 to 12 November 2005, the Swiss intelligence services intercepted a fax from the Egyptian European affairs ministry to the Egyptian embassy in London referring to the existence of secret detention centres in Romania, Bulgaria, Ukraine, Macedonia and Kosovo. The newspaper published a copy of a Swiss departmental memorandum (in French) dated 14 November 2005 summarising the content of the original message intercepted (probably in Arabic). It was from the newspaper article that I discovered the content of the intercepted fax. Interception of the Egyptian fax has not been denied by the parties concerned. On the contrary the Swiss authorities are investigating the breach of official secrecy.

53. The foreign affairs minister stated in an interview published on 15 January 2006 that the Swiss authorities would co-operate with me "as far as possible".

B. Debate in North America

54. In the United States, the authorities' attitude in the war on terrorism and the controversial methods used by the CIA in that connection have also aroused controversy.

55. The CIA action programme set up after 11 September 2001 and known as the "GST programme", gives the CIA greatly enhanced powers (apparently comparable to those which existed during the cold war). It allows the CIA to arrest suspects with the help of foreign internal security services, hold them captive abroad, employ interrogation techniques (some of which are very widely regarded as possibly contravening the United States' international undertakings regarding prohibition of torture) and fly prisoners between countries[8].

56. The facts as reported by several official sources point to higly controversial practices on the part of the American security services.

57. Several prominent figures have openly condemned the practices in question. One can but welcome the perseverance shown by Senator John McCain, who was himself a torture victim in Vietnam and who was responsible for an amendment to the 2006 defence expenditure bill expressly prohibiting cruel, inhuman and degrading treatment of foreign prisoners, whether in CIA hands, in the United States or abroad. The amendment is extremely significant in the context of my report, implying that such treatment was not hitherto prohibited by American law in the circumstances referred to. It also strikes me as fairly revealing that Vice-President Dick Cheney fought, unsuccessfully, to have the McCain amendment not apply to the CIA. However, we cannot be altogether confident of the effects the amendment will have – the press reports that President Bush seems to reserve the right to disregard the amendment in certain circumstances[9].

58. Similarly, extension of the Patriot Act was agreed to only after fierce debate and resistance in the Senate, and only for six months (during which period it is hoped to make its content more flexible). The fact is that a large number of senators regard the provisions of the Act, which was adopted in the wake of 11 September 2001 and is concerned, in particular, with empowering the FBI to secretly obtain information on telecommunications, as placing undue restrictions on citizens' rights and freedoms.

59. The uproar in the United States over telephone taps which President Bush has authorised, apparently without any legal basis whatever, can only reinforce that sentiment. The revelation by *The New York Times* has further fuelled present controversy.

60. Amnesty International (AI) expressed serious concern about the attitude adopted by the Canadian authorities. As suspect flights had been reported over the country, AI asked the authorities on 22 November 2005 to look into the matter. In an open letter to the Minister of Public Safety and Emergency Preparedness dated 18 January 2006, AI observes that there has still been no serious investigation into these allegations. We have no doubt that Canada, a permanent observer to the Assembly, will shed full light on the allegations.

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8 Dana Priest, "Covert CIA Program Withstands New Furor – Anti-Terror Efforts Continue to Grow", *The Washington Post*, 30 December 2005.

9 Charlie Savage, "Bush could bypass new torture ban – Waiver right is reserved", *The Boston Globe*, 4 January 2006.

D. Reminder: anti-terrorist action must respect human rights

61. The Parliamentary Assembly has made its position very clear, which is that it shares "the United States' determination to combat international terrorism and fully endorses the importance of detecting and preventing terrorist crimes, prosecuting and punishing terrorists and protecting human lives"[10].

62. Obviously that position is the only possible one and, as far as action on terrorism is concerned, requires close international co-operation, which, however, must be organised on the basis of clear, precise agreements and in compliance with agencies' powers and responsibilities.

63. "Rendition" of prisoners must be carried out in accordance with legal procedure, so that the prisoner is afforded all the legal guarantees to which he or she is entitled, including a fair trial within a reasonable time. In no case should it be made possible for a person to be returned or transferred "in reliance on 'diplomatic assurances' from countries known to engage in the systematic practice of torture and ... unless the absence of a risk of ill-treatment is firmly established"[11].

64. It cannot be overemphasised that nothing and no one can justify waiving the principles of the rule of law and respect for human rights and that torture, in addition to being an unreliable way of obtaining information, is in any case absolutely prohibited.

65. As the Assembly has stated, "some human rights (such as the right to be protected from torture or inhuman treatment) are absolute, and should never be interfered with by state authorities, including internal security services."[12] Secret services' role, however fundamentally important to counter-terrorist action, clearly can never place such services above the law.

E. Preliminary analysis of the information already obtained

a. Awareness of Council of Europe member states?

66. "Rendition" affecting Europe seems to have concerned more than a hundred persons in recent years[13]. Hundreds of CIA-chartered flights have passed through numerous European countries[14]. It is highly unlikely that European governments, or at least their intelligence services, were unaware. And a number of revelations have already been published by the press, especially in America, over the past few years. It is, to say the least, curious that media interest, especially in Europe, suddenly surged after the article in *The Washington Post* in early November 2005.

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[10] Resolution 1433(2005) on the lawfulness of detentions by the United States in Guantànamo Bay, §1.

[11] Idem, §8.x.

[12] Recommendation 1402(1999) on control of internal security services in Council of Europe member states, §4.

[13] Michael Scheuer, writing in *Die Zeit* of 29 December 2005, referred to "hundreds, but not thousands" of persons held by the United States in the context of "rendition".

[14] According to a list obtained from Germany's Office for Air Traffic Safety by the Left Party group in Germany, two aircraft linked to the CIA had landed at airports within Germany in 2002 and 2003, 137 and 146 times respectively. I dare not extrapolate the number of potentially suspect flights in all Council of Europe member states during the period under examination by the 40 aircraft allegedly linked to the CIA!

67. The statements made by Secretary of State, Condoleezza Rice, during and before her European visit of December 2005, and by her predecessor, Colin Powell, who said that the US had always respected the national sovereignty of its allies, are taken by some as both a reprimand and a warning: "stop being hypocritical", and "do you really want us to say what happened?".

68. In the case of Abu Omar it was obvious that the CIA acted without informing the Italian judicial and police authorities. The Milan public prosecutors explicitly state that the action taken by the American service, which they consider constituted a criminal offence, prevented them from competing investigations which they were conducting against Omar and which was on the verge of identifying a network of activists considered potentially dangerous. The Italians' meticulous and highly professional work had thus been undone by the unexpected intervention by CIA agents who, by abducting Abu Omar, had sabotaged a major anti-terrorist operation. This "rendition" is a glaring illustration of the fact that such actions, which infringe the principles of the rule of law, are not only unacceptable from the legal and ethical point of view but also ineffective, or indeed damaging to the fight against terrorism. This lack of co-operation with and confidence in the authorities officially mandated to fight crime is bound to have very serious consequences, challenging the very functioning of the law-based State and its democratic foundation. Similarly, we might add that the American authorities in Ramstein are refusing to co-operate with the German prosecutor responsible for the German strand of the Abu Omar case, on Washington's orders. It is difficult to believe that such an approach to relations between authorities in different countries can provide any valid basis for genuine co-operation among States endeavouring together to combat the worst threats facing us in modern times.

b. *Extraordinary rendition* and torture – a link known and accepted?

69. Over the last few months, a number of former officials of the American intelligence services, some of whom had held responsible positions, have given interviews and provided many details of the resources used against actual and suspected terrorists. These statements, which have in fact been corroborated by indiscretions from officials still serving, clearly confirm that the current US Administration seems to start from the principle that the principles of the rule of law and human rights are incompatible with efficient action against terrorism. Even the laws of war, especially the Geneva Conventions, are not accepted or applied. The relocation of prison camps to Guantanamo and elsewhere indicates that even American legal standards are seen as obstacles by the US Administration. "Extraordinary rendition" and secret detention facilitate the use of degrading treatment and torture. It is even the stated objective of such practices, as the following quotations would appear to confirm.

70. Mr Michael Scheuer, one of the architects of the "rendition" system further developed during the Presidency and with the agreement of Bill Clinton, formerly headed the CIA's Bin Laden unit. He stated in an interview with *Die Zeit*[15] that the CIA was within its rights to break all laws except American law. He expressed doubt as to the existence of secret prisons in eastern Europe, given the fact that the US had, in his opinion, sufficient capacity in other places, particularly in Iraq and Cuba.

71. In another interview, given to the *Sunday Herald* in October 2005, Mr Scheuer is reported to have said, on the subject of his knowledge of the use of torture, that he had no doubt about this and that the White House was more willing than the CIA itself to ignore the legal details ("to turn a blind eye to the legal niceties"). The CIA was aware that it would eventually have to take the blame ("The Agency always knew it would be left holding the baby for this one")[16].

[15] *Die Zeit*, 29 December 2005.

[16] Neil Mackay, "These two men are experts on rendition: one invented it, the other has seen its full horrors", *Sunday Herald* (Scotland), 16 October 2005, available at http://www.sundayherald.com/52305.

72. As early as March 2005, in a CBS interview, Mr Scheuer had admitted knowing that suspects were tortured in Egypt, adding that it was "very convenient" finding "someone else to do your dirty work"[17].

73. Mr Robert Baer, a former CIA agent interviewed by British journalist Stephen Grey, is reported to have said: "If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear - never to see them again - you send them to Egypt."[18].

74. Mr Vincent Cannistraro, former head of counter-espionage in the CIA is reported to have said that a Guantánamo detainee suspected of belonging to Al-Qaeda and who was refusing to co-operate provided better information after being "rendered" to Egypt: "They promptly tore his fingernails out and he started to tell things"[19]. Mr Cannistraro also reportedly said that Egyptian prisons were full of men without finger and toenails. "It's crude, but highly effective, although we could never condone it publicly. The Egyptians and Jordanians are not that squeamish"[20]. Lastly, he also said that only someone "deaf, dumb and blind" could believe that the Syrians did not used torture, despite their claims to the contrary[21].

75. Some officials who have remained nameless have given even more direct evidence. A CIA member directly involved in "renditions", for instance, was quoted by *The Washington Post* back in December 2002 as saying "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them"[22].

76. "If you don't violate someone's human rights some of the time, you probably aren't doing your job": this was allegedly said by one official who had supervised the capture and transfer of alleged terrorists[23].

77. Another official directly involved in "renditions" said that he knew the persons concerned would probably be tortured ("I ... do it with my eyes open")[24].

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[17] Ibid.
[18] Stephen Grey, "America's Gulag", *The New Statesman*, 17 May 2004, available at http://www.newstatesman.com/200405170016.
[19] Knut Royce, "Mixed Reviews from Experts. Critics: Make Case on Deceit, Not Terror", *Newsday*, 6 February 2003.
[20] Ian Bruce, "Middleman Reveals Al Qaeda Secrets", *The Herald* (Scotland), 17 October 2002.
[21] Shannon McCaffrey, "Canadian Sent to Syrian Prison Disputes U.S. Claims against Torture", Knight-Ridder, 1 August 2004.
[22] Dana Priest and Barton Gellman. "U.S. Decries Abuse but Defends Interrogations", *The Washington Post*, 26 December 2002, available at http://www.washingtonpost.com/ac2/wp-dyn/A37943 - 2002Dec25?language=printer; also see Doc. 10497, report of the Committee on Legal Affairs and Human Rights on the lawfulness of detentions by the United States in Guantánamo Bay, rapporteur Kevin McNamara.
[23] Ibid.
[24] Ibid.

78. Some officials of President Bush's administration have said that the CIA in practice uses a narrow definition of what amounts to "knowing" that a suspect has been tortured: "If we're not there in the room, who is to say?"[25].

79. Another case of rendition concerns a so-called Muslim militant in Canada, called Arar. Some American officials speaking on condition of anonymity are reported to have said that there was strong evidence that Mr Arar had long been associated with suspected Islamist militants in Canada. They reported that he had confessed under torture in Syria that he had received terrorist training in Afghanistan, and had given the names of his instructors and other details[26].

80. Others reportedly told *Time* that no American had been in the room in which the Syrians interrogated Mr Zammar. American officials in Damascus gave written questions to the Syrians, who passed back Zammar's answers. State Department officials appreciated this arrangement, which kept the American government out of any torture that the Syrians might use against him. Some State Department officials suspected that he had indeed been tortured[27].

81. In an interview with Dana Priest (*The Washington Post*) published in March 2005, another CIA official involved in "renditions" described other countries' "assurances" as "a farce"[28], and admitted that it was widely understood that interrogation practices that would be illegal in the United States were being used[29]. In the same interview, he said that "They say they are not abusing them, and that satisfies the legal requirement, but we all know they do"[30].

82. It seems, furthermore, that the CIA's partners quite clearly understand the worse than ambiguous attitude it takes to the use of torture; one Arab diplomat from a country actively involved in anti-terror operations and sharing intelligence with the CIA reportedly said that it was unrealistic to believe that the CIA really wanted to verify the assurances given: "It would be stupid to keep track of them because then you would know what's going on [...] It's really more like 'Don't ask, don't tell.'"[31].

83. In this context, it can be noted that in May 2005 the U.N. Committee against Torture held that the 1984 U.N. Convention against Torture had been violated by Sweden with respect to the removal, to Egypt, of Ahmed Agiza and Mohammed al-Zari, back in December 2001 (see Agazi v. Sweden, CAT/C/34/D/233/2003 of 24 May 2005).

84. Another case concerning a certain Mr Mahdouh Habib, Australian citizen arrested in Pakistan in October 2002, is prompting debate in Australia, highlighting the legal difficulties arising out of the use of torture: "After promising for more than three years that it would charge Mr. Habib, the Bush administration told the Australians in January that it would not prosecute him because the C.I.A. did not want the evidence about Mr. Habib being taken to Egypt, and his allegations of torture, raised in court", Australian officials reportedly said[32].

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[25] Ibid.
[26] Clifford Krauss, "Qaeda Pawn, U.S. Calls Him; Victim, He Calls Himself", *New York Times*, 18 November 2003.
[27] Mitch Frank, "Help from an Unlikely Ally", *Time*, 1 July 2002.
[28] Dana Priest, "CIA's Assurances on Transferred Suspects Doubted", *The Washington Post*, 17 March 2005, available at http://www.washingtonpost.com/wp-dyn/articles/A42072-2005Mar16.html
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Raymond Bonner, "Australians Uneasy About U.S. detainee case", *New York Times*, 10 April 2005.

85. Drawing on all this concordant information and evidence we can say that there is a great deal of coherent, convergent evidence pointing to the existence of a system of "relocation" or "outsourcing" of torture. Acts of torture, or severe violations of detainees' dignity through the administration of inhuman or degrading treatment, are carried out outside national territory and beyond the authority of the national intelligence services. Does this mean that torture is so easy to use in this day and age? Is it enough for one's own secret services not to be physically present at the place of interrogation and to pretend to have no official knowledge of this practice to state that the law is not being broken? In this context, the statements made by Mr Schäuble, Germany's new Minister for the Interior, appear at the very least highly debatable, if not alarming. He seems to consider that the use of information obtained by dubious means is acceptable, provided that the German services were not perpetrating acts of torture themselves[33].

86. Did such pointers to the existence of "networked" torture really escape the notice of Council of Europe member states? What is, therefore, the share of responsibility of member states when their airport facilities are used to transport detainees to places where they will be subjected to torture, ie places – dare I say – of public notoriety ? Is there true co-operation between European states and the United States, or do the former display a respectable kind of duplicity?

87. These assumptions are obviously very serious, but all these questions require plain, honest answers. The opinion to be delivered by the Venice Commission in March 2006 will give us a clearer view of the legal consequences of these practices, including member States' responsibility in the light of the international treaties and the rules of general international law to which they are subject.

88. With specific reference to the awareness among member states' authorities of torture committed by their "partners" in the context of the fight against terrorism, we shall hear a personal account at our Committee's meeting of 24 January 2006 from Mr Craig Murray, former British Ambassador to Uzbekistan. The documents that he has already forwarded to me, and which led me to invite him to give his evidence, appear to be damning for the UK authorities, which seem to have knowingly continued to make use of information obtained under torture and supplied by the Uzbek intelligence services, thereby encouraging the practice of torture. Mr Murray was unable to persuade his authorities to cease doing so, and therefore resigned.[34]

89. Allegations have just been published to the effect that some German executive authorities had themselves, during co-operation with the American FBI, "outsourced" acts of torture, in collusion with the Lebanese and Syrian services. These allegations are currently being checked, and in the light of the statements quoted above such verification would appear necessary and urgent.

c. Secret detention centres

90. At this stage of the investigations, there is no formal, irrefutable evidence of the existence of secret CIA detention centres in Romania, Poland or any other country. Nevertheless, there are many indications from various sources which must be considered reliable, justifying the continuation of the analytical and investigative work. The information requested from the European Union Satellite Centre and from Eurocontrol should be supplied and evaluated in the very near future. The Egyptian message intercepted by the Swiss services, the authenticity of which is no longer in doubt, contains nothing very new, but it does nonetheless point to a different source regarding the existence of these centres. The Egyptian services have a reputation for efficiency, and there is a great deal of evidence to the effect that they have engaged in very active co-operation in carrying out these renditions.

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[33] Spiegel online, 16 December 2005; see also the opposite stance adopted by the President of the Constitutional Court, Mr Papier, in the *Handelsblatt*, 26 December 2005.

[34] See in this context the judgment of the House of Lords of 8 December 2005 confirming that information obtained under torture cannot be used in evidence before the courts.

d. Kosovo and Chechnya

91. Where Kosovo is concerned, the KFOR detention centre (Camp Bondsteel) is not "secret" in so far as its existence has been well-known for a long time now. Back in 2002 the Commissioner for Human Rights, Mr Gil-Robles, reported on his findings *in situ*. At the hearing with our committee on 13 December 2005 the Commissioner for Human Rights repeated that the Kfor detention centre had "many parallels with Guantanamo: prisoners arrested without recourse to any kind of judicial procedure or legal representation". Nor is Camp Bondsteel open for inspection by the Council of Europe's Committee for the Prevention of Torture (CPT), which has the right to inspect all places of detention in States Parties to the European Convention for the Prevention of Torture (including Serbia and Montenegro), and which has not hitherto obtained authorisation to visit. Negotiations are in progress with KFOR.

92. Where Chechnya is concerned, Mr Bindig's report, which is to be discussed in the plenary sitting of 25 January, reports on numerous cases of "enforced disappearances" and torture, as well as the existence of secret places of detention, all strongly criticised by the CPT in two public statements to which I referred in my December 2005 introductory memorandum, and which are still waiting to be given their due importance by the Committee of Ministers of the Council of Europe.

F. Looking ahead to the continuing investigation

93. The replies from Eurocontrol and the European Union Satellite Centre would appear to be imminent, as the Romanian authorities have now agreed supply satellite photographs of places located on their territory. We will not be able to pronounce on the importance and the scope of this information until a later juncture.

94. The factual elements secured to date, thanks *inter alia* to the action of the Council of Europe, have induced the European Parliament to set up a temporary special committee responsible for investigating any possible unlawful action taken in the context of the fight against terrorism in the European Union member or applicant States. This decision underscores the seriousness of the evidence secured so far. It is felicitous that other international institutions are also dealing with these issues, and the Council of Europe and its Rapporteur will obviously fully co-operate with them.

95. We should also mention the remarkable work being done by various NGOs and numerous investigatory journalists. Such journalists symbolise the commitment of a community which is determined to ascertain the truth and will not allow the fight against terrorism, which is absolutely vital, to justify using unspeakable methods, thereby raising the threat of a lapse into barbarity. Consequently, the officials who are well aware of the fact and who in all conscience cannot accept these methods, provide a major channel for ascertaining the truth. These officials face two contradictory imperatives, namely official secrecy and the ethical duty not to collude in acts infringing human dignity. In this context, whistle-blowing is the expression of civil commitment and courage, rather than an act of denunciation or betrayal.

96. The replies which the Council of Europe's member States must supply under the procedure set out in Article 52 of the European Convention on Human Rights must reach the Secretary General by 21 February 2006. These replies will provide additional material for assessing the situation.

97. Similarly, the legal opinion requested from the Venice Commission will be very important for the conclusions of the final report, particularly in terms of the Council of Europe member States' obligations under the European Convention on Human Rights in order to ensure that their territory, and even their airspace, are not misused, even by friendly and allied third states, for the purposes of human rights violations. National procedures for parliamentary supervision of intelligence services will have to be analysed and, where necessary, improved, in order to ensure that abuse cannot be perpetrated on the pretext of the confidentiality of current procedures. Parliamentarians must also analyse the repeated

recourse by executives authorities to the concepts of "State secrecy" and "higher interests" in withholding information.

98. My experience as the Assembly's rapporteur on this particularly sensitive and substantial subject also makes me wonder about the resources at the Parliamentary Assembly's disposal for conducting this kind of inquiry. When national procedures cannot appropriately deal with investigations into possible human rights violations which are more than individual cases (for which the European Court of Human Rights has jurisdiction) and which transcend borders, we are justified in wondering whether the current instruments are still equal to the task. Instead of one single member as Rapporteur with the support of the normal resources of the Committee's secretariat, already overwhelmed by other current reports, we might seriously consider whether setting up a true committee of inquiry, assisted by experts and holding more extensive investigatory powers, might not be a better solution and more able to deal with these new important challenges.

99. As we have said, no cogent evidence has yet emerged on the existence in Europe of detention camps like the one at Guantanamo Bay. On the other hand, it has been proved (and in fact never denied), that individuals have been abducted, deprived of their liberty and all rights, and transported to different destinations in Europe, to be handed over to countries in which they have suffered degrading treatment and torture. This is serious enough to justify the continuation of the Council of Europe's inquiries and strenuous efforts from all member States to ascertain the truth.

100. There is a heated public debate in America on the requisite resources for fighting terrorism. The fact that detention and interrogation centres have been relocated to other countries is proof that the authorities are fully aware that the methods used are incompatible with the American legal system. Europe must clearly and unambiguously declare that it refuses outright to tolerate such doings in its territory, or anywhere else.

101. It is equally unacceptable and appalling to ease one's conscience by delegating such tasks – illegal secret detention and use of torture – to third countries (which have long been the target of high-profile specific and repeated denunciations of very serious human rights violations and the lack of any kind of democratic control).

102. In fact, we must go beyond ascertaining the existence or non-existence of secret detention centres in Europe. The issue at stake is even more important than that. The current US Administration obviously considers that the traditional instruments of the democratic State governed by the rule of law – justice, constitutional guarantees of a fair trial, respect for human dignity – are inappropriate for facing up to the terrorist threat. Persons assumed to be terrorists are therefore arrested, interrogated, deported and detained without any rights or safeguards, thus accepting the concrete and inevitable risk of subjecting completely innocent people to such treatment (inside the CIA an internal inquiry is reportedly under way into several cases of individuals who were abducted, imprisoned and tortured, before it emerged that the wrong people had been targeted). Is Europe prepared to accept such an approach? Can we really say that human rights are an obstacle to national security? Can there be any real security without respect for human dignity?

103. The safety and security of citizens and the fight against the terrorist threat are undeniable fundamental priorities for democracies and an immense challenge to the State founded on the rule of law. In a remarkable judgment handed down in June 2004, the US Supreme Court used the following very clear terms: "The point at issue in this case is nothing less than the essence of a free society. If this national is still attached to the ideals symbolised in its flag, it must not use the weapons of tyrants to resist an attack by the forces of tyranny". Frank, open dialogue between the institutions on both sides of the Atlantic is necessary, indeed absolutely vital, if we wish to implement the most effective means of combating the new threats facing us. This can only be achieved if one side answers the questions and the other is genuinely prepared to ask them.

* * *

Update: 23.01.06

On 23rd January 2006, the Rapporteur received information from both the EU Satellite Center and Eurocontrol. He will now undertake an analysis of the information (satellite pictures, flights records) provided.

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APPENDIX I

Alleged secret detentions in Council of Europe member states: Background information

Rapporteur of the Committee on Legal Affairs and Human Rights (AS/Jur): Mr Dick Marty, Switzerland, ALDE (appointed 13.12.2005)
Rapporteur for opinion of the Political Affairs Committee: Mr Peter Schieder, Austria, SOC

- Mandate: Doc 10748, Reference 3153 of 25.11.2005
- Expiry date for adoption of the report: 25.11.2007

AS/Jur meeting on 7.11.2005:
- considered the possibility of asking the Standing Committee of the Assembly for an urgent procedure debate
- [provisionally] appointed its Chairperson, Mr Marty, as Rapporteur and instructed him to collect pertinent information and to present his conclusions at the next meeting
- authorised him, if he deemed it necessary, to make fact-finding visits to Poland and Romania in this context
- left it to him, if he deemed it necessary, to address a request for an urgent procedure debate to the President of the Assembly on behalf of the Committee
- invited the Secretary General of the Council of Europe to ask States Parties to the European Convention on Human Rights (ECHR) for information on this subject (Article 52)

14.11.2005: Letters to US authorities (Observer to the CoE), and Polish and Romanian PACE Delegations, asking for information
17.11.2005: Reply from Romanian PACE Delegation

AS/Jur meeting on 22.11.2005:
- considered and took note of an information memorandum (AS/Jur (2005) 52 rev 2) submitted by the Rapporteur, decided to declassify it and transmit it to the Bureau with a view to its public distribution at the Standing Committee's meeting in Bucharest on 25 November 2005
- held an exchange of views with Mrs Kathalijne Buitenweg, MEP (Netherlands, Group of the Greens), member of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament and Mr Emmanuel Crabit, Principal Administrator in the Directorate-General for Justice, Freedom and Security of the European Commission
- asked its Chairperson to table a motion for a resolution on alleged secret detention centres in Council of Europe member States and to propose to the President of the Assembly that the text be referred to the Committee on Legal Affairs and Human Rights for report as soon as possible (letter sent on 24.11.2005)

29.11.2005: Letters to Mr Frank Asbeck, Director of European Union Satellite Centre, and to Mr Victor Aguado, Director General of Eurocontrol, asking for their cooperation
5.12.2005: Letter from Eurocontrol, informing that they are seeking agreement of member states governing body
6.12.2005: Letter from US Ambassador (Observer to the CoE), enclosing public statement made by US Secretary of State on 5.12.2005
[7.12.2005: Letters from Mr Frattini, Vice-President of European Commission to Mrs Benita Ferrero-Waldner, European Commissioner, and to Mr Jacques Barrot, Vice-President of European Commission, asking for support for Mr Marty (concerning EU Satellite Centre and Eurocontrol respectively)]
9.12.2005: Interim provisional reply from EU Satellite Centre

12.12.2005: AS/Bur invited the national parliaments to cooperate fully with Mr Marty in the preparation of his report

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AS/Jur meeting on 3.12.2005:

- held an exchange of views with Mrs Maud de Boer Buquicchio, Deputy Secretary General of the Council of Europe, Mr Alvaro Gil-Robles, Council of Europe Human Rights Commissioner, Mr Cem Özdemir, member of the European Parliament (Germany, Group of the Greens/European Free Alliance), and Mr Emmanuel Crabit, Principal Administrator in the Directorate-General for Justice, Freedom and Security of the European Commission
- heard a statement by the Rapporteur on developments on this issue since the last meeting,
- approved a public statement by the Rapporteur
- authorised the Rapporteur to go to the seats of the European institutions and to make fact-finding visits to certain Council of Europe member states if he deemed it necessary
- decided to ask the European Commission for Democracy through Law (Venice Commission) to prepare a legal opinion assessing the legality of secret detention in the light of Council of Europe member states' international obligations, in particular the European Convention on Human Rights and the European Convention for the Prevention of Torture, and expressed the wish that this opinion be submitted as soon as possible
- asked its Chairperson to submit to the Bureau a request for an urgent procedure debate on «the alleged secret detentions in Council of Europe member states" during the Assembly's January 2006 part-session

14.12.2005:	Letter to Mr Brian Ross, Journalist ABC
14.12.2005:	Letter to Mr Lenn Downie, Editor, Washington Post
14.12.2005:	Letter from Mr Frank Asbeck, EU Satellite Centre, informing that the provision of satellite images is not part of the Centre's mission
15.12.2005:	Letter sent to the Venice Commission requesting a legal opinion (see Appendix III)
16.12.2005:	"Information Notice" (reply) from Polish Delegation
16.12.2005:	Letter sent to the President of the Assembly proposing an urgent procedure debate
19.12.2005:	Letters sent all PACE delegations, enclosing questions which MPs could put to their governments and a list of alleged flight patterns (see Appendix II)
21.12.2005:	Letter from Washington Post (Mr Downie), informing that it was not possible to disclose their sources
21.12.2005:	Follow-up letter to Mr Iwinski, Head of Polish PACE Delegation
22.12.2005:	Letter sent to Mr Javier Solana, SG of the Council of the European Union, asking him to authorise EU Satellite Centre cooperation
10.01.2006:	Letter from Venice Commission: adoption of its opinion foreseen on 17-18.03.2005
11.01.2006:	Reminder letter to Mr Victor Aguado, Director General of Eurocontrol + reminder e-mail from AS/Jur secretariat to Mr Solana's secretariat
16.01.2005:	Reminder messages sent to Mr Iwinski and Mr Ross (ABC)
19.01.2006:	Letter from ABC (on behalf of Mr Brian Ross) informing that it was not possible to disclose their sources, but that they could provide the video recording of the report of 5 December 2005 (to which Mr Marty replied that he would indeed appreciate receiving the video recording)
23.01.2006:	Information received from the EU Satellite Center and Eurocontrol

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APPENDIX II

Letter of 19 December 2005 from Mr Dick Marty, Chairperson of the Committee on Legal Affairs and Human Rights to the Chairpersons of the National Delegations

...

As you are no doubt aware, the Committee on Legal Affairs and Human Rights has instructed me to prepare a report on *"Alleged secret detention centres in Council of Europe member states"* (Doc 10748).

At its meeting in Paris on 13 December 2005, the Committee discussed the action taken on this issue in their national parliaments. I have been asked, at the request of members of the Committee, to prepare a list of pertinent questions which members of parliament could address to their governments. I would be grateful if you could forward this list to the members of your Parliament as soon as possible. The pressure thus brought to bear in national parliaments will reinforce that exerted by international organisations.

I would also be grateful if you could send me replies already given or to be given by your governments to these questions. This information will be extremely useful if the Assembly decides to follow the Committee's proposal to hold an urgent procedure debate on this matter during the January 2006 part-session.

Thanking you in advance for your cooperation, I remain,

...

[Enclosed with this letter was a list of alleged flight patterns of suspected CIA flights.]

Appendix to the letter:

Questions which members of the Parliamentary Assembly might put to their respective governments in their national parliament:

Secret services:

- Is the Government systematically informed of the activities of foreign secret services (in particular the CIA) on national territory?
- How does it supervise co-operation between the national secret services and those of partner countries? To what extent might the Government have tolerated certain illegal activities by foreign secret services on national territory by adopting a passive attitude?
- Are there any specific agreements with the USA on combating terrorism (possibly providing for the USA to have bases on national territory or even to carry out policing operations independently)?

Secret detention centres:

- Does the Government have any information regarding the existence of secret detention centres on national territory or elsewhere in Europe? If so, what information? Since when?
- Have the authorities been contacted by the authorities or secret services of other countries requesting permission for the (secret) detention and/or "rendition" of prisoners on national territory?
- Has the Government requested information from the American authorities regarding the alleged existence of secret detention centres in Europe? If so, what replies has it received to date?

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Flights to, from or over national territory by CIA aircraft/transportation of prisoners:

- Does the Government know of any flights to, from or over national territory by aircraft chartered by the CIA or related agencies (outsourcing)? If so, since when, and how frequent have they been?

- Was permission requested from the Government or the competent authorities for the flights and overflights in question? If so, what was its/their response?

- What information must be provided in support of such requests? Must a list of passengers' names (always) be supplied?

- What implications do the NATO accords or other similar agreements have for the procedures for requesting permission for the alleged flights? Do these procedures only apply to military flights or can they be extended to civilian flights?

- Does the Government know of (or has it tolerated by adopting a passive attitude) the illegal transportation of prisoners on those flights? If so, since when has this been the case?

- What is the legal basis allowing prisoners to be transported *via* national territory by a third country? Has the Government ever authorised this kind of transportation? If so, what kind of assurances can it demand regarding the conditions under which these prisoners are held?

- Does the Government know of any landings on national territory of aircraft which may have carried such prisoners (eg on their way to the Guantanamo Bay base)? If so, please give details.

- Does the Government know of, or has it been passively or actively involved in, the carrying out of abductions by foreign secret services on national territory or that of other states? Have there been any judicial investigations into these cases? If so, what results have there been so far?

- Has the Government requested information from the American authorities regarding alleged flights to, from or over national territory by aircraft chartered by the CIA which may have been used for the illegal transportation of prisoners? If so, what replies has it received so far?

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APPENDIX III

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Letter of 15 December 2005 from Mr Dick Marty, Chairperson of the Committee on Legal Affairs and Human Rights to Mr Antonio La Pergola, President of the European Commission for Democracy through Law

...

As you are no doubt aware, I am preparing a report on "alleged secret detention centres in Council of Europe member states" (PACE Doc 10748 and document AS/Jur (2005) 52 rev 2, copies attached). In this context, I have been mandated by the Committee on Legal Affairs and Human Rights to request a Legal Opinion from the Venice Commission.

The Committee would appreciate receiving an Opinion with respect to the following two inter-related matters:

1. An assessment of the legality of secret detention in the light of Council of Europe member States' international law obligations, in particular the European Convention on Human Rights and the European Convention for the Prevention of Torture. In particular, to what extent is a State responsible if - actively or passively - it permits illegal detention or abduction by a third State or an agent thereof?

2. What are the legal obligations of Council of Europe member States, under human rights and general international law, regarding the transport of detainees by other States through their territory, including their airspace? What is the relationship between such obligations and possible countervailing obligations which derive from other treaties, including treaties concluded with non-member States?

Bearing in mind that my report is to be presented at the Assembly's session on 23- 27 January 2006, I would very much appreciate it if the said Legal Opinion, or at least an interim or provisional version thereof, could be provided to the Committee on Legal Affairs and Human Rights before the Assembly's January 2006 part-session.

...

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DATE/CASE ID: 18 JUN 2009 200706444

APPENDIX IV

Communication of 21 November 2005 from the Secretary General of the Council of Europe to the Contracting Parties to the ECHR

Request for an explanation in accordance with Article 52 of the European Convention on Human Rights

The Secretary General of the Council of Europe,

Having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the Convention") and its Protocols;

Having regard also to the case law of the European Court of Human Rights which has given concrete expression to the rights and freedoms guaranteed thereunder and which has affirmed that the law and practice of the High Contracting Parties must comply with the provisions of the Convention and its additional Protocols;

Noting that there have been recent reports suggesting that individuals, notably persons suspected of involvement in acts of terrorism, may have been apprehended and detained, or transported while deprived of their liberty, by or at the instigation of foreign agencies, with the active or passive cooperation of High Contracting Parties to the Convention or by High Contracting Parties themselves at their own initiative, without such deprivation of liberty having been acknowledged;

Bearing in mind the fundamental importance of the safeguards contained in the Convention against arbitrary deprivation of liberty both in their own right and for the protection of the right to life and for upholding the absolute prohibition of torture or inhuman or degrading treatment or punishment;

Considering that, under Article 1 of the Convention, the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms guaranteed therein and that the participation, acquiescence or connivance of the authorities of a Contracting State in the acts of the agents of another State affecting Convention rights may engage the Contracting State's responsibility under the Convention and that such responsibility may also be engaged where that State's agents are acting *ultra vires* or contrary to instructions;

Considering also that unacknowledged deprivation of liberty raises serious questions concerning the effective implementation of, and compliance with, the Convention, notably its Articles 2, 3, 5, 6, 8, 13 and Article 2 of Protocol No. 4 to the Convention;

Acting on the basis of the powers conferred on him by virtue of Article 52 of the European Convention of Human Rights:

1. Requests the Governments of the High Contracting Parties to furnish an explanation of the manner in which their internal law ensures the effective implementation of the provisions of the Convention and its additional Protocols, as interpreted by the European Court of Human Rights, regarding the following specific issues:

   - explanation of the manner in which their internal law ensures that acts by officials of foreign agencies within their jurisdiction are subject to adequate controls;

   - explanation of the manner in which their internal law ensures that adequate safeguards exist to prevent unacknowledged deprivation of liberty of any person within their jurisdiction, whether such deprivation of liberty is linked to an action or an omission directly attributable to the High Contracting Party or whether that Party has aided or assisted the agents of another State in conduct amounting to such deprivation of liberty, including aid or assistance in the transportation by aircraft or otherwise of persons so deprived of their liberty;

   - explanation of the manner in which their internal law provides an adequate response to any alleged infringements of Convention rights of individuals within their jurisdiction,

notably in the context of deprivation of liberty, resulting from the conduct of officials of foreign agencies. In particular, explanation of the availability of effective investigations that are prompt, independent and capable of leading to the identification and sanctioning of those responsible for any illegal acts, including those responsible for aiding or assisting in the commission of such acts, and the payment of adequate compensation to victims;

In the context of the foregoing explanations, an explanation is requested as to whether, in the period running from 1 January 2002 (or from the moment of entry in force of the Convention if that occurred on a later date) until the present, any public official or other person acting in an official capacity has been involved in any manner – whether by action or omission - in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty, including where such deprivation of liberty may have occurred by or at the instigation of any foreign agency. Information is to be provided on whether any official investigation is under way and/or on any completed investigation;

2. Requests that these explanations be provided by 21 February 2006.

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OFFICE OF THE LEGAL ADVISER TASKER

L Control No.: 2006-022

Date: 2/3/06 Due Date: 2/8/06

FOIA/PA: Blue/Red Border: 200602123

Other: DOJ Doc Req:

SUBJECT: Allegations heard by UK's Andrew Tyrie that the U.S. has carried out extraordinary renditions

ACTION			INFO
	L/ACV	L/AF	
	L/BA	L/CA	
	L/CID	L/DL	
	L/EAP	L/EB	
	L/EMP	L/EUR	X
	L/EX	L/HRR	
X	L/LEI	L/LM	
	L/NESA	L/NP	
	L/OES	L/PD	
X	L/PIL	L/PM	
	L/T	L/UNA	
	L/WHA	L/FO	

TASKING DETAILS

- X Direct Reply (copy to Staff Assist)
- ___ Action Memo w/Letter for ___sign
- ___ Briefing Memo/Checklist
- ___ Information Memo
- ___ Issue Paper
- ___ Q&As
- ___ Background Paper
- ___ Hofmann Memo:
- ___ Questions for the Record
- ___ Building Blocks
- X For Appropriate Handling (if respond, provide copy)
- ___ Document Search/Review
- ___ Cong Mand Reporting Req

SPECIAL NOTES/INSTRUCTIONS:

emailed each office.
Also to note: Ref L drafts response
EUR/UBI UKdesk-R

ALL TASKERS MUST HAVE:

1. Email document to the Staff Assistant if going to 7th Floor Principals (D, S, P, etc).
2. If red border, type S/ES number on original in the upper right hand corner.
3. Clearance page with drafter's name spelled out in full and signed.
4. Clearance page should have date and document number.
5. DO NOT TYPE DATE. Date will be added after signature.
6. If direct reply on behalf of POTUS, fill out Executive Secretariat Transmittal Form.

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Department of State Correspondence

EXECUTIVE SECRETARIAT

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Classification / Downgrader

ACTION Assigned To: L

Date: 2-3-06

DATE DUE in S/ES: 2-8-06

S/ES #: 200602123

X-Ref: (if any) L1267

ACTION REQUESTED: ___ HIGH PRIORITY

___ RECOMMENDATION FOR _____ UNDER COVER OF AN ACTION MEMO

WITH REPLY ATTACHED: LETTER FORMAT ___ CABLE FORMAT ___

___ OR a written reason why bureau recommends against a reply (E-mail address: SES-CR)

___ REPLY FOR SIGNATURE BY _____ (no action memo)

✓ DIRECT REPLY ON BEHALF OF S if appropriate; RETURN TO S/ES-CR AN INFO COPY OF THE SIGNED / DATED DIRECT REPLY.

___ REGRET BY PHONE and PROVIDE A WRITTEN CONFIRMATION TO S/ES-CR (E-mail address: SES-CR)

___ OTHER (see "REMARKS / SPECIAL INSTRUCTIONS")

___ FOR APPROPRIATE HANDLING ___ FOR YOUR INFORMATION

REMARKS / SPECIAL INSTRUCTIONS:

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FROM: ANGELA BARBER-WILSON
EXECUTIVE SECRETARIAT
EXT: 7-0645

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444

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HUMAN RIGHTS WATCH

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List of "Ghost Prisoners" Possibly in CIA Custody

List of Detainees Published by Human Rights Watch

The following is a list of persons believed to be in U.S. custody as "ghost detainees" -- detainees who are not given any legal rights or access to counsel, and who are likely not reported to or seen by the International Committee of the Red Cross. The list is compiled from media reports, public statements by government officials, and from other information obtained by Human Rights Watch. Human Rights Watch does not consider this list to be complete: there are likely other "ghost detainees" held by the United States.

Under international law, enforced disappearances occur when persons are deprived of their liberty, and the detaining authority refuses to disclose their fate or whereabouts, or refuses to acknowledge their detention, which places the detainees outside the protection of the law. International treaties ratified by the United States prohibit incommunicado detention of persons in secret locations.

Many of the detainees listed below are suspected of involvement in serious crimes, including the September 11, 2001 attacks; the 1998 U.S. Embassy bombings in Kenya and Tanzania; and the 2002 bombing at two nightclubs in Bali, Indonesia. (One of the listed, No. 25, Ahmed Khalfan Ghailani, was indicted in U.S. federal court for his role in the 1998 attacks.) Yet none on this list has been arraigned or criminally charged, and government officials, speaking anonymously to journalists, have suggested that some detainees have been tortured or seriously mistreated in custody.

The current location of these prisoners is unknown.

List, as of December 1, 2005:

1. Ibn Al-Shaykh al-Libi
Reportedly arrested on **November 11, 2001,** Pakistan.
Libyan, suspected commander at al-Qaeda training camp.
Previously listed as "disappeared" by Human Rights Watch.

2. Abu Faisal
Reportedly arrested on **December 12, 2001**
Nationality unknown. See next entry.

3. Abdul Aziz
Reportedly arrested on **December 14, 2001**
Nationality unknown. In early January 2001, Kenton Keith, a spokesman at the U.S. Embassy in Islamabad, produced a chart with the names of senior al-Qaeda members listed as killed in action, detained, or on the run. Faisal and Aziz were listed as detained on Dec. 12 and 14, 2001. See: Andrea Stone, "Path to bin Laden may lie behind bars; US interrogates al-Qaeda, Taliban prisoners in hope of nailing down war on terror's prime targets," USA Today, January 8, 2002; Bradley Graham and Walter Pincus, "Al-Qaeda Trainer in U.S. Hands," The Washington Post, January 5, 2002.

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4. Abu Zubaydah (also known as Zain al-Abidin Muhahhad Husain)
Reportedly arrested in **March 2002**, Faisalabad, Pakistan.
Palestinian (born in Saudi Arabia), suspected senior al-Qaeda operational planner. Listed as captured in "George W. Bush: Record of Achievement, Waging and Winning the War on Terror," available on the White House website. Previously listed as "disappeared" by Human Rights Watch.

5. Abdul Rahim al-Sharqawi (aka Riyadh the facilitator)
Reportedly arrested in **January 2002**
Possibly Yemeni, suspected al-Qaeda member (possibly transferred to Guantanamo). Previously listed as "disappeared" by Human Rights Watch (see note 27).

6. Abd al-Hadi al-Iraqi
Reportedly arrested in **January 2002**
Nationality unknown, presumably Iraqi, suspected commander of al-Qaeda training camp. U.S. officials told Associated Press on January 8, 2002 and March 30, 2002, of al-Iraqi's capture. See e.g., "Raid May Have Nabbed Bin Laden Lieutenant," Associated Press, March 30, 2002. Previously listed as "disappeared" by Human Rights Watch (see note 27).

7. Muhammed al-Darbi
Reportedly arrested in **August 2002**
Yemeni, suspected al-Qaeda member. The Washington Post reported on October 18, 2002: "U.S. officials learned from interviews with Muhammad Darbi, an al Qaeda member captured in Yemen in August, that a Yemen cell was planning an attack on a Western oil tanker, sources said." On December 26, 2002, citing "U.S. intelligence and national security officials," the Washington Post reports that al-Darbi, as well as Ramzi Binalshibh [see below], Omar al-Faruq [reportedly escaped from U.S. custody in July 2005], and Abd al-Rahim al-Nashiri [see below] all "remain under CIA control."

8. Ramzi bin al-Shibh
Reportedly arrested on **September 13, 2002**
Yemeni, suspected al-Qaeda conspirator in Sept. 11 attacks (former roommate of one of the hijackers). Listed in "George W. Bush: Record of Achievement, Waging and Winning the War on Terror," available on the White House website. Previously listed as "disappeared" by Human Rights Watch.

9. Abd al-Rahim al-Nashiri (or Abdulrahim Mohammad Abda al-Nasheri, aka Abu Bilal al-Makki or Mullah Ahmad Belal)
Reportedly arrested in November 2002, United Arab Emirates.
Saudi or Yemeni, suspected al-Qaeda chief of operations in the Persian Gulf, and suspected planner of the USS Cole bombing, and attack on the French oil tanker, Limburg. Listed in "George W. Bush: Record of Achievement, Waging and Winning the War on Terror," available on the White House website. Previously listed as "disappeared" by Human Rights Watch.

10. Mohammed Omar Abdel-Rahman (aka Asadullah)
Reportedly arrested in **February 2003**, Quetta, Pakistan.
Egyptian, son of the Sheikh Omar Abdel-Rahman, who was convicted in the United States of involvement in terrorist plots in New York. See Agence France Presse, March 4, 2003: "Pakistani and US agents captured the son of blind Egyptian cleric Omar Abdel Rahman. . . a US official said Tuesday. Muhamad Abdel Rahman

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was arrested in Quetta, Pakistan, the official said, speaking on condition of anonymity." David Johnston, New York Times, March 4, 2003: "On Feb. 13, when Pakistani authorities raided an apartment in Quetta, they got the break they needed. They had hoped to find Mr. [Khalid Sheikh] Mohammed, but he had fled the apartment, eluding the authorities, as he had on numerous occasions. Instead, they found and arrested Muhammad Abdel Rahman, a son of Sheik Omar Abdel Rahman, the blind Egyptian cleric. . ."

11. Mustafa al-Hawsawi (aka al-Hisawi)
Reportedly arrested on **March 1, 2003** (together with Khalid Sheikh Mohammad), Pakistan.
Saudi, suspected al-Qaeda financier. Previously listed as "disappeared" by Human Rights Watch.

12. Khalid Sheikh Mohammed
Reportedly arrested on **March 1, 2003,** Rawalpindi, Pakistan.
Kuwaiti (Pakistani parents), suspected al-Qaeda, alleged to have "masterminded" Sept. 11 attacks, killing of Daniel Pearl, and USS Cole attack in 2000. Listed in "George W. Bush: Record of Achievement, Waging and Winning the War on Terror," available on the White House website. Previously listed as "disappeared" by Human Rights Watch.

13. Majid Khan
Reportedly arrested on **March-April 2003,** Pakistan.
Pakistani, alleged link to Khalid Sheikh Mohammad, alleged involvement in plot to blow up gas stations in the United States. Details about Khan's arrest were revealed in several media reports, especially in Newsweek: Evan Thomas, "Al Qaeda in America: The Enemy Within," Newsweek, June 23, 2003. U.S. prosecutors provided evidence that Majid Khan was in U.S. custody during the trial of 24-year-old Uzair Paracha, who was convicted in November 2005 of conspiracy charges, and of providing material support to terrorist organizations.

14. Yassir al-Jazeeri (aka al-Jaziri)
Reportedly arrested on **March 15, 2003,** Pakistan.
Possibly Moroccan, Algerian, or Palestinian, suspected al-Qaeda member, linked to Khalid Sheikh Mohammed. Details of arrest reported: Alex Spillius, "FBI Questions al-Qaeda Man in Pakistan," Daily Telegraph, March 17, 2003; Paul Haven, "Al-Qaida suspect begins cooperating with authorities, Pakistani security officials say," Associated Press, March 17, 2003.

15. Ali Abdul Aziz Ali (aka Ammar al Baluchi)
Reportedly arrested on **April 29, 2003,** Karachi, Pakistan.
A Pakistani, he is alleged to have funneled money to September 11 hijackers, and alleged to have been involved with the Jakarta Marriot bombing and in handling Jose Padilla's travel to the United States. U.S. Judge Sidney Stein ruled that defense attorneys for Uzair Paracha could introduce statements Baluchi made to U.S. interrogators, proving that he was in U.S. custody. Former Deputy Attorney General James Comey also mentioned Baluchi during remarks to the media about the case of Jose Padilla on June 1, 2004

16. Waleed Mohammed bin Attash (aka Tawfiq bin Attash or Tawfiq Attash Khallad)
Reportedly arrested on **April 29, 2003,** Karachi, Pakistan.
Saudi (of Yemeni descent), suspected of involvement in the bombing of the USS Cole in 2000, and the Sept. 11 attacks. See Afzal Nadeem, "Pakistan Arrests Six Terror Suspects, including Planner of Sept. 11 and USS Cole Bombing," Associated Press, April 30, 2003. His brother, Hassan Bin Attash, is currently held in Guantanamo. Previously listed as "disappeared" by Human Rights Watch.

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President Bush described his arrest as a "major, significant find" in the war against terrorism: "He's a killer. He was one of the top al-Qaeda operatives. . . . He was right below Khalid Shaikh Mohammad on the organizational chart of al-Qaeda. He is one less person that people who love freedom have to worry about." David Ensor and Syed Mohsin Naqvi, "Bush Hails Capture of Top al Qaeda Operative," CNN.com, May 1, 2003.

17. Adil al-Jazeeri
Reportedly arrested on **June 17, 2003** outside Peshawar, Pakistan.
Algerian, suspected al-Qaeda and longtime resident of Afghanistan, alleged "leading member" and "longtime aide to bin Laden." (Possibly transferred to Guantanamo.) Previously listed as "disappeared" by Human Rights Watch.

18. Hambali (aka Riduan Isamuddin)
Reportedly arrested on **August 11, 2003,** Thailand.
Indonesian, involved in Jemaah Islamiyah and al-Qaeda, alleged involvement in organizing and financing the Bali nightclub bombings, the Jakarta Marriot Hotel bombing, and preparations for the September 11 attacks. Listed in "George W. Bush: Record of Achievement, Waging and Winning the War on Terror," available on the White House website. Previously listed as "disappeared" by Human Rights Watch.

19. Mohamad Nazir bin Lep (aka Lillie, or Li-Li)
Reportedly arrested in **August 2003,** Bangkok, Thailand.
Malaysian, alleged link to Hambali. See next entry.

20. Mohamad Farik Amin (aka Zubair)
Reportedly arrested in **June 2003,** Thailand.
Malaysian, alleged link to Hambali. For more information on the arrest of Mohammad Farik Amin and Mohamad Nazir bin Lep, see: Kimina Lyall, "Hambali Talks Under Grilling—Slaughter of Innocents," The Australian, August 21, 2003; Kimina Lyall, "Hambali Moved JI Front Line to Bangladesh, Pakistan," The Weekend Australian, September 27, 2003; Simon Elegant and Andrew Perrin, "Asia's Terror Threat," Time Asia Magazine, October 6, 2003; Simon Elegant, "The Terrorist Talks," Time, October 13, 2003.

21. Tariq Mahmood
Reportedly arrested in **October 2003,** Islamabad, Pakistan.
Dual British and Pakistani nationality, alleged to have ties to al-Qaeda. See "Pakistan grills detained British al-Qaeda suspect," Agence-France Presse, November 10, 2005; Sean O'Neill, "Five still held without help or hope; Guantanamo," The Times, January 12, 2005.

22. Hassan Ghul
Reportedly arrested on **January 23, 2004,** in Kurdish highlands, Iraq.
Pakistani, alleged to be Zarqawi's courier to bin Laden; alleged ties to Khalid Sheikh Mohammad. President Bush described Hassan Ghul's arrest on January 26, 2004, in comments to the press, Little Rock, Arkansas: "Just last week we made further progress in making America more secure when a fellow named Hassan Ghul was captured in Iraq. Hassan Ghul reported directly to Khalid Sheik Mohammad, who was the mastermind of the September 11 attacks. . . . He was captured in Iraq, where he was helping al Qaeda to put pressure on our troops."

23. Musaad Aruchi (aka Musab al-Baluchi, al-Balochi, al-Baloshi)

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Reportedly arrested in Karachi on **June 12, 2004,** in a "CIA-supervised operation."
Presumably Pakistani. Pakistani intelligence officials told journalists Aruchi was held by Pakistani authorities at an airbase for three days, before being handed over to the U.S., and then flown in an unmarked CIA plane to an undisclosed location. Anwar Iqbal, "Pakistan Hands Over 1998 Bomber to US," United Press International, August 3, 2004. See also, reports cited in next entry, and Zahid Hussain, "Pakistan Intensifies Effort Against al Qaeda," The Asian Wall Street Journal, August 5, 2004; Bill Powell, "Target: America," Time Magazine, August 16, 2004, Vol. 164, Issue 7; "Pakistani Aides: Al-Qaida Arrest in June Opened Leads," Dow Jones International News, August 3, 2004; "CIA-supervised arrest in Pak opened valuable leads: Report," The Press Trust of India, August 3, 2004.

24. Mohammed Naeem Noor Khan (aka Abu Talaha)
Reportedly arrested on **July 13, 2004,** Pakistan.
Pakistani, computer engineer, was held by Pakistani authorities, and likely transferred to U.S. custody. (Possibly in joint U.S.-Pakistani custody.) See Douglas Jehl and David Rohde, "Captured Qaeda Figure Led Way To Information Behind Warning," New York Times, August 2, 2004. Kamran Khan, "Al Qaeda Arrest In June Opened Valuable Leads," Washington Post, August 3, 2004; Kamran Khan and Dana Priest, "Pakistan Pressures Al Qaeda; Military Operation Results In Terror Alert and Arrests," Washington Post, August 5, 2004; "Pakistan questioning almost 20 Al-Qaeda suspects," Agence-France Presse, August 5, 2005; Robert Block and Gary Fields, "Al Qaeda's Data on U.S. Targets Aren't New: Surveillance of Listed Sites In Eastern Cities Took Place Over Time, Perhaps Years," The Asian Wall Street Journal, August 7, 2004; Adrian Levy and Cathy Scott-Clark, "One Huge U.S. Jail," The Guardian, March 19, 2005.

25. Ahmed Khalfan Ghailani
Reportedly arrested on **July 24, 2004,** Pakistan
Tanzanian, reportedly indicted in the United States for 1998 embassy bombings. U.S. and Pakistani intelligence officials told UPI that Ghailani was transferred to "CIA custody" in early August. See Anwar Iqbal, "Pakistan Hands Over 1998 Bomber to US," United Press International, August 3, 2004. Pakistani security officials told AFP and Reuters in January 2005, that Ghailani was handed over to the United States "several months ago." See e.g., "Pakistan hands Tanzanian Al-Qaeda bombing suspect to US," Agence France Presse, January 25, 2005. Listed as captured in "George W. Bush: Record of Achievement, Waging and Winning the War on Terror," available on the White House website.

26. Abu Faraj al-Libi
Reportedly arrested on **May 4, 2005,** North Western Frontier Province, Pakistan.
Libyan, suspected al-Qaeda leader of operations, alleged mastermind of two assassination attempts on Musharraf. Col. James Yonts, a U.S. military spokesman in Afghanistan, "said in an email to The Associated Press that al-Libbi was taken directly from Pakistan to the U.S. and was not brought to Afghanistan."

From: http://hrw.org/english/docs/2005/11/30/usdom12109.htm

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Deeks, Ashley S

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From: Filippatos, James
Sent: Friday, May 05, 2006 9:34 AM
To: Deeks, Ashley S; Brancato, Gilda M; Hill, Steven R; Pelofsky, Eric J; Johnson, Darin E; Dorosin, Joshua L; Legal-All-Deputies
Subject: FW: USEU Media Transcript for Clearance

FYI.

Jim
7-7970

From: Gianfranceschi, Robert E(Brussels)
Sent: Friday, May 05, 2006 4:31 AM
To: Filippatos, James
Subject: FW: USEU Media Transcript for Clearance

Jim,
John Bellinger asked that I send him directly the transcript for clearance, which I did yesterday afternoon. Sending you a copy to follow up with any changes and clearance, for posting on USEU website.
Thanks for your help on this – and for your preliminary advice on press events.
Rob

Robert Gianfranceschi
Press Officer - USEU
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From: Gianfranceschi, Robert E
Sent: Thursday, May 04, 2006 6:01 PM
To: Bellinger, John B(Legal)
Subject: USEU Media Transcript for Clearance

John,
Here's the draft transcript from this morning's media roundtable – for your clearance. Our intention, with your approval, is to post the cleared transcript on USEU website.

Le Monde expects the story based on the Stroobants interview to run in the edition out Friday early afternoon (and dated Saturday, May 6).

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JOHN B. BELLINGER, III
Legal Adviser, U.S. Department of State

Media Roundtable
USEU – Brussels
May 4, 2006

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 12 AUG 2009 200706444

Mr. Bellinger: Thank you all for coming out this morning early. As you know, I'm John Bellinger, the Legal Adviser at the State Department. I am passing through Brussels briefly right now, largely just for bilateral consultations with EU officials, with Belgian officials, with NATO officials, primarily on my way this afternoon to Geneva where I will head the U.S. delegation presenting our defense of our report to the Committee Against Torture under the Convention Against Torture. We make our presentation tomorrow in Geneva.

It's actually an amusing process in terms of the process. We will make a presentation, then the Committee will give us questions, and then we have a take-home assignment. We go home over the weekend and work out our answers to the questions, and then we come back on Monday in Geneva and provide our answers.

We'll have quite a large delegation, between 25 and 30 people, from all U.S. agencies. We've worked very hard to answer the Committee's questions and have taken the process extremely seriously.

The Convention Against Torture requires a report every four years and it was time for the U.S. report. We have provided quite a voluminous one, and in addition have prepared a number of answers to the Committee's questions.

Obviously, this is a difficult time for the United States with numerous allegations that have been made, but we don't shrink away from answering the questions and we have brought, as I say, a large delegation of people to demonstrate that we take the process very seriously, that we take our obligations to provide a report very seriously, and have come prepared to answer the Committee's questions.

I have, during the last year including my time in Brussels, tried to meet with journalists and with officials in all of the European capitals that I have been through to address questions that have been raised about the U.S. commitment to its international obligations, including with respect to detainees and international criminal justice. This is something that Secretary Rice takes extremely seriously. During her transition from the White House to the Department of State, when I was the co-manager of her transition team, this was an issue that we identified was of particular concern in Europe. You'll recall at the time she was confirmed she emphasized that now is the time for diplomacy, meaning that after the two wars during the previous four years that it was important to emphasize our diplomatic activities and a sub-part of that was emphasizing U.S. commitment to our international obligations and to rule of law.

You will have seen, if you follow closely, that Secretary Rice has mentioned this theme regularly in her presentations. Just two weeks ago she addressed the American Society of International Law, at its centennial in Washington, and made further significant remarks on international law and rule of law, and I, as the Legal Adviser to the State Department, have tried to go through European capitals and to answer questions on these issues and emphasize our commitment to our obligations and to answer the questions people have that we know are out there.

So I'll just stop with that and start taking your questions.

Q: I have been following the CIA inquiries in the European Parliament. One of the allegations made by the former British Ambassador to Uzbekistan is that the CIA has been effectively subcontracting torture, using the Uzbeks to do this. The argument put forward by the British Foreign Secretary Jack Straw was that was in line with the Convention on Torture because you're not instigating the torture yourselves. Is that also the American administration's reading of the Convention?

Mr. Bellinger: I won't comment on what Mr. Straw said because I haven't seen it. We've made very clear that, contrary to allegations, we do not outsource torture. We are against torture ourselves. We take our obligation under the Convention Against Torture seriously. We have criminal statutes against torture. The President has made clear that we do not condone torture. We will not transfer people to other countries expecting that they will be tortured.

We have said, as you know, in Secretary Rice's statement last December, we have defended as a useful tool in fighting terrorism the practice of rendition in certain rare circumstances where an individual would otherwise not be able to be brought to justice or would otherwise be able to escape and avoid capture, that we have defended the practice in terms of transferring a person to another country of his nationality or where the person may be wanted. But in all circumstances we do not transfer the person with the expectation that the person would be tortured or would be mistreated.

Q: The U.S. is evidently in a campaign here, a public relations campaign, as you said earlier in your statement, to alleviate fears in the international community on this. Do you not think it is really time to take into account what the international community is telling you, basically the Europeans - that it's time to really do something about Guantanamo, which I'm no legal person, but it seems to me it does not abide by international law. That would be a huge step in easing fears and making the situation better. [Inaudible] So what are you going to do?

Mr. Bellinger: We are acutely aware of the concerns that have been raised both in Europe and around the world about Guantanamo. We don't want to keep Guantanamo open any longer than is necessary. As you know, we have been reducing the numbers. We do not want to be the world's jailers.

A great difficulty is - what is the alternative? There have been a number of voices recently who have called for the closure of Guantanamo, but none of those who have called for the closure of Guantanamo have suggested an alternative. So we know there are a large number of people in Guantanamo who have trained in al-Qaida training camps, trained in terrorist techniques, in bomb making, in chemical weapons manufacture, and the question is what should be done with those people?

We don't have many other countries in the world who are stepping up to say this is a problem for the international community. The United States should not have to shoulder this burden alone. So we are happy to take these individuals.

I would dispute your suggestion that it's a violation of international law. We're clearly aware of the concerns people have raised. One of the things that I have tried to do because I think the U.S. perhaps has not been sufficiently clear to explain our legal basis and to address the legal concerns that have been raised over the last few years about Guantanamo, to go out and address those concerns.

I think it's both ironic and telling that critics criticize us for essentially diametrically opposed violations of international law. Half the critics tell us that the people in Guantanamo should be treated as criminals and need to be prosecuted under criminal laws or released. The other half of the people say they should be treated under international humanitarian law or the laws of war and need to be treated as POWs or released. That's just simply a quick summary. There are hundreds of different statements that people tell us about the way they think the legal framework ought to work, and the fact that there seem to be so many different views reflects, I think, an understandable, uncomfortableness that perhaps we all have about the holding of this category of al-Qaida people. But the fact is the legal framework for holding people like this was simply not a very well developed framework and not well developed to hold people like this.

So I don't think it's a violation of international law. We think we are acting completely consistently with our international obligations. But we do know those questions are out there and that's one of the reasons that I've tried to come out and to address the concerns that people have.

Q: You said that there has been the practice of rendition. Now the Council of Europe has said in a preliminary report that there have been thousands of CIA flights over Europe. Can you confirm that the rendition taking place has been in Europe or above the EU, and could you give any figures?

Mr. Bellinger: Thanks very much for that question. The last time I was in Europe, about two months ago, the suggestion was that there were 400 flights. We're now up to 1,000 flights. I think the next time I'll be here it will probably be about 10,000 flights.

These allegations that there have been thousands of flights with the implication that they all have got detainees on them, and worse, detainees bound for mistreatment, is simply absurd. And the suggestion in fact that these flights are in fact leading up to anything that is improper or nefarious is also, I think, a dangerous suggestion.

There have not been thousands of flights. There have been, as we have said, a very few cases of rendition. We have made clear that we are not going to comment on specific details. But the suggestion that there have been large numbers or that this allegedly large number of flights have had detainees on them is simply an absurd allegation.

It's dangerous in the following way: in that the suggestion that flights themselves, intelligence flights are somehow engaged in illegal activity really undermines the cooperation between the United States and Europe. Many of these flights that have occurred may simply be carrying analysts for intelligence agencies to cooperate with one another, or other officials who are engaged in counter-terrorism cooperation. They may be carrying forensic evidence that will be shared with European partners so that Europeans can look at the evidence that we have collected.

So it's very dangerous to suggest that these instances of flights like this are somehow always engaged in illegal activity.

Q: To follow up on that. I think the reference was to about a thousand, not thousands. Do you still say that that figure is absurd?

Mr. Bellinger: I don't have the details on, one, I'm not sure what the latest allegation is. My point is that it seems to be growing. I don't have the information on exactly how many flights there have been.

What I am suggesting is that the unchallenged allegation or implication that all of these flights have got detainees on them is really just absurd. Someone needs to challenge that. It's not possible for the United States to prove a negative, but responsible European governments or responsible European officials simply need to say this has gotten out of hand. There is no evidence for the suggestion or implication that however many flights there have been, that they have all got detainees on them or that an intelligence flight is in fact engaged in some sort of improper activity. In fact, just the opposite.

The implication ought to be that if there are flights, no matter how many of them there have been, that this is in fact a manifestation of cooperation amongst our governments.

The best way to prevent terrorist attacks against any of our countries is through effective intelligence cooperation, and intelligence activities really in this global environment can't be done by one country alone. It can only be done through cooperation.

So the fact that there are two flights or a thousand flights, and I really don't have the details on how many there have been, I'm making a more general point, really is a sign of cooperation and not of anything that's improper.

Q: So are you saying that European governments did know about these flights?

Mr. Bellinger: No, I'm not saying that at all. I am saying, you'll recall Secretary Rice said previously that we have conducted renditions prior to September 11. In those cases the United States brought people back to justice prior to September 11th. In cases since September 11,[t] there have been cases where we have transferred an individual to another government of their nationality, or otherwise to face justice, and that in doing that we comply with our international obligations. We assume that other governments are complying with their international obligations. And we respect the sovereignty of the governments involved.

Q: So the flights are continuing? Continuing if and when they're necessary?

Mr. Bellinger: I wouldn't necessarily assume that at all. I would note that at least despite a good deal of digging by every journalist in Europe that the last allegation of a rendition was something like three years ago.

Q: And this inquiry, can it affect transatlantic intelligence sharing between the U.S. and EU?

Mr. Bellinger: That's a good question. I think it can be. That's really the point that I am trying to make here, is that this furor over renditions and really now just the furor over flights alone and the suggestion that flights alone are somehow improper I think can ultimately and already is undermining intelligence cooperation by suggesting that there should not even be people flying from one country to another or information being shared. This is the way we cooperate with one another. To suggest that the mere fact alone that a flight is somehow improper I think is a dangerous idea.

Q: You are saying those flights were done in cooperation, and so can I, do you suggest that those flights are continuing now without detainees? Or if there is no flights at the moment does that mean there is no cooperation going on?

Mr. Bellinger: The idea about intelligence activities is that one does not confirm or deny them.

I will tell you we looked very closely, at the time of Secretary Rice's trip in December, at the individual allegations because so many - not only in their breadth but also the individual allegations of a rendition here or a flight there - so many of the individual allegations were incorrect, that the U.S. government thought very seriously about trying to deny the individual allegations because so many of them were wrong. But we ultimately concluded, as I think all governments have concluded, that it's simply not possible to get into the business of confirming or denying specifics.

The result, unfortunately, has been damage to the reputation of the United States because people have assumed a number of things that are simply not happening. But I cannot comment on the specifics. I simply say that people should not assume that the fact alone of a flight is in fact something improper.

Q: But sir, the problem there is that we take your word for it, but you know just as well as I do precisely that the activities of the CIA and others tend to be secret. So you have a problem here. You can say as much as you want that there are no detainees on these flights and what have you, but it is your word against others. What is a little bit strange in your argument is that you are admitting that there are a whole bunch of flights. You are telling us that we should not assume there are detainees on all these flights, but you cannot exclude it either.

Mr. Bellinger: That's why it's a very difficult situation for the United States.

I think that any reasonable person looking at the facts that are actually out there would conclude that these allegations or a suggestion that these flights have all got detainees on them, or really, that any more than an extremely small number from a number of years back have been involved in renditions. I think any reasonable

person looking at those facts would conclude that the allegations to the contrary are just simply overblown.

But you're exactly right. It's very difficult for us to try to combat these suggestions. That's why we have asked for responsible voices to simply try to calm things down a little bit. It's very difficult to try to prove a negative.

People have periodically asked us, well, prove to us what is on every single flight. Come up with a list of every flight, tell us what was involved. Well, I think by my merely stating that, I think you will realize that's just not possible to do. Intelligence activities by their nature are simply carried out in secret. That's because you don't want to tell the al-Qaida people that you may have captured their material or that you are engaged in cooperation. That's simply something we cannot carry out publicly.

Q: Will you cooperate with the European Parliament's inquiry into this, will officials actually....?

Mr. Bellinger: Yes, I will meet with them myself, as will other senior officials at the State Department. Of course, we will do it on an unofficial basis. There's not any official jurisdiction by the committee over the United States, but we recognize that the questions are out there. We are not trying to dodge the questions. We recognize that they're there. We are limited in what we can say for the reasons that I've explained, but we'll be happy to meet with them when they're in Washington.

Q: You are saying that renditions serve a useful purpose. Why is there a need to send detainees to Egypt or Syria or Uzbekistan to be interrogated? What is the added value in that?

Mr. Bellinger: Thank you for that question. I've certainly regularly heard "what possible reason could there be for a rendition except to send someone off to be tortured." That's an unfortunate statement.

One, as I've said I think clearly, renditions can be used to bring someone back to justice correctly as the United States has done, as European governments have done, and those have been upheld by the European Court of Human Rights. But in other cases let's assume a country finds a member of al-Qaida who is trying to cross into that country, cross their borders. They picked them up for an immigration violation and they're prepared to expel them, but they notify other countries such as the United States that they have picked this person up and we find that they're in fact a national of some third country and that third country says "that is one of our nationals, we are prepared to take that individual back." They may be wanted in connection with a terrorist act. They may be a suspect as part of a terrorist cell. They say we're prepared to take that person back but we don't have an extradition treaty with the first country, and moreover, we don't have any way ourselves of bringing that person back.

The question then becomes really for the international community, is it better to simply let a person suspected of terrorism who has been picked up somewhere around the world, simply disappear to perhaps commit a terrorist act again? Or in terms of the overall fight against terrorism, is it better to have the person returned to the country of their nationality or to a country in which they're wanted?

For better or worse the United States is the country that has got the resources to be able to move people from one country to another, but that's the reason why, why a rendition may be a useful tool in fighting terrorists.

Q: Why can't the CIA interrogate them itself? If you bring them to Guantanamo Bay, there are not Americans in Guantanamo Bay, so why do you send others to Syria and Uzbekistan?

Mr. Bellinger: To ask the question is to answer it. As you know, we're not looking to have more people in Guantanamo Bay. And in a number of these cases, they may not have actually committed a crime against the United States. It may be that we find that it is a member of al-Qaida who is wanted in some other country. Another country may have notified us that an individual is wanted in connection with a terrorist act or

a part of a terrorist cell. So, no, the United States would not want to bring yet another person to Guantanamo Bay or to bring them into the United States.

Q: But some of the renditions have involved people who are, in the case of Maher Arar, for example, he was a Canadian citizen. He was flown off to Syria. The case of Khalid al Masri, which is still being investigated, he was a German citizen. How can you justify that? If they are wanted, why can't they be returned to the country where they are naturalized and the country where they are living?

Mr. Bellinger: I can't comment on all of the specific cases. I think in the Arar case you should check the facts. I think he was simply expelled, actually, for an immigration violation from the United States and --

Q: But he was taken to Syria and tortured.

Mr. Bellinger: That's what he says. I don't know what the facts are in that case. He was expelled from the United States. I think a rendition in that context would be a mischaracterization.

Q: You said intelligence sharing is very important with your European partners. How come that some of your European partners actually deny that there have been CIA flights? Like NATO Secretary General de Hoop Scheffer, EU Terrorism Coordinator de Vvries recently at the European Parliament.

Mr. Bellinger: Well, I don't know what he has said specifically. Overall, obviously there is cooperation that may involve flights carrying an analyst or forensic information from one country to another. In some cases people may take commercial flights, but in other cases if one has a private airplane, that's a much more efficient way to carry U.S. or foreign officials or information around than using a commercial aircraft.

Again, my point is the mere fact of an airplane operated by an intelligence service is no different from a military aircraft or a law enforcement aircraft. The suggestion that an intelligence flight is somehow improper is, I think, a wrong suggestion.

Q: But they actually denied that there had been any CIA flights, whereas you admit this.

Mr. Bellinger: I'm not aware of what they've said. I have not seen anybody deny that there have been any CIA flights.

Q: Can I go back to the allegations; the latest allegations from the Parliament are that there have been flights with a police mission that have not been declared to international security authorities. Now I don't know how it works, but in their eyes it seems like a serious breach of rules. Can you clarify how this works? If there's a CIA-operated plane, what does it have to do to be able to land in any country?

Mr. Bellinger: The laws governing air travel get to be quite complex. But we certainly are complying with our international obligations with respect to flights.

Q: If a plane lands at a military base, an American military base, does it have to be declared?

Mr. Bellinger: I think the facts may be, it may vary from country to country in terms of practice and whether it's a state flight or a civilian flight. As I said, rules can be quite complex, but we comply with our international obligations and as Secretary Rice has said, we respect the sovereignty of our European partners.

Q: Have you given any specific guarantees to any governments in the EU that rendition hasn't taken place on their territory?

Mr. Bellinger: We obviously get questions about renditions, both publicly and privately all the time, and we do

what we can to answer the questions. We don't publicly confirm or deny intelligence flights, but we are obviously in regular conversation with European governments.

Q: Can I ask a question on the definition of torture? Because Amnesty says that the American Administration policy is that sleep deprivation, making people stand up for long periods of time, and pouring water over them to simulate drowning sensations, that these are not forms of torture. Is that your viewpoint, the American Administration's viewpoint?

Mr. Bellinger: Well, two things. One, I'm not going to comment on specific techniques. We've made clear that we don't comment on specific techniques. The definition of torture, though, is something that is defined in both the Torture Convention and in our criminal laws and we abide by those definitions and the definition is conduct that's intended to inflict severe physical or mental pain. We abide by that definition.

In addition, as you know, we recently had enacted the Detainee Treatment Act, also known as the McCain Amendment, which also prohibits a lesser form of activity which would be anything that would inflict cruel, inhuman, or degrading treatment.

Q: But don't you think, until you give concrete examples that you can just simply say: "well, we don't agree with torture," but you never really define what kind of things are acceptable and what aren't. That's the big problem. Because, surely, are you almost implicitly admitting you do practice these techniques because you're refusing to deny that these are torture?

Mr. Bellinger: We have, again, thought hard about trying to address specific allegations and concluded, despite the difficulties that you mentioned, that it's just simply not appropriate to go confirming, denying, or analyzing specific techniques.

We do expect that in the next several weeks that the Defense Department will be releasing the revised field manual on interrogation techniques. This is the one that's referred to in the McCain amendment and we expect that that will be out sometime shortly.

Q: What is it not appropriate to comment on specific techniques? I'm not a lawyer, but isn't that what the law is about, about practice?

Mr. Bellinger: Surely you can understand that if we state precisely what it is that the interrogation techniques are that would be used against members of al-Qaida then they would train against them. And so our military has concluded that it's just simply not appropriate to provide a road map for the techniques that are being used.

At the same time we also think that it's not appropriate to confirm or deny and get into the specific business of saying yes, we do this but no, we don't do that.

Q: If there has been such a fuss about this whole issue. Assuming that your assumption is that most of these flights are not for rendition, wouldn't it be more sensible just to say, transparently, that X percentage of these 1,000 flights would involve rendition or only eight or nine cases and that's it, because, like it or not, the impression has got about, the statement of Dick Marty of "gangster tactics" by the CIA. Wouldn't transparency, in this case, be the best course?

Mr. Bellinger: We've been trying to do that as best we can. One of our purposes in trying to dampen this really hyperbolic speculation about flights is to say exactly what you've just said which is that while we have said that we conduct, have conducted renditions on a periodic basis, the suggestion that there have been large numbers is just simply incorrect, but we just can't get into the business or providing exact numbers.

Q: You said early some allegations were dangerous. Can you elaborate on what you mean by dangerous?

Mr. Bellinger: By dangerous I mean in order to fight terrorism, which we all know that al-Qaida has conducted and is planning additional attacks against all of our countries; the best way to prevent those attacks is for there to be cooperation amongst all of our countries. No country can do it by itself. It's important for information to be shared between Europe and the United States and vice versa. And the suggestion that a mere fact of a flight alone, which in fact may simply be bringing people to talk to one another or to share evidence, and to suggest that the mere fact of a flight is improper will certainly dampen that sort of cooperation.

It may be that next time the United States will be reluctant to bring people to Europe or to share information if the suggestion is that any flight is engaged in improper activity, so that's what I mean by dangerous. Dangerous to the extent that it may undermine public support for the intelligence cooperation that really is necessary to protect all of our societies.

Q: Do you feel like your policies are working? You have referred to concerns Europeans have, and others, regarding Guantanamo Bay, these rendition flights. Are you winning the war against terror? [inaudible]?

Mr. Bellinger: We collect, because we have very good intelligence services, we share an enormous amount of information with Europe. We do not obviously talk about the specific information that we collect and that we share, but certainly information that is collected does, we think, thwart further intelligence attacks.

Are we being successful in addressing these concerns? These are very difficult issues. We understand, as I said, we're acutely aware of the concerns that have been raised both about Guantanamo and about renditions, and part of what we're doing is simply trying to answer the questions as best we can. We understand that unless one can provide details that it may not be satisfying, but that's simply the nature of intelligence activities.

Q: You mentioned earlier the discussion of the status of prisoners at Guantanamo. Can you explain why is it that they are not treated as prisoners of war? And what is their status?

Mr. Bellinger: Their status is, as you know we refer to them as "unlawful combatant" which is not, and this is really quite important and one of the reasons that I try to do roundtables like this. The term "unlawful combatant" is not a term that was invented by the Bush administration. It's a term that's been around for 40 or 50 years, widely acknowledged in all of the treatises on the laws of war and about prisoners of war. It refers to individuals who engage in combat but do it in an illegal way. So this is an accepted term.

One problem overall in this whole area is that there are very, very few people who are knowledgeable about international humanitarian law or about the laws of war. Most lawyers and others in our societies have grown up, because none of us have really been at war for 50 years, grown up in a civil or criminal law system, so they're used to those systems. But in fact the term "unlawful combatant" is one that's been regularly used in the academic literature.

Why are they not treated as a prisoner of war? Under the Geneva Conventions it's quite clear. The Geneva Conventions apply, it says in Article 2 of the Convention, between High Contracting Parties to the Convention. The Geneva Convention is essentially a contract amongst states that says if we go to war with one another and we have signed the Convention, we will treat each other in a particular way, assuming that we've signed the Convention and that we meet the terms of the Convention.

Al-Qaida, obviously, is not a signatory to the Convention and so it's not a beneficiary of the Convention because it's not a High Contracting Party.

Furthermore, the term "prisoner of war" is actually a defined term in the Convention. People accuse us of

violations of international law, but actually if one simply reads the terms of the Geneva Convention it says a "prisoner of war" is a member of a national army who carries arms openly, wears a uniform recognizable at a distance, and respects the laws and customs of war.

Al-Qaida, in addition to not being a party to the Geneva Convention, doesn't fit any of those definitions.

Members of the Afghan army or the Taliban, Afghanistan was a signatory to the Geneva Convention, but they still didn't fit the definitions of a "prisoner of war", so they don't fit the definitions of the treaty.

Q: If they don't fit the definition, what are the implications for your treatment?

Mr. Bellinger: What are the implications for treatment? Then that they are not entitled to the privileges of being a "prisoner of war". Those privileges are provided to people whose countries are party to the Convention and who have followed the Convention. What the United States has said, because we are absolutely committed to the Geneva Conventions, we certainly want, we have applied them, for example, in Iraq, which is a more traditional war. We expect our forces, if captured by a Contracting Party to the Geneva Conventions, to be treated in accordance with the Geneva Convention.

So we have said that we will treat the detainees consistent with the principles of the Geneva Convention, but there are numerous things in the Convention that say that prisoners of war are entitled to that we think would not be appropriate for members of al-Qaida, such as, normally, as you know I think from watching television, that in a normal prisoner of war camp people are allowed to continue to organize themselves hierarchically, to wear their uniforms, and we think that would not be appropriate for members of al-Qaida.

Q: You mentioned people talking about alternatives to Guantanamo. What alternatives do you see?

Mr. Bellinger: Thank you. It's a good question.

We really are aware of these concerns. We have been looking for good alternatives. We welcome the assistance of the international community in trying to see this as a common problem.

The United States certainly sees that in detaining individuals who were picked up by coalition forces, who had been trained in al-Qaida training camps, that we are doing not just a service for the United States, but for all countries who might have been subject to attack by these same individuals. So we have not seen other countries volunteering to be helpful, but certainly we could appreciate assistance rather than simply calling for the closure of Guantanamo.

What we have been trying to do is to reduce the numbers by releasing people who we think would not return to the fight. Now as you've heard us say before, about ten percent of the people who have been just released outright have gone right back to fighting again. Others we have transferred to other governments for further detention. As you know we've reached agreements recently with Afghanistan to return a large number to Afghanistan, but we are trying very hard to reduce the numbers.

People say, well why can't you prosecute them criminally? The United States on September 11th did not have criminal laws that exerted jurisdiction in most cases over foreign nationals who were simply training in a training camp in Afghanistan. We had jurisdiction over our own nationals. We had jurisdiction over people who were planning specifically to commit crimes against the United States. But people very glibly say, well if you think these people have done something wrong, why don't you try them in your federal courts? But remember, there has to have been a criminal statute.

This is what actually Europeans themselves are finding. When we have returned the dozen or so detainees to

European countries, none of them found that they actually had violated specific criminal statutes because none of our countries really had a well developed criminal framework that —

Now since September 11, more criminal laws have been put on the books to combat this sort of behavior, but in most of these cases people who are not U.S. nationals or who are not plotting particular crimes against the United States had not violated U.S. criminal laws.

For those who were generally part of a criminal conspiracy of being part of al-Qaida or were fighting us on the battlefield and committed war crimes, people like that may be tried in our military commissions. But to answer your question, the alternatives are really very, very difficult. We would welcome good suggestions from other countries as to what should be done with these individuals rather than to simply say "Guantanamo should be closed."

Mr. Bellinger: Thank you all for coming.

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Also:
Josh
Ashley
Bob H.
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Sandy H.

THE WALL STREET JOURNAL. OPINION WEDNESDAY, JULY 5, 2006

LETTERS TO THE EDITOR

U.S. Renditions of Terrorists Are Legal, Vital

Council of Europe Secretary General Terry Davis's June 27 editorial-page commentary "Unlawful Rendition" suggests that renditions of terrorist suspects conducted by the U.S. are fundamentally different from the 1994 "capture" in Sudan by French authorities of Illich Ramirez Sanchez, also known as Carlos the Jackal, which subsequently was upheld by the European Commission on Human Rights. The U.S. government is well aware that Carlos was rendered in order to face criminal prosecution in France. The U.S. itself has rendered a number of suspected terrorists to stand trial in the U.S., including Ramzi Yousef, who helped plan the first attack on the World Trade Center, and Mir Aimal Kansi, who gunned down several officials in front of CIA headquarters in Langley, Va.

But renditions of suspects to stand trial are not the only situations in which renditions are appropriate. Renditions are an important way to transfer terrorist suspects to their home countries, or to countries where they can be questioned, held or brought to justice for their suspected terrorist acts or other crimes. Sometimes such transfers cannot be done through extraditions or other "standard" processes, either because an extradition treaty is not in place or because the formal extradition process is not feasible in a particular case.

The Council of Europe's Venice Commission, which Swiss Senator Dick Marty's recent report cites as the "European point of view," asserts that there are only four legal ways to transfer a prisoner to foreign authorities: deportation, extradition, transit, and transfer of a sentenced person to serve that sentence in his country of origin. Thus, under the Venice guidelines, even the French rendition of Carlos would have been improper.

We disagree with the Venice Commission's conclusion. As the European Commission on Human Rights found, renditions are not per se unlawful, though important principles must be protected. Renditions should not be used to transfer terrorist suspects to face torture, and the U.S. does not transport anyone, and will not transport anyone, for this purpose. We believe, however, that the international community must continue to be able to use renditions not only to bring terrorists to justice but also to prevent terrorist suspects from remaining at large to plan future attacks.

John B. Bellinger III
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U.S. Department of State
Washington

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444

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TELEGRAM September 06, 2006

To: ALL DIPLOMATIC AND CONSULAR POSTS - NIACT IMMEDIATE

Origin: L

From: SECSTATE WASHDC (STATE 146996 - NIACT IMMEDIATE)

TAGS: PHUM, PREL

Captions: None

Subject: PRESIDENTIAL SPEECH ON DETAINEES IN THE WAR ON TERROR

Ref: None

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1. (U) This is an action request. Please see paragraph 6.

2. (U) On September 6, President Bush delivered a major speech addressing the issue of detainees in the war on terrorism. In his remarks, the President announced that 14 leaders and operatives of al Qaeda have been moved from classified locations, where they were being held and questioned by CIA, to DOD custody where they can be brought to justice for their crimes. The ICRC has been notified and will have access to them at Guantanamo. No detainees remain in CIA custody. This group included those believed to have orchestrated the 9/11 attacks and the attack on the U.S.S. Cole, and those believed to have been involved in the bombings of our embassies in East Africa.

3. (U) The President explained that we are working with the U.S. Congress on legislation that we hope will soon allow us to bring these individuals to trial before military commissions. He described the need after September 11 to take the offensive to deny terrorists safe haven and kill or capture al Qaeda members; explained the CIA program created after September 11 to detain and interrogate the most dangerous terrorists captured by the United States during the ongoing armed conflict with al Qaeda, who had unparalleled knowledge about terrorist networks and their plans for new attacks; and demonstrated the critical ways that this program has thwarted further attacks both at home and abroad. He reiterated that he hopes eventually to close Guantanamo, and called on other countries to work with us toward this end, urging nations to take back their nationals at Guantanamo who will not be prosecuted by military commission. He emphasized that we are a nation of laws and that we will continue to work with the in ternational community to construct a common foundation to defend our nations and protect our freedoms.

4. (U) In tandem with the President's speech, the Department of Defense today issued two significant new detainee-related instruments: a new Directive on detention

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standards and a new Field Manual on interrogation. DOD issued the Directive and Field Manual after a comprehensive review to ensure consistency with U.S. and international law, including the Supreme Court's decision in the Hamdan case. By law, DOD personnel are only permitted to use those interrogation techniques listed in the new Field Manual, the contents of which are entirely public.

5. (U) The President's speech, draft military commission legislation, and new DOD detention policies represent a major new initiative on U.S. detention policy. With these announcements, the Administration intends to work with the Congress on new military commission legislation and to consult on this and other new programs to ensure that the CIA can continue to play a vital role in collecting intelligence about new attack plans, newly-developed capabilities, and members of terrorist organizations. This initiative also creates an opportunity to further U.S. diplomatic efforts to explain U.S. detention policies, seek consensus on the need to recognize the unique challenges created by the war on terrorism, and develop a comprehensive and durable framework for the conduct of this conflict into the future.

6. (U) ACTION REQUEST: Drawing from the points below, posts are directed immediately to engage with host governments and local media to pursue this initiative at all levels. Para 7 contains public diplomacy themes. Para 8 contains talking points. Para 9 contains selected questions and answers. In addition to these talking points, posts should review and draw as necessary from the full text of the President's speech (available at the White House website).

7. (U) PUBLIC DIPLOMACY THEMES

-- In a major speech today the President announced that 14 leaders and operatives of al Qaeda have been moved from classified locations, where they were being held and questioned by CIA, to DOD custody where they can be brought to justice for their crimes. This group included those believed to have orchestrated the 9/11 attacks and the attack on the U.S.S. Cole, and those believed to have been involved in the bombings of our embassies in East Africa.

-- The ICRC has been notified and will have access to them at Guantanamo. No detainees remain in CIA custody.

-- After the September 11 attacks, we took the offensive to deny terrorists safe haven and kill or capture al Qaida operatives. We had many successes, some publicly known, some not.

-- Information from captured terrorists is one of the most vital tools we have to stop new attacks. Information from captured terrorists has saved lives in the United States and overseas.

-- We created a program, run by the CIA, to focus on a small number of the most dangerous terrorists and operatives, many of whom we believed knew the terrorists' secrets about potential attacks -- secrets that would help us save innocent lives.

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-- The CIA program for detaining and questioning these high-value terrorists has been conducted professionally and effectively. The Department of Justice reviewed the conditions of confinement and the questioning procedures and advised that the program complied with the U.S. constitution, laws, and treaty obligations.

-- The Supreme Court, in June in the Hamdan case, held that military commissions to try these terrorist for their offenses against the laws of war could not go forward without additional legislation. The Court also held that Common Article Three of the Geneva Conventions applies to the US war against al Qaida.

-- Common Article 3 of the Geneva Conventions describes in vague and undefined terms now the US should treat captured terrorists, leaving US personnel uncertain on where the law draws the line.

-- Accordingly, the President has sent legislation to Congress to (1) make clear the standards for questioning of captured terrorists so that US personnel can effectively and lawfully obtain the intelligence we need from terrorists, and (2) authorize the creation of military commissions as an effective and fair means to try terrorists for their crimes.

-- This is part of the Administration's broader effort to work with Congress to obtain additional authorization for the tools this and any future Administration will need to fight and win the war on terror.

-- The President has made clear that the United States will move toward the day when the United State can close the detention facility at Guantanamo Bay. America has no desire to be the world's jailer.

-- We are engaged in a global struggle -- and the entire civilized world has a stake in its outcome. America is a nation of law. As the Administration works with Congress to strengthen and clarify our laws at home, the United States will continue to work with members of the international community who have been our partners in this struggle.

-- One critical area of discussion is the need for a durable and effective framework for the detention and interrogation of those captured during this conflict.

-- We believe that the our laws and policies, together with the legislation proposed by the President, provide a comprehensive and durable legal framework for the interrogation and treatment of detainees in these kinds of conflicts.

-- This comprehensive framework is fully consistent with U.S. domestic and international law requirements. Indeed, this framework is more than consistent with Common Article 3 of the Geneva Conventions.

-- We are ready to work with our partners around the world to construct a common foundation to defend our nations and protect our freedoms.

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8. (U) TALKING POINTS

Key Elements of President's Speech

-- On September 6, President Bush delivered a major speech addressing the issue of detainees in the war on terrorism.

-- In his remarks, the President:

-- announced that 14 leaders and operatives of al Qaeda have been moved from classified locations, where they were being held and questioned by the CIA, to DOD custody where they can be brought to justice for their crimes;

-- stated that the ICRC has been notified and will have access to them, and that no detainees remain in CIA custody;

-- explained the need after September 11 to take the offensive to deny terrorists safe haven and kill or capture al Qaeda members;

-- described the CIA program created after September 11 to detain and interrogate the most dangerous terrorists captured by the United States during the ongoing armed conflict with al Qaeda, who had unparalleled knowledge about terrorist networks and their plans for new attacks; and

-- demonstrated the critical ways that this program has thwarted further attacks both at home and abroad.

-- This program has been focused on a very small number of the most dangerous terrorists.

-- The President indicated that we will consult with Congress on this and other programs to help us gather vital intelligence to prevent terror attacks.

-- The President also indicated that the Administration has provided the Congress with draft military commission legislation, and called upon the Congress to act quickly on that legislation in order to develop new military commissions consistent with the Supreme Court's decision in the Hamdan case.

-- The President also laid out key facts regarding Guantanamo Bay and its future. He described how approximately 315 of approximately 760 detainees have been returned to other countries, and asked other countries to work with us to transfer out as many of the remaining detainees as possible in order to eventually close Guantanamo.

-- The President emphasized that we are a nation of laws and will continue to work with the international community to construct a common foundation to defend our nations and protect our freedoms.

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Review of U.S. Positions

-- We recognize that the international community has not always agreed with U.S. positions in the war on terror.

-- We believe that we are in a state of armed conflict with al Qaeda, the Taliban, and their affiliates following the attacks of September 11, on the U.S.S. Cole, and on our embassies in East Africa.

-- In our armed conflict with al Qaeda, the Taliban, and their affiliates, it is the law of war that applies.

-- These individuals have been determined to be unlawful enemy combatants who are not entitled to prisoner of war status. As in other conflicts, under the law of war they may be detained until the end of hostilities.

Treatment of CIA Detainees Transferred to Guantanamo

-- The President has now announced the transfer of 14 individuals from the CIA to DOD custody at Guantanamo for possible prosecution by military commissions, and that no detainees remain in this CIA program.

-- This disclosure reflects the President's intention to bring these individuals to justice.

-- The President carefully has considered what aspects of the program may be disclosed, consistent with national security. We are not confirming, among other things, site locations, interrogation techniques, or total numbers of individuals who may have been detained in this program, as these are operational details that would provide valuable information to al Qaeda and could have an adverse impact on the effectiveness of CIA's future operations.

-- The detainees transferred include Khalid Sheikh Mohammed ("KSM") and Abu Zubaydah, two of the most notorious members of al Qaeda.

-- Interrogations of the 14 individuals have yielded vital intelligence that we have shared with our allies, and stopped numerous plots, including in Karachi, Heathrow Airport and the Canary Wharf in London, and in the United States.

-- At Guantanamo, these individuals will receive the same standard of treatment as all other detainees at Guantanamo.

-- The ICRC will be allowed to visit these individuals. We are in contact with the ICRC on this issue.

-- These detainees will appear before a combatant status review tribunal to confirm that they are properly held as enemy combatants in accordance with the same standards that govern all other DOD detainees at Guantanamo.

-- These detainees will have access to counsel, will be

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afforded the opportunity to worship, and will be able to write and receive mail from their families and friends, to the same extent as other detainees in DOD custody.

-- All requests by foreign officials to meet with these detainees will be considered using the existing DOD policy on foreign government access to Guantanamo detainees.

-- These individuals will be housed in a separate high-security facility for security reasons.

Military Commission Legislation

-- The President announced that the Administration has submitted draft legislation to create a strong and effective military commission structure.

-- In the wake of the Supreme Court decision in the Hamdan case, we are working with Congress to create a process for prosecuting unlawful enemy combatants that ensures terrorists can be brought to justice; recognizes the nature of the enemy and the battlefield; protects our national security interests; and provides the accused a full and fair trial.

-- This legislation is the product of close consultation with members of Congress and with military lawyers in all branches of the armed services.

-- This legislation clarifies application of Common Article 3 of the Geneva Conventions to our conflict with al Qaeda.

-- The vagueness of some terms in Common Article 3 makes them susceptible to uncertain and unpredictable application.

-- The President has asked Congress to make these ambiguous terms clear to provide guidance to our personnel. The bill also amends the War Crimes Act to eliminate the vague terms while still criminalizing the most serious violations of Common Article 3.

-- The Administration looks forward to continuing to work with Congress to ensure that we have the necessary tools to question and prosecute terrorists, and that the men and women on the front lines in the war on terror have clear rules that are defined in law as they work to protect us.

BEGIN NOTE: Posts should be aware that there will likely be particular interest in the Administration's proposal to interpret vague elements of Common Article 3 by equating the detention standards contained in Common Article 3 with the standards of the Detainee Treatment Act and by amending the War Crimes Act to criminalize the most serious violations of Common Article 3. END NOTE

A Durable Framework for Detention

-- The President has expressed his desire to work with members of the international community who have been

partners in this long struggle.

-- One critical area of discussion is the need for a durable and effective framework for the detention and interrogation of those captured during this conflict.

-- We have learned that while the traditional rules and procedures of criminal justice are vital, they are not always sufficient to deal with this type of enemy. The law of war is an appropriate body of law to confront the threat posed by an organized enemy with global reach and an ability to inflict mass casualties.

-- As a matter of international law, these terrorists are unlawful enemy combatants to whom the law of war applies. In the Hamdan case, the U.S. Supreme Court recently confirmed that the law of war applies, when it ruled that Common Article 3 of the Geneva Conventions applies to our conflict with al Qaeda.

-- We recognize that detention in the war on terror has been controversial, but over the last five years we have made numerous changes to our policies and to the legal framework governing these policies.

-- In addition to the military commission legislation announced by the President, Congress in 2005 enacted the Detainee Treatment Act, and our Defense Department has now issued a new Field Manual and Detention Directive to provide clear rules for the detention and interrogation of all individuals detained by the Department of Defense.

-- We believe that these laws and policies, together with our proposed legislation, provide a comprehensive and durable legal framework for the interrogation and treatment of detainees in conflicts such as our continuing conflict with al Qaeda.

-- This comprehensive framework is fully consistent with U.S. domestic and international law requirements. Indeed, this framework is more than consistent with Common Article 3 of the Geneva Conventions -- the proposed legislation and new DOD policies also exceed the minimum protections in Common Article 3 in significant ways.

-- We are ready to work with our partners around the world to construct a common foundation to defend our nations and protect our freedoms.

9. (U) QUESTIONS AND ANSWERS: The following questions and answers have been selected from a more comprehensive set of questions and answers because they are the most likely questions to be asked of U.S. officials:

QUESTION: Why is this program being disclosed now? Why is it being decided to bring these detainees to GTMO now, after all this time, and disclose that we have them?

ANSWER:

-- We have long intended to disclose our detention of these terrorists at the appropriate time, when consistent with

national security.

-- Most of the intelligence value of these detainees has at this time been exhausted.

-- The President decided that it is important if possible to prosecute these key terrorist leaders and operatives for their crimes, and that military commissions are the best forum for doing that. We have been waiting for some time for a ruling from our courts resolving whether military commissions will be available for this purpose.

-- The Supreme Court's decision this summer in Hamdan did two things: it invalidated the existing military commissions and, by virtue of its holding that Common Article 3 of the Geneva Conventions applies in this context, it also imposed vague and undefined legal standards on military and intelligence operations regarding detainees in our conflict with al Qaeda.

-- In light of that decision, we are now asking that Congress both authorize military commissions to try these terrorists, and that they address the Common Article 3 issue in order to provide a clear legal framework for military and intelligence operations in our conflict with al Qaeda.

-- It is important that Congress and the public understand the importance of these issues to our national security as Congress considers how to address them.

-- Our Administration has worked in the last two months with members of Congress on how best to respond to the Hamdan decision, and today we submitted our proposed legislation. We want to work with Congress to enact a durable and sustainable framework for confronting the serious threat posed by international terrorism to our nation's security.

QUESTION: Did you tell the countries who had secret prisons that the U.S. would make this announcement? How did they react?

ANSWER:

-- Few tools are more critical to our ability to fight and win the war against al Qaeda and its affiliates than the close intelligence relationships the United States maintains with states allied with us in this war. Many countries take great risks in order to help us, and do so with the explicit agreement that the work they do will remain secret. We will not discuss these relationships, except to say that we could not achieve our successes alone and we are grateful to those who have helped.

-- We have provided our allies information from this program and they have told us of its great value in helping prevent terrorist attacks in their own countries.

QUESTION: How many detainees remain in this program?

ANSWER:

-- None. However, we expect that we will continue to capture key terrorist leaders and operatives in the future.

-- As in the past, we may need to detain such terrorists without disclosing their detention in exceptional circumstances. We will not comment in the future on whether we are holding detainees in this manner, or if so, how many are being held. If we were to answer such questions, the pattern of our answers over time could reveal information that would aid our terrorist enemies.

-- We do not expect that we would need to detain individuals for an extended period of time without notifying the ICRC, but we reserve the right to hold detainees without notice to the ICRC for as long as may be necessary.

-- We will continue to keep Congress informed as appropriate.

QUESTION: How many detainees have been in the program since its inception?

ANSWER:

-- Since the development of this program in mid-2002, fewer than 100 terrorist detainees have been held for detention and questioning in CIA's custody. The program was selective: it was designed only for a small number of the most dangerous terrorist leaders and operatives, many of whom were believed to know information of great intelligence value -- for example, on attack planning or al Qaeda's capabilities. CIA officers have captured or played a role in the capture, questioning, and transfer of many more terrorists since 9/11, but only a very few entered this program. The overwhelming majority of such captured terrorists were taken into detention by U.S. military or host country officials.

QUESTION: Why were the detainees held in secret facilities and not identified to the ICRC?

ANSWER:

-- These terrorists have been held under conditions that were deemed essential to learning information they knew about planned terror attacks, al Qaeda's senior leadership, and the enemy's current capabilities.

-- It is critical not to make the identities or locations of key terrorist leaders and operatives we capture immediately known, so as not to alert al Qaeda to their detention and allow al Qaeda to make adjustments to its plans. It has also been important to keep operational details of CIA's efforts, including its interrogation procedures, secret from al Qaeda, in order to preserve their effectiveness.

-- Maintaining secrecy and focusing all relevant intelligence on questioning a small number of the most dangerous terrorists enabled us to collect information that stopped terror attacks and saved the lives of thousands of Americans and foreign nationals.

-- We place significant value on our relationship with the ICRC and on its work and rely heavily on the ICRC to ensure important protections for our personnel.

-- Our decisions here are not intended to devalue the important role of the ICRC. The Department of Justice made the determination that detention in this program was legal, and we determined that, in a small number of cases, it was necessary in order to obtain intelligence information from these individuals that was critical to protecting the United States and its allies from further terrorist attacks.

-- Providing the ICRC notice of and access to these terrorists is not legally required. Such notice and access is required under the Geneva Conventions only for POWs and protected persons.

-- Even though international law provides no such right, the United States has made clear that, as a matter of policy, it will provide ICRC access to al Qaeda and Taliban detainees to the maximum extent practicable, and such access has been denied only to a tiny fraction of such detainees.

QUESTION: What legal authority does CIA have to capture, detain, and question these terrorists?

ANSWER:

-- The authority derives from the U.S. Constitution, including the President's authority as Commander in Chief, and various statutes, including the September 18, 2001 Authorization for Use of Military Force and the National Security Act.

-- Exercise of this authority is also consistent with the law of war. Under the law of war, the United States may detain captured enemy combatants until the end of hostilities.

-- DOJ reviewed CIA's interrogation procedures, which were referred to it by CIA, and determined that they complied with the U.S. Constitution, applicable U.S. statutes, including the anti-torture statute, and applicable treaty obligations, including those in the Convention Against Torture (CAT). And of course the General Counsel of CIA also reviewed the procedures and determined that they were lawful.

QUESTION: Were the detainees provided basic human necessities during detention? What were their conditions of confinement like?

ANSWER:

-- Yes. Terrorists held by CIA have been provided with basic human necessities.

-- They have been held in humane conditions of confinement. We are not going to comment further on the conditions under which they were held.

QUESTION: The media has reported that CIA has rendered more than 100 terrorists since 9-11, including some individuals who were picked up due to mistaken identity. Have all of these individuals been in the CIA program discussed by the President?

ANSWER:

-- Suggestions that we have rendered thousands or even hundreds of terrorists to secret sites are inaccurate. This program was selective: it was designed only for a small number of the most dangerous terrorist leaders and operatives, many of whom were believed to know information of great intelligence value -- for example, on attack planning or al Qaeda's capabilities. Most of the terrorists transported by the United States since September 11, 2001 were not part of the highly specialized CIA program disclosed today, but were transported to their home countries, or countries where they faced criminal charges, or to DoD for questioning and detention as enemy combatants.

-- We note that before we turn a terrorist over to a foreign government, where appropriate we obtain credible assurances that the country will take responsibility for ensuring that the individual will not pose a threat and will not be tortured.

QUESTION: How did you decide who to take into the program?

ANSWER:

-- This program was selective: it was designed only for a small number of the most dangerous terrorist leaders and operatives, many of whom were believed to know information of great intelligence value -- for example, on attack planning or al Qaeda's capabilities.

QUESTION: How many CIA detention sites exist and where are these sites?

ANSWER:

The number of sites and locations will not be disclosed. Providing locations of CIA's detention sites would put our allies at risk of terrorist retaliation and also betray relationships built on trust that are vital to winning the war against al Qaeda and its affiliates.

QUESTION: Why couldn't you detain them at GTMO? Wasn't it so that you could torture them?

ANSWER:

-- It was decided that it was important to keep this small, tightly controlled effort entirely separate from DoD's much larger detainee operations.

-- It is also critical not to make the identities of senior terrorists we capture immediately known, so as not to alert al Qaeda to their detention and allow al Qaeda to make adjustments to its plans. It has also been important to

keep operational details of CIA's efforts, including its interrogation procedures and locations of its facilities, secret from al Qaeda, in order to preserve their effectiveness.

-- These operational requirements could not be met at GTMO.

-- The United States does not authorize torture. It is against U.S. law.

QUESTION: What interrogation techniques were used with these detainees?

ANSWER:

-- One of the reasons these interrogations have proved so successful is that terrorists do not know what the procedures are or what the limits are. Al Qaeda trains to resist U.S. interrogation procedures that are publicly revealed. We want our procedures to be clear to our interrogators. We don't want them to be clear to the terrorists. Therefore we will not identify or describe these procedures publicly.

-- However, I can assure you that the authorized procedures used in questioning detainees were determined to comply with applicable U.S. law, including U.S. treaty obligations. They were also deemed to be safe and effective and they were subjected to rigorous review to ensure safety of the detainee and professionalism. CIA personnel involved in interrogations receive hundreds of hours of professional training before they undertake this mission.

-- Providing further detailed information publicly about CIA questioning will aid our terrorist enemies, allowing them to develop and train in effective countermeasures - many terrorists are already trained to resist the procedures in the Army Field Manual - and unnecessarily degrade our ability to detect and disrupt terrorist attack plans.

QUESTION: What kind of intelligence can the CIA gather with this program that cannot be gathered by the military with the Army Field Manual techniques?

ANSWER:

-- The CIA gathered life-saving intelligence from captured terrorists who are the most dedicated to al Qaeda's cause and the least willing to share intelligence. Many of these terrorists had received interrogation resistance training and were familiar with the interrogation methods publicized in the U.S. Army Field Manual on Interrogations.

-- As a result of this program, these terrorists have given the United States a fuller, deeper, and more complete understanding of their organization. Dedicated members of the organization like these can provide unique insight into the extreme mindset and methods of the al Qaeda membership.

-- These terrorists have provided valuable, independently

NotesTele

verified and corroborated intelligence on al-Qaeda and its terrorist allies, to include information on: members; financing; logistics; plots; communications; document forgery and criminal activities; travel routes and safe havens; and terrorist intentions to obtain and use chemical, biological, and nuclear devices in their attacks. Subsequent disruption of these components of al Qaeda's network has proved invaluable in weakening our enemy's ability to launch offensive operations.

-- Intelligence gathered by questioning detained terrorists has been used as lead information to guide further counterterrorist operations. It is a vital, irreplaceable piece of the intelligence puzzle, but we still seek to corroborate it through other sources to gauge its reliability.

QUESTION: How can you say that the act of waterboarding does not constitute torture or cruel treatment?

ANSWER:

-- We will not confirm, deny, or comment on procedures or alleged procedures, so as to preserve their effectiveness.
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L155

Deeks, Ashley S

From: Robinson, John G
Sent: Thursday, February 01, 2007 11:41 AM
To: Dorosin, Joshua L; Deeks, Ashley S; Noyes, Julieta V (DRL); Petersen, Robert B
Cc: Robinson, John G
Subject: Germany orders arrest of 13 over CIA 'kidnapping'

Germany orders arrest of 13 over CIA 'kidnapping'

BERLIN, Jan 31, 2007 (AFP) - Germany has ordered the arrest of 13 people behind the alleged CIA-backed kidnapping of a Lebanese-born German man, prosecutors said Wednesday, in one of the best-known cases of US "renditions" of terror suspects. The prosecutor's office in Munich, southern Germany, said in a statement that the city's administrative court had issued the arrest warrants against people believed to be CIA agents on suspicion of abduction and grievous bodily harm. German authorities are probing allegations by Khaled el-Masri that he was abducted by US agents in the Macedonian capital Skopje on New Year's Eve 2003 and flown to a prison in Afghanistan for interrogation before he was released five months later in Albania. Masri, a 43-year-old unemployed car salesman, has said he was drugged, questioned and tortured while imprisoned. The case raised tensions when US Secretary of State Condoleezza Rice visited Germany in December 2005 at the height of a controversy over the CIA's strategy of "rendition" -- flying terror suspects through European states to detention in third countries where they risk being tortured.

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2201 C St. NW
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UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444
2/6/2007

L-157

Deeks, Ashley S

From: Bellinger, John B(Legal)
Sent: Tuesday, February 06, 2007 10:09 AM
To: Deeks, Ashley S
Subject: FW: New Spain and Portugal Rendition Investigations (to add to Italy and Germany)

FYI...

From: Bellinger, John B(Legal)
Sent: Tuesday, February 06, 2007 10:08 AM
To: 'Kyle.Sampson@usdoj.gov'
Subject: New Spain and Portugal Rendition Investigations (to add to Italy and Germany)

Judge tells Spain to declassify CIA flight papers

Wed Jan 31, 1:13 PM ET

A judge has ordered Spain's state intelligence agency to declassify any documents it has about secret CIA flights shuttling terrorism suspects, court officials said on Wednesday.

High Court Judge Ismael Moreno issued the order to the National Intelligence Center (CNI) as part of an investigation he began last year to determine whether suspects on CIA flights touching down on the Spanish island of Mallorca were held illegally or tortured, the officials said.

Up to 50 people were moved across Europe in flights to jails in third countries where they faced torture and other abuse, according to European Parliament investigators.

A Council of Europe investigator last year said Spain might have acted in "collusion, active or passive," with secret detentions and unlawful inter-state transfers.

The Spanish government has said it has no knowledge anything illegal took place in its territory. No government spokesman was immediately available to comment on Wednesday's ruling.

Moreno's ruling came as a court in Germany ordered the arrest of 13 people suspected of involvement in the abduction of German national Khaled el-Masri, who says he was kidnapped and tortured by the CIA.

Kuwaiti-born Masri testified about his ordeal to Judge Moreno in October.

Portugal probes alleged CIA flights

Mon Feb 5, 10:58 PM ET

Portugal's attorney general is opening a criminal investigation into claims that CIA flights, some of them allegedly carrying terror suspects, made stopovers in the country, the state-owned news agency reported on Monday.

The agency Lusa quoted Deputy Attorney General Candida Almeida as saying the investigation had "many leads" to pursue after a Portuguese deputy at the European Parliament presented a dossier of allegations.

"Before, we had no indications (of a crime), but the complaints we have received show areas we might

UNITED STATES DEPARTMENT OF STATE
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explore," Almeida was quoted as saying.

Officials at the attorney general's office were not immediately available for comment. But authorities often use Lusa to make official announcements.

The attorney general's decision to launch a formal investigation is embarrassing for the government. Last week, Foreign Minister Luis Amado said authorities had not unearthed any evidence of CIA flights and would not investigate the matter further.

A report published by a European Parliament committee last month said Britain, Poland, Germany, Italy and other EU nations were aware of CIA flights over Europe and of "extraordinary rendition," a practice whereby the U.S. government allegedly sends foreign terror suspects to third countries for interrogation.

It said information from Eurocontrol, the EU's air safety agency, showed that more than 1,200 undeclared CIA flights had entered European airspace since the Sept. 11 attacks in 2001.

Though there was no direct evidence that CIA flights had used Portugal as a stopover, the report urged the government to continue investigating whether they had.

Ana Gomes, a European Parliament deputy, met with the attorney general last week and said she gave him evidence that dozens of CIA planes had landed in Portugal, some of them flying to or from the U.S. military prison for terror suspects at Guantanamo Bay, Cuba.

Gomes said she collected statements from witnesses who claimed to have seen handcuffed prisoners at an airport in Portugal's mid-Atlantic Azores Islands.

She also alleged that local authorities knew Portugal was being used for CIA flights.

A CIA spokesman declined to comment Monday on the allegations.

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L158

Deeks, Ashley S

From: Robinson, John G
Sent: Tuesday, February 06, 2007 9:15 AM
To: Dorosin, Joshua L; Deeks, Ashley S; Noyes, Julieta V (DRL); Petersen, Robert B; Opstrup, Kevin R
Cc: Robinson, John G
Subject: Portugal opens criminal investigation into alleged CIA flights

Report: Portugal opens criminal investigation into alleged CIA flights

LISBON - Portugal's attorney general is opening a criminal investigation into claims that CIA flights, some of them allegedly carrying terror suspects, made stopovers in the country, a senior official said Monday, according to a news report. The investigation had "*many leads*" to pursue after a Portuguese deputy at the European Parliament presented a dossier of allegations, Deputy Attorney General **Candida Almeida** said, according to state-owned news agency Lusa. *"Before, we had no indications* (of a crime), *but the complaints we have received show areas we might explore*," Almeida was quoted as saying.

Officials at the attorney general's office were not immediately available for comment. Authorities often use the Lusa agency to make official announcements. Ana Gomes, a European Parliament deputy, met with the attorney general last week and said she gave him evidence that dozens of CIA planes had landed in Portugal, some of them flying to or from the U.S. military prison for terror suspects at Guantanamo Bay. Gomes said she collected statements from witnesses who claimed to have seen handcuffed prisoners at an airport in Portugal's mid-Atlantic Azores Islands. She also alleged that local authorities knew Portugal was being used for CIA flights. Last week, Foreign Minister Luis Amado said authorities had not unearthed any evidence of CIA flights and would not investigate the matter further. (AP, 2/5)

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HUMAN RIGHTS WATCH
350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300
Email: hrwnyc@hrw.org

Josh D/
Ashley/
Bob H:
Pls work w/ CIA on a response. I think we should respond.

HUMAN RIGHTS WATCH

www.hrw.org

Facsimile

To: President George W. Bush	**From: Human Rights Watch**
Fax Number: 202-456-0200	**Phone Number:**
cc:	**Date: February 26, 2007**
Pages: 4 (including cover page)	**Re:**

MESSAGE

Dear Sir,

Please find attached a letter to the President, requesting information about people who were previously held in secret detention facilities operated by the Central Intelligence Agency (CIA).

Sincerely,
HUMAN RIGHTS WATCH

Cc: Condoleezza Rice, United States Secretary of State
John M. McConnell, United States Director of National Intelligence
Gen. Michael V. Hayden, Director of the Central Intelligence Agency
John B. Bellinger, III, Legal Adviser to the Secretary of State of the United States

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Bruce Rabb, *Secretary*

HUMAN RIGHTS WATCH

www.hrw.org

February 26, 2007

President George W. Bush
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear President Bush:

I am writing to request information about people who were previously held in secret detention facilities operated by the Central Intelligence Agency (CIA). Specifically, I ask that you disclose the identities, fate, and current whereabouts of all prisoners held for any period of time at facilities operated or controlled by the CIA since 2001. In addition, for any such prisoners who were transferred to the custody of another government, I ask that you disclose the date and location of the transfer.

I would like first to express Human Rights Watch's strong concern over the CIA's use of secret prisons to hold people suspected of involvement in terrorism. By holding such people in unacknowledged, incommunicado detention, the United States violated fundamental human rights norms, in particular, the prohibition on enforced disappearance.[1]

Human Rights Watch recognizes that some terrorism suspects may have committed serious crimes that merit the sanction of incarceration. The decision to imprison such persons must be taken in accordance with legal processes, however. If such persons are indeed implicated in terrorist crimes, they should be charged and prosecuted, not subject to enforced disappearance.

I would note that, to date, your administration has concealed nearly all information regarding persons imprisoned by the CIA since 2001. In a televised speech in early September 2006, you did acknowledge that the CIA had been secretly detaining suspected terrorists in facilities outside of the United States. But while you announced that 14 people who had previously been in CIA detention had been

[1] See International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly on December 20, 2006, opened for signature on February 6, 2007. Although the newly adopted convention has yet to enter into force, its definition of enforced disappearance is consistent with definitions contained in a number of earlier international instruments. Human Rights Watch notes that the United States was not among the 57 countries that signed the convention.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444
UNCLASSIFIED

transferred to the US detention facilities at Guantanamo Bay—saying that with those transfers there were no more people in CIA custody—you said nothing about the fate or whereabouts of other persons who were believed to have been detained by the CIA.

It is beyond dispute that more than 14 people were imprisoned by the CIA at some point prior to September 2006. Indeed, in April 2006, just a few months before your speech, Director of National Intelligence John Negroponte publicly acknowledged that the CIA was holding some three dozen persons in detention.

Given the close secrecy surrounding the CIA's detention practices, Human Rights Watch does not believe that it has information about every person who, since 2001, has been held in CIA detention. But based on accounts from former detainees, press articles, and other sources, Human Rights Watch has put together a list of 16 people whom we believe were once held in CIA prisons and whose current whereabouts are unknown. We have also compiled a separate list of 22 people who were possibly once held in CIA prisons and whose current whereabouts are also unknown.

The following people—whose name, nationality, and place and date of arrest are provided, where known—are believed to have once been held in secret CIA prisons:

1. Ibn al-Shaykh al-Libi (Libyan) (Pakistan, 11/01)[2]
2. Mohammed Omar Abdel-Rahman (aka Asadallah) (Egyptian) (Quetta, Pakistan, 2/03)
3. Yassir al-Jazeeri (Algerian) (Lahore, Pakistan, 3/03)
4. Suleiman Abdalla Salim (Kenyan) (Mogadishu, Somalia, 3/03)
5. Marwan al-Adeni (Yemeni) (approximately 5/03)
6. Ali Abd al Rahman al Faqasi al Ghamdi (aka Abu Bakr al Azdi) (Saudi) (Medina, Saudi Arabia, 6/03)
7. Hassan Ghul (Pakistani) (northern Iraq, 1/04)
8. Ayoub al-Libi (Libyan) (Peshawar, Pakistan, 1/04)
9. Mohammed al Afghani (Afghan born in Saudi Arabia) (Peshawar, Pakistan, 5/04)
10. Abdul Basit (probably Saudi or Yemeni) (arrested before 6/04)
11. Adnan (arrested before 6/04)
12. Hudeifa (arrested before 6/04)
13. Mohammed Naeem Noor Khan (aka Abu Talaha) (Pakistani) (Lahore, Pakistan, 7/04)
14. Muhammad Setmarian Naser (Syrian/Spanish) (Quetta, Pakistan, 11/05)
15. Unnamed Somali (possibly Shoeab as-Somali)
16. Unnamed Somali (possibly Rethwan as-Somali)

[2] By some accounts, al-Libi was transferred from CIA custody to Libya in early 2006, but this has not been confirmed.

In addition, the following people may have once been held in secret CIA prisons:

1. Abd al-Hadi al-Iraqi (presumably Iraqi) (1/02)
2. Anas al-Liby (Libyan) (Khartoum, Sudan, 2/02)
3. Retha al-Tunisi (Tunisian) (Karachi, Pakistan, early- to mid-2002)
4. Sheikh Ahmed Salim (aka Swedan) (Tanzanian) (Kharadar, Pakistan, 7/02)
5. Saif al Islam el Masry (Egyptian) (Pankisi Gorge, Georgia, 9/02)
6. Amin al-Yafia (Yemeni) (Iran, 2002)
7. _ al-Rubaia (Iraqi) (Iran, 2002)
8. Aafia Siddiqui (Pakistani) (Karachi, Pakistan, 3/03)
9. Jawad al-Bashar (Egyptian) (Vindher, Balochistan, Pakistan, 5/03)
10. Safwan al-Hasham (aka Haffan al-Hasham) (Saudi) (Hyderabad, Pakistan, 5/03)
11. Abu Naseem (Tunisian) (Peshawar, Pakistan, 6/03)
12. Walid bin Azmi (unknown nationality) (Karachi, Pakistan, 1/04)
13. Ibad Al Yaquti al Sheikh al Sufiyan (Saudi) (Karachi, Pakistan, 1/04)
14. Amir Hussein Abdullah al-Misri (aka Fazal Mohammad Abdullah al-Misri) (Egyptian) (Karachi, Pakistan, 1/04)
15. Khalid al-Zawahiri (Egyptian) (South Waziristan, Pakistan, 2/04)
16. Musaab Aruchi (aka al-Baluchi) (Pakistani) (Karachi, Pakistan, 6/04)
17. Qari Saifullah Akhtar (Pakistani) (arrested in the UAE, 8/04)
18. Mustafa Mohamed Fadhil (Kenyan/Egyptian) (eastern Punjab, Pakistan, 8/04)
19. Sharif al-Masri (Egyptian) (Pakistan border, 8/04)
20. Osama Nazir (Pakistani) (Faisalabad, Pakistan, 11/04)
21. Osama bin Yousaf (Pakistani) (Faisalabad, Pakistan, 8/05)
22. Speen Ghul (from Africa) (Pakistan)

Human Rights Watch is extremely concerned about the fate of these people. One possibility is that the CIA may have transferred some of them to foreign prisons where for practical purposes they remain under CIA control. Another worrying alternative is that prisoners were transferred from CIA custody to places where they face a serious risk of torture, in violation of the fundamental prohibition on returns to torture. We note that some of the missing prisoners are from Algeria, Egypt, Libya, and Syria, countries where the torture of terrorism suspects is common.

Enforced disappearance violates both international human rights law and international humanitarian law. It has long been recognized that enforced disappearance is a "continuous crime until the fate or whereabouts of the disappeared person becomes known."[3] We note, therefore, that persons "disappeared" in US custody who have since been transferred elsewhere remain the

[3] See, for example, Report of the Working Group on Enforced or Involuntary Disappearances, Commission on Human Rights, E/CN.4/2006/56, December 27, 2005, para. 10.

legal obligation of the United States so long as their fate or whereabouts remain unknown.

I would also like to point out that refusing to reveal the whereabouts of these people is extraordinarily cruel to their families. To take one small but telling detail, the wife of a man who has not been seen since he was believed to have been taken into CIA custody told Human Rights Watch that she has continually lied to her four children about her husband's absence. She explained that she could not bear telling them that she did not know where he was: "[W]hat I'm hoping is if they find out their father has been detained, that I'll at least be able to tell them what country he's being held in, and in what conditions."

As you may know, the CIA's detention program has inflicted great harm on the reputation, moral standing, and integrity of the United States. By revealing information about the fate and whereabouts of people formerly held in CIA custody, you could begin to repair the damage this abusive program has caused.

Sincerely,

Joanne Mariner, Director
Terrorism and Counterterrorism Program
Human Rights Watch

Cc: Condoleezza Rice, United States Secretary of State
John M. McConnell, United States Director of National Intelligence
Gen. Michael V. Hayden, Director of the Central Intelligence Agency
John B. Bellinger, III, Legal Adviser to the Secretary of State of the United States

Brooks, Maren C

From: Rubin, Eric S
Sent: Friday, July 20, 2007 3:16 PM
To: P_Officers
Subject: Fw: EXECUTIVE ORDER: INTERPRETATION OF THE GENEVA CONVENTIONS COMMON ARTICLE 3 AS APPLIED TO A PROGRAM OF DETENTION AND INTERROGATION OPERATED BY THE CENTRAL INTELLIGENCE AGENCY

----- Original Message -----
From: Bellinger, John B(Legal)
To: Burns, Nicholas R
Cc: Rubin, Eric S; Beecroft, Robert S; Wittenstein, Edward M
Sent: Fri Jul 20 14:31:14 2007
Subject: FW: EXECUTIVE ORDER: INTERPRETATION OF THE GENEVA CONVENTIONS COMMON ARTICLE 3 AS APPLIED TO A PROGRAM OF DETENTION AND INTERROGATION OPERATED BY THE CENTRAL INTELLIGENCE AGENCY

From: bounce-451177-255175@list.whitehouse.gov [mailto:bounce-451177-255175@list.whitehouse.gov] On Behalf Of White House Press Releases
Sent: Friday, July 20, 2007 2:08 PM
To: Bellinger, John B(Legal)
Subject: EXECUTIVE ORDER: INTERPRETATION OF THE GENEVA CONVENTIONS COMMON ARTICLE 3 AS APPLIED TO A PROGRAM OF DETENTION AND INTERROGATION OPERATED BY THE CENTRAL INTELLIGENCE AGENCY

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release July 20, 2007

EXECUTIVE ORDER

- - - - - - -

INTERPRETATION OF THE GENEVA CONVENTIONS COMMON ARTICLE 3

AS APPLIED TO A PROGRAM OF DETENTION AND INTERROGATION

OPERATED BY THE CENTRAL INTELLIGENCE AGENCY

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444

By the authority vested in me as President and Commander in Chief of the Armed Forces by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force (Public Law 107-40), the Military Commissions Act of 2006 (Public Law 109-366), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. General Determinations. (a) The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces. Members of al Qaeda were responsible for the attacks on the United States of September 11, 2001, and for many other terrorist attacks, including against the United States, its personnel, and its allies throughout the world. These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere, and they continue to plan additional acts of terror throughout the world. On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination.

(b) The Military Commissions Act defines certain prohibitions of Common Article 3 for United States law, and it reaffirms and reinforces the authority of the President to interpret the meaning and application of the Geneva Conventions.

Sec. 2. Definitions. As used in this order:

(a) "Common Article 3" means Article 3 of the Geneva Conventions.

(b) "Geneva Conventions" means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

(c) "Cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Sec. 3. Compliance of a Central Intelligence Agency Detention and Interrogation Program with Common Article 3. (a) Pursuant to the authority of the President under the Constitution and the laws of the United States, including the Military Commissions Act of 2006, this order interprets the meaning and application of the text of Common Article 3 with respect to certain detentions and interrogations, and shall be treated as authoritative for all purposes as a matter of United States law, including satisfaction of the international obligations of the United States. I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section. The requirements set forth in this section shall be applied with respect to detainees in such program without adverse

distinction as to their race, color, religion or faith, sex, birth, or wealth.

(b) I hereby determine that a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3, provided that:

(i) the conditions of confinement and interrogation practices of the program do not include:

(A) torture, as defined in section 2340 of title 18, United States Code;

(B) any of the acts prohibited by section 2441(d) of title 18, United States Code, including murder, torture, cruel or inhuman treatment, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking of hostages, or performing of biological experiments;

(C) other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in section 2441(d) of title 18, United States Code;

(D) any other acts of cruel, inhuman, or degrading treatment or punishment prohibited by the Military Commissions Act (subsection 6(c) of Public Law 109-366) and the Detainee Treatment Act of 2005 (section 1003 of Public Law 109-148 and section 1403 of Public Law 109-163);

(E) willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the

acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to

perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield; or

(F) acts intended to denigrate the religion, religious practices, or religious objects of the individual;

(ii) the conditions of confinement and interrogation practices are to be used with an alien detainee who is determined by the Director of the Central Intelligence Agency:

(A) to be a member or part of or supporting al Qaeda, the Taliban, or associated organizations; and

(B) likely to be in possession of information that:

(1) could assist in detecting, mitigating, or preventing terrorist attacks, such as attacks within the United States or against its Armed Forces or other personnel, citizens, or facilities, or against allies or other countries cooperating in the war on terror with the United States, or their armed forces or other personnel, citizens, or facilities; or

(2) could assist in locating the senior leadership of al Qaeda, the Taliban, or associated forces;

(iii) the interrogation practices are determined by the Director of the Central Intelligence Agency, based upon professional advice, to be safe for use with each detainee with whom they are used; and

(iv) detainees in the program receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.

(c) The Director of the Central Intelligence Agency shall issue written policies to govern the program, including guidelines for Central Intelligence Agency personnel that implement paragraphs (i)(C), (E), and (F) of subsection 3(b) of this order, and including requirements to ensure:

(i) safe and professional operation of the program;

(ii) the development of an approved plan of interrogation tailored for each detainee in the program to be interrogated, consistent with subsection 3(b)(iv) of this order;

(iii) appropriate training for interrogators and all personnel operating the program;

(iv) effective monitoring of the program, including with respect to medical matters, to ensure the safety of those in the program; and

(v) compliance with applicable law and this order.

Sec. 4. Assignment of Function. With respect to the program addressed in this order, the function of the President under section 6(c)(3) of the Military Commissions Act of 2006 is assigned to the Director of National Intelligence.

Sec. 5. General Provisions. (a) Subject to subsection (b) of this section, this order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(b) Nothing in this order shall be construed to prevent or limit reliance upon this order in a civil, criminal, or administrative proceeding, or otherwise, by the Central

Intelligence Agency or by any individual acting on behalf of the Central Intelligence Agency in connection with the program addressed in this order.

GEORGE W. BUSH

THE WHITE HOUSE,

July 20, 2007.

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UNCLASSIFIED

RELEASED IN FULL

INITIALS		
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CLR 6:	CWA	...
CLR 7:	SMC	...
CLR 8:	___	...

CONFIDENTIAL

EUR/ERA:PETER CHASE:HLB
10/16/07 202-647-3474
C:PZELIKOW

L:JBELLINGER D:RWALLER(SUBS) P:SAMADEO(SUBS)
R:KVOLKER EUR:KVOLKER C:CWARD PA: SEAN MCCORMACK

173

IMMEDIATE ALDAC

E.O. 12958: DECL: OADR

TAGS: PREL, PHUM

SUBJECT: SECRETARY'S STATEMENT ON ALLEGED U.S. DETENTION OR TRANSPORTATION OF TERRORIST SUSPECTS

Classified By: COUNSELOR PHILIP ZELIKOW, REASONS 1.4 (B) AND (D)

1. (C) Over the course of the last few weeks, the EU, Council of Europe and several European countries have requested U.S. clarifications following media accusations that the United States has violated law in holding detainees or transporting them through the territory of European nations.

2. (C) On December 5, the Secretary of State issued a statement that responds to these requests. On behalf of the administration, the Secretary's statement is a robust explanation of U.S. thinking on the issue of detainees and renditions in the context of the global war on terror. We seek to focus discussion where it belongs - on the responsibility of all democratic governments, European as

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444

UNCLASSIFIED

well as American, to take all appropriate law enforcement and intelligence measures to protect our citizens from attack. Some government ministers and spokespersons have accepted an overly-simplistic, populist critique of the United States as a rogue actor. It is not. For example, appropriate renditions are a vital tool in fighting transnational terrorism and are permissible under international law.

3. (C) The Secretary's statement serves as a call on European governments, commentators and publics to step up to the hard choices we face together as allies in the fight against terrorism. Cooperation in this fight is a sovereign choice. It is a two way street. Responsible governments cannot endorse it privately to protect their citizens while publicly distancing themselves from this necessity.

4. (U) The U.S. also understands the concerns European governments and publics may have in light of various reports about U.S. conduct. The Secretary thus also provided firm assurances about the content and conduct of U.S. policy.

5. (SBU) For use only in appropriate backgrounding: The Secretary's statement is in part an effort to foster greater understanding and promote a genuine dialogue on these issues. An emotional and ill-informed discussion should evolve into a constructive exchange among allies and friends that share common goals. For example, the statement acknowledges publicly that:

-- the US is in fact conducting renditions. As she notes, under the right circumstances, renditions are permissible under international law, and are in fact a vital tool in combating international terrorism;

-- US intelligence agencies have handled the gathering of intelligence from a very small number of extremely dangerous detainees, including individuals who planned the

9/11 and other attacks. The Secretary summarizes U.S. policy on these matters.

6. (U) The text of the Secretary's statement follows in paragraph eight. Paragraph seven contains suggested public diplomacy actions posts should take to actively change the nature of the public debate about this issue. Posts are encouraged to direct questioners to the full statement.

7. (C) Public Diplomacy Actions: Ambassadors and appropriate members of their country teams should seek every opportunity to shape the public discussion about the issue of U.S. detention or transportation of terrorist suspects in ways that highlight the points made in the Secretary's statement and that turn the public discussion toward understanding of how the U.S. actions are legal, respect the sovereignty of other nations, and contribute to the safety of people everywhere who are threatened by terrorists. Posts should ensure that the Secretary's complete statement is widely available and accurately presented in your local media. As appropriate, seek opportunities to address the media to highlight the statement, drawing on the talking points and themes in paragraph four and the statement itself. The goal of your public diplomacy activities is to ensure that the media, particularly prominent commentators on detainee issues, recognize the serious effort the U.S. has made to respond thoughtfully to public concerns, while they should also reflect on the very hard choices we all must face.

8. (U) The Secretary's Statement:

We have received inquiries from the European Union, the Council of Europe, and from several individual countries about media reports concerning U.S. conduct of the war on terror. I wish to respond now to those inquiries, as I depart today for Europe.

The United States and many other countries are waging a war against terrorism. For our country this war often

takes the form of conventional military operations in places like Afghanistan and Iraq. Sometimes this is a political struggle, a war of ideas. It is a struggle waged also by our law enforcement agencies. Often we engage the enemy through the cooperation of our intelligence services with their foreign counterparts.

We must track down terrorists who seek refuge in areas where governments cannot take effective action, including where the terrorists cannot in practice be reached by the ordinary processes of law. In such places terrorists have planned the killings of thousands of innocents - in New York City or Nairobi, in Bali or London, in Madrid or Beslan, in Casablanca or Istanbul. Just two weeks ago I visited a hotel ballroom in Amman, viewing the silent, shattered aftermath of one of those attacks.

The United States, and those countries that share the commitment to defend their citizens, will use every lawful weapon to defeat these terrorists. Protecting citizens is the first and oldest duty of any government. Sometimes these efforts are misunderstood. I want to help all of you understand the hard choices involved, and some of the responsibilities that go with them.

One of the difficult issues in this new kind of conflict is what to do with captured individuals who we know or believe to be terrorists. The individuals come from many countries and are often captured far from their original homes. Among them are those who are effectively stateless, owing allegiance only to the extremist cause of transnational terrorism. Many are extremely dangerous. And some have information that may save lives, perhaps even thousands of lives.

The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have had to adapt. Other governments are now also facing this challenge.

We consider the captured members of al Qaeda and its affiliates to be unlawful combatants who may be held, in accordance with the law of war, to keep them from killing innocents. We must treat them in accordance with our laws, which reflect the values of the American people. We must question them to gather potentially significant, life-saving, intelligence. We must bring terrorists to justice wherever possible.

For decades, the United States and other countries have used "renditions" to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice.

In some situations a terrorist suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make the sovereign choice to cooperate in a rendition. Such renditions are permissible under international law and are consistent with the responsibilities of those governments to protect their citizens.

Rendition is a vital tool in combating transnational terrorism. Its use is not unique to the United States, or to the current administration. Last year, then Director of Central Intelligence George Tenet recalled that our earlier counterterrorism successes included "the rendition of many dozens of terrorists prior to September 11, 2001."

-- Ramzi Youssef masterminded the 1993 bombing of the World Trade Center and plotted to blow up airliners over the Pacific Ocean, killing a Japanese airplane passenger in a test of one of his bombs. Once tracked down, a rendition brought him to the United States, where he now serves a life sentence.

-- One of history's most infamous terrorists, best known as "Carlos the Jackal," had participated in murders in Europe and the Middle East. He was finally captured in Sudan in 1994. A rendition by the French government brought him to justice in France, where he is now imprisoned. Indeed, the European Commission of Human Rights rejected Carlos' claim that his rendition from Sudan was unlawful.

Renditions take terrorists out of action, and save lives.

In conducting such renditions, it is the policy of the United States, and I presume of any other democracies who use this procedure, to comply with its laws and comply with its treaty obligations, including those under the Convention Against Torture. Torture is a term that is defined by law. We rely on law to govern our operations. The United States does not permit, tolerate, or condone torture under any circumstances. Moreover, in accordance with the policy of this administration:

-- The United States has respected -- and will continue to respect -- the sovereignty of other countries.

-- The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture.

-- The United States does not use the airspace or airports of any country for the purpose of transporting a detainee to a country where he or she will be tortured.

-- The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured.

International law allows a state to detain enemy combatants for the duration of hostilities. Detainees may

only be held for an extended period if the intelligence or other evidence against them has been carefully evaluated and supports a determination that detention is lawful. The U.S. does not seek to hold anyone for a period beyond what is necessary to evaluate the intelligence or other evidence against them, prevent further acts of terrorism, or hold them for legal proceedings.

With respect to detainees, the United States government complies with its Constitution, its laws, and its treaty obligations. Acts of physical or mental torture are expressly prohibited. The United States government does not authorize or condone torture of detainees. Torture, and conspiracy to commit torture, are crimes under U.S. law, wherever they may occur in the world.

Violations of these and other detention standards have been investigated and punished. There have been cases of unlawful treatment of detainees, such as the abuse of a detainee by an intelligence agency contractor in Afghanistan or the horrible mistreatment of some prisoners at Abu Ghraib that sickened us all and which arose under the different legal framework that applies to armed conflict in Iraq. In such cases the United States has vigorously investigated, and where appropriate, prosecuted and punished those responsible. Some individuals have already been sentenced to lengthy terms in prison; others have been demoted or reprimanded.

As CIA Director Goss recently stated, our intelligence agencies have handled the gathering of intelligence from a very small number of extremely dangerous detainees, including the individuals who planned the 9/11 attacks in the United States, the attack on the U.S.S. Cole, and many other murders and attempted murders. It is the policy of the United States that this questioning is to be conducted within U.S. law and treaty obligations, without using torture. It is also U.S. policy that authorized interrogation will be consistent with U.S. obligations under the Convention Against Torture, which prohibit cruel, inhuman, or degrading treatment. The intelligence

so gathered has stopped terrorist attacks and saved innocent lives - in Europe as well as in the United States and other countries. The United States has fully respected the sovereignty of other countries that cooperate in these matters.

Because this war on terrorism challenges traditional norms and precedents of previous conflicts, our citizens have been discussing and debating the proper legal standards that should apply. President Bush is working with the U.S. Congress to come up with good solutions. I want to emphasize a few key points.

-- The United States is a country of laws. My colleagues and I have sworn to support and defend the Constitution of the United States. We believe in the rule of law.

-- The United States government must protect its citizens. We and our friends around the world have the responsibility to work together in finding practical ways to defend ourselves against ruthless enemies. And these terrorists are some of the most ruthless enemies we face.

-- We cannot discuss information that would compromise the success of intelligence, law enforcement, and military operations. We expect other nations share this view.

Some governments choose to cooperate with the United States in intelligence, law enforcement, or military matters. That cooperation is a two-way street. We share intelligence that has helped protect European countries from attack, helping save European lives.

It is up to those governments and their citizens to decide if they wish to work with us to prevent terrorist attacks against their own country or other countries, and decide how much sensitive information they can make public. They have a sovereign right to make that choice.

Debate in and among democracies is natural and healthy. I hope that debate also includes a healthy regard for the responsibilities of governments to protect their citizens.

Four years after 9/11, most of our populations are asking us if we are doing all we can to protect them. I know what it is like to face an inquiry into whether everything was done that could have been done. So now, before the next attack, we should all consider the hard choices that democratic governments must face. We can all best meet this danger if we work together.

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NotesTele

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CABLX:
ACTION: PSA
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DISSEMINATION: PSA
CHARGE: PROG

APPROVED: PSA:JDELAURENTIS
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UNCLAS SECTION 01 OF 02 GENEVA 002441

STATE FOR IO/SHA, DRL/MLA, L/HRR

E.O. 12958: N/A
TAGS: PHUM, UNHRC-1
SUBJECT: COMMUNICATION FROM THE WORKING GROUP ON ENFORCED DISAPPEARANCES

1. Mission received the following letter dated August 25, 2004 from the Chairman of the Working Group on Enforced or Involuntary Disappearances, Stephen J. Toope, addressed to Ambassador Moley. The letter concerns reports the Working Group has received regarding alleged secret detention centers under United States' authority in various parts of the world and invites the USG to submit written information by October 15 and/or send a representative to appear in person at the next Working Group session November 8-15, 2004.

2. Text of letter and annex follows:

Begin text.

25 August 2004

Dear Mr. Ambassador,

I should like to communicate to you, on behalf of the Chairman of the Working Group on Enforced or Involuntary Disappearances, the following letter addressed to you:

"Dear Mr. Ambassador,

I have the honour to write to you on behalf of the Working Group on Enforced or Involuntary Disappearances, which held its seventy-third session from 16 to 20 August 2004, at the United Nations Office in Geneva.

In the course of the session, the Working Group decided to inform your Government of reports it had received about developments in your country having an influence on the phenomenon of disappearances or the solution of the cases not

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 04 SEP 2008 200706444

yet clarified, and/or on the implementation of the Declaration on the Protection of All Persons from Enforced Disappearances. A summary is provided as an Annex to this letter.

I would like to take this opportunity to remind your Government that the Working Group will hold its seventy-fourth session from 8 to 15 November 2004, at the Untied Nations Office in Geneva. It would therefore be very much appreciated if any written information that your Government wishes to submit for the Working Group's consideration, could be received, if possible, by 15 October 2004.

In conformity with its usual practice, the Working Group is prepared to receive representatives of interested Governments during the first three days of its session. Should your Government wish to be represented at the forthcoming session, I would appreciated your contacting the Group's secretariat at the Untied Nations Office of the High Commissioner for Human Rights in Geneva (tel. 022-917-9176), in order to schedule an appointment with the Group.

I remain
Dear Mr. Ambassador,

Yours sincerely

Stephen J. Toope
Chairman
Working Group on Enforced or Involuntary Disappearances"

I remain,
Dear Mr. Ambassador,

Yours sincerely,
//////////////////////
Tanya Smith
Secretary a.i.
Working Group on Enforced or Involuntary Disappearances

ANNEX
WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

General allegations

United States of America

The Working Group received information from non-governmental organizations concerning the reported non-compliance by the Government of the United States of America with provisions of the Declaration on the Protection of All persons from Enforced Disappearance.

Reports were received by the Working Group regarding secret detention centers under United States' authority in various parts of the world, in which an unknown number of persons are detained. Reports assert that there was inadequate provision of notice to families about the capture of detainees and their conditions, legal status and rights. It is also reported that it is unclear in many circumstances which U.S. agency is ultimately responsible for the arrest or the conditions of confinement of the detainees in these

B5

facilities.

Reports further specify that the most sensitive and high-profile detainees are not being held in Guantanamo because it is believed that detainees there will eventually be monitored by the U.S. courts. It is stated that terrorism suspects are detained by the Untied States in "undisclosed locations," presumably outside the United States, with no access to the ICRC, no notification to families, no oversight of any sort of their treatment, and in most cases no acknowledgment that they are even being held. Information was provided on 13 specific alleged detainees, apprehended in places such as Pakistan, Indonesia, Thailand, Morocco, and the United Arab Emirates, who have reportedly disappeared in U.S. custody.

B5

American authorities have also apparently refused to disclose the names of men secretly detained during the past few years within the United States. Families have not been informed on the arrested persons' locations. Reports state that some of these detainees have now been released or deported.

End text.

3. Mission transmitted a copy of the letter by fax to IO/SHA, Attention Director.

Cassel
BT
#2441
NNNN

SECRET

Wright, Elizabeth B

L95

From: Dolan, JoAnn
Sent: Thursday, May 05, 2005 5:38 PM
To: Wright, Elizabeth B
Subject: FW: Clearance (SECRET) [redacted] B1
[redacted]-Due in S/ES by 3PM, 5/5. thanks.

Importance: High

RELEASED IN PART
B1, 1.4(D)

-----Original Message-----
From: Dolan, JoAnn
Sent: Thursday, May 05, 2005 5:38 PM
To: Dorosin, Joshua L; SWCI; Carpenter, Jonathan J(P); Degnan, Kelly C(P); Waller, Robert P(D); Ward, Celeste J(C); McLean, Lori A (C); Pollack, Margaret J(SA-1)
Cc: Bellinger, John B (L Bureau)
Subject: Clearance (SECRET) [redacted] Due in S/ES by 3PM, 5/5. thanks.
Importance: High

Attached memo was due in S/ES at 3:00 today and must go up tonight as Secretary departs tonight. It is due at NSC tomorrow.

LEGAL-#122095-v1 -AM_on_Draft_P...

LEGAL-#122097-v1 -Memo_to_Hadle...

-----Original Message-----
From: Sarkis, Saadia E
Sent: Wednesday, May 04, 2005 3:41 PM
To: TTL-L
Cc: TTL-S; TTL-D; P Officers; C; TTL-SP; SES 4; SES-Line Only; TTL-SCT; TTL-SWCI; TTL-SA; TTL-PM; TTL-NEA
Subject: (SECRET) [redacted] Due in S/ES by 3PM, 5/5. thanks. B1

L, please coordinate State's response under cover of an Action Memo to S covering a memorandum from the Secretary to NSA Hadley. Pls clear with D, P, C, S/WCI and others as appropriate. Many thanks.

DUE IN S/ES BY 3:00 PM, THURSDAY, MAY 5

CC: S,D,P,C,S/P,S/ES,NEA,SA,PM,SCT, SWCI

200508934

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
CLASSIFICATION: SECRET REASON: 1.4(D)
DECLASSIFY AFTER: 5 MAY 2015
DATE/CASE ID: 17 AUG 2009 200706444

L115

NotesTele (49)
C O N F I D E N T I A L OSLO 01694
Laser1:
INFO: PAS CONS
CXOSLO:
ACTION: P/E
INFO: RSO AMB DAO RAO ODC DCM

RELEASED IN PART
B1, 1.4(B), 1.4(D)

DISSEMINATION: POLO
CHARGE: PROG

APPROVED: DCM:CWWEBSTER
DRAFTED: POL\ECON:HAMMERMIKE
CLEARED: DAO:JSTEVENS, RAO:GSIMS PAO:JE-B

VZCZCNYI332
OO RUEHC RUEHCP RUEHRK RUEHSM RUEAIIA RUEAWJA
RUEKJCS RHEHNSC RUEKJCS RUEAHLC RUCNFB
DE RUEHNY #1694/01 3201606
ZNY CCCCC ZZH
O 161606Z NOV 05
FM AMEMBASSY OSLO
TO RUEHC/SECSTATE WASHDC IMMEDIATE 3117
INFO RUEHCP/AMEMBASSY COPENHAGEN IMMEDIATE 1935
RUEHRK/AMEMBASSY REYKJAVIK IMMEDIATE 0595
RUEHSM/AMEMBASSY STOCKHOLM IMMEDIATE 2697
RUEAIIA/CIA WASHDC IMMEDIATE
RUEAWJA/DEPT OF JUSTICE WASHDC IMMEDIATE
RUEKJCS/JOINT STAFF WASHDC IMMEDIATE
RHEHNSC/NSC WASHDC IMMEDIATE
RUEKJCS/SECDEF WASHDC IMMEDIATE
RUEAHLC/HOMELAND SECURITY CENTER WASHINGTON DC PRIORITY
RUCNFB/FBI WASHINGTON DC PRIORITY
BT
C O N F I D E N T I A L SECTION 01 OF 03 OSLO 001694

COPENHAGEN FOR LEGATT

E.O. 12958: DECL: 11/16/2015
TAGS: MARR, PREL, PTER, PGOV, NO
SUBJECT: NORWEGIAN QUESTIONS REGARDING DETAINEE FLIGHTS

REF: A. STATE 115990 B. OSLO 842 C. OSLO 829

Classified By: DCM Christopher W. Webster, Reason 1.4 b and d.

1. (U) This is an action request -- see para 4.

2. [redacted] B1

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 10 SEP 2008 200706444

NotesTele (49)

[redacted] B1

an article in the leftist weekly "Ny Tid" that alleges that an aircraft with the tail number N50BH owned by Crystal Jet Aviation of Albany, New York, is operated by the USG to transport detainees and landed in Norway. [redacted] B1

End note).

[redacted] B1

5. (U) Post has also received press inquiries and only plans to confirm that the MFA has indeed asked for information regarding possible detainee flights.

Comment

NotesTele (49)

- - - -

[redacted] B1

Translation of one of the Articles on Alleged Detainee Flight
- -

8. (U) Norwegian News Agency (NTB) report dated November 16, 2005
(begin text of informal Embassy translation)

CIA Plane was at Gardermoen (Oslo,s main airport) for 12 hours

An American airplane that is suspected of having been on an assignment for the CIA, and which landed at Gardermoen, was at the airport for twelve hours.

&The plane came at 0740 and departed at 1922,8 communications director Ove Narvesen at Avinor tells NTB.

He explains that there were two passengers on board in addition to the crew, but otherwise doesn't know anything about the plane's stay or the purpose of the visit by the passengers to Norway.

NotesTele (49)

On Friday, the weekly Ny Tid broke the story about the landing at Gardermoen on July 20 of this year. The plane in question is one of several that are discussed in the American media in connection with the CIA's transport of prisoners to Guantanamo Bay in Cuba and to third countries where prisoners are said to have been tortured.

The issue has come on the agenda in several European countries the past few days and is the subject of considerable attention.

The plane has the tail number &N50BH8 and is owned by the company Cyrstal Jet Aviation based in Albany, New York. The same plane is now the subject of an investigation in Sweden, where the plane is said to have landed at several locations during recent years.

Ministry of Foreign Affairs Meeting

The (Norwegian) Foreign Ministry was reported to be meeting Wednesday afternoon with the U.S. Embassy to clarify the circumstances around the landing of the plane at Gardermoen during the summer when it allegedly was on a mission for the CIA.

&We will ask about the circumstances concerning the landing,8 the Ministry's spokeswomen, Anne Lene Dale Sandsten, told NTB.

&If it was an official flight, they should have known about it,8 she responded to a question as to whether the Embassy knew about the landing.

Dale Sandsten says that from the Foreign Ministry's point of view, there is no reason to believe that anything is out of order.

&But there is a certain level of media interest,8 she added regarding the background on the meeting.

She references that earlier this year the Foreign Ministry discussed a similar case after a similar American layover at Sola in Stavanger on June 1 had been reported.

&At that point the Americans explained that there had not been prisoners on board,8 she says.

NotesTele (49)

No Information on Passengers

Information Director Robert Haast at the Civil Air Authority explains that his office does not know who was on board the plane on July 20. According to regulations, it is possible that his office would be informed about this.

&If it is an official flight, the Civil Air Authority should be informed of who is on board. That did not happen in this case,8 Haast tells NTB.

&If a civilian company carries out an operation for the government in a country, for example transport of a head of state, information is provided to the Civil Air Authority via an application to the Foreign Ministry.8

&If a civilian air company carries out an operation for the police or intelligence service, it is evaluated on a case-by-case basis. But in most instances it would not be viewed as an official flight,8 says Haast. End translation.
Visit Oslo's Classified website:
http://www.state.sgov.gov/p/eur/oslo/index.cfm

ONG
BT
#1694
NNNN

L 118

Pekala, Mark A

RELEASED IN PART
B5

From: Allegrone, Kathleen H
Sent: Wednesday, November 23, 2005 10:04 AM
To: Pekala, Mark A; Graffy, Colleen P
Subject: Spanish -- MFA Communique on the CIA planes/DCM mentioned

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From: Clements, Gary A
Sent: Wednesday, November 23, 2005 9:30 AM
To: Allegrone, Kathleen H
Cc: EUR-WE-Spain-DL
Subject: FW: MFA Communique on the CIA planes/DCM mentioned

Kathy,
I have calls in to post [redacted] B5
[redacted] A question to
Adam Ereli last week from a reporter [redacted]
[redacted]
Gary

From: Hall, Morgan C
Sent: Thursday, November 17, 2005 1:31 PM
To: Manzanares, Bob; Allegrone, Kathleen H; Propp, Kenneth R; Terrill, Damon A; EUR-WE-Spain-DL
Cc: Fitzpatrick, Kathleen M; Zuniga, Ricardo F; Keener, Geraldine F
Subject: RE: MFA Communique on the CIA planes/DCM mentioned

Here is a quick translation of the Spanish MFA Communique issued yesterday:

Government of Spain Official Statement

Wednesday, 16 of November 2005

With regard to the news that has appeared in recent days concerning the possible use of Spanish airports for the transfer of prisoners or detainees in international flights, the Government communicates the following:

1. - The Government has asked the Minister of Foreign Affairs to appear before the Congress of Deputies to provide a detailed report on all aspects related to this subject.

2. - In March of this year, after the appearance of the news in some media outlets, the Director General of Foreign Policy for Europe and North America, Jose Pons, asked the Charge d'Affaires of the United States in Madrid, Mr. Manzanares, for all the information that the U.S. Embassy could provide.

3. - Mr. Manzanares, after carrying out the appropriate consultations, informed the Ministry of Foreign Affairs that he was aware of no aerial transfers of prisoners.

4. - Today, the Ministry of Foreign Affairs has raised the issue again with the Bureau of European and Eurasian Affairs of the U.S. Department of State and the Assistant Secretary of that Bureau has reconfirmed what was stated in March.

From: Manzanares, Bob(Madrid)
Sent: Thursday, November 17, 2005 1:01 PM
To: Hall, Morgan C; Allegrone, Kathleen H
Subject: FW: MFA Communique on the CIA planes/DCM mentioned

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 06 AUG 2009 200706444

FYI.

-----Original Message-----
From: Fitzpatrick, Kathleen M
Sent: Thursday, November 17, 2005 2:18 PM
To: Diaz, Irene X; Zuniga, Ricardo F; Allison, Robert S; Tachco, Amy N; Manzanares, Bob; Law, John; Shumake, Josie S

Subject: MFA Communique on the CIA planes/DCM mentioned

Thanks Irene. Bob -- Here is the text of MFA statement.

-----Original Message-----
From: Diaz, Irene X
Sent: Thursday, November 17, 2005 1:50 PM
To: Fitzpatrick, Kathleen M; Zuniga, Ricardo F; Allison, Robert S; Tachco, Amy N
Subject: CIA Planes
Importance: High

The following is the official communiqué issued by the Ministry of Foreign Affairs re the CIA planes

Comunicado del Gobierno

miércoles, 16 de noviembre de 2005

En relación con las noticias aparecidas estos días sobre la posible utilización de aeropuertos españoles para el traslado de presos o detenidos en vuelos internacionales, el Gobierno comunica lo siguiente:

1.- El Gobierno ha solicitado la comparecencia, a petición propia, del Ministro de Asuntos Exteriores y de Cooperación en el Congreso de los Diputados para informar con detalle de todos los extremos relacionados con este asunto.

2.- En el mes de marzo de este año, y tras las primeras noticias difundidas por algún medio de comunicación, el Director General de Política Exterior para Europa y América del Norte, José Pons, solicitó, a través del Encargado de Negocios de Estados Unidos en Madrid, señor Manzanares, toda la información de la que dispusiese la embajada norteamericana.

3.- El Encargado de Negocios de Estados Unidos, señor Manzanares, tras efectuar las oportunas consultas, informó al Ministerio de Asuntos Exteriores y de Cooperación de que no tenía constancia alguna de posibles traslados aéreos de detenidos.

4.- En el día de hoy, el Ministerio de Asuntos Exteriores y de Cooperación ha vuelto a dirigirse a la Dirección General para Asuntos de Europa y Eurasia del Departamento de Estado Norteamericano para interesarse nuevamente por el Asunto y el Director General del citado departamento ha vuelto a confirmar todos los extremos expuestos en el mes de marzo.

Irene Díaz
Political Section Specialist
U.S. Embassy Madrid
Tel: 34-91-587-2502
Mobil: 34-650-622-281
Fax: 34-91-587-2391/2292

RELEASED IN PART
B5 L 121

HUMAN RIGHTS WATCH

Questions and Answers: U.S. Detainees Disappeared into Secret Prisons: Illegal under Domestic and International Law

December 9, 2005

The United States is holding an unknown number of terrorism suspects in secret overseas locations, and refusing either to acknowledge the detentions or to give information on the fate or the whereabouts of these detainees. These detainees have been held incommunicado, without trial, some for as many as four years. Some of the detainees are reported to have been tortured in custody.[1]

Several reports indicate that the CIA has held detainees in secret facilities in Eastern Europe, with Poland and Romania named as possible locations.[2] While refusing to directly address the existence of such detention centers, the U.S. asserts that its actions are consistent with its obligations under international law. Meanwhile, the Council of Europe and a number of European states have launched investigations into the allegations of violations of international and domestic laws.

The following questions and answers address legal issues concerning U.S. detainees disappeared into secret prisons.

What laws apply to the cases of U.S. detainees disappeared into secret prisons?

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1 "U.S. Holding at Least Twenty-Six "Ghost Detainees": List of Detainees Published by Human Rights Watch," Human Rights Watch, press release, December 1, 2005, available at http://hrw.org/english/docs/2005/11/07/usint11995.htm; Richard Esposito and Brian Ross, "Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons," ABC News, December 5, 2005; Dana Priest, "CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11," Washington Post, November 2, 2005.

2 Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," Washington Post, November 2, 2005; "Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe," Human Rights Watch, press release, November 2005, available at http://hrw.org/english/docs/2005/11/07/usint11995.htm; ABC News Radio Broadcast, "Brian Ross Investigates: Secretary of State Condoleezza Rice is off to Europe Today and the Timing Could Not be Worse," December 6, 2005.

PAGES MISSING

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444

International human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR)[3] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[4] govern individual rights to liberty, to a fair trial, and to be free from torture and other cruel, inhuman or degrading treatment. European governments are also bound by similar provisions in the European Convention on Human Rights.[5] The Geneva Conventions address the detention, treatment and trial of prisoners of war and civilians during armed conflict or military occupation.6

International human rights and humanitarian law (the laws of war) ensure that the fundamental rights of all individuals are protected at all times. When the laws of war do not apply, international human rights law still protects that person's rights. Furthermore, certain protections are so well established, such as the prohibitions on torture and other cruel, inhuman or degrading treatment, and prolonged arbitrary detention, that they have become customary obligations that are binding legal obligations independent of specific treaty agreements.[7] The domestic laws of states whose territories or nationals are implicated also apply.

Does holding someone without trial violate international human rights law?

Human rights law has long recognized that everyone has a right to liberty and security of person, and the right to a fair trial. These rights are guaranteed in the Universal Declaration of Human Rights,[8] the ICCPR,[9] and the ECHR.[10] The ICCPR and the

B5

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[3] International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, available at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. Each State Party to the ICCPR pledges to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the convention, regardless of such distinctions as race, religion, political or other opinion, or national or social origin. Art. 2. The ICCPR has been ratified by a total of 154 countries, including the United States, the United Kingdom, Germany, Italy, Poland, Spain, Romania, Portugal, the Netherlands, Austria, Sweden and Norway.

4 Convention Against Torture, General Assembly resolution 39/46, entered into force on June 26, 1987, in accordance with article 27 (1), available at http://www.ohchr.org/english/law/cat.htm. The Convention against Torture has been ratified by a total of 140 countries, including the United States, the United Kingdom, Germany, Italy, Poland, Spain, Romania, Portugal, the Netherlands, Austria, Sweden and Norway.

5 European Convention on Human Rights (ECHR), Rome, 4.XI.1950 , available at http://conventions.coe.int/treaty/en/Treaties/Html/005.htm. The ECHR obligates each State Party to secure this right to everyone within its jurisdiction. Art.1. The European Convention binds 46 countries, including the United Kingdom, Germany, Italy, Poland, Spain, Romania, Portugal, the Netherlands, Austria, Sweden and Norway.

6 International Committee of the Red Cross, International Humanitarian Law database, available at: http://www.icrc.org/ihl. All of these countries are bound by the Geneva Conventions.

7 Restatement (Third) of Foreign Relations Law of the United States, Sec. 702 (Customary International Law of Human Rights). The Restatement, prepared by the American Law Institute, is generally considered to be an authoritative statement of the law of the United States.

[8] Universal Declaration of Human Rights, arts. 3 and 11.

ECHR specify that no one shall be deprived of his or her liberty except as established by law. Anyone arrested or detained on a criminal charge must have a fair and public trial within a reasonable time.[11]

International law permits the detention of persons without trial (administrative detention) under certain narrowly defined circumstances. In accordance with the ICCPR, there must be a public emergency that threatens the life of the nation. Administrative detainees under states of emergency should enjoy as a minimum the following rights and guarantees:

(a) The right to be brought before a judicial authority promptly after arrest;

(b) The right to receive an explanation of rights upon arrest in their own language or soon thereafter and to be informed of the specific reasons for the deprivation of liberty;

(c) The right of immediate access to family, legal counsel and a medical officer;

(d) The right to communicate with and be visited by a representative of an international humanitarian agency, such as the ICRC;

(e) The right to challenge, in a fair hearing and periodically if necessary, the lawfulness of the detention and to be released if the detention is arbitrary or unlawful;

(f) The right to complain to a judicial authority about mistreatment;

(g) The right to seek and obtain compensation if the detention proves to be arbitrary or unlawful.

Does holding persons in secret violate international human rights law?

When a person is forcibly detained by government officials who refuse to acknowledge the detention and who keep the person from the protection of the law, this is called a *forced disappearance.*[12] The U.S. has long condemned other countries that engage in forced disappearances, and was instrumental in drafting and approving United Nations statements that condemn all enforced disappearances with no exceptions for national

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9 Each State Party to the ICCPR pledges to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the convention, regardless of such distinctions as race, religion, political or other opinion, or national or social origin., art. 2.

10 The ECHR obligates each State Party to secure this right to everyone within its jurisdiction, art.1.

11 ICCPR, art. 9; ECHR, art. 5-6.

12 "The United States' "Disappeared": The CIA's Long-Term "Ghost Detainees", Human Rights Watch Briefing Paper, October 2004.

security or emergencies.[13] As described by the ICRC, "No matter how legitimate the reasons for a person's detention, no one has the right to keep that person's fate or whereabouts secret or to deny that he or she is being detained."[14]

"Disappeared" detainees are cut off from the outside world and from the protection of the law and thus subject to the whim of their captors. This has the effect of suspending the rights of "disappeared" persons and placing them in a situation of complete defenselessness, making them especially vulnerable to torture and other ill-treatment.

Do the laws of war apply to these detainees?

The U.S. has claimed that all persons captured in the "global war on terror" are "enemy combatants" who may be detained without charges for the duration of the conflict. Even if this were the case, a view Human Rights Watch contests,[15] the U.S. has not met even its basic obligations for detainees held under the laws of war. The U.S. has never stated the legal basis for the detention of any of detainees disappeared into secret prisons, the circumstances of their capture, or their individual status as combatants or terrorism suspects – the U.S. does not even acknowledge they are being held.

Does secret detention without trial violate the laws of war?

The customary laws of war prohibit secret detention. Consistent with the prohibition on enforced disappearance, states are required to record the personal details of detainees and provide information to family members on the fate of missing persons,[16] and detainees should be allowed to correspond with relatives and receive visits to the degree practicable.[17]

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During an international armed conflict, the Third and Fourth Geneva Conventions require that the ICRC have access to all detainees and places of detention. Prisoners

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13 Declaration on the Protection of all Persons from Enforced Disappearance, GA Res 47/133, entry into force December 18, 1992.

14 International Committee of the Red Cross, "Enforced Disappearance Must Stop," August 30, 2003, available at: http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList581/8AE1907FEC3D5CA0C1256D92005202B3.

15 "Letter to Secretary Rumsfeld on the 'Joint Doctrine for Detainee Operations'," Human Rights Watch letter, April 7, 2005, available at: http://hrw.org/english/docs/2005/04/07/usdom10439.htm; "US: Pentagon Detention Guidelines Entrench Illegality: Enemy Combatants Could be Held as "Ghost Detainees"," Human Rights Watch press release, April 7, 2005, available at: http://hrw.org/english/docs/2005/04/07/usdom10440.htm.

16 See ICRC, Customary International Humanitarian Law, rules 123 and 117.

17 Ibid, rules 125-26.

should be documented, and their whereabouts must be made known to their family. Visits from the ICRC may only be prohibited for "reasons of imperative military necessity" and then only as "an exceptional and temporary measure."[18] In all cases, including where civilians can legitimately be held as spies or saboteurs, detainees must be treated with humanity and, if charged with a criminal offense, afforded a fair and regular trial.[19] In all cases, the Geneva Conventions prohibit torture or inhumane treatment.

What is the connection between secret incommunicado detentions and torture?

The prohibition on secret incommunicado detention is not just a protection of individuals' right to liberty and security, but is an important safeguard against abuse in detention or during interrogations, including torture and other forms of cruel inhuman or degrading treatment. Historically, secret detention has been a gateway to abuse.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as the intentional infliction of severe physical or mental pain or suffering by someone acting in an official capacity for a specific purpose.[20]

News reports citing current or **former intelligence officers and interrogators** have confirmed that detainees in U.S. custody have been subjected to abuse.[21] U.S. government officials, speaking anonymously to the media, have described a number of interrogation techniques authorized for use by the CIA which constitute torture, and which the United States has historically considered as such when conducted by other governments, including "waterboarding" (mock drowning), forced standing for over 40 hours, extended sleep deprivation, and exposure to extreme temperatures.[22]

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18 Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), art 126. and Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 143.

19 See e.g. article 3(1)(d) common to the four Geneva Conventions of 1949; Third Geneva Convention, arts. 93, 103, 105, 107; Fourth Geneva Convention, art. 71.

20 Convention against Torture, art. 1. The ECHR likewise prohibits torture and inhuman or degrading treatment or punishment. ECHR , art. 3.

21 Richard Esposito and Brian Ross, "Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons," ABC News, December 5, 2005; Neil A. Lewis, "Fresh Details Emerge on Harsh Methods at Guantanamo," *New York Times*, January 1, 2005.

22 "CIA Whitewashing Torture: Statements by Goss Contradict U.S. Law and Practice," Human Rights Watch press release, November 21, 2005, available at: http://hrw.org/english/docs/2005/11/21/usdom12069.htm; "Descriptions of Techniques Allegedly Authorized by the CIA," Human Rights Watch background briefing, November 21, 2005, available at: http://hrw.org/english/docs/2005/11/21/usdom12071.htm.

What international laws prohibit torture and cruel, inhumane and degrading treatment?

Torture and cruel, inhuman or degrading treatment are prohibited by such treaties as the ICCPR, the Convention against Torture, and the European Convention on Human Rights, among other treaties.

Torture and cruel, inhuman or degrading treatment is also prohibited under international law even for states that have not ratified human rights treaties. The ban is powerful enough to stand as customary international law. Torturers have been compared to slavers, *genocidaires* and pirates as "enemies of all mankind."[23]

All states are obligated under both international humanitarian and human rights law to prohibit, prevent and prosecute instances of torture and other ill-treatment of persons in custody. The prohibition against mistreatment applies to the United States during times of peace, armed conflict, or a state of emergency. Any person is protected, whether a U.S. national or a non-citizen. It is irrelevant whether the detainee is determined to be a prisoner-of-war, a protected person, or a so-called "security detainee" or "unlawful combatant." And the prohibition is in effect within the territory of the United States or any place anywhere U.S. authorities have effective control over a person. In short, the prohibition against torture and ill-treatment is absolute.

Does rendition to a country where a person is likely to be tortured violate human rights law?

States are absolutely prohibited from returning persons to another state where there are substantial grounds for believing that they would be subjected to torture or other ill-treatment.[24] This ban against *refoulement* is expressly stated in numerous major human rights agreements, and has been authoritatively interpreted as part of the general prohibition against torture even where not expressly stated.[25]

A note on terminology: *Rendition* is any transfer of a person between governments. *Extradition* is a rendition from one country to another through a legal process normally

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23 Restatement (Third) of Foreign Relations Law, §102, and reporter's note 6 (1986).

24Convention against Torture, art. 3.

25 "Still at Risk: Diplomatic Assurances No Safeguard Against Torture," Human Rights Watch report, April 2005, available at: http://hrw.org/reports/2005/eca0405/.

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UNITED NATIONS

CAT

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.
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14 December 2005
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COMMITTEE AGAINST TORTURE
Thirty-fifth session
7 – 25 November 2005

UNITED STATES OF AMERICA

List of issues to be considered during the examination of the second periodic report of the United States of America (CAT/C/48/Add.3)

Article 1

1. [redacted] Please explain why, if "[t]he definition of torture accepted by the United States upon ratification of the Convention (...) remains unchanged"[1], the Department of Justice issued a memorandum dated August 2002[2] which concluded "that torture as defined in and proscribed by section 2340-2340A covers only extreme acts" and how this is compatible with article 1 of the Convention. B5

2. [redacted] Q2: Please explain for which substantive reasons the August 2002 memorandum has been replaced by a new memorandum in December 2004[3], as the definition of torture remained unchanged, and Q3: if any of the conclusions of the August 2002 memorandum are still valid. Q4: How does a memorandum interpret a Convention and is it legally binding? B5

[1] § 11 of the State party report
[2] US Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, Memorandum for Alberto R. Gonzales, August 1, 2002, p.46
[3] US Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, Memorandum for James B. Comey Deputy Attorney General, December 30, 2004

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444

3. [redacted] How does the State party consider Q5: that the memorandum dated 30 December 2004[4] is compatible with the Convention when it states that "[t]he term "torture", in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices (...)",[5] or Q6: that "[t]he CAT thus treats torture as an "extreme form" of cruel, inhumane, or degrading treatment",[6] or Q7: that "[t]he requirement that torture be an extreme form of cruel and inhuman treatment is expressed in article 16 (...)"[7] [of CAT]. Herman Burgers and Hans Danelius,[8] quoted as authorities in the 30 December 2004 memorandum, expressly refer that "(...) extreme or extremely severe pain were suggested during the *travaux préparatoires*, but the phrase "severe pain" was considered sufficient to convey the idea that only acts of a certain gravity shall be considered to constitute torture". Q8: Please explain how this interpretation is compatible with article 1 of the Convention. B5

4. [redacted] Q9: Please explain why the interpretation of both memoranda seem to be much more restrictive than previous UN standards, namely the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[9] which states that "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". B5

Article 2

5. [redacted] Considering the reservation of the State party to the Convention declaring that the "provisions of articles 1 through 16 of the Convention are not self-executing",[10] only legislation giving the United States courts criminal jurisdiction over extraterritorial acts of torture was enacted.[11] Q10: Is the State party actively considering to formally incorporate all provisions of the Convention into domestic law? Q11: If not, how will the State party ensure that its legislative, judicial, administrative and other measures fully meet the obligations of the Convention? Q12 [redacted] What guarantees B5 B5

[4] § 13 and annex 3 of the report
[5] US Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, Memorandum for James B. Comey Deputy Attorney General, December 30, 2004, p. 6
[6] Ibid., p. 6
[7] Ibid., p. 7
[8] The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1988, p. 117, *in fine*
[9] Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975
[10] Annex 4 to the report
[11] § 141 of the core document (HRI/CORE/1/Add.49) and § 47 of the initial report (CAT/C/28/Add.5)

and controls does the State party have to ensure the monitoring of the activities of law enforcements officials in prisons and other detention centres under the jurisdiction of States of the Union or under its jurisdiction or *de facto* control[12]?

6. [redacted] B5 Q13: Is the transfer of detainees from one place of detention to another duly registered and is this registrar public? Q14: Do foreigners detained under the jurisdiction of the State party receive any consular assistance? Q 15: Please provide updated and detailed data regarding the incarcerated population in the State party's territory[13] Q16: and in areas under the jurisdiction of the State party, including in Afghanistan, Iraq, and Guantánamo Bay.[14] Q17: Regarding the latter, please provide information on their exact legal status, Q18:the offences they are detained for, Q19: for what period and Q20: the process which determines the length of their detention. Q21: Do detainees have access to legal advice, Q22: medical treatment and Q23: family visits? Q 24: Is there any independent review of the grounds of detention and their continuing applicability? Please provide detailed information on the matter.

7. [redacted] B5 According to information before the Committee,[15] the State party has established secret detention facilities, including on vessels, as well as of unacknowledged detentions, with no access to the International Committee of the Red Cross, no notification to families, no oversight with regard to their treatment, and in most cases no acknowledgement that they are even being held. Q.25: Please provide a list of all detention facilities where detainees are being held under the *de facto* effective control of the State party's authorities,[16] outside its territory or on State party's vessels, as well as information on the Q26: number, Q27: nationality, Q28: charges and Q29: exact legal status of those persons. Q30: Why have such secret detention facilities been established? Q31: Does the State party assumes responsibility for alleged acts of torture perpetrated by its own public agents out of its territory but in territories under its jurisdiction or *de facto* control[17]? Q32:As well as in

[12] "*De facto* control of the State party", means, e.g., territories, or part of territories, where American troops are operating under American command.
[13] § 78 of the initial report
[14] pages 50 and 71 of the report (annex 1)
[15] Report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/2005/65, § 364)
[16] Conclusions and recommendations of the Committee Against Torture: United Kingdom of Great Britain and Northern Ireland, and Dependent Territories, § 4 (b)
[17] "*De facto* control of the State party", means, e.g., territories, or part of territories, where American troops are operating under American command.

cases where those acts are perpetrated by persons who are not public agents but are subject to the control of the State party?

8. [redacted] Considering the numerous allegations of torture and ill-treatment of persons in detention under the jurisdiction of the State party and the case of the Abu Ghraib prison, Q33: what specific measures have been undertaken to identify and remedy problems in the command and operation of those detention facilities under the jurisdiction of the State party? Q34: What measures have been undertaken to ensure that the International Committee of the Red Cross has appropriately wide access to all such facilities and to all detainees, and Q35: that its reports are made known to sufficiently senior members of the chain of command for purposes of implementation? B5

9. [redacted] Q36: Under the State party domestic law, is it possible to derogate from the principle of prohibition of torture? Q37: Have any measures taken by the State party derogated from this absolute prohibition? Q38: Can any provision of the Patriot Act of 2001, be interpreted as a possible derogation? Q39: What legal or administrative measures has the State party put in place to ensure that the Convention's prohibition against torture is not derogated from under any circumstances? B5

10. [redacted] Q40: According to information before the Committee, criminal responsibility of perpetrators of torture may be waived under the President's authority as Commander-in-Chief. Please comment. Q41: Does the State party attribute to any person the right to authorize torture or ill-treat anyone under any circumstances, if so, to whom? Q42: Does the State party considers that such an authorization is compatible with article 2 of the Convention? Q43: Has there been an independent investigation regarding the possible responsibility of the high ranking officials of the Administration, including the CIA, Department of Defence, Department of Justice, and the armed forces, for authorizing or consenting, in any way, including through the issuance of orders or guidelines, for acts committed by their subordinates, especially during the interrogation of detainees, which could be considered as acts of torture? B5

11. [redacted] Q44: Can an order from a superior be invoked as a justification of torture? Q 45: Please indicate the appropriate legal measures to ensure this does not occur. Q46: Are there B5

any circumstances, such as "necessity", "self-defense", "superior orders" or any other principle which can be invoked as a defense for those who torture or ill-treat detainees?

12. [redacted] Considering the adoption of several versions of interrogation rules, instructions and methods, specially regarding suspects of terrorism, Q47: have those interrogation rules, instructions and methods been unified for civilian and military use, and Q48: specially for the CIA and the military intelligence services? Q49: Are persons detained outside the State party, but under its jurisdiction, protected by the same norms regarding interrogation rules, instructions and methods? B5

Article 3

13. [redacted] Please provide detailed information on Q50: the provisions implementing article 3 of the Convention in domestic law, and which procedures, Q51: including judicial remedies, ensure that it is implemented in practice, Q52: including regarding persons under the jurisdiction of the State party outside its territory. Q53: Have any decisions of non-refoulement to third countries, under article 3 of the Convention, been revoked? Q54: Are any categories of foreign persons considered as having committed a crime or suspected of having committed a crime automatically excluded from the protection of article 3 of the Convention? B5

14. [redacted] Q55: Does the reservation of the State party to article 3 of the Convention restrict or change the protecting scope of this provision? Q56: Please explain the practical differences between Article 3 of the Convention and the State party reservation to article 3.[18] Q57: How and by whom the determination that a person is "more likely than not" to be tortured is made? Please provide examples, *in abstracto*, if necessary. B5

15. [redacted] Q58: May foreigners, who claim the right not to be returned to a third country under article 3 of the Convention, appeal to the courts against the decision of the Secretary of State? Q59: Do asylum seekers have the right to appeal against removal? Q60: Please provide detailed information on any such procedure. Q61: Does the appeal against a removal have suspensive effect? Q62: Please provide information on the number of appeals filed and their B5

[18] § 33 of the report

outcome. Q63: Does the State party have a list of "safe third countries" for removal? Q64: If so, how is it created and maintained?

16. [redacted] According to information before the Committee, the State party has adopted a policy to send, or to assist in the sending of persons to third countries, either from the State party's territory or from areas under its jurisdiction, for purposes of detention and interrogation. Q65: How many persons have been affected by this policy, Q66: to which countries were they sent to, and Q67: what measures have been adopted to ensure that they would not be subject to torture? There are also allegations[19] that persons are detained without charges *in certain countries at the request* of the State party's authorities. Q68: Please comment. B5

17. [redacted] Are enforced or involuntary disappearances, which can be considered a form of torture, a crime punishable by law in the State party? [redacted] B5
[redacted] Q70: How does the State party prevent that persons returned to third countries to be interrogated disappear? B5

18. [redacted] Q71: Please provide further information on the procedure used to obtain diplomatic assurances that a person will not be tortured if removed Q72: or extradite to a third State.[20] Q73: Have there been any cases where those assurances were not considered adequate and, therefore, the person was not removed or extradited? Q74: Please provide examples, *in abstracto* if necessary. Q75: Please provide details of the assurances that must be fulfilled by the receiving country in order for the State party to remove or extradite a person. Q76: What monitoring mechanisms are in place to assess if the assurances have been honored?[21] [redacted] Q77: Please provide further information on the "rule of non-inquiry" of the Secretary of State.[22] Q78: What purpose does this rule serve? B5

[19] Report of the Special Rapporteur on Torture (E7CN.4/2004/56/Add.1, § 1818 to 1833)
[20] § 33 of the report
[21] § 43 of the report
[22] § 41 of the report

19. [redacted] bundled with Q71-76 According to information before the Committee, persons have been sent to third countries, which the State party itself considers not to respect human rights,[23] where they have undergone torture and ill-treatment. Q78: [redacted] Q79: Were those cases investigated and what was the result of the investigations, if any? Q80: Are all State party's agencies, when operating outside the State party's territory, under the obligation to respect the *non-refoulement* rule? [redacted] Q81: Please explain what "extraordinary renditions" are and Q82: what procedures and guarantees they follow? B5 B5 B5

Article 4

20. [redacted] Q83: Does torture, under the State party's federal law, constitute a specific type of criminal offense, when committed inside the State party?[24] Q84: Please provide examples. Q85: If not, is the state party actively considering making torture a specific federal crime, if committed inside its territory? Q86: Please explain how this *lacuna* is reconciled with the necessity of prevention of torture and, specifically, with the obligations of the State party under articles 1, 2 and 4 of the Convention? According to the State party report,[25] acts of torture "may be prosecuted" as other criminal acts (assault, homicide, kidnapping, rape, etc.). Q87: Please explain how and under which other offences they could be prosecuted. B5

21. [redacted] According to the State party's report,[26] the Uniform Code of Military Justice includes the offences of cruelty and maltreatment but does it include the offence of torture? Q88: If not, please explain why and how this is compatible with the State party's obligations under article 4 of the Convention. B5

Article 5

[23] The US State Department's annual Country Reports on Human Rights Practices http://www.state.gov/g/drl/rls/hrrpt/2004/c14136.htm
[24] U.S.C.: Title 18, part I, chapter 113C, § 2340
[25] § 16 of the report
[26] § 19 of the report

22. [redacted] Q89: In which case do foreigners have penal immunity regarding the crime of torture, including if present in the territory of the State party, according to the domestic law of the State party? Q90: Have any prosecutions been initiated under the extraterritorial criminal torture statute,[27] considering that there were investigations pending at the date of submission of the report?[28] Q91: Taking in consideration that the prohibition of torture and conspiracy to torture extends to contractors outside the State party,[29] have any contractors been charged with this specific offence? B5

Article 10

23. [redacted] Q92: Are the terms of the Convention applicable to the armed forces and other personnel, including contractors, when participating in peacekeeping or other military operations either alone or as part of an internationally authorised contingent? [redacted] Q:93: If so, have they been informed of their obligations under the Convention and [redacted] Q94: which other international human rights instruments apply to them? B5 B5 B5

24. [redacted] Q95: What education programs and information, rules and instructions and mechanisms of systematic review exist for military personnel involved in the custody, interrogation or treatment of individuals in detention? B5

25. [redacted] Q:96: What use does the State party make of private contractors in respect of the operation of detention facilities and interrogation of detainees and how is this personnel recruited? Q97: According to information before the Committee, human right training for contractors is inexistent or very limited. Please provide detailed information on their training. B5

Article 11

[27] U.S.C.: Title 18, part I, chapter 113C, § 2340A
[28] § 50 of the report
[29] § 12 of the report

26. [ ] Q98: Could the use of the word "extreme" in the December 2004 memorandum[30] create unnecessary confusion for trainers and personnel, considering that, according to the Report by Major General Fay, Lieutenant General Jones, and General Kerna, "military personnel or civilians appeared to have abused Iraqi prisoners due to (...) confusing interrogation rules".[31] B5

27. [may be bundled with Q98 above.] Q99: Please provide detailed examples of revisions of interrogation rules, instructions, methods and practices after the August 2002 memorandum was superseded by the December 2004 memorandum.[32] Q100: Are there any specific interrogation rules, instructions and methods for specific agencies or Q101: do the same apply to all personnel, including the limits on interrogation techniques? Q102: Please provide the Committee with all the interrogation rules, instructions and methods currently applicable. B5

Article 12

28. [ ] Q103: Please provide information on the programs, activities, resources and results of the Civil Division Rights of the Department of Justice? B5

29. [ ] Q104: Since October 1999, what has been the outcome of the enforcement of the Civil Rights of Institutionalized Persons Act?[33] [ ] B5

[ ] Q105: How many investigations ended in prosecution for torture or cruel, inhuman or degrading treatment or punishment or similar offences? Q106: What measures have been taken for the betterment of conditions of detention? Please provide detailed information. B5

30. [ ] Please provide disaggregated statistical data regarding deaths in custody according to Q107: location of detention, and Q108: gender, Q109: age, Q110: ethnicity of the deceased and B5

[30] US Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, Memorandum for James B. Comey Deputy Attorney General, December 30 2004
[31] Page 75 of the report (annex 1)
[32] § 62 of the report
[33] § 26 of the report

Q111: cause of death. Q112: Please provide detailed information on the results of the investigations in respect of those deaths, Q113: including any specific recommendations made following the inquiries? [redacted] B5

Deleted: ¶

31. [redacted] Please provide information in respect of the numerous deaths of detainees which have occurred under the State party's jurisdiction Q114: in Afghanistan Q115: and Iraq, allegedly after being torture. Q116: Have those death been fully and impartially investigated, those found to be responsible prosecuted and punished in accordance with the seriousness of the offences? B5

32. [redacted] may be lumped with Q31 above.] Please provide updated detailed information on any specific cases of torture or cruel, inhuman or degrading treatment or punishment or similar offences committed by personnel of the State party's in Q117: Afghanistan, Q118: Iraq and Q119: Guantánamo Bay, including number of cases, their status, before which authorities they are pending and their outcome, if any. Q120: In the view of the State party, how did such acts occur, and Q121: what actions have been adopted to ensure that there will be no re-occurrence of any such acts in places of detention under the State party's control? B5

33. [redacted] [may be lumped with Q31 above.] Please comment on the information that the official investigations conducted into allegations of torture and ill-treatment in Q122:Afghanistan and Q123: Iraq, and especially in the Abu Ghraib prison, were not fully independent. Q124: Were any investigations[34] carried out by an independent, judicial or non-military authority? Q125: If not, are any independent investigation foreseen in the future? Q126:Are there any independent entities that monitor these facilities (national or international or non-governmental)? Q127: Please provide the results of the investigations that were still ongoing at the time of submission of the report, including by the Naval Criminal Investigation Service and by the Naval Inspector General.[35] B5

Articles 13 and 14

[34] Page 74 of the report (annex1)
[35] Page 68 of the report

34. [redacted] Q128: Do the Combatant Status Review Tribunals and the Administrative Review Boards[36] have any jurisdiction regarding complaints of torture and cruel, inhuman or degrading treatment or punishment? Q129: How is their impartiality ensured when dealing with such cases? B5

35. [redacted] Q130: Please provide detailed information on how, in practical terms, the "Justice For All Act" of 2004 has provided an improvement of the rights of victims of torture to obtain redress?[37] Q131: Since the enactment of the Act, has there been an increase in the number of complaints? Q132: Please provide statistical information. B5

36. [redacted] Q133: What remedies are available to detainees under the State party jurisdiction outside the State party territory with regard to acts of torture, and before what authority they may seek compensation? Q134: How many detainees have exercised this right so far? Q135: Please provide a breakdown of the statistical data regarding complaints of torture or ill-treatment according to gender, age, location of the complainant, and result of the investigation. Q136: Has compensation been provided to date, to how many victims, and what amounts were involved? Q137: Please provide information on compensation given to the Abu Ghraib victims.[38] B5

37. [redacted] Q138: Please explain how the Prison Litigation Reform Act which contains a provision establishing "that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury"[39] is compatible, amongst others, with article 13 of the Convention, considering that it limits the right of victims to complain and increases the possibility of impunity for perpetrators. B5

38. [redacted] Q139: Please indicate if victims of torture perpetrated by personnel of the State party have been treated in any Centre for Victims of Torture in the State party.[40] B5

39. [redacted] suggest that we provide information as of April 2006] Q140: Please update information on the *habeas corpus* cases pending before B5

[36] Page 53 of the report (annex 1)
[37] § 65 of the report
[38] Page 79 of the report
[39] § 153 of the report
[40] § 84 of the report

district courts,[41] following the decisions of the U.S. Supreme Court in "Rasul v. Bush". Q141: Does the State party ensure the right of *habeas corpus* to detainees under its control in other parts of the world?

40. [redacted] Q142: Is the State party considering reviewing its decision not to apply the Geneva Conventions to detainees who are considered "enemy combatants" by the State party, in Afghanistan, Iraq, Guantánamo Bay or in other location under the jurisdiction of the State party[, which creates a climate of impunity for cruel, inhuman or degrading treatment or punishment of those persons]? Q143: What is the exact legal status of those persons and Q144: what international instruments are applicable to them, in order to protect their human rights. B5

Article 15

41. [redacted] Q145: Please provide examples of judicial cases where the courts have declared statements inadmissible on ground of having being obtained coercively, if any. B5

42. [redacted] Q 146: In view of the prohibition contained in Article 15 of the Convention on the use of any statement obtained as a result of torture from being used as evidence in any proceedings except against the alleged torturer, how is this provision specifically guaranteed at the Combatant Status Review Tribunals and at the Administrative Review Boards?[42] Q147: Please provide information on any statement which has been considered inadmissible so far. B5

Article 16

43. [redacted] The reservation to article 16 limits the meaning of cruel, inhuman or degrading treatment or punishment to the treatment or punishment prohibited by the fifth, eight and fourteen amendments to the Constitution. Q148: B5

[41] Page 59 of the report
[42] Page 53 of the report (annex 1)

In practical terms, what kinds of treatment or punishment are prohibited, and admissible, by the amendments but not by the Convention? Please provide concrete examples.

44. [redacted] Q149: Considering the reservation to article 16, is this article fully applicable outside the State party territory, in territories under the jurisdiction of the State party or under the *de facto* control of the State party?[43] Q150: Please clarify what is considered to be within the Special Maritime and Territorial Jurisdiction? Q151: Does article 16 of the Convention apply to the Special Maritime and Territorial Jurisdiction?[44] Q152: Are cruel, inhuman or degrading treatments or punishment, committed by its agents against foreigners outside the territory of the State party, punishable by law in the State party? B5

45. [redacted] Q153: Please provide examples of practical implementation of the National Detention Standards which provided non-citizens detainees with better condition of detention.[45] Q154: Please provide information on the measures taken to address the complaints of harassment and sexual violence against immigrant women by border patrol agents. B5

46. [redacted] According to information before the Committee, various cases of death after the use of "tasers" have occurred, which raises serious concerns about their safety. Q155: Please provide detailed information on their use, including any measures taken to make their use safe? B5

47. [redacted] Q156: Why are juveniles detained with adults, in federal or state facilities, and under which conditions, considering that federal law prohibits that juveniles be held in custody with adults. Q157: How many juveniles are still detained with adults, in federal or state facilities?[46] B5

48. [redacted] According to information before the Committee, detained women are kept shackled during childbirth. 158: Why does the State party consider such a measure to be necessary? Please enunciate the measures taken to prohibit detainees been placed in Q159: B5

[43] "*De facto* control of the State party", means, e.g., territories, or part of territories, where American troops are operating under American command.
[44] § 45 of the report
[45] § 126 of the report
[46] § 116 of the report

chain gangs and Q160: in hitching posts.[47] Q161: What measures have been taken to review the regime of super maximum security prisons?[48]

49. [redacted] Q162: What measures have been taken to prevent sexual violence to detainees, including inter-prisoner violence? Q163: Regarding females, juveniles and immigrants detainees, which specific measures have been taken to protect them against this type of violence? Q164: Please provide the number of complaints lodged by detainees, Q165the outcome of the investigations Q166: and the compensation paid to the victims. B5

50. [redacted] Q167: How the use of solitary confinement is regulated and Q168: how the monitoring of the detainees' mental is health carried out?[49] [redacted] Q169: How is prolonged isolation and indefinite detention, with or without charges, compatible with the obligation of the State party under article 16? B5 B5 B5

51. [redacted] Q170: Please provide information in respect of allegations of extreme pain during the procedure of execution by lethal injection, as the sedative is not properly administrated.[50] Q171: How executions are monitored, especially those by lethal injection? B5

52. [redacted] According to information before the Committee, the State party has authorized the use of interrogation techniques such as 20-hour interrogations, stress positions, isolation, sensory deprivation, hooding, exposure to cold or heat, sleep and dietary adjustments, use of dogs to instil fear, removal of clothing, forced shaving, use of female interrogators, physical contact and removal of religious items? Q172: If so, how does the State party reconcile the use of such techniques with its obligations under article 16 of the Convention? Please provide detailed information on interrogation techniques authorized and practised in Q173: Guantánamo Bay, Q174: Afghanistan, Q175: Iraq, and Q176: in other places of detention under the State party control. Q177:Are there any specific rules regarding the use of gender or sexualized practices as methods of interrogation? B5

[47] § 121 and 124 of the report
[48] § 95 of the report
[49] Report of the Special Rapporteur on Torture (E/CN.4/2005/62/Add.1, § 1857)
[50] Report of the Special Rapporteur on Torture (E/CN.4/2005/62/Add.1, § 1858)

53. [redacted] While acknowledging the federal structure of the State party, it is the federal State that responds for the international obligations assumed by the State party under the Convention. Q178: Please provide detailed information on the existing mechanisms the State party has to monitor the implementation of the Convention at the State level, in order to fulfill its international obligations under the Convention? [redacted] B5

[redacted] Please provide detailed information on the Q179: McCain and Q180: Graham-Levin amendments Q181: as well as on the changes they will introduce to the current legislative, administrative, judicial and other measures preventing cruel, inhuman or degrading treatment or punishment. B5

Other issues

54. [redacted] Q182: Is the State party considering making the declaration under article 22, recognizing the competence of the Committee to receive and consider individual communications? B5

55. [redacted] Q183: Is the State party considering withdrawing any of its reservations to the Convention, as they might be interpreted, and applied, as limiting the full application of the Convention? B5

56. [redacted] Q184: Does the State party envisage ratifying the Optional Protocol to the Convention against Torture? If so, has the State party taken any steps to set up or designate a national mechanism that would conduct periodic visits to places of deprivation of liberty in order to prevent torture or other cruel, inhuman or degrading treatment or punishment? B5

57. [redacted] Q185: Please indicate whether the State party's legislation prevents and prohibits the production, trade, import, export and use of equipment specifically designed to inflict torture or other cruel, inhuman or degrading treatment. Q186: If so, please provide information about its contents and implementation. Q187:If not, please indicate whether the adoption of such legislation is being actively considered. B5

58. [redacted] B5

[redacted] B5 Q188: Please provide information on the legislative, administrative and other measures the State party has taken to respond to the threats of terrorism, and please describe if, and Q189: how, these measures have affected human rights safeguards in law and practice. Q 190: Please describe the relevant training given to law enforcement officers, Q191: the legal remedies available to persons subjected to anti-terrorist measures, Q192: the number of complaints of non-observance of international standards, and Q193: the outcome of these complaints.

59. [redacted] B5

[redacted] B5 Q194: Please provide information on the legislative and other measures the State party has taken to prevent domestic violence and Q195: to classify acts of domestic violence as specific offences under the criminal law.

ANDREW TYRIE MP

HOUSE OF COMMONS
LONDON SW1A 0AA

RELEASED IN PART
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2006 FEB -1 P 5:11

Dr Condoleezza Rice
Secretary of State

200602123

2006 Feb 2 P 13:18

By hand

30th January 2006

Dear Secretary of State

I am writing to you again in my capacity as Chairman of the All Party Parliamentary Group on Extraordinary Rendition. As you may recall, this is a cross party group of over 50 MPs and Peers from the British parliament.

We are deeply concerned about allegations that the United States has carried out extraordinary renditions. We are also concerned about allegations that the UK may have provided logistical support to US flights as individuals are transported to and from third countries, such as Egypt, Jordan and Syria.

We read your statement of 5th December on this issue with care. We commissioned a leading authority, Professor James Crawford, Dean of the Faculty of Law at the University of Cambridge, to give his opinion on it (attached).

B5 Two important conclusions can be drawn from Professor Crawford's Opinion. First, to comply with its legal obligation the British government must satisfy itself that Extraordinary Rendition is not leading to torture. As Professor Crawford puts it: 'the question that must be asked is whether torture is likely to take place if a person is transported, irrespective of whether or not the government claims that the answer is no, or what its hopes or beliefs may be' (para. 20). [redacted] B5 [redacted] B5

Chairman: Andrew Tyrie MP
Vice Chairmen: Chris Mullin MP, The Rt Hon Sir Menzies Campbell MP
Specialist Adviser: Mark Pallis, LLM
APPG on Extraordinary Rendition,
c/o Office of Andrew Tyrie,
House of Commons, London, SW1A 0AA
Tel 0207 219.6371 Fax 0207 219 0625

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444

Secondly, relying on your assurances provides little or no legal cover for the UK government. Your assurances are based on the US government's interpretation of its obligations, but these are as good as worthless for ensuring compliance with Britain's legal obligations.

In particular, as Professor Crawford clarifies, any UK assistance to US aircraft which may be engaged in Extraordinary Rendition should be conditional on the US respecting obligations not to engage in torture, at the legal standard at which the obligations apply to the UK. In other words, if the US is to use, or has used, UK airports and airspace for these practices, the US must abide, or have abided, by the legal rules that bind the UK and UK courts' interpretation of them, not just US law or the US administration's interpretation of them.

B5

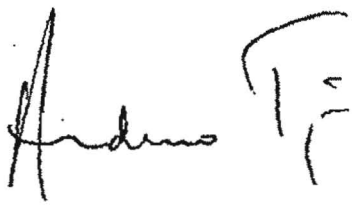
We would very much welcome your response to these concerns.

We would also be delighted if you felt able, if only briefly, to meet with us - either at a full meeting specially convened for the purpose or with Chris Mullin MP, The Rt Hon Sir Menzies Campbell and me, each of us from one of the main parties in Britain.

If you are not able to attend, perhaps your legal adviser, John Bellinger, may be able to find the time to address us when he is in the UK in early February.

I am putting this letter into the public domain.

Yours sincerely



ANDREW TYRIE

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OPINION

Extraordinary rendition of terrorist suspects through United Kingdom territory

Introduction

1. We are asked by the All Party Parliamentary Group on Extraordinary Rendition to advise on various aspects of the statement made by United States Secretary of State Condoleezza Rice on 5 December 2005 in response to allegations that the United States is engaging in unlawful renditions of terror suspects, and to the concern that United Kingdom territory or facilities may have been used as transit points in that context.

2. The Secretary's statement makes the following points:

(a) The United States acknowledges the use of rendition to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held or brought to justice;

(b) Such renditions take place in accordance with United States law and the United States' treaty obligations including under the Convention Against Torture;

(c) The United States does not authorise, permit, tolerate or condone torture under any circumstances;

(d) The United States has respected and will continue to respect the sovereignty of other countries;

(e) The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture;

(f) The United States does not use the airspace or the airports of any country for the purpose of transporting a detainee to a country where he or she will be tortured;

(g) The United States has not transported anyone, and will not transport anyone, to a country where the United States believes the person will be tortured. Where appropriate assurances are sought from the receiving Government that a person being transferred will not be tortured.

3. In the statement, Secretary Rice makes a number of additional remarks concerning the "war against terrorism" including the status of captured members of al-Qaida and the legality, in general, of the practice of rendition. It is not our purpose to deal with these issues in this memorandum. Nor will we examine the application of

UNITED STATES DEPARTMENT OF STATE
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the Chicago Convention to issues of overflight concerning civil or State aircraft. This memorandum is confined to the issue of the legality of material assistance by one State (the transit State, here assumed to be the UK) to another (the rendering State) in circumstances where a third State (the receiving State) may subject persons to torture or cruel, inhuman or degrading treatment in violation of international law.

4. Reference was made to the alleged practices of the United States in a landmark decision handed down on 8 December 2005 by the House of Lords.[1] The question at issue there was whether the Special Immigration Appeals Commission could make use of evidence which had been or might well have been obtained by torture committed by a third State outside the United Kingdom without any complicity on the part of the United Kingdom. On the basic question of the inadmissibility of evidence obtained abroad by torture, they were unanimous. Thus Lord Hoffmann said:

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> "The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal 'rendition' of suspects to countries where they would be tortured..."[2]

5. It should be emphasised, however, that at present there is no evidence that the United Kingdom has provided any material assistance to the United States to carry out renditions in breach of international law. All that can be said is that allegations have been made that the United States has seized terrorist suspects and sent them to third countries, possibly in aircraft which in the course of their journeys may have landed in the United Kingdom, for interrogation in circumstances that may be unlawful under international law. The question of the United Kingdom's responsibility is thus essentially one for the future – including the duty of inquiry in the light of the circumstances now known or reasonably suspected.

6. In this opinion, we will examine the formulations used in the Secretary's statement with respect to the United States' international responsibility concerning the prohibition of torture and analyse whether those formulations comply with the equivalent formulations adopted by the United Kingdom. We will do this by examining three main points:

B5

(a) The definition of torture: what is the definition of torture and what are the relevant differences in the definition relied on by the United States and the United Kingdom?

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[1] *A (FC) and others (FC) v. Secretary of State for the Home Department; A and others (FC) and others v. Secretary of State for the Home Department (Conjoined Appeals)*, 8 December 2005, [2005] UKHL 71(Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Carswell, Lord Brown of Eaton-under-Heywood).

[2] Ibid, para 82 (Lord Hoffmann), citing J Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 *Columbia Law Review* 1681.

(b) The standard of the risk of torture in the receiving State: what standard of risk of torture applies and what are the differences in the approaches taken by the United States and the United Kingdom?

(c) The question of the United Kingdom's own obligations in light of the allegations made?

The definition of torture

7. The first point to arise is a definitional one. Torture is prohibited in both general international law and in a range of treaties including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), the International Covenant on Civil and Political Rights (article 7) and the European Convention on Human Rights (article 3). In general international law, the prohibition against torture is a peremptory norm from which no derogation is permitted; likewise under the European Convention on Human Rights no derogation is permitted from article 3 even in time of national emergency.

8. Secretary Rice states that "torture is a term that is defined by law". In fact torture is defined in the Torture Convention in the following terms:

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[3]

The Convention does not define cruel, inhuman or degrading treatment, however the Committee Against Torture and the European Court of Human Rights have given content to the meaning of such treatment in their jurisprudence. One of the leading cases on point is *Selmouni v France* in which the European Court said:

> "The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading."[4]

This decision was referred to with approval by the House of Lords in its judgment of 8 December 2005.[5]

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3 Torture Convention, Art. 1.

4 (1999) 29 EHRR 403

5 *A (FC) and others v. Secretary of State for the Home Department*, [2005] UKHL 71, para 29 (Lord Bingham of Cornhill).

9. The United Nations definitions of torture and cruel, inhuman or degrading treatment have been interpreted and applied by the House of Lords and European Court of Human Rights. In its judgment of 8 December 2005, the House of Lords referred to the fact that the common law "has from its very earliest days ... set its face firmly against the use of torture."[6] The Court proceeded to affirm the definition of torture contained in the Torture Convention and to draw conclusions for the United Kingdom from the peremptory status of the prohibition of torture under international law.[7]

10. The European Court of Human Rights has examined numerous cases involving allegations of torture and cruel, inhuman and degrading treatment, against State parties including the United Kingdom. While mistreatment must attain a minimum level of severity to fall within the scope of article 3 of the European Convention on Human Rights, the Court has generally adopted a somewhat lower threshold for this standard in respect of persons held in detention.[8]

11. One of the leading cases is *Ireland v. United Kingdom*.[9] The Court held that various techniques used to interrogate Nationalist detainees in Northern Ireland constituted inhuman or degrading treatment. The techniques included forcing a detainee to stand spread-eagled against a wall for extended periods of time with the majority of his weight on his fingertips; covering a detainee's head with a hood; subjection of the detainee to a loud hissing noise; sleep deprivation and deprivation of food and drink. According to the Court:

> The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.[10]

The House of Lords has since said that the conduct complained of would now be regarded as torture.[11]

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6 Ibid, para 11 (Lord Bingham of Cornhill).

7 Ibid, paras 32-3 (Lord Bingham of Cornhill; cf Lord Hoffmann at para 97: "I would be content for the common law to accept the definition of torture which Parliament adopted in section 134 of the Criminal Justice Act 1988, namely, the infliction of severe pain or suffering on someone by a public official in the performance or purported performance of his official duties. That would in my opinion include the kind of treatment characterised as inhuman by the European Court of Human Rights in *Ireland v United Kingdom* but would not include all treatment which that court has held to contravene article 3."

8 *Selmouni v. France* (1999) 29 EHRR 403; *Ribitsch v. Austria* (1996) 21 EHRR 573. Both decisions stand for the proposition that any recourse to physical force which is not made strictly necessary by an applicant's own conduct diminishes human dignity and will in principle breach art. 3.

9 *Ireland v. United Kingdom* (1978) 2 EHRR 25.

10 Ibid, para 167.

11 *A (FC) and others v. Secretary of State for the Home Department*, [2005] UKHL 71, para 53 (Lord Bingham of Cornhill).

12. There have been suggestions made in United States material that under United States law certain practices such as "waterboarding"[12] do not constitute torture or the United States' interpretation of what constitutes torture or cruel, inhuman or degrading treatment. This interpretation of the definition of torture is clearly at odds with the views taken by UK courts and the European Court of Human Rights. Under UK law, using "waterboarding" to obtain information from a suspect would clearly constitute both torture and cruel, inhuman or degrading treatment. Lord Bingham, (with whose speech on the principal issues the rest of the members of the House agreed) expressed the view that various techniques detailed in the so-called "Torture Papers" would also fall within the definition of torture under UK law.[13] We have no doubt that "waterboarding" and practices of analogous severity would be condemned by United Nations treaty monitoring bodies such as the Committee Against Torture, United Nations Special Rapporteur on Torture[14] and the Human Rights Committee.[15]

13. The central point to note is that the United Kingdom is bound by its own obligations in respect of torture, and not by any view taken by the United States as to what constitutes torture. The United Kingdom's obligations arise independently of those of the United States. The same is true with respect to the standard of the risk of torture, to which we now turn.

The standard of the risk of torture under the principle of *non-refoulement*

14. Under international law, States are prohibited from sending a person to a territory where it is believed that he will be tortured. This obligation is commonly referred to as the *non-refoulement* principle. It arises both under general international law and under international treaties to which the United Kingdom is a party. These

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[12] The practice of "waterboarding" has been described as binding a prisoner to an inclined board with his feet raised and head lowered. Cellophane is then wrapped over the prisoner's face and water is poured over him causing him to gag. The practice continues until the prisoner offers information or a confession: "CIA's Harsh Interrogation Techniques Described", ABC News, 18 November 2005, available at: http://abcnews.go.com/WNT/Investigation/story?id=1322866.

[13] *A (FC) and others v. Secretary of State for the Home Department*, [2005] UKHL 71, para 53 (Lord Bingham of Cornhill): "[S]ome of the Category II or III techniques detailed in a J2 memorandum dated 11 October 2002 addressed to the Commander, Joint Task Force 170 at Guantanamo Bay, Cuba, (see *The Torture Papers: The Road to Abu Ghraib*, ed K Greenberg and J Dratel, (2005), 227-8), would now be held to fall within the definition in article 1 of the Torture Convention.". The techniques referred to are as follows: Category II: the use of stress positions (like standing) for a maximum of four hours, the use of falsified documents or reports, use of the isolation facility for up to 30 days, interrogating the detainee in an environment other than the standard interrogation booth, deprivation of light and auditory stimuli, placing a hood over the detainees head, the use of 20 hour interrogations, removal of all comfort items (including religious items), switching the detainee from hot rations to MREs, removal of clothing, forced grooming and using individuals detainees individuals phobias to induce stress; Category III: the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family, exposure to cold weather or water (with appropriate medical monitoring), use of a wet towel and dripping water to induce the misperception of suffocation, use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger and light pushing: Greenberg and Dratel (eds) *The Torture Papers: The Road to Abu Ghraib*, (CUP, 2005) 227-8.

[14] The Special Rapporteur on Torture has condemned numerous cases involving credible allegations of torture by the use of water in similar circumstances: UN doc E/CN.4/2005/62/Add.1 paras. 97, 583, 1825, 1829.

[15] See for example: Human Rights Committee, General Comment No. 20 concerning prohibition of torture and cruel treatment or punishment, 10 March 1992.

B5 **The United Kingdom's independent obligations in light of the allegations made**

21. Regardless of the United States' position, the United Kingdom has an independent obligation to ensure that its territory is not used to send any person to a country where there is a real risk that he may be tortured.

22. International law requires torture to be guarded against by active measures. As Lord Bingham stated "... the *jus cogens erga omnes* nature of the prohibition of torture requires member states to do more than eschew the practice of torture."[22] In addition to the duty to refrain from committing acts of torture, States have a positive B5 obligation to protect individuals by ensuring that they are not subjected to conduct constituting a violation of international law. This positive duty requires States to investigate arguable breaches of the Torture Convention that may have occurred on its territory, including allegations of complicity or participation in torture. In Lord Bingham's words:

> "A Committee against Torture was established under article 17 of the Torture Convention to monitor compliance by member states. The Committee has recognised a duty of states, if allegations of torture are made, to investigate them: *PE v France*, 19 December 2002, CAT/C/29/D/193/2001, paras 5.3, 6.3; *GK v Switzerland*, 12 May 2003, CAT/C/30/D/219/2002), para 6.10.[23]

The duty to investigate arises where a prima facie case exists that the Convention has been breached. Credible information suggesting that foreign nationals are being transported by officials of another State, via the United Kingdom, to detention facilities for interrogation under torture, would imply a breach of the Convention and must be investigated.

23. The matter of diplomatic assurances has been raised in respect of the present allegations. It has been suggested that both the sending State and transit State may be exonerated from liability under international law if assurances are obtained from officials of the receiving State that persons transferred into their jurisdiction will not B5 be subject to torture or cruel, inhuman or degrading treatment. B5

24. The European Court of Human Rights dismissed the sufficiency of obtaining assurances to exonerate the United Kingdom from a breach of the non-refoulement obligation in *Chahal v. United Kingdom*.[24] The Government of India provided written assurances to the United Kingdom to the effect that Chahal "would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities". The Court found:

B5 > "Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above (paragraph 92), it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain

[22] *A (FC) and others v. Secretary of State for the Home Department*, [2005] UKHL 71, para 34 (Lord Bingham of Cornhill).
[23] Ibid, para 36 (Lord Bingham of Cornhill).
[24] (1996) 23 EHRR 413.

> members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem... Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety."[25]

25. Where governments are using public power to transfer persons at risk to a given country, in circumstances where earlier practices support credible allegations of torture in that country, mere assurances by the government, unaccompanied by other action, will be insufficient.

B5

James Crawford SC, FBA
Whewell Professor of International Law,
University of Cambridge

Kylie Evans
Lauterpacht Centre for International Law

9 December 2005

[25] *Chahal v. United Kingdom* (1996) 23 EHRR 413, para 105.

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NotesTele

Elizabeth M Kiingi 02/16/2006 10:31:10 AM From DB/Inbox: Elizabeth M Kiingi

Cable
Text:

CONFIDENTIAL
TELEGRAM February 15, 2006

To: SECSTATE WASHDC - PRIORITY

Action: EUR

From: USEU BRUSSELS (USEU BRUSS 524 - PRIORITY)

TAGS: EUN, PGOV, PHUM, PTER

Captions: None

Subject: SECSTATE LEGAL ADVISER ON WAR ON TERROR

Ref: None

Classified By: USEU POLOFF TODD HUIZINGA, FOR REASONS 1.4 (B) AND (D)

B1

[redacted]

2. (SBU) On February 7-8, Secretary of State Legal Adviser John Bellinger met with a wide range of EU and member-state officials, including Robert Cooper, Director-General for Common Foreign and Security Policy at the EU Council Secretariat; Jean-Claude Piris, the Director-General of the Legal Services of the EU Council Secretariat; Michel Petite, Director-General of the Legal Services of the European

CLASSIFIED BY DEPT. OF STATE, L. HEDGBETH, DAS, A/ISS
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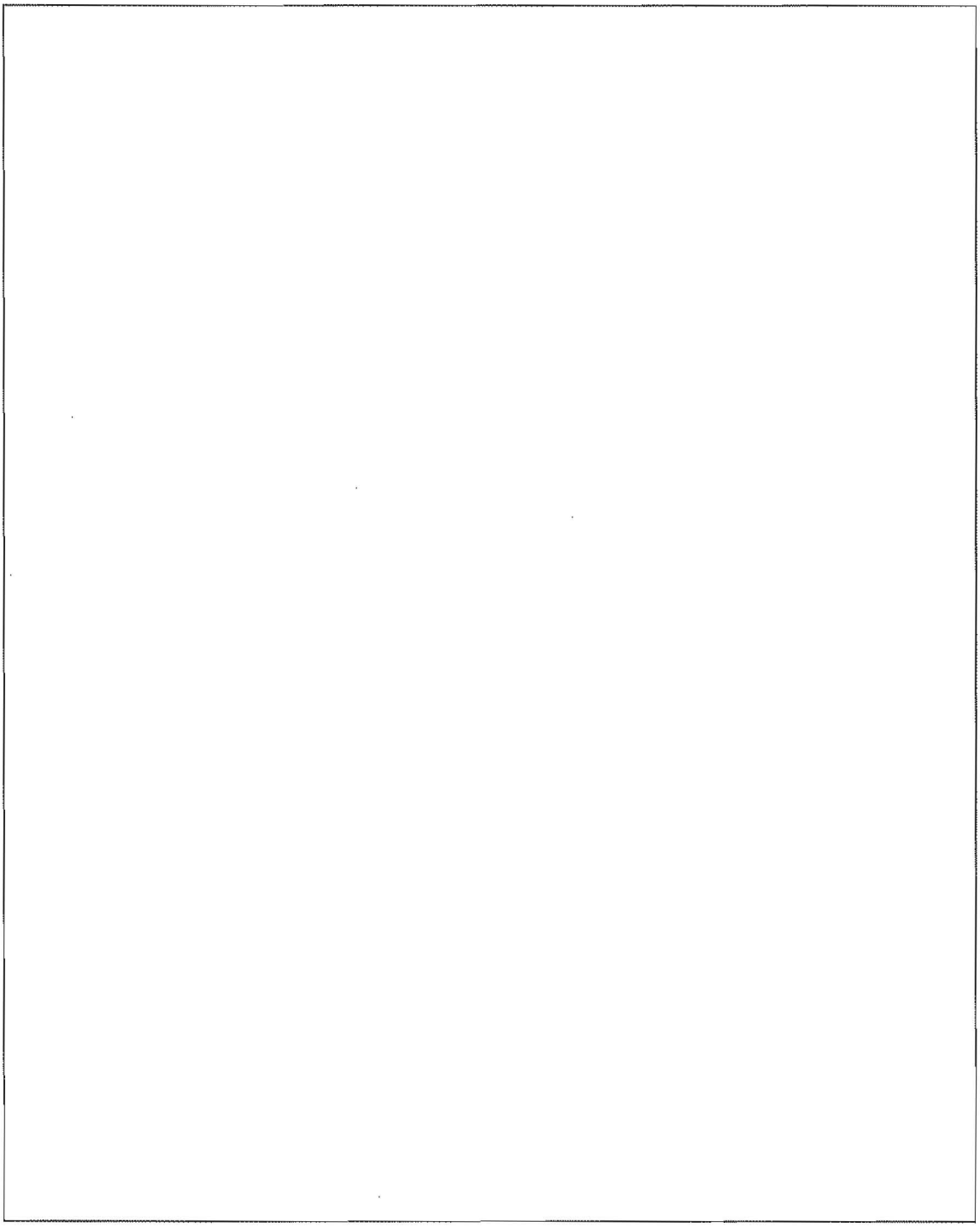
Commission; Jim Cloos, EU Council Secretariat Director for Transatlantic Relations, Human Rights and UN; and Gijs de Vries, EU Coordinator for the Fight Against Terrorism. The visit was capped by a two-and-a-half-hour discussion with the EU Legal Services Working Group (COJUR), comprising the MFA Legal Advisers of the 25 EU member states, plus Commission and Council Legal Services and Romanian and Bulgarian observers.



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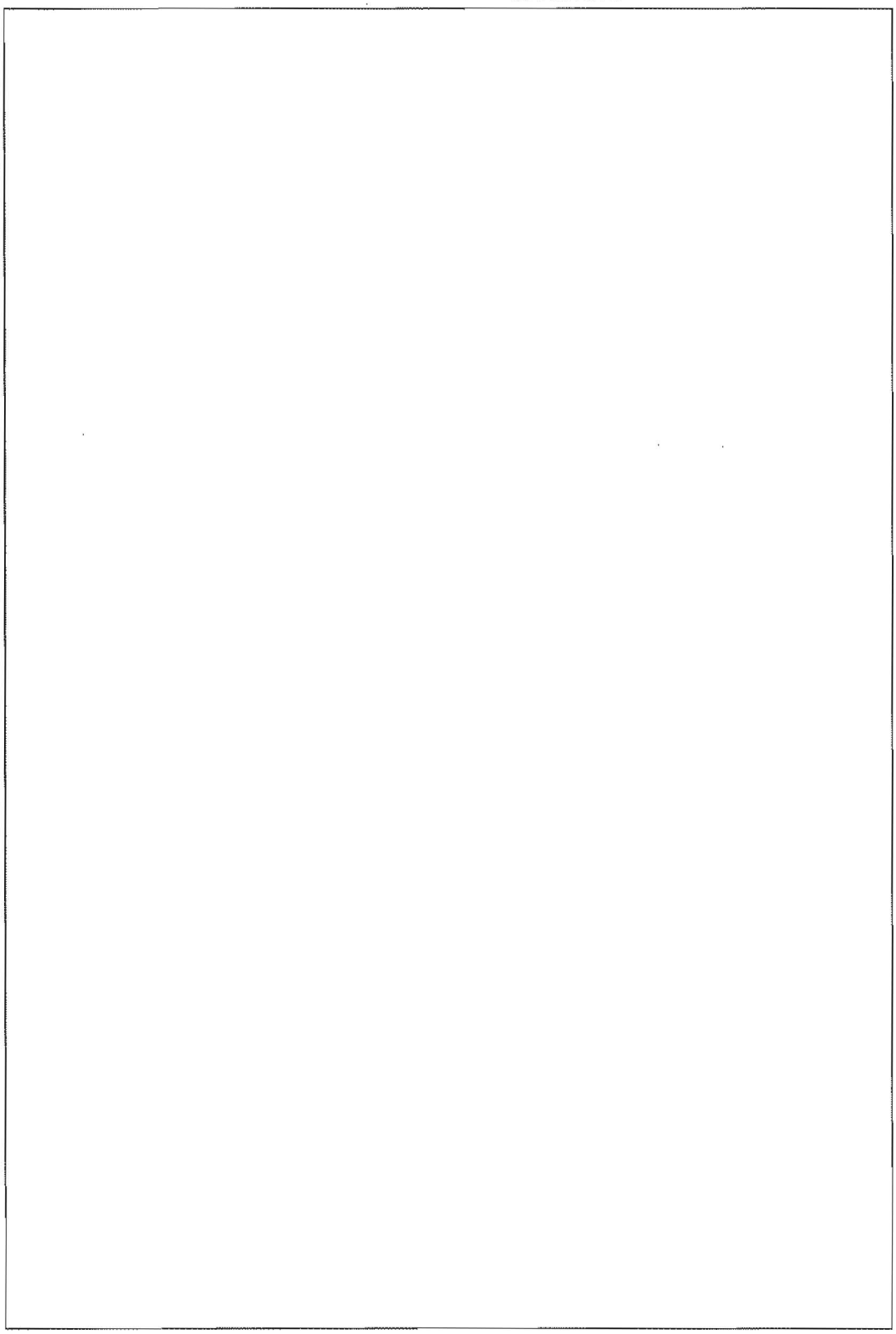

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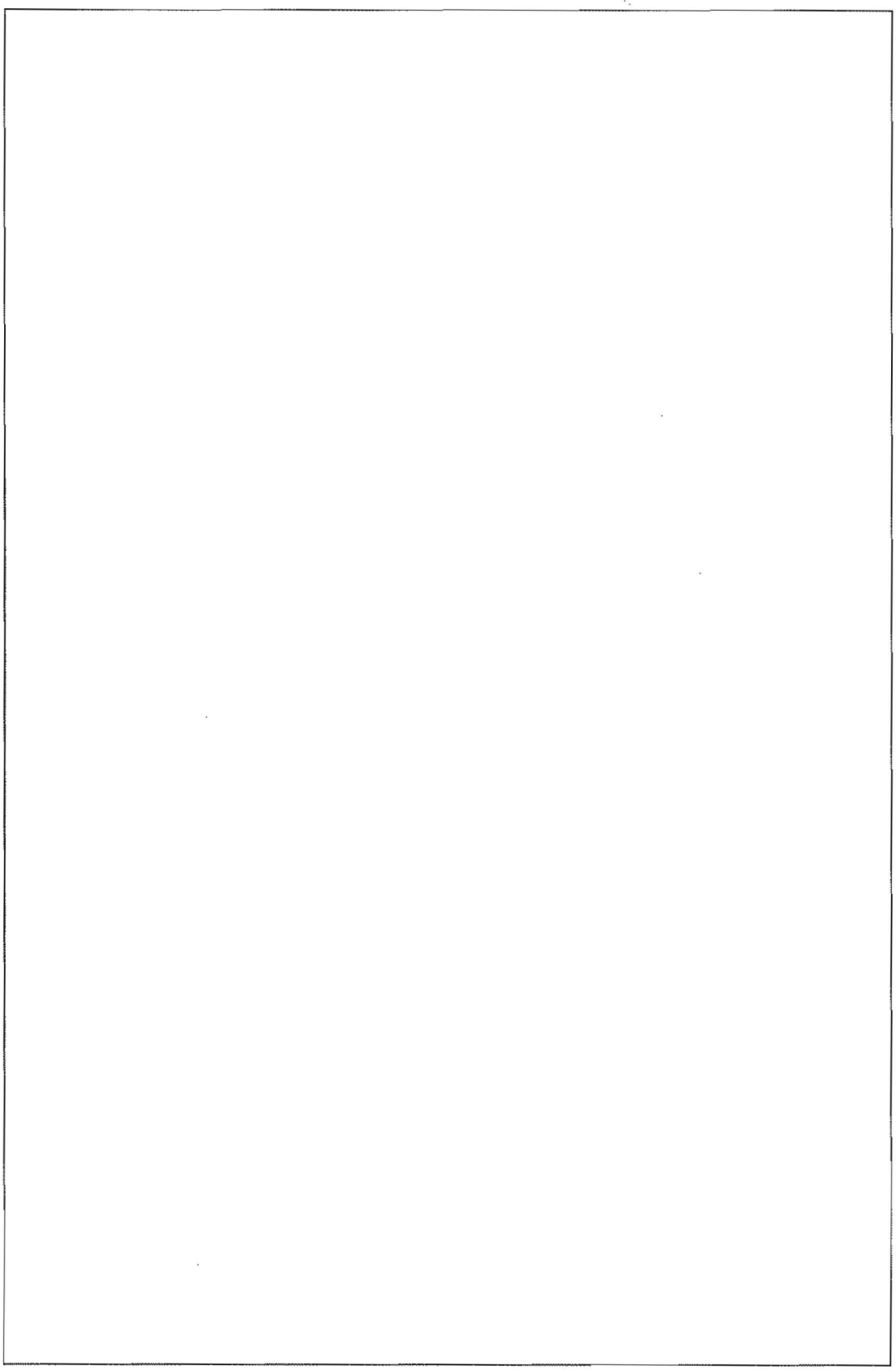

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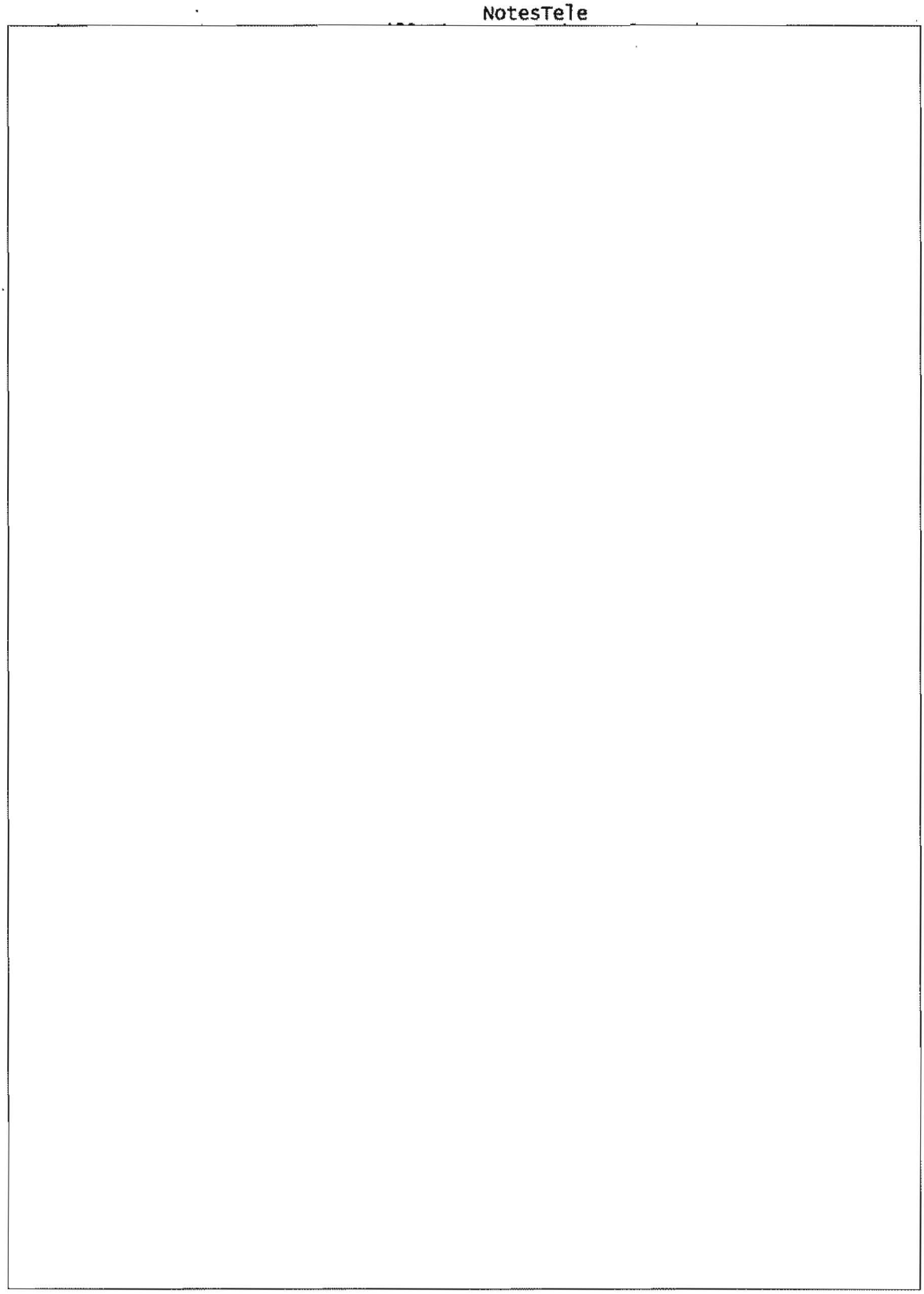

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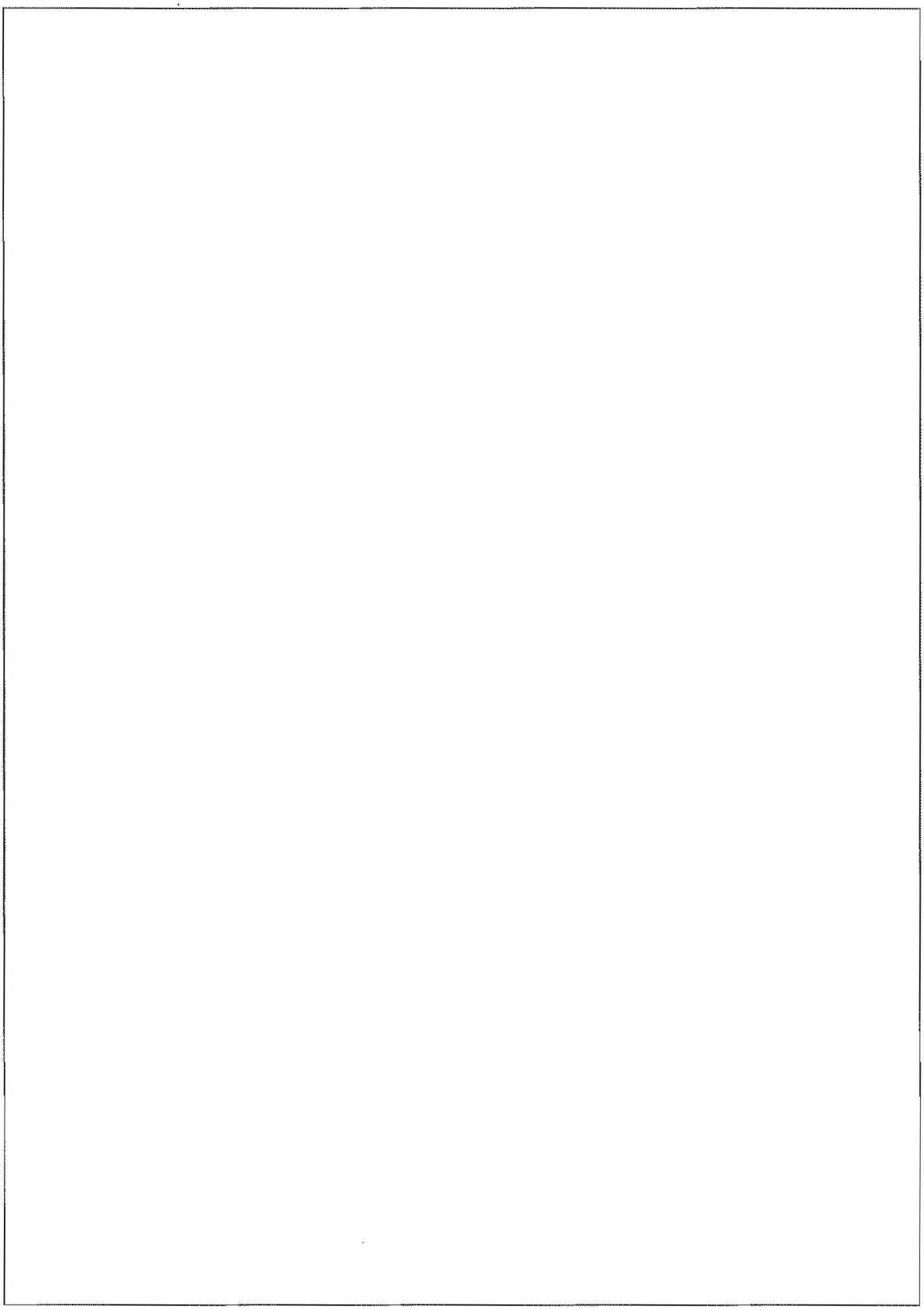

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18. (U) This message has been cleared by Legal Adviser John Bellinger.

Gray

Additional Addressees:
None

CC:
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EUROPEAN POLITICAL COLLECTIVE

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DOD FOR HAYNES
NSC FOR WIEGMANN

E.O. 12958: DECL: 02/10/2016
TAGS: PGOV, PTER, PHUM, EUN
SUBJECT: SECSTATE LEGAL ADVISER ON WAR ON TERROR

End Cable Text

Elizabeth M Kiingi 02/16/2006 10:31:10 AM From DB/Inbox: Elizabeth M Kiingi

Recipient/Profile Information
Cable Recipients:
lCynthia S Francisco
Lois L Allder

Venice Commission
Commission de Venise

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B5
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Strasbourg, 17 March 2006

CDL-AD(2006)009
Or. Engl.

Opinion no. 363 / 2005

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

ON THE INTERNATIONAL LEGAL OBLIGATIONS OF COUNCIL OF EUROPE MEMBER STATES IN RESPECT OF SECRET DETENTION FACILITIES AND INTER-STATE TRANSPORT OF PRISONERS

adopted by the Venice Commission
at its 66th Plenary Session
(Venice, 17-18 March 2006)

on the basis of comments by

Mr Iain CAMERON (Substitute Member, Sweden)
Mr Pieter van DIJK (Member, the Netherlands)
Mr Olivier DUTHEILLET de LAMOTHE (Member, France)
Mr Jan HELGESEN (Member, Norway)
Mr Giorgio MALINVERNI (Member, Switzerland)
Mr Georg NOLTE (Substitute Member, Germany)

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444

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CONCLUSIONS

INTRODUCTION

1. By a letter of 15 December 2005, Mr Dick Marty, chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, requested an opinion of the Commission in respect of the following inter-related matters:

a) An assessment of the legality of secret detention centres in the light of the Council of Europe member States' international law obligations, in particular the European Convention on Human Rights (ECHR) and the European Convention for the Prevention of Torture. In particular, to what extent is a State responsible if – actively or passively – it

permits illegal detention or abduction by a third State or an agent thereof?

b) What are the legal obligations of Council of Europe member States, under human rights and general international law, regarding the transport of detainees by other States through their territory, including the airspace ? What is the relationship between such obligations and possible countervailing obligations which derive from other treaties, including treaties concluded with non-member States ?

2. A working group was set up, which was composed of the following members: Mr Iain Cameron, Mr Pieter van Dijk, Mr Olivier Dutheillet de Lamothe, Mr Jan Helgesen, Mr Giorgio Malinverni and Mr Georg Nolte. It was assisted by Ms Simona Granata-Menghini, Head of the Constitutional Co-operation Division.

3. Two working meetings were held in Paris, on 13 January and on 27 and 28 February 2006.

4. The Working Group sought the assistance of the NATO Legal Services and requested clarifications in relation to certain matters of military law as well as certain documents. Regrettably, the Commission was not provided with either of them.

5. The Working Group availed itself of the valuable assistance of the International Civil Aviation Organisation (ICAO), whose Legal Bureau provided documentation about the interpretation of certain provisions of the Chicago Convention on International Civil Aviation. The Commission wishes to express its appreciation and gratitude for the co-operation of the ICAO.

6. The present study was discussed within the Sub-Commissions on International Law and on Democratic Institutions in the course of a joint meeting on 16 March 2006, and was subsequently adopted by the Commission at its 66th Plenary Session (Venice, 17-18 March 2006).

7. The present opinion does not aim, nor does it have the ambition to assess the facts in relation to the current allegations about the existence of secret detention facilities in Europe or about the transport of detainees by the CIA through the territory (including the airspace) of certain European States. This is not the task of the Venice Commission. It is instead the object of the report that is in the process of being prepared by the PACE Legal Affairs Committee.

8. This opinion does not aim at identifying the pertinent internal law and practice of the Council of Europe member-States either. On 21 November 2005, the Secretary General of the Council of Europe decided to use his power of inquiry under Article 52 of the ECHR and invited the Council of Europe member States to furnish an explanation of the manner in which their internal law ensures the effective implementation of the ECHR in relation to secret detention and transport of detainees. On 28 February 2006, the Secretary General presented his report based on the replies submitted by all member States (See the Secretary General's report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, SG/Inf (2006)5).

9. The aim of this opinion is to provide a reply to the questions put by PACE Legal Affairs Committee, and thus to identify the obligations of Council of Europe member States under public international law in general and under human rights law in particular, in respect of the irregular transport, extradition, deportation or detention of prisoners. In order to be able to do so, the Commission deems that it is necessary to outline at the outset the basic rules under international law, human rights law, humanitarian law and air law (Section I) in respect of detention and inter-State transport of prisoners. The Commission will subsequently proceed with the identification of the specific obligations of Council

of Europe member States in these areas (Section II), and will then answer the questions put by PACE (Conclusions).

SECTION I: THE LEGAL REGIME

A. General principles

a. Regular inter-State transfers of prisoners

10. Under international law and human rights law, there are four situations in which a State may lawfully transfer a prisoner to another State: deportation, extradition, transit and transfer of sentenced persons for the purposes of serving their sentence in another country.

11. *Deportation* is the expulsion from a country of an alien whose presence is unwanted or deemed prejudicial. A person against whom a deportation decision has been taken by an administrative authority must have the possibility of applying to a competent authority [1], preferably a court [2]. Deportation is only possible on the specific grounds indicated by the pertinent national law.

12. *Extradition* is a formal procedure whereby an individual who is suspected to have committed a criminal offence and is held by one State is transferred to another State for trial or, if the suspect has already been tried and found guilty, to serve his or her sentence.

13. Extradition is a process to which both international and national law apply. While extradition treaties may provide for the transfer of criminal suspects or sentenced persons between States, domestic law determines under what conditions and according to which procedure the person concerned is to be surrendered in accordance with such treaties. Extradition legislation varies significantly among the different European countries, notably as concerns the incorporation of treaties into national law, procedural guarantees, especially the respective role of the executive and the judiciary in the extradition process, and the proof (and assurances) required for extradition.

14. In Council of Europe member States, extradition laws must take into consideration, or be interpreted in conformity with constitutional provisions guaranteeing human rights and international human rights treaties and humanitarian law.

15. The 1957 European Convention on Extradition [3] requires, like most bilateral extradition treaties nowadays, respect for the principles of *ne bis in idem* and speciality. It also forbids extradition to a country where the death penalty would be carried out. The same is true if the extraditing State has "substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons" [4]. In addition, the *nulla poena* principle has to be respected.

16. The 1977 European Convention on the Suppression of Terrorism [5] was adopted with a view to eliminating or restricting the possibility for the requested State of invoking the political nature of an offence in order to oppose an extradition request in respect of terrorist acts. Under this Convention, for extradition purposes, certain specified offences shall never be regarded as "political" (Article 1) and

other specified offences may not be regarded as such (Article 2), notwithstanding their political content or motivation. There is no obligation, and even a prohibition to extradite, however, if the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that the position of the person whose extradition is requested may be prejudiced for any of these reasons.

17. *Transit* is an act whereby State B provides facilities for State A to send a prisoner through its territory.

18. Transit is regulated by bilateral and multilateral treaties, *inter alia* Article 21 of the European Convention on Extradition, which provides:

> *1. Transit through the territory of one of the Contracting Parties shall be granted on submission of a request by the means mentioned in Article 12, paragraph 1, provided that the offence concerned is not considered by the Party requested to grant transit as an offence of a political or purely military character having regard to Articles 3 and 4 of this Convention.*
>
> *2. Transit of a national, within the meaning of Article 6, of a country requested to grant transit may be refused.*
>
> *3. Subject to the provisions of paragraph 4 of this article, it shall be necessary to produce the documents mentioned in Article 12, paragraph 2.*
>
> *4. If air transport is used, the following provisions shall apply:*
> *a when it is not intended to land, the requesting Party shall notify the Party over whose territory the flight is to be made and shall certify that one of the documents mentioned in Article 12, paragraph 2.a exists. In the case of an unscheduled landing, such notification shall have the effect of a request for provisional arrest as provided for in Article 16, and the requesting Party shall submit a formal request for transit;*
> *b when it is intended to land, the requesting Party shall submit a formal request for transit.*
>
> *5. A Party may, however, at the time of signature or of the deposit of its instrument of ratification of, or accession to, this Convention, declare that it will only grant transit of a person on some or all of the conditions on which it grants extradition. In that event, reciprocity may be applied.*
>
> *6. The transit of the extradited person shall not be carried out through any territory where there is reason to believe that his life or his freedom may be threatened by reason of his race, religion, nationality or political opinion.*

19. Although the wording of Article 21 § 4 a) indicates that States need to "notify" a transit flight, State practice on this matter may vary, and indeed some States do not appear to require notification of transit of a prisoner by air over their territory, when no landing is planned [6].

20. European Council Directive no. 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air [7], underlines that "member States are to implement this Directive with due respect for human rights and fundamental freedoms" and that "in accordance with the applicable international obligations, transit by air should be neither requested nor granted if in the

third country of destination or of transit the third-country national faces the threat of inhumane or humiliating treatment, torture or the death penalty, or if his life or liberty would be at risk by reason of his/her race, religion, nationality, membership of a particular social group or political conviction". Pursuant to Article 4 of the Directive,

> *"1. The request for escorted or unescorted transit by air and the associated assistance measures under Article 5(1) shall be made in writing by the requesting Member State. It shall reach the requested Member State as early as possible, and in any case no later than two days before the transit. This time limit may be waived in particularly urgent and duly justified cases.*
>
> *2. The requested Member State shall inform the requesting Member State forthwith of its decision within two days. This time limit may be extended in duly justified cases by a maximum of 48 hours. Transit by air shall not be started without the approval of the requested Member State.*
>
> *Where no reply is provided by the requested Member State within the deadline referred to in the first subparagraph, the transit operations may be started by means of a notification by the requesting Member State.*
>
> *Member States may provide on the basis of bilateral or multilateral agreements or arrangements that the transit operations may be started by means of a notification by the requesting Member State."*

21. Under this Directive, with respect to any request for transit, the requesting member State must provide the requested member State with information about the third-country national to whom the transit request relates, flight details and further information about the state of health of the person and possible public order concerns.

22. The text of an Agreement on Extradition between the European Union and the USA was finalised in 2003; however, this agreement has, so far, not entered into force in respect of any EU member-State [8]

. It provides that a EU member State may authorise transportation through its territory of a person surrendered to the US by a third State, or by the US to a third State. A request for transit shall be made through the diplomatic channel and shall contain a description of the person being transported and a brief description of the facts of the case. Authorization is not required when air transportation is used and no landing is scheduled on the territory of the transit State (which does not change the obligations of member States of the Council of Europe under human rights treaties, see below, para. 147) ; if an unscheduled landing occurs, the State on whose territory the landing takes place may require a request for transit.

23. States may enter into agreements concerning the *transfer of sentenced persons* for the purpose of serving their sentence in their country of origin. Such procedures are not relevant for this opinion.

[9]

b. Irregular inter-State transfers of prisoners

24. A transfer is unlawful or irregular when the government of State B transfers a person from State B to the custody of State A, against his or her consent, in a procedure not set out in law (i.e. not extradition, deportation, transit or transfer with a view to sentence-serving).

25. The kidnapping of a person by agents of State A on the territory of State B and his or her removal to State A or to a third State is a violation of State B's territorial sovereignty and therefore an

internationally wrongful act which engages the international responsibility of State A [10].

26. Under general international law (see para. 37 below), in such a case State A has to make "full reparation for the injury caused by the internationally wrongful act" at the request of the injured State, which, in this case, would include the return of the person in question. The rights of the person in question vis-à-vis State A depend upon the latter's law, on the applicable human rights obligations.

27. Irregular transfers may take place with the acquiescence of the territorial government. This type of situation raises a human rights issue. For a *Rechtsstaat*, it will also raise the issues of governmental responsibility for acts of its organs and services and of parliamentary control over government.

28. Another form of irregular transfer happens where some section of the public authorities in State B (police, security forces etc.) transfers a person from State B but not in accordance with a procedure set out in law, or even contrary to domestic law. This, in turn, may take the form of official participation in the transfer (arresting and handing over), or facilitating a kidnapping (actively, or passively – not preventing a kidnapping which it was known would occur). The security/police action may occur with or without government knowledge.

29. If there is no legal basis for an active measure (arrest, handing over etc) under national law, then there will be in such cases a breach of national law on arrest, and consequently also a breach of Article 5 of the European Convention on Human Rights. This situation also raises the issue of governmental control over the security/police services, and parliamentary control over the government (see below, §§ 38-43).

30. As regards the terminology used to refer to irregular transfer and detention of prisoners, the Venice Commission notes that the public debate frequently uses the term "rendition". This is not a term used in international law. The term refers to one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State. "Rendition" is thus a general term referring more to the result – obtaining of custody over a suspected person – rather than the means. Whether a particular "rendition" is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights law. Thus, even if a particular "rendition" is in accordance with the national law of one of the States involved (which may not forbid or even regulate extraterritorial activities of state organs), it may still be unlawful under the national law of the other State(s). Moreover, a "rendition" may be contrary to customary international law and treaty or customary obligations undertaken by the participating State(s) under human rights law and/or international humanitarian law. B5

31. The term "extraordinary rendition" appears to be used when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applying in the State where the person was situated at the time.

c. International co-operation in the fight against terrorism

32. General international law allows States to cooperate in the transport of detainees, provided that such transport is carried out in full respect of human rights and other international legal obligations of the States concerned. Numerous international treaties confirm this rule.

33. As movement around the world becomes easier and crime takes on a larger international

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dimension, it is increasingly in the interest of all nations that terrorist crimes be prevented and that persons who are suspected of having committed a very serious crime and are suspected to have acted from abroad or who have fled abroad should be brought to justice. Conversely, the establishment of safe havens for persons who are preparing terrorist crimes or who are suspected of having committed a serious crime would not only result in danger for the State harbouring the protected person but also tend to undermine the foundations of extradition [11].

34. The European Convention on Human Rights does not, in principle, prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing suspects of serious crimes to justice, provided that it does not interfere with any of the rights or freedoms recognised in the ECHR [12].

35. The Council of Europe has produced several international instruments and recommendations relating to the fight against terrorism, including three international treaties dealing with suppression of terrorism [13], prevention of terrorism [14] and money laundering and terrorist financing [15], and three recommendations of the Committee of Ministers to member States relating to special investigation techniques; protection of witnesses and collaborators of justice; and questions of identity documents which arise in connection with terrorism [16].

36. An additional set of standards aimed specifically at safeguarding human rights and fundamental freedoms has been produced after 2001, namely the Guidelines on Human Rights and the Fight Against Terrorism (2002), a Policy Recommendation on Combating Racism While Fighting Terrorism (2004), the additional Guidelines on the Protection of Victims of Terrorist Acts (2005) and a Declaration on Freedom of expression and information in the media in the context of the fight against terrorism (2005).

d. Some observations on State responsibility

37. When a State commits, through its agents acting in their official capacity, an internationally wrongful act, it incurs responsibility and "is under an obligation to make full reparation for the injury caused by the internationally wrongful act" at the request of the injured State (see Article 31 para. 1 of the International Law Commission (ILC)'s Articles on State Responsibility).

38. With respect to the imputability of an international wrong, the question arises of whether and to what extent a State incurs responsibility when its agents have *ultra vires* consented expressly or impliedly by rendering assistance, to acts of a foreign State infringing its territorial sovereignty (see above, paras. 27 and 29).

39. Ultra vires acts usually bind the State for the purposes of State responsibility (Article 7, ILC Articles on State Responsibility).

40. Consent to carry out activities which otherwise would be internationally wrongful renders them lawful, unless these activities are contrary to *jus cogens* (see para. 42 below). However, consent to an interference with sovereignty must be validly given (Article 20, ILC Articles on State Responsibility). In this context, Article 46 of the Vienna Convention of the Law of Treaties is pertinent. It provides that:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

41. In the opinion of the Commission, if a public authority of a State would give a permission to the representative of another State to arrest and/or transfer a person against his will from the territory of that State and it is clear that this would be outside of the ordinary (judicial, administrative) procedures for such arrest/transfer, such permission would be a manifest violation of a rule of internal law of fundamental importance in any State under the rule of law. Such permission could therefore not be invoked by the other State as valid consent.

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42. Even where such permission does not result in the conclusion of or accession to a treaty, the Law of Treaties insofar reflects the general principle of good faith.[17] This principle is "one of the most basic principles governing the creation and performance of legal obligations"[18]. The giving of a permission is comparable to the conclusion of a treaty insofar as the validity of consent is concerned. In any case, the validity of any consent as a circumstance precluding wrongfulness in international law is limited by the rule enunciated in Article 26 of the ILC Articles on State Responsibility:

"Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."

43. A norm is of peremptory character (*jus cogens*) when it "is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" (Article 53 of the Vienna Convention of the Law of Treaties). These norms include, *inter alia*, the prohibitions of genocide, aggression, crimes against humanity, slavery, piracy and torture.[19]

44. In order to be considered wrongful, an act must be inconsistent with an international obligation of the State which commits it. For Council of Europe member States, in the present context, the obligation in question stems directly from the European Convention on Human Rights, namely from the obligation not to expose anyone to the risk of treatment contrary to Article 3, the obligation to prevent any detention in breach of Article 5 and the obligation to investigate into any substantiated claim that an individual has been taken into unacknowledged custody. These obligations may be breached by a State also by merely but knowingly letting its territory be used by a third State in order to commit a breach of international law.

45. For a State knowingly to provide transit facilities to another State may amount to providing assistance to the latter in committing a wrongful act, if the former State is aware of the wrongful character of the act concerned. Under general international law (see Article 16 ILC Articles on State Responsibility) "a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."

46. The consequences of irregular transfers and secret detentions from the viewpoint of human rights law for Council of Europe member States will be examined below (see paras. 137-153).

B. Human rights law

a. The rights at issue

47. Council of Europe member States are committed to respecting fundamental rights, as defined by a number of international treaties, both at the universal level (including the 1966 International Covenant on Civil and Political Rights ("ICCPR"), and the 1987 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and at the European level, *in primis* the European Convention on Human Rights, but also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment).

48. With respect to the matters which form the object of the present opinion, the fundamental rights which are at issue are primarily the right to liberty and security of person and the ban on torture and other inhuman or degrading treatments or punishments.

i) Liberty and security of person

49. Article 5 ECHR protects the right to liberty and security of person. Although this right is not absolute (see the authorized deprivations of liberty under paragraph 1 a) to f) of Article 5), a person may only be detained on the basis of and according to procedures set out by the law, and the law in question must be consistent with recognised European standards, that is *inter alia* with the (other) provisions of the ECHR. In addition, paragraph 4 of Article 5 provides for all forms of deprivation of liberty allowed under that article, that the detainee "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful" (*habeas corpus*).

50. Detention must be lawful and in accordance with a procedure prescribed by law: in the European Court of Human Rights' view, the requirement of lawfulness means that both domestic law and the ECHR must be respected. The possible reasons for detention are exhaustively enumerated in Article 5 (1) ECHR. Paragraph 1 (c) of Article 5 permits "the lawful arrest or detention of a person effected for the purpose of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so", while paragraph (f) of Article 5 permits "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." A detention for any reason other than those listed in Article 5 § 1 is unlawful and thus a violation of a human right.

51. As regards extradition arrangements between States, when one is a party to the ECHR and the other is not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest was lawful. The fact that a person has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or give rise to an issue under Article 5. However, for the member States of the Council of Europe the provisions of the extradition treaty or the practice of cooperation cannot justify any deviation of their obligations under the ECHR;

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for those States the decisive factor is whether the extradition is according to domestic law and respects the State's obligations under the ECHR.

52. The ECHR contains no provisions concerning the exact circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. Subject to its being the result of cooperation between the States concerned and provided that the legal basis for the order for the suspect's arrest is an arrest warrant issued by the authorities of the suspect's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the ECHR [20]. This being said, it has also to be stressed that several rights and freedoms protected by the ECHR, may be relevant in the case of extradition and will have to be respected, the most important being Articles 2 and 3, and in some circumstances Articles 5 and 6.

53. Article 5 must be seen as requiring the authorities of the territorial State to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into a substantiated claim that a person has been taken into custody and has not been seen since [21].

ii) Torture, inhuman and degrading treatment or punishment

54. Torture is prohibited by Article 3 ECHR, Article 7 ICCPR, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. It is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." [22]

55. The crucial distinction between "torture", "inhuman treatment" and "degrading treatment" lies in the degree of suffering caused.

56. "Inhuman treatment" is such treatment which causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. Unlike torture, inhuman treatment does not need to be intended to cause suffering. [23] In its judgment in Ireland v. United Kingdom [24], the European Court of Human Rights held that the so-called "five techniques" were inhuman treatment. This decision has sometimes been misunderstood to mean that the same or similar techniques would not amount to torture. However, in the *Selmouni* case the Court later clarified that, since the Convention is a "living instrument which must be interpreted in the light of present-day conditions", acts which were classified in the past as "inhuman and degrading treatment" could be classified as torture in future. [25] The Court stated that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies." [26]

57. "Degrading treatment" is treatment which grossly humiliates or debases a person before others or drives him to act against his will or conscience. Although causing less suffering than torture or inhuman treatment, it must attain a minimum level [27]. It too does not need to be intended to cause suffering.

58. The prohibition of torture and inhuman or degrading treatment or punishment enshrines one of the most fundamental values of democratic societies. As the European Court of Human Rights has stated on many occasions, even in the most difficult circumstances, such as the fight against terrorism and organised crime, the ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the ECHR and of Protocols Nos. 1 and 4, Article 3 makes no provision for limitations and no derogation from it is permissible under Article 15 § 2, not even in the event of a public emergency threatening the life of the nation.

59. Article 2, paragraph 2, of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the UN Convention against Torture") expressly States that "No exceptional circumstances whatsoever, whether a State of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

60. The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment ("ECPT") establishes the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") which, "by means of visits, examines the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment." Pursuant to Article 2 of this Convention, CPT can visit any place on the territory of member States where a person is deprived of their liberty (i.e. including military bases, non-official detention centres such as the offices of the intelligence service or a particular police department - drugs, anti-terrorism - if CPT believes that persons are being held/interviewed in these offices).

61. Member States of the ECHR not only have the obligation not to torture but also the duty to prevent torture [28]. In addition they have an obligation of investigation. Under this obligation Member States must assure an efficient, effective and impartial investigation [29]. As soon as the authorities receive substantiated information giving rise to the suspicion that torture or inhuman or degrading treatment has been committed, a duty to investigate arises whether and in which circumstances torture has been committed.

b. Scope of the duty of Council of Europe member States to secure human rights

62. Under Article 1 of the ECHR, "The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention" [30]. According to the European Court of Human Rights, the notion of "jurisdiction" is primarily territorial. It does, however, exceptionally extend to certain other cases, such as acts of public authority performed abroad by diplomatic or consular representatives of the State, or by an occupying force; acts performed on board vessels flying the State flag or on aircraft or spacecraft registered there.

63. There is a presumption that jurisdiction is exercised by the State throughout its territory. States may also be held accountable for human rights violations occurring outside their territory in certain

situations [31].

64. Article 2 of the International Covenant on Civil and Political Rights provides that a State Party undertakes to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."

65. The term "jurisdiction" under the International Covenant on Civil and Political Rights is comparable to the same term under the European Convention on Human Rights. It is also not limited to territorial jurisdiction. The Human Rights Committee has held, for example, that communications by persons who were kidnapped by agents in a neighbouring States are admissible, reasoning that States Parties are responsible for the actions of their agents on foreign territory [32]. The Human Rights Committee also clarified in its General Comment no. 31 that "a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." [33]

66. The duty of State parties under Article 1 ECHR to "secure" to everyone within their jurisdiction "the rights and freedoms ... of this Convention" is not limited to the duty of state organs not to violate these rights themselves. This duty also includes positive obligations to protect individuals against infringements of their rights by third parties, be they private individuals or organs of third States operating within the jurisdiction of the State party concerned (see para. 146 below). The European Court of Human Rights has, in particular, recognized positive obligations which flow from the prohibition of torture and inhuman treatment, the right to life, and the right to freedom and security. Such positive obligations include duties to investigate, especially in the case of disappeared persons, and to provide for effective remedies.

c. Limitations on the competence to transfer prisoners imposed by human rights obligations

67. The international condemnation of torture has a clear impact on extradition and deportation. Article 3 of the UN Convention against Torture prevents States Parties from "expelling, returning ("refouler") or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" [34].

68. The ECHR does not guarantee a right not to be extradited or deported. Nor is there a right to political asylum. Extradition and deportation are not *per se* in breach of Article 3 of the ECHR. Nonetheless, extradition or deportation may run counter to provisions of the ECHR. According to the *Soering* doctrine of the European Court of Human Rights, a State may be held responsible for a violation of Articles 2 and 3, in flagrant cases also of possible violations of Articles 5 and 6 ECHR, if its decision, permission or other action has created a real risk of a violation of these rights by the State to which the prisoner is to be transferred. [35] It is of no relevance in such case whether the State on whose territory the violation will or could ultimately take place is also bound by the ECHR [36].

69. Under what circumstances a State may be deemed to have known about a "real risk of a violation" is to be determined in each separate case. Indeed, the establishment of the responsibility of a State in

respect of an extradition or deportation inevitably involves an assessment of conditions in the requesting or receiving country against the standards of Article 3 ECHR. Nonetheless, the responsibility of the requesting or receiving country, whether under general international law, under the ECHR or otherwise, is not decisive for the liability of the extraditing State under the ECHR. Such liability may have been incurred by the latter member State by reason of its having taken action which has as a direct consequence the exposure of an individual to ill-treatment prohibited by Article 3 ECHR [37].

70. In the Agiza case, the UN Committee against Torture found a violation of article 3, as Sweden, at the time of the complainant's removal to Egypt, knew or should have known that Egypt resorted to consistent and widespread use of torture against prisoners, and therefore that the complainant was at a real risk of torture. In the opinion of the Committee, the procurement of diplomatic assurances, which, moreover, had no effective mechanism for enforcement, did not suffice to protect against this risk [38].

71. In the Mamatkulov case, the European Court of Human Rights accepted that assurances leading to extradition/deportation can take away the real risk of torture, even when the follow-up procedures were not extensive [39]. However, the assessment of diplomatic assurances in this case should not be overestimated. The Court merely took "formal cognizance of the diplomatic notes from the Uzbek authorities that have been produced by the Turkish Government" [40]. Moreover, there was no substantiated evidence in the individual case that the people in question had in fact been tortured. Finally, according to the European Court of Human Rights, the existence of the risk must be assessed "primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion." [41]

d. Derogations

72. Under Article 15 ECHR, a Contracting State may derogate from certain of its obligations under the ECHR "in time of war or other public emergency threatening the life of the nation. Among these "derogable" obligations are also those laid down in Articles 5 and 6; but, under paragraph 2 of Article 15, not those laid down in Articles 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 [42]. However, a State may apply Article 15 only if and to the extent that a war or other public emergency threatening the life of the nation presents itself in that very same State, and the derogating measures are "strictly required by the exigencies of the situation" and "are not inconsistent with its other obligations under international law". When such a situation pertains, it is imperative for the State in question to make a formal derogation under Article 15 ECHR [43]. Moreover, in case of such derogation, the third paragraph of Article 15 requires that the State concerned keep the Secretary General of the Council of Europe fully informed of the measures that it has taken and the reasons therefore.

73. Article 4(1) of the International Covenant on Civil and Political Rights is expressed in terms very similar to those of article 15(1) [44].

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74. In its Resolution 1271, adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe resolved (para 9) that: "In their fight against terrorism, Council of Europe members should not provide for any derogations to the European Convention on Human Rights". It also called on all member States (para 12) to "refrain from using Article 15 to limit the rights and liberties guaranteed under its Article 5."

75. In its 2002 Guidelines on human rights and the fight against terrorism, the Committee of Ministers of the Council of Europe reiterated that member States "may never, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law." [45]

76. In its General Comment no 29/2001 on Article 4 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee observed (in para 3) that "On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation, in situations not covered by article 4."

77. In the era of "global terrorism" it has been put to debate whether fundamental human rights as they are discussed in this opinion or the extent of possible derogations from them should be reinterpreted. Recent decisions by several domestic courts in Europe and beyond, however, have confirmed that the existing rights and standards are, in principle, appropriate for the current situation of the fight against global terror. [46] It is also the Commission's opinion that no such reinterpretation is necessary or warranted.

C. International Humanitarian law

78. At present, International Humanitarian Law has only limited relevance for the question of the law applicable to extraordinary transfers of prisoners and secret detention on the territory or through the airspace of member States of the Council of Europe. International Humanitarian Law applies during "armed conflict" and it distinguishes between international and non-international armed conflicts. "Armed conflict" in the sense of International Humanitarian Law refers to protracted armed violence between States or between governmental authorities and/or organised armed groups within a State. [47] "State practice indicates that banditry, criminal activity, riots, sporadic outbreaks of violence and acts of terrorism do not amount to an armed conflict." [48] This means, for example, that the organised hostilities in Afghanistan before and after 2001 have been an "armed conflict" which was at first a non-international armed conflict, and later became an international armed conflict after the involvement of US troops. On the other hand, sporadic bombings and other violent acts which terrorist networks perpetrate in different places around the globe and the ensuing counter-terrorism measures, even if they are occasionally undertaken by military units, cannot be said to amount to an "armed conflict" in the sense that they trigger the applicability of International Humanitarian Law.

79. The Venice Commission considers that counter-terrorist measures which are part of what has sometimes been called "war on terror" are not part of an "armed conflict" in the sense of making the regime of International Humanitarian Law applicable to them. It considers that further reflection is

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necessary to consider whether any additional instrument may be needed in the future to meet or anticipate the novel threats to international peace and security. [49]

80. International Humanitarian Law thus only applies to such transports of prisoners through the territory and/or airspace of the member States of the Council of Europe if such prisoners have been arrested/captured in the context of an "armed conflict" as explained above. This would be the case, for example, if a prisoner was captured in an area of Afghanistan in which organized fighting takes place at the time of the arrest. In this case his or her transfer or detention would be covered by International Humanitarian Law irrespective of where he or she is transferred to or detained in Europe. If, on the other hand, persons are transported or detained who have been arrested in the territory of a State where no armed conflict takes place, or in an area in which no armed conflict takes place, International Humanitarian Law does not apply. In such cases human rights law fully applies.

81. Even in those limited cases in which International Humanitarian Law applies (in the context of extraordinary transport of prisoners) this body of law does not apply exclusively. As a general rule, human rights law applies at all times, whether in times of peace or concurrently in situations of armed conflict, to all persons subject to a State's authority and control ("jurisdiction"). However, once an armed conflict has begun, human rights law is normally partly superseded by International Humanitarian Law, which contains rules specifically regulating the behaviour of parties to an armed conflict. For example, human rights law does not specifically take account of the regime of belligerent occupation. This means that the rules of the Hague Regulations and the Fourth Geneva Convention of 1949 largely serve as *lex specialis*. However, as the Commission has previously pointed out [50], human rights law's non-derogable rules and those rules which have not been derogated from in accordance with the derogation mechanism provided for under the relevant treaty instrument are also applicable in situations of armed conflict.

82. Under the 1949 Geneva Conventions, persons who are arrested by a power in the course of an international armed conflict are protected either as prisoners of war (hereinafter "POW") (Article 4 GCIII) or as other "protected persons" (all persons, in particular civilians, who are not nationals of the detaining Power or are not protected by other Conventions, Article 4 GCIV). The plain wording of Article 4 (1) and (4) GC IV makes it clear that there should be no category of persons that would remain unprotected. As the Commission has pointed out before, even those persons who do not fulfil the nationality requirements of Article 4 GC IV are protected by customary international humanitarian law, as it has been given expression in Article 75 of the First Additional Protocol of 1977 to the Geneva Conventions.

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83. Persons who are suspected to be members of an international terrorist network, such as Al-Qaeda, and who have been arrested in connection with an armed conflict, will fall either into the category of other "protected persons" or into the category of POWs.

84. As far as the Fourth Geneva Convention, the First Additional Protocol and customary international humanitarian law apply, all protected persons, including terrorist suspects, must be treated according to the rules laid down in Articles 27-78 GCIV and the minimum requirements of Article 75 of the First Additional Protocol. This has been confirmed in recent years by national courts. [51]

85. In the case that suspected members of international terrorist networks qualify as POWs, their transfer would be regulated by the Third Geneva Convention (see in particular Articles 12 and 46-48).

D. General principles of civil aviation

86. International air law has a codified framework in the Convention on International Civil Aviation (commonly referred to as the "Chicago Convention"), signed in Chicago on 7 December 1944.

87. The Chicago Convention sets out in Article 1 the principle that every State has complete and exclusive sovereignty over the airspace above its territory, that is to say above the land areas and territorial waters adjacent thereto.

88. Article 4 of the Chicago Convention provides that: *"Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention"*.

89. The Chicago Convention sets out the regime for civil aircraft and civil aviation. According to Article 3 (a), such regime does not apply to State aircraft.

90. Under the Convention, aircraft "used in military, customs and police services" are deemed to be state aircraft (Article 3(b)). This presumption, however, is not irrebuttable [52]. Moreover, aircraft engaged in other state activities such as coast guard and search and rescue could also be either state aircraft or civil aircraft in the sense of the Convention. [53]

91. It has generally been admitted [54] that, in case of doubt, the status of an airplane as "civil aircraft" or "state aircraft" will be determined by the function it actually performs at a given time [55]. As a general rule, "aircraft are recognised as state aircraft when they are under the control of the State and used exclusively by the State for state intended purposes" [56]. Accordingly, the same airplane can be considered to be "civil aircraft" and "state aircraft" on different occasions.

92. Civil aircraft that are not engaged in scheduled international air services of a State party to the Chicago Convention [57] are entitled to make flights into or in transit non-stop across the territory of another State party and to make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of the State flown over to require landing. The authorities of each State party have the right, without unreasonable delay, to search aircraft of the other State party on landing or departure, and to inspect the certificates and other documents prescribed by the Chicago Convention (Article 16).

93. State aircraft do not enjoy the overflight rights of civil aircraft. According to Article 3 (c), state aircraft are not permitted to fly over or land in foreign sovereign territory otherwise than with express authorisation of the State concerned, and in harmony with the terms of such authorisation. Such authorisation must be given by special agreement "or otherwise"; the practice of States indicates that the preferred form is a bilateral or multilateral agreement between the States concerned, valid for a given period of time, one year for example, or general permissions, or "ad hoc" permissions properly obtained through the diplomatic channels. In the latter case, the diplomatic notes are to be submitted to the competent authorities - to the Ministry of Foreign Affairs, for example - prior to the operation of the flight and usually contain *inter alia* the name of the foreign air operator, the type of aircraft and its registration and identification, the proposed flight routing (including last point of departure outside the State, the first point of entry, the date and time of arrival, the place of embarkation or disembarkation

abroad of passengers or freight), the purpose of the flight (number of passengers and their names).

94. If "state aircraft" enter the foreign sovereign air space without a proper authorisation, they may be :

- intercepted for purposes of identification;
- directed to leave the violated air space;
- directed to land for the purpose of further investigation/prosecution;
- forced to land for further investigation/prosecution [58].

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95. Under customary international law [59], state aircraft enjoy immunity from foreign jurisdiction in respect of search and inspection. Accordingly, they cannot be boarded, searched or inspected by foreign authorities, including host State's authorities, without the captain's consent. However, because state aircraft need authorisation to enter another State's airspace, the extent of their immunity is conditioned on such an authorisation pursuant to Article 3 (c) of the Chicago Convention [60].

96. A mere operational air traffic control clearance for the flight is not sufficient to satisfy the requirement for permission under Article 3 (c) [61], unless this corresponds to an accepted practice.

97. Article 3bis para. b) of the Chicago Convention provides that:

> *[E]very State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph a) of this Article [62]. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.*

98. The flag State of the violating aircraft is internationally responsible for the infraction; the consequences of such responsibility would impact on the overall relations of the States concerned and can range from the duty to apologise, a promise to penalise the individuals responsible, a promise not to repeat the infraction and so on, to more severe sanctions.

99. Pursuant to Article 54 of the Chicago Convention, any action which may be considered as an infraction, breach, violation or infringement of the Convention is potentially subject to action by the Council of the International Civil Aviation Organisation (ICAO) under Article 54 (j) or (k). For example, a contracting State which by its action contravenes the principle in Article 1 that every State has complete and exclusive sovereignty over the airspace above its territory, can be considered committing an infraction of the Convention. A similar conclusion could be drawn in respect of a State which by its action disregards the scope of "territory" given in Article 2; or whose regulations for State aircraft do not show "due regard for the safety of navigation of civil aircraft" (Article 3 (d)); or which uses weapons against civil aircraft in flight contrary to Article 3 *bis*; or which uses civil aviation for any purpose inconsistent with the aims of the Chicago Convention (Article 4). Infractions may be brought before the Council by a Contracting State or a group of Contracting States.

100. As long as an airplane is in the air and not on the ground, persons on board are subject to the concurrent jurisdiction of both the national State of the airplane and the territorial State [63]. In this context, it should be noted that Article 4 of the Convention on Offences and Certain other Acts Committed on Board Aircraft (the Tokyo Convention) [64], to which practically all Council of Europe member States are party, provides that:

"A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:
(a) the offence has effect on the territory of such State;
(b) the offence has been committed by or against a national or permanent resident of such State;
(c) the offence is against the security of such State;
(d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;
(e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement."

101. This provision does not limit the jurisdiction of the territorial State but only the exercise of its right to interfere with an aircraft in flight. In the first place, serious offences of abduction, torture etc. certainly have "effect" on the territorial state. Where the conditions of a prisoner on a plane do not in themselves constitute inhuman or degrading treatment, all acts involved in transferring by air a prisoner to a place where he or she runs a real risk of being tortured may not necessarily be criminal offences in the territorial State. This will depend upon how the relevant offences and inchoate offences (preparation, conspiracy etc.) are formulated in the law in the territorial State (e.g. whether the acts in question constitute a continuing offence of abduction) and that State's rules on extraterritorial crime, in particular, whether the deliberate handing over of a person to extraterritorial torture is an offence. It should be stressed however that the obligations of a Council of Europe member State to ensure protection of human rights (see above, paras. 62-67, and below para. 146) are not limited simply to enforcing its criminal law. Thus, it is not decisive that, in a particular case, a territorial State may not, in fact, make all acts involved in transfer punishable, or exercise jurisdiction over these. In addition, according to subparagraph (e) of Article 4 of the Tokyo Convention, the limitation of the exercise of the right of the territorial State to interfere with an aircraft in flight does not apply when "the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement", such as the European Convention of Human Rights. Therefore, if the positive obligations arising under the ECHR require a member State of the Council of Europe to investigate possible violations of human rights committed in an aircraft in flight through its airspace, this member State is not barred by the Tokyo Convention to interfere with this aircraft in flight.

102. The question arises in this context of what would be the status of an airplane registered in the flag State as civil aircraft but carrying out "State functions" (such as special missions for the transport of prisoners) which entered the airspace of another State without seeking a specific authorisation or without following the applicable procedures for State aircraft.

103. In the opinion of the Venice Commission, state aircraft can only claim immunity inasmuch as they make their state function known to the territorial State through the appropriate channels. If the public purpose was not declared in order to circumvent the requirement of obtaining the necessary permission(s), then the State will be estopped from claiming State aircraft status [65] and the airplane will be deemed to be civil and thus falling within the scope of application of the Chicago Convention,

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including its Article 16 providing for the territorial State's right to search and inspection. The territorial State could request the airplane to land and could proceed to search and inspection and take the necessary measures to put an end to possible violations it might identify [66]. In addition, the flag State would face international responsibility for the breach of Article 4 of the Chicago Convention and of customary international law.

104. The relations between air law and human rights law will be analysed below (see paras 144-152).

E. Military bases

105. The lawfulness of the presence of the armed forces of one State on the territory of another State in peacetime is contingent on the consent of the host State. The initial decision to admit the force may take the form of a bilateral or multilateral treaty, often defence agreements. There follows a decision by the receiving State granting the use of facilities on its soil, which is normally done through a further agreement.

106. A State does not abandon its sovereignty when it consents to the presence of foreign armed forces on its territory. It guarantees the enjoyment of the privilege of user of its territory accorded to the sending State; it retains however the right to regulate this privilege within the framework of the applicable treaties and agreements. It follows that the sending State acquires various powers pertaining to the operation of its defence forces on a territory that remains subject to the sovereignty of the host State. The sending State may lawfully claim in or over the territory of the receiving State, only those rights and powers that are connected directly with the establishment and operation of, and access to, the sites at which the foreign forces and installations are located. The principle of sovereignty dictates that any further rights and powers can derive only from an express grant by the receiving States. In particular, the extent of the right for the receiving State to search a foreign military base on its territory depends on the terms of the defence agreement or of the "Status-of-forces agreement" (SOFA) [67].

107. SOFAs between the host State and a State stationing military forces in the host State define the legal status of the sending State's personnel and property in the territory of the host State. They are usually an integral part of the overall military bases agreements that allow the sending State's military forces to operate within the host State [68].

108. Foreign armed forces whose admission has been consented to by the receiving State are, as a rule, not subject to the normal immigration controls and entry formalities applicable to foreign nationals. The NATO-SOFA agreement provides that "members of a force shall be exempted from passport and visa regulations and immigration inspection on entering or leaving the territory of a receiving State. They shall also be exempt from the regulations of the receiving State on the registration and control of aliens" [69]. This waiver of entry procedures is counter-balanced by the requirement for members of the force, to present on demand, whether on entry or at any time thereafter, identification and an individual or collective movement order certifying the status of the individual as a member of a force [70]. The receiving State has a discretion whether to require a movement order to be countersigned by its authorised representatives. Exemption from entry formalities is made conditional on compliance with the formalities established by the receiving State relating to the entry and departure of a force or the members thereof.

109. The sending State must have access to the base and, where it has more than one base on the territory of the same State, it must be allowed movement between them. To deny access would amount to a derogation from the grant made by the host State. It is therefore common for military base agreements to authorise the sending State to have access to its forces and to the ports or airfields which it has been accorded in the host State. This authorisation is essential, as in relation to public vessels and aircraft there is no right of access under customary international law. It is, however, often the practice in bilateral treaties for entry to the ports of the receiving State to be subject to "appropriate notification under normal conditions" made to the authorities of the latter [71].

110. The sending State does not benefit from an unrestricted freedom of movement within, and overflight of, the receiving State, unless such rights are expressly granted in a base agreement. In any case, the national and international law that is applicable to military bases cannot, and does not claim to, diminish the obligations and responsibilities of the member States of the Council of Europe under human rights treaties.

F. Article V of the NATO Treaty [72]

111. Article V is the core clause of the Washington Treaty, NATO's founding charter. It states that an armed attack against one Ally shall be considered an attack against them all. In response to an invocation of Article 5, each Ally determines, in consultation with other Allies, how it can best contribute to any action deemed necessary to restore and maintain the security of the North Atlantic area, including by the use of armed force.

112. Article V was first invoked on 12 September 2001 immediately following the 11 September terrorist attacks against the United States. The invocation was initially provisional, pending determination that the attacks were directed from abroad. This was confirmed on 2 October 2001, after US officials presented findings on investigations into the attacks to the North Atlantic Council, concluding that the Al-Qaeda terrorist network was responsible.

113. On 4 October 2001, the Allies agreed on a series of measures to assist the US-led campaign against Al-Qaeda and related terrorism [73]. These include enhanced intelligence sharing and cooperation, blanket over-flight clearances in accordance with the necessary air traffic arrangements and national procedures, and access to ports and airfields for US and other Allied craft for operations against terrorism.

114. In application of this agreement, certain NATO member-States granted US (and NATO member States') aircraft either blanket over-flight clearances for certain time-periods, or overflight rights upon request [74].

115. Article V of the North Atlantic Treaty does not contain an obligation for member States of the Council of Europe to allow irregular transfers of prisoners or to grant blanket overflight rights, for the purposes of fighting against terrorism. That treaty provision at most contains an obligation to take measures, including cooperation and consent, into consideration; but leaves any decision as to concrete measures to the appreciation of the State concerned of the necessity of such measures in order to restore and maintain security. In addition, neither Article 5 of the North Atlantic Treaty nor any Agreements in execution thereof can, or claim to, diminish the obligations and responsibilities of

member States of the Council of Europe under human rights treaties.

SECTION II – THE INTERNATIONAL LEGAL OBLIGATIONS OF COUNCIL OF EUROPE MEMBER STATES

A. Council of Europe member States' obligations in respect of arrests by foreign authorities on their territory

116. A State party to the European Convention on Human Rights is presumed to exercise its jurisdiction over its whole territory. Any arrest of a person by foreign authorities on the territory of a Council of Europe member State without the agreement of this member State is a violation of its sovereignty and is therefore contrary to international law. In addition, the now defunct European Commission of Human Rights has stated that "an arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not only involve the State responsibility vis-à-vis the other State, but also affects that person's individual right to security under Article 5 § 1".[75]

117. The European Court of Human Rights has clearly expressed how the responsibility of a Council of Europe member State is engaged in relation to the arrest of an individual on its territory by foreign authorities: irrespective of whether the arrest amounts to a violation of the law of the State in which the suspect has been arrested, the responsibility of the host State is engaged unless it can be proved that the authorities of the State to which the applicant has been transferred have acted extra-territorially and without consent, and consequently in a manner that is inconsistent with the sovereignty of the host State.[76]

118. Any form of involvement of the Council of Europe member State or receipt of information prior to the arrest taking place entails responsibility under Articles 1 and 5 ECHR (and possibly Article 3 in respect of the modalities of the arrest). A State must thus prevent the arrest from taking place, unless the arrest is effected by the foreign authorities in the exercise of their jurisdiction under the terms of an applicable SOFA (see footnote 68 above).

119. The responsibility of the Council of Europe member States is engaged also in the case that some section of its public authorities (police, security forces etc.) has co-operated with the foreign authorities or has not prevented an arrest *without government knowledge*. This situation raises the question of governmental control over the security/police services, and possibly, if the applicable national law so foresees, of parliamentary control over the government.

120. Different European States exercise different systems for political insight into, and control over, the operations of the security and intelligence services, depending upon constitutional structure, historical factors etc. Different mechanisms exist for ensuring that particularly sensitive operations are subject to approval and/or adequate control. Meaningful government accountability to the legislature is obviously conditioned upon meaningful governmental control over the security and intelligence services[77]. Where the law provides for governmental control, but this control does not exist in practice, the security and intelligence services risk becoming a "State within a State". Where, on the other hand, the law provides for a degree of distance between government ministers and officials and the day-to-day operations of the security and intelligence services, but government ministers in fact exercise influence or even control over these operations, then the phenomenon of "deniability" can

arise. In such a case, the exercise of power is concealed, and there is no proper accountability. The Statute of the Council of Europe and the ECHR require respect for the rule of law which in turn requires accountability for *all* exercises of public power. Independently of how a State chooses to regulate political control over security and intelligence agencies, in any case effective oversight and control mechanisms must exist to avoid these two problems. [78]

B. Council of Europe member States' obligations in respect of alleged secret detention facilities

121. The term "secrecy" can have different meanings. In the context of the present opinion, the problematic aspect of the secrecy of detention lies in the first place in the impact which such secrecy has on the prisoner's defence rights under Articles 5 and 6 ECHR. [79] In addition, prolonged secret detention may impinge on Article 3 and on other aspects of Article 6 ECHR. [80]

122. For a State to provide facilities to another State to conduct voluntary interviews with suspects on its territory is, in principle, not in violation of international law. On the contrary, it is a feature of most modern Mutual Assistance Treaties. It depends upon the territorial States' constitutional and administrative rules on the exercise of public power whether this can go so far as involuntary interrogation. Some States will not allow any but their own officials to exercise public power on their territory. Others make exceptions by treaty rules [81].

123. The territorial State retains its full jurisdiction within the meaning of Article 1 ECHR over any place on its territory where such interviews take place, including any ad hoc detention facilities: : that State is therefore responsible for any infringement of the ECHR in relation to any suspect treated in violation of Articles 3 and 5, e.g. any prisoners who may be held incomunicado there. The modalities of the interrogation and detention, and of treatment given, need to comply with the standards of the European Convention on Human Rights.

124. *Incomunicado* detention, that is detention without the possibility of contacting one's lawyer and of applying to a court, is clearly not "in accordance with a procedure prescribed by law" of any of the member States of the Council of Europe, if alone because the detention is not subject to judicial review. For the detainee, it is not possible to exercise his entitlement to *habeas corpus* guaranteed by Article 5, paragraph 4. The unlike possibility that such a detention is "in accordance with a procedure prescribed by law" under the law of the foreign State by whose authorities the detention was ordered and executed, is irrelevant for the issue of the responsibility under the European Convention on Human Rights of the State on whose territory it takes place.

125. If and in so far as *incomunicado* detention takes place, is made possible or is continued on the territory of a member State of the Council of Europe, in view of its secret character that detention is by definition in violation of the European Convention on Human Rights and the applicable domestic law of that State.

126. Active and passive co-operation by a Council of Europe member State in imposing and executing secret detentions engages its responsibility under the European Convention on Human Rights. The European Court of Human Rights has ruled that "the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other

[82]
individuals within its jurisdiction may engage the State's responsibility under the Convention" . This is even more true in respect of acts of agents of foreign States.

127. While no such responsibility applies if the detention is carried out by foreign authorities without the territorial State actually knowing it, the territorial State must take effective measures to safeguard against the risk of disappearance and must conduct a prompt and effective investigation into a substantiated claim that a person has been taken into unacknowledged custody.

128. The possible obligation by a Council of Europe member State under bilateral or multilateral treaties to co-operate in prosecution measures does not affect or diminish this State's obligation not to allow or contribute to secret detention on its territory.

[83]
129. As the European Court of Human Rights has pointed out , the opinion of the State under whose authority the detention is decided and executed concerning the issue of whether the detention is in violation of fundamental rights is not conclusive for the question of whether cooperation engages responsibility of a member State of the Council of Europe under the European Convention on Human Rights; only the relevant provisions of the latter Convention, as interpreted by the European Court of Human Rights, are decisive. This means, for instance, that the opinion which has been put forward in certain quarters with respect to the US Government that "cruel and unusual punishment", if applied outside US territory, does not violate the US Constitution, is of no relevance whatsoever for the question of responsibility of member States under the European Convention on Human Rights. It also means that the individual opinion of specific Governments, or of certain public persons, about possible limits to the absolute character of the scope of the prohibition of torture are not relevant either. In addition to the interpretation given by the European Court of Human Rights concerning the absolute character of the prohibition of torture, Article 2, paragraph 2, of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment expressly states that there is no room whatsoever and under any circumstances to justify torture B5

130. If a State is informed or has reasonable grounds to suspect that any persons are held *incomunicado* at foreign military bases on its territory, despite its limited jurisdiction over foreign military bases, its responsibility under the European Convention on Human Rights is still engaged, unless it takes all measures which are within its power in order for this irregular situation to end.

131. As a rule, a State cannot search foreign military bases on its territory unless this is allowed under the relevant treaties or unless the host State is authorised by the sending State to do so. However, the right to detain non-military personnel does not fall under the ordinary rights and powers that are connected directly with the establishment and operation of the sites at which the foreign forces and installations are located (see para. 106 above), unless the site falls under the jurisdiction of the sending State under the applicable SOFA, such as the NATO-SOFA (see footnote 68 above). B5

132. The host State is therefore entitled and even obliged to prevent, and react to such abuse of its territory. It could exercise its powers in respect of registration and control of aliens, and demand identification and movement orders of those present on the military base in question. Access to such military bases, assuming that it had been freely granted under the military base agreement, would require notification under normal conditions. In addition, appropriate diplomatic channels can be used in order to protest against such practice.

133. The case might arise that some section of the public authorities of the Council of Europe member State (police, security forces etc.) is informed and tolerates, or fails to prevent or even co-operates in

the maintenance of secret detentions without government knowledge. While this situation raises the already mentioned constitutional issue of control over security forces, the State remains responsible under the European Convention on Human Rights.

134. States which have ratified the European Convention for the Prevention of Torture have the obligation to co-operate with the Committee for the Prevention of Torture and to provide it with a list of all the detention centres which are present on their territory. CPT must have access to all and any of these detention centres. Failure by a State to inform CPT of any detention facility can be seen as a lack of co-operation within the meaning of Article 3 ECPT [84], which, if not clarified appropriately, can result in procedures towards a public statement under Art 10(2) [85].

135. As concerns international humanitarian law, the Geneva Conventions (Articles 126 of GCIII and 143 GCIV) grant the International Committee of the Red Cross "permission to go to all places where prisoners of war or protected persons may be, particularly to places of internment, imprisonment and labour", and "access to all premises occupied by" them, including "the places of departure, passage and arrival of prisoners who are being transferred". Responsibility could arise in this respect too.

136. Insofar as detention can be "secret" vis-à-vis the national authorities, the Commission considers that a State is exempted from responsibility only if and as long as it does not have any knowledge of a detention carried out by foreign agents in breach of its territorial sovereignty. However, if any branch of the State is involved in or informed about the detention, irrespective of their acting *ultra vires*, the responsibility of the State as a subject of international law is engaged (see paras. 38-43 above).

C. Council of Europe member States' obligations in respect of inter-state transfers of prisoners

137. There are only four legal ways of transferring a prisoner to foreign authorities: deportation, extradition, transit and transfers of sentenced persons for the purpose of their serving the sentence in their country of origin.

138. Extradition and deportation proceedings must be specified by the applicable law, and the prisoners must be given access to the competent authorities. In addition, extradition and deportation proceedings cannot be carried out where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 of the ECHR and of the UN Convention against Torture in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to such a country.

139. In this context, it is worth underlining that Council of Europe member States are under an obligation to prevent prisoners' *exposure to the risk* of torture: the violation does not depend on whether the prisoner is eventually subjected to torture.

140. The assessment of the reality of the risk must be carried out very rigorously. The risk assessment will depend upon the circumstances, meaning both the rights which risk being violated and the situation in the receiving State. The diplomatic assurances which are usually provided by the requesting State in order to exclude human rights breaches in its territory after the extradition or deportation is carried out may be appropriate as concerns risks of application of the death penalty or for fair trial violations, because such risks can in most instances be monitored satisfactorily. On the [86]

other hand, as regards the risk of torture, monitoring is impracticable in the vast majority of conceivable cases, especially bearing in mind the fact that, even after conviction in a criminal case, a State may torture a prisoner for the purpose of obtaining information. At the same time, it is impracticable to have a "life-long" responsibility for people who are removed out of the country.

141. This situation raises the question of the value of diplomatic assurances [87]. In the Venice Commission's view, the acceptance of such assurances is in principle the expression of the necessary good faith and mutual trust between friendly States, although, as far as assurances may be regarded as acceptable in principle (see para. 142 below), the terms of the diplomatic assurances need to be unequivocal (for instance, a reference to "torture" or to "inhuman or degrading treatment" should be interpreted within the meaning given to these terms by the ECtHR, the CAT and the HR Committee) and need to reflect the scope of the obligation by which the State which issues them is legally bound.

142. However, this general mutual trust must not prevail over the accurate examination of each specific situation, particularly if there are precedents or even patterns of violation of previously accepted assurances [88]. For example, an important difference between the situation in the Mamatkulov case (see para. 71 above) and later ones is that recent experience has shown that the risk of torture seems to be greater than what was known before, despite assurances. In the Commission's view, under these circumstances the room for accepting guarantees against torture is reduced significantly. Where there is substantial evidence that a country practices or permits torture in respect of certain categories of prisoners, guarantees may not satisfactorily reduce this risk in cases of requests for extradition of prisoners belonging to those categories.

143. The requirement of not exposing any prisoner to the real risk of ill-treatment also applies in respect of the transit of prisoners through the territory of Council of Europe member States: member States should therefore refuse to allow transit of prisoners in circumstances where there is such a risk.

144. The situation may arise that a Council of Europe member State has serious reasons to believe that the mission of an airplane crossing its airspace is to carry prisoners with the intention of transferring them to countries where they would face ill-treatment.

145. If such an airplane does not require landing, as long as the plane is in the air, all persons on board are subject to the jurisdiction of both the flag State and the territorial State. In the Commission's view, Council of Europe member States' responsibility under the European Convention on Human Rights is engaged if they do not take the preventive measures which are within their powers. In addition, their responsibility for aiding another State to commit an unlawful act would be at issue. It follows, in the Commission's view, that the territorial State is entitled to, and must take all possible measures in order to prevent the commission of human rights violations in its territory, including in its air space.

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146. There are obviously practical difficulties involved in securing the effective enjoyment of Convention rights in aircraft transiting a Council of Europe member State's airspace or military base for foreign forces on its territory. Without prejudice to the wider question of how such difficulties can affect the scope of a State's obligations to secure generally the rights under the Convention, the case-law of the European Court of Human Rights makes it clear that the State's duty to secure the most elementary rights at issue in the present case (right to security of person; freedom from torture and right to life) continues to apply, regardless of acquiescence or connivance [89].

147. The territorial State possesses a different course of action in respect of the suspect airplane,

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depending on its status.

148. If the state airplane in question has presented itself as if it were a civil plane, that is to say it has not duly sought prior authorisation pursuant to Article 3 c) of the Chicago Convention, it is in breach of the Chicago Convention : the territorial State may therefore require landing. The airplane having failed to declare its State functions, it will not be entitled to claim State aircraft status and subsequently not be entitled to immunity : the territorial State will therefore be entitled to search the plane pursuant to Article 16 of the Chicago Convention and take all necessary measures to secure human rights. In addition, it will be entitled to protest through appropriate diplomatic channels.

149. If the plane has presented itself as a State plane and has obtained overflight permission without however disclosing its mission, the territorial State can contend that the flag State has violated its international obligations. The flag State could thus face international responsibility. The airplane however will, in principle, be entitled to immunity according to general international law and to the applicable treaties: the territorial State will therefore be unable to search the plane, unless the captain consents.

150. However, the territorial State may refuse further overflight clearances in favour of the flag State or impose, as a condition therefore, a duty to submit to searches. If the overflight permission derives from a bilateral treaty or a SOFA or a military base agreement, the terms of such treaty might be questioned if and to the extent that they do not allow for any control in order to ensure respect for human rights, or their abuse might be advanced. In this respect, the Venice Commission recalls that the legal framework concerning foreign military bases on the territory of Council of Europe member States must enable the latter to exercise sufficient powers to fulfil their human rights obligations.

151. While mutual trust and economic and military co-operation amongst friendly States need to be encouraged, in granting foreign state aircraft authorisation for overflight, Council of Europe member States must secure respect for their human rights obligations. This means that they may have to consider whether it is necessary to insert new clauses, including the right to search, as a condition for diplomatic clearances in favour of State planes carrying prisoners. If there are reasonable grounds to believe that, in certain categories of cases, the human rights of certain passengers risk being violated, States must indeed make overflight permission conditional upon respect of express human rights clauses. Compliance with the procedures for obtaining diplomatic clearance must be strictly monitored; requests for overflight authorisation should provide sufficient information as to allow effective monitoring (for example, the identity and status (voluntary or involuntary passenger) of all persons on board and the destination of the flight as well as the final destination of each passenger). Whenever necessary, the right to search civil planes must be exercised.

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152. With a view to discouraging repetition of abuse, any violations of civil aviation principles in relation to irregular transport of prisoners should be denounced, and brought to the attention of the competent authorities and eventually of the public. Council of Europe member States could bring possible breaches of the Chicago Convention before the Council of the International Civil Aviation Organisation pursuant to Article 54 of the Chicago Convention.

153. As regards the treaty obligations of Council of Europe member States, the Commission considers that there is no international obligation for them to allow irregular transfers of prisoners to or to grant unconditional overflight rights, for the purposes of fighting terrorism. In the Commission's opinion, therefore, States must interpret and perform their treaty obligations, including those deriving from the NATO treaty and from military base agreements and SOFAs, where these are applicable, in a manner compatible with their human rights obligations. As regards notably the NATO treaty, the Commission stresses that this principle is expressed in Article 7 according to which "[t]his Treaty does not affect,

and shall not be interpreted as affecting in any way the rights and obligations under the Charter [of the United Nations] of the Parties which are members of the United Nations." Even if NATO member states have undertaken obligations concerning irregular transfer or unconditional overflight, the Commission recalls that if the breach of a treaty obligation is determined by the need to comply with a peremptory norm (*jus cogens*), it does not give rise to an internationally wrongful act. As underlined above (para. 43), the prohibition of torture is a peremptory norm.

CONCLUSIONS

154. Council of Europe member States are under an obligation to fight terrorism, but in doing so they must safeguard human rights.

155. Council of Europe member States are under an international legal obligation to secure that everyone within their jurisdiction (see para. 146 above) enjoy internationally agreed fundamental rights, including and notably that they are not unlawfully deprived of their personal freedom and are not subjected to torture and inhuman and degrading treatment, including in breach of the prohibition to extradite or deport where there exists a risk of torture or ill-treatment. This obligation may also be violated by acquiescence or connivance in the conduct of foreign agents. There exists in particular a positive duty to investigate into substantiated claims of breaches of fundamental rights by foreign agents, particularly in case of allegations of torture or unacknowledged detention.

156. Council of Europe member States are bound by numerous multilateral and bilateral treaties in different fields, such as collective self-defence, international civil aviation and military bases. The obligations arising out of these treaties do not prevent States from complying with their human rights obligations. These treaties must be interpreted and applied in a manner consistent with the Parties' human rights obligations. Indeed, an implied condition of any agreement is that, in carrying it out, the States will act in conformity with international law, in particular human rights law.

157. The Venice Commission considers that there is room to interpret and apply the different applicable treaties in a manner that is compatible with the principle of respect for fundamental rights. Council of Europe member States must do so. For example, the search of a state airplane which has presented itself as a civil aircraft is allowed under the Chicago Convention and must be effected whenever there are reasonable grounds to suspect that the plane may be used to commit human rights breaches. The relevant inter-state practice must be changed and adapted to this obligation, without however frustrating the legitimate aims pursued by the treaties in question. Diplomatic measures may also need to be taken.

158. To the extent that this due interpretation and application of the existing treaties in the light of human rights obligations is not possible, Council of Europe member States must take all the necessary measures to renegotiate and amend the treaty provisions to this effect.

159. In reply to the questions put by the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe, the Venice Commission has reached the conclusions listed below:

<u>As regards arrest and secret detention</u>

a) Any form of involvement of a Council of Europe member State or receipt of information prior to an arrest within its jurisdiction by foreign agents entails accountability under Articles 1 and 5 of the European Convention on Human Rights (and possibly Article 3 in respect of the modalities of the arrest). A State must thus prevent the arrest from taking place. If the arrest is

effected by foreign authorities in the exercise of their jurisdiction under the terms of an applicable Status of Forces Agreement (SOFA), the Council of Europe member State concerned may remain accountable under the European Convention on Human Rights, as it is obliged to give priority to its *jus cogens* obligations, such as they ensue from Article 3.

b) Active and passive co-operation by a Council of Europe member State in imposing and executing secret detentions engages its responsibility under the European Convention on Human Rights. While no such responsibility applies if the detention is carried out by foreign authorities without the territorial State actually knowing it, the latter must take effective measures to safeguard against the risk of disappearance and must conduct a prompt and effective investigation into a substantiated claim that a person has been taken into unacknowledged custody.

c) The Council of Europe member State's responsibility is engaged also in the case where its agents (police, security forces etc.) co-operate with the foreign authorities or do not prevent an arrest or unacknowledged detention *without government knowledge*, acting *ultra vires*. The Statute of the Council of Europe and the European Convention on Human Rights require respect for the rule of law, which in turn requires accountability for *all* form of exercise of public power. Regardless of how a State chooses to regulate political control over security and intelligence agencies, in any event effective oversight and control mechanisms must exist.

d) If a State is informed or has reasonable suspicions that any persons are held *incomunicado* at foreign military bases on its territory, its responsibility under the European Convention on Human Rights is engaged, unless it takes all measures which are within its power in order for this irregular situation to end.

e) Council of Europe member States which have ratified the European Convention for the Prevention of Torture must inform the European Committee for the Prevention of Torture of any detention facility on their territory and must allow it to access such facilities. Insofar as international humanitarian law may be applicable, States must grant the International Committee of the Red Cross permission to visit these facilities.

As regards inter-state transfers of prisoners

f) There are only four legal ways for Council of Europe member States to transfer a prisoner to foreign authorities: deportation, extradition, transit and transfer of sentenced persons for the purpose of their serving the sentence in another country. Extradition and deportation proceedings must be defined by the applicable law, and the prisoners must be provided appropriate legal guarantees and access to competent authorities. The prohibition to extradite or deport to a country where there exists a risk of torture or ill-treatment must be respected.

g) Diplomatic assurances must be legally binding on the issuing State and must be unequivocal in terms; when there is substantial evidence that a country practices or permits torture in respect of certain categories of prisoners, Council of Europe member States must refuse the assurances in cases of requests for extradition of prisoners belonging to those categories.

h) The prohibition to transfer to a country where there exists a risk of torture or ill-treatment also applies in respect of the transit of prisoners through the territory of Council of Europe member States: they must therefore refuse to allow transit of prisoners in circumstances where there is such a risk.

As regards overflight

i) If a Council of Europe member State has serious reasons to believe that an airplane crossing its airspace carries prisoners with the intention of transferring them to countries where they would face ill-treatment in violation of Article 3 of the European Convention on Human Rights, it must take all the necessary measures in order to prevent this from taking place.

j) If the state airplane in question has presented itself as a civil plane, that is to say it has not duly sought prior authorisation pursuant to Article 3 c) of the Chicago Convention, the territorial State must require landing and must search it. In addition, it must protest through appropriate diplomatic channels.

k) If the plane has presented itself as a state plane and has obtained overflight permission without however disclosing its mission, the territorial State cannot search it unless the captain consents. However, the territorial State can refuse further overflight clearances in favour of the flag State or impose, as a condition therefor, the duty to submit to searches; if the overflight permission derives from a bilateral treaty or a Status of Forces Agreement or a military base agreement, the terms of such a treaty should be questioned if and to the extent that they do not allow for any control in order to ensure respect for human rights.

l) In granting foreign state aircraft authorisation for overflight, Council of Europe member States must secure respect for their human rights obligations. This means that they may have to consider whether it is necessary to insert new clauses, including the right to search, as a condition for diplomatic clearances in favour of State planes carrying prisoners. If there are reasonable grounds to believe that, in certain categories of cases, the human rights of certain passengers risk being violated, States must indeed make overflight permission conditional upon respect of express human rights clauses. Compliance with the procedures for obtaining diplomatic clearance must be strictly monitored; requests for overflight authorisation should provide sufficient information as to allow effective monitoring (for example, the identity and status (voluntary or involuntary passenger) of all persons on board and the destination of the flight as well as the final destination of each passenger). Whenever necessary, the right to search civil planes must be exercised.

m) With a view to discouraging repetition of abuse, any violations of civil aviation principles in relation to irregular transport of prisoners should be denounced, and brought to the attention of the competent authorities and eventually of the public. Council of Europe member States could bring possible breaches of the Chicago Convention before the Council of the International Civil Aviation Organisation pursuant to Article 54 of the Chicago Convention.

n) As regards the treaty obligations of Council of Europe member States, the Commission considers that there is no international obligation for them to allow irregular transfers of prisoners or to grant unconditional overflight rights, for the purposes of combating terrorism. The Commission recalls that if the breach of a treaty obligation is determined by the need to comply with a peremptory norm (*jus cogens*), it does not give rise to an internationally wrongful act, and the prohibition of torture is a peremptory norm. In the Commission's opinion, therefore, States must interpret and perform their treaty obligations, including those deriving from the NATO treaty and from military base agreements and Status of Forces Agreements, in a manner compatible with their human rights obligations.

160. The Venice Commission hopes that this opinion will assist the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe in the completion of the

inquiry into these matters. The Commission also hopes that this opinion will assist the Secretary General of the Council of Europe in his ongoing inquiry under Article 52 of the European Convention on Human Rights. The Commission is ready to pursue its reflection on these matters, if so requested.

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[1]
Article 1, Protocol 7 to the ECHR (Procedural safeguards relating to expulsion of aliens) provides:

"1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: a to submit reasons against his expulsion, b to have his case reviewed, and c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security." Similarly, Article 13 of the International Covenant on Civil and Political Rights provides:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

[2]
European Court of Human Rights, Klass and others v. Federal Republic of Germany judgment of 24 October 1979, § 55.

[3]
ETS no. 24. The European Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States simplifies and speeds up the procedure of extradition between EU member States, by requiring each national judicial authority (the executing judicial authority) to recognise, ipso facto, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority). As of 1 July 2004, it has replaced for the EU member States the 1957 European Extradition Convention and the 1978 European Convention on the suppression of terrorism as regards extradition; the agreement of 26 May 1989 between 12 Member States on simplifying the transmission of extradition requests; the 1995 Convention on the simplified extradition procedure ; the 1996 Convention on extradition and the relevant provisions of the Schengen agreement.

[4]
Article 7 ECHR.

[5]
ETS no. 90.

[6]
The Explanatory report on the European Convention on Extradition underlines that different approaches were taken by the different States as to whether the transport of a person on board of a ship or aircraft of the nationality of a country other than the requesting or requested Parties was to be considered as transit through the territory of that country. This question was left to be settled in practice (see Explanatory Report on Article 21, at http:/conventions.Council of Europe.int/treaty/en/reports/htlm/024.htm).

[7]
OJ L, 321, 6.12.2003, p. 26.

[8]
The specific human rights obligations for Council of Europe member States in respect of extradition treaties, including this agreement, will be dealt with below (see paras 137-153)

[9]
In the context of the present opinion, the term "prisoner" means "anyone deprived of their liberty by State authorities".

[10]
European Court of Human Rights, Stocké v. Germany judgment of 12 October 1989, Series A no. 199, opinion of the Commission, p. 24, § 167.

[11]
European Court of Human Rights, Soering v. the United Kingdom judgment of 7 July 1989, p. 35, § 89

[12]
European Court of Human Rights, Stocké v. Germany, 12 October 1989, Series A no. 199, opinion of the Commission, p. 24, § 169

[13]
European Convention on the Suppression of Terrorism, ETS 90

[14]
European Convention on the Prevention of Terrorism, ETS No. 196

[15]
European Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, ETS No. 198

[16]
Recommendation Rec(2005)10 of the Committee of Ministers to member States on "special investigation techniques" in relation to serious crimes including acts of terrorism; Recommendation REC(2005)09 of the Committee of Ministers to member States on the protection of witnesses and collaborators of justice; Recommendation Rec(2005)07 of the Committee of Ministers to member States on identity and travel documents and the fight against terrorism.

[17]
See *Müller/Kolb*, Article 2(2), MN. 16, in: Simma (ed.), The Charter of the United Nations – A Commentary, Oxford, 2nd ed. 2002).

[18]
Border and Transborder Armed Actions, Nicaragua v. Honduras, Jurisdiction of the Court and Admissibility of the Application, ICJ Rep. 1988, 69, 105, para. 105.

[19]
See ICTY, Prosecutor v. Furundzija, International Legal Materials 38 (1999) 317, at p. 349; further references in: Andreas Paulus, Jus Cogens in a Time of Hegemony and Fragmentation, Nordic Journal of International Law 74 (2005) 297-334 (at p. 306).

[20]
European Court of Human Rights, Öcalan v. Turkey judgment [GC] of 12 May 2005.

[21]
European Court of Human Rights, Kurt v. Turkey judgment of 25 May 1988, § 124

[22]
Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[23]
European Court of Human Rights, Ireland v. UK judgment of 18 January 1978, § 167

[24]
European Court of Human Rights, Ireland v.UK judgment, § 167.

[25]
European Court of Human Rights Selmouni v. France judgment of 29 July 1999, § 101.

[26]
European Court of Human Rights, Selmouni v. France judgment, § 101.

[27]
European Court of Human Rights, Tyrer v. United Kingdom judgment of 25 April 1978, § 29.

[28]
European Court of Human Rights, Z v. United Kingdom judgment of 10 May 2001; A. v. the United Kingdom judgment of 23 September 1998, § 22.

[29]
European Court of Human Rights, Caloc v. France judgment of 20 July 2000.

[30]

Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment similarly States that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." See para. 146.

[31]

See European Court of Human Rights, Issa v. Turkey judgment of 6 November 2004, §§ 71-74; International Court of Justice, Advisory Opinion on legal consequences of the construction of a wall in the occupied Palestinian territory, 9 July 2004, § 109. See also the views adopted by the Human Rights Committee on 29 July 1981 in the cases of Lopez Burgos v. Uruguay and Celiberti de Casariego v. Uruguay, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively. See Inter-American Commission on Human Rights, Coard v. US, Case 10.951, Report No. 109/99, 29 September 1999, § 37, and Alejandre Cuba, Case 11.589, Report No. 86/99 29 September 1999, § 23.

[32]

Lopez Burgos, No 52/ 1979, § 12.3; Celiberti, No 56/1979, § 103.3; Persons who have fled abroad are not prevented by Art 2 (1) from submitting an individual communication, No 25/1978, § 7.2; No. 74/1980, § 4.1; No. 110/1981, § 6; States parties are responsible for violations of the Covenant by foreign diplomatic representatives, No 31/1978; No 57/1979; Nr 77/1980, No 106/1981; No 108/1981; No. 125/1982

[33]

HRC General Comment 31, § 10.

[34]

See Also Article 33 (Prohibition of expulsion or return ("refoulement")) of the 1951 UN Convention relating to the Status of Refugees. In 1990, the United Nations General Assembly sought to ensure that human rights would receive full respect in the extradition process when it gave approval to the UN Model Treaty on Extradition which excludes extradition not only if there are substantial grounds for believing that the person will be prosecuted or punished in the requesting State on account of his race, religion, nationality, ethnic origin, political opinion, sex or status, or subjected to torture or cruel inhuman or degrading treatment or punishment, but also "if that person has not received or would not receive the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights".

[35]

European Court of Human Rights, Soering v. the United Kingdom judgment of 7 July 1989; Chahal v. United Kingdom judgment, of 15 November 1996, § 80.

[36]

Soering judgment, § 86.

[37]

Soering judgment, §§ 89-91.

[38]

Ahmed Hussein Mustafa Kamil Agiza v. Sweden, Decision CAT/C/34/D/233/2003, 24 May 2005.

[39]

European Court of Human Rights, Mamatkulov and Askerov v. Turkey judgment [GC] of 4 February 2005.

[40]

European Court of Human Rights, Mamatkulov and Askerov judgment, § 76

[41]

European Court of Human Rights, Cruz Varas and others v. Sweden judgment of 20 March 1991, § 75, Mamatkulov and Askerov judgment, § 69; Vilvarajah and others v. UK judgment of 30 October 1991, § 107.

[42]

See e.g. European Court of Human Rights, Aksoy v. Turkey judgment of 18 December 1996, § 62.

[43]

See European Court of Human Rights, Isayeva v. Russian Federation judgment of 24 February 2005, § 191; ICJ, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion of 9 July 2004, para. 127 ("The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory").

[44]

Article 4(1) ICCPR has led to the formulation by the United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, of the so-called Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984). In paras 39-40, under the heading "Public Emergency which Threatens the Life of the Nation", it is said: "39. A State party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant. 40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4".

[45]

Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 11 July 2002, article XV.

[46]

House of Lords, Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004)A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals), [2005] UKHL 71; House of Lords, Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), [2004] UKHL 56; Bundesverfassungsgericht, Aviation Security Act, 1 BvR 357/05; Israeli Supreme Court, Public Committee Against Torture in Israel v. The State of Israel et al., Case HCJ 5100/94; Israeli Supreme Court, The Center for the Defense of the Individual v. The Commander of IDF Forces in the West Bank, Case HCJ 3278/02; Israeli Supreme Court, Marab v. The Commander of IDF Forces in the West Bank, Case HCJ 3239/02; see also US Supreme Court, Rasul v. Bush, Case No. 03-334, 542 US 466 (2004) 321 F.3d 1134.

[47]

See Prosecutor v. Tadic (1996) 105 ILR 419, 488.

[48]

The Manual of the Law of Armed Conflict, UK Ministry of Defence, Oxford (OUP) 2004, no. 3.5.1(at p. 31).

[49]

See Venice Commission's opinion on possible need to further develop the Geneva Convention, CDL-AD (2003)018, § 87.

[50]

Opinion on the possible need for further development of the Geneva Conventions, CDL-AD (2003)018, § 56.

[51]

See Supreme Court of Israel, HCJ 7015/02, Ajuri v. The Commander of the IDF Forces in the West Bank, in: Judgments of the Supreme Court of Israel – Fighting Terrorism within the Law, http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm, at pp. 144-178.

[52]

The Secretariat of the ICAO Council stated that "the predominant view is that all such other aircraft [performing State services other than military, police and customs] would in fact be considered as falling within the scope of the Convention". In the study, it is recalled that under the Paris Convention of 1919 all State aircraft other than military, customs and police aircraft were treated as private aircraft and subjected to all the provisions of the Paris Convention (see Doc. C-WP/9835 of 22/09/1993, Secretariat Study on "Civil/State aircraft" presented by the Secretary General at the ICAO Council 140th Session, § 5.2).

[53]

In Germany, for example, certain flights performing state functions, such as transports of high government officials or humanitarian/disaster relief flights are referred to as "civil State flights" (zivile Staatsflüge) and are regarded as civil flights in the sense of the ICAO Convention (but not necessarily in the sense of general public international law), see Bericht der Bundesregierung (Offene Fassung) gemäß Anforderung des Parlamentarischen Kontrollgremiums vom 25. Januar 2006 zu den Vorgängen im Zusammenhang mit dem Irakkrieg und der Bekämpfung des Internationalen Terrorismus, at http://www.bundesregierung.de/Anlage965868/Bericht+der+Bundesregierung+-+offene+Fassung.pdf., at pp. 62-67.

[54]

ICAO Secretariat Study on "Civil/State Aircraft" LC/29-WP/2-1, Pellet, Dailler, Droit International Public, LGDJ, 7è edition, 2002, pp. 1250; Combacau (J.), Sur (S), Droit international Public, Montchristien, 5è édition, 2001, p. 473; "Status of military aircraft in international law", address at the Third International Law Seminar of 28 August 1999, by Professor Michael Milde, formerly the head of the legal bureau of the International Civil Aviation Organisation, at: http:// www.mindef.gov.sg/dmg/ls/Il399.doc; Diederiks-Verschoor, Introduction to air law, Kluwer, pp. 30 and following.

[55]

In the case of a civil aircraft (B-737, MisrAir flight 2843 from Cairo to Tunis) carrying, on the basis of charter by the Government, suspected terrorists out of the country under Military Police escort and intercepted and forced to land in Italy by the US military based in Italy, the US Government, in a letter to the International Federation of Air Line Pilots Association, stated: "It is our view that the aircraft was operating as a state aircraft at the time of interception. The relevant factors - including exclusive State purpose and function of the mission, the presence of armed military personnel on board and the secrecy under which the mission was attempted - compel this conclusion". This case, quoted in ICAO document LC/29-WP/2-1, pp. 11-12, was cited by Professor Milde, see above, footnote 54. See also A. Cassese, Terrorism, Politics and Law, the Achille Lauro case, Polity Press, p. 39.

[56]

Diederiks-Verschoor, Introduction to air law, Kluwer, pp. 30 § 12 . See also footnote 52.

[57]

Status of ratifications of the Chicago Convention available at: http://www.ICAO.int/ICDB/HTML/English/Representative%20Bodies/Council/Working%20Papers%20by% 20Session/163/c.163.wp.11641.en/C.163.WP.11641.ATT.EN.HTM

[58]

See M. Milde, "Status of military aircraft in international law", address at the Third International Law Seminar of 28 August 1999, op. cit.

[59]

The United Nations Convention on Jurisdictional Immunities of States and their Property, signed on 1 March 2004, provides in its Article 3 § 3 that "The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by the State".

[60]

See Pellet, Dailler, Droit International Public, op. cit., p. 1252 ; A. Cassese, Terrorism, Politics and Law, op. cit., p. 39.

[61]

See "Status of military aircraft in international law", address at the Third International Law Seminar of 28 August 1999, by Professor Michael Milde, formerly the head of the legal bureau of the International Civil Aviation Organisation, at: http:// www.mindef.gov.sg/dmg/ls/Il399.doc.

[62]

Para. a) of Article 3bis of the Chicago Convention provides that " The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

[63]

For Germany see Schönke/Schröder, Strafgesetzbuch, 26th ed. 2001, Vor §§ 3-7, para. 30, and § 153 c Strafprozessordnung (Law on Criminal Procedure), according to which the Public Prosecutor *may* abstain from prosecuting a crime which has been committed by a foreigner in a foreign aircraft; this provision presupposes that full jurisdiction over foreign aircraft in flight exists and only gives the Prosecutor a discretionary power not to exercise this jurisdiction, see Meyer-Goßner, Strafprozessordnung, 48th ed. 2005. See also, e.g. Males (French Cour de Cassation, 29 June 1972, 27 June 1973, 73 ILR 698), Public Prosecutor v. Janos V. Austrian Supreme Court 17 May 1972, 71 ILR 229, Air India v. Wiggens, UK House of Lords, 3 July 1980, 77 ILR 276), US v. Georgescu, 723 F. Supp. 912 (1989).

[64]

Tokyo, 14 September 1963, UNTS 704.

[65]

ICJ judgment on the North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Reports 4 at 26 (§ 30).

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

on the INTERNATIONAL legal obligations

of Council of Europe member States

in respect of secret detention facilities

and inter-State transport of PRISONERS

adopted by the Venice Commission

at its 66th Plenary Session

(Venice, 17-18 March 2006)

on the basis of comments by

Mr Iain CAMERON (Substitute Member, Sweden)

Mr Pieter van DIJK (Member, the Netherlands)

Mr Olivier DUTHEILLET de LAMOTHE (Member, France)

Mr Jan HELGESEN (Member, Norway)

Mr Giorgio MALINVERNI (Member, Switzerland)

Mr Georg NOLTE (Substitute Member, Germany)

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UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 12 AUG 2009 200706444

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INTRODUCTION

1. By a letter of 15 December 2005, Mr Dick Marty, chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, requested an opinion of the Commission in respect of the following inter-related matters:

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a) An assessment of the legality of secret detention centres in the light of the Council of Europe member States' international law obligations, in particular the European Convention on Human Rights (ECHR) and the European Convention for the Prevention of Torture. In particular, to what extent is a State responsible if – actively or passively – it permits illegal detention or abduction by a third State or an agent thereof?

b) What are the legal obligations of Council of Europe member States, under human

rights and general international law, regarding the transport of detainees by other States through their territory, including the airspace ? What is the relationship between such obligations and possible countervailing obligations which derive from other treaties, including treaties concluded with non-member States ?

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2. A working group was set up, which was composed of the following members: Mr Iain Cameron, Mr Pieter van Dijk, Mr Olivier Dutheillet de Lamothe, Mr Jan Helgesen, Mr Giorgio Malinverni and Mr Georg Nolte. It was assisted by Ms Simona Granata-Menghini, Head of the Constitutional Co-operation Division.

3. Two working meetings were held in Paris, on 13 January and on 27 and 28 February 2006.

4. The Working Group sought the assistance of the NATO Legal Services and requested clarifications in relation to certain matters of military law as well as certain documents. Regrettably, the Commission was not provided with either of them.

5. The Working Group availed itself of the valuable assistance of the International Civil Aviation Organisation (ICAO), whose Legal Bureau provided documentation about the interpretation of certain provisions of the Chicago Convention on International Civil Aviation. The Commission wishes to express its appreciation and gratitude for the co-operation of the ICAO.

6. The present study was discussed within the Sub-Commissions on International Law and on Democratic Institutions in the course of a joint meeting on 16 March 2006, and was subsequently adopted by the Commission at its 66th Plenary Session (Venice, 17-18 March 2006).

7. The present opinion does not aim, nor does it have the ambition to assess the facts in relation to the current allegations about the existence of secret detention facilities in Europe or about the transport of detainees by the CIA through the territory (including the airspace) of certain European States. This is not the task of the Venice Commission. It is instead the object of the report that is in the process of being prepared by the PACE Legal Affairs Committee.

8. This opinion does not aim at identifying the pertinent internal law and practice of the Council of Europe member-States either. On 21 November 2005, the Secretary General of the Council of Europe decided to use his power of inquiry under Article 52 of the ECHR and invited the Council of Europe member States to furnish an explanation of the manner in which their internal law ensures the effective implementation of the ECHR in relation to secret detention and transport of detainees. On 28 February 2006, the Secretary General presented his report based on the replies submitted by all member States (See the Secretary General's report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, SG/Inf (2006)5).

9. The aim of this opinion is to provide a reply to the questions put by PACE Legal Affairs Committee, and thus to identify the obligations of Council of Europe member States under public international law in general and under human rights law in

particular, in respect of the irregular transport, extradition, deportation or detention of prisoners. In order to be able to do so, the Commission deems that it is necessary to outline at the outset the basic rules under international law, human rights law, humanitarian law and air law (Section I) in respect of detention and inter-State transport of prisoners. The Commission will subsequently proceed with the identification of the specific obligations of Council of Europe member States in these areas (Section II), and will then answer the questions put by PACE (Conclusions).

SECTION I: THE LEGAL REGIME

A. General principles

a. Regular inter-State transfers of prisoners

10. Under international law and human rights law, there are four situations in which a State may lawfully transfer a prisoner to another State: deportation, extradition, transit and transfer of sentenced persons for the purposes of serving their sentence in another country.

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11. *Deportation* is the expulsion from a country of an alien whose presence is unwanted or deemed prejudicial. A person against whom a deportation decision has been taken by an administrative authority must have the possibility of applying to a competent authority [1], preferably a court[2]. Deportation is only possible on the specific grounds indicated by the pertinent national law.

12. *Extradition* is a formal procedure whereby an individual who is suspected to have committed a criminal offence and is held by one State is transferred to another State for trial or, if the suspect has already been tried and found guilty, to serve his or her sentence.

13. Extradition is a process to which both international and national law apply. While extradition treaties may provide for the transfer of criminal suspects or sentenced persons between States, domestic law determines under what conditions and according to which procedure the person concerned is to be surrendered in accordance with such treaties. Extradition legislation varies significantly among the different European countries, notably as concerns the incorporation of treaties into national law, procedural guarantees, especially the respective role of the executive and the judiciary in the extradition process, and the proof (and assurances) required for extradition.

14. In Council of Europe member States, extradition laws must take into consideration, or be interpreted in conformity with constitutional provisions guaranteeing human rights and international human rights treaties and humanitarian law.

15. The 1957 European Convention on Extradition[3] requires, like most bilateral extradition treaties nowadays, respect for the principles of *ne bis in idem* and speciality. It also forbids extradition to a country where the death penalty would be carried out. The same is true if the extraditing State has "substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons". In

addition, the nulla poena principle has to be respected.[4]

16. The 1977 European Convention on the Suppression of Terrorism[5] was adopted with a view to eliminating or restricting the possibility for the requested State of invoking the political nature of an offence in order to oppose an extradition request in respect of terrorist acts. Under this Convention, for extradition purposes, certain specified offences shall never be regarded as "political" (Article 1) and other specified offences may not be regarded as such (Article 2), notwithstanding their political content or motivation. There is no obligation, and even a prohibition to extradite, however, if the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that the position of the person whose extradition is requested may be prejudiced for any of these reasons.

17. *Transit* is an act whereby State B provides facilities for State A to send a prisoner through its territory.

18. Transit is regulated by bilateral and multilateral treaties, *inter alia* Article 21 of the European Convention on Extradition, which provides: B5

1. Transit through the territory of one of the Contracting Parties shall be granted on submission of a request by the means mentioned in Article 12, paragraph 1, provided that the offence concerned is not considered by the Party requested to grant transit as an offence of a political or purely military character having regard to Articles 3 and 4 of this Convention.

2. Transit of a national, within the meaning of Article 6, of a country requested to grant transit may be refused.

3. Subject to the provisions of paragraph 4 of this article, it shall be necessary to produce the documents mentioned in Article 12, paragraph 2.

4. If air transport is used, the following provisions shall apply:

a when it is not intended to land, the requesting Party shall notify the Party over whose territory the flight is to be made and shall certify that one of the documents mentioned in Article 12, paragraph 2.a exists. In the case of an unscheduled landing, such notification shall have the effect of a request for provisional arrest as provided for in Article 16, and the requesting Party shall submit a formal request for transit;

b when it is intended to land, the requesting Party shall submit a formal request for transit.

5. A Party may, however, at the time of signature or of the deposit of its instrument of ratification of, or accession to, this Convention, declare that it will only grant transit of a person on some or all of the conditions on which it grants extradition. In that event, reciprocity may be applied.

6. The transit of the extradited person shall not be carried out through any territory where there is reason to believe that his life or his freedom may be threatened by reason

of his race, religion, nationality or political opinion.

19. Although the wording of Article 21 § 4 a) indicates that States need to "notify" a transit flight, State practice on this matter may vary, and indeed some States do not appear to require notification of transit of a prisoner by air over their territory, when no landing is planned[6].

20. European Council Directive no. 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air[7], underlines that "member States are to implement this Directive with due respect for human rights and fundamental freedoms" and that "in accordance with the applicable international obligations, transit by air should be neither requested nor granted if in the third country of destination or of transit the third-country national faces the threat of inhumane or humiliating treatment, torture or the death penalty, or if his life or liberty would be at risk by reason of his/her race, religion, nationality, membership of a particular social group or political conviction". Pursuant to Article 4 of the Directive,

"1. The request for escorted or unescorted transit by air and the associated assistance measures under Article 5(1) shall be made in writing by the requesting Member State. It shall reach the requested Member State as early as possible, and in any case no later than two days before the transit. This time limit may be waived in particularly urgent and duly justified cases.

2. The requested Member State shall inform the requesting Member State forthwith of its decision within two days. This time limit may be extended in duly justified cases by a maximum of 48 hours. Transit by air shall not be started without the approval of the requested Member State.

Where no reply is provided by the requested Member State within the deadline referred to in the first subparagraph, the transit operations may be started by means of a notification by the requesting Member State.

Member States may provide on the basis of bilateral or multilateral agreements or arrangements that the transit operations may be started by means of a notification by the requesting Member State."

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21. Under this Directive, with respect to any request for transit, the requesting member State must provide the requested member State with information about the third-country national to whom the transit request relates, flight details and further information about the state of health of the person and possible public order concerns.

22. The text of an Agreement on Extradition between the European Union and the USA was finalised in 2003; however, this agreement has, so far, not entered into force in respect of any EU member-State[8]. It provides that a EU member State may authorise transportation through its territory of a person surrendered to the US by a third State, or by the US to a third State. A request for transit shall be made through the diplomatic channel and shall contain a description of the person being transported and a brief description of the facts of the case. Authorization is not required when air transportation is used and no landing is scheduled on the territory of the transit State (which does not

change the obligations of member States of the Council of Europe under human rights treaties, see below, para. 147) ; if an unscheduled landing occurs, the State on whose territory the landing takes place may require a request for transit.

23. States may enter into agreements concerning the *transfer of sentenced persons* for the purpose of serving their sentence in their country of origin. Such procedures are not relevant for this opinion.

b. Irregular inter-State transfers of prisoners[9]

24. A transfer is unlawful or irregular when the government of State B transfers a person from State B to the custody of State A, against his or her consent, in a procedure not set out in law (i.e. not extradition, deportation, transit or transfer with a view to sentence-serving).

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25. The kidnapping of a person by agents of State A on the territory of State B and his or her removal to State A or to a third State is a violation of State B's territorial sovereignty and therefore an internationally wrongful act which engages the international responsibility of State A[10]. what if B consents?

26. Under general international law (see para. 37 below), in such a case State A has to make "full reparation for the injury caused by the internationally wrongful act" at the request of the injured State, which, in this case, would include the return of the person in question. The rights of the person in question vis-à-vis State A depend upon the latter's law, on the applicable human rights obligations.

27. Irregular transfers may take place with the acquiescence of the territorial government. This type of situation raises a human rights issue. For a *Rechtsstaat*, it will also raise the issues of governmental responsibility for acts of its organs and services and of parliamentary control over government.

28. Another form of irregular transfer happens where some section of the public authorities in State B (police, security forces etc.) transfers a person from State B but not in accordance with a procedure set out in law, or even contrary to domestic law. This, in turn, may take the form of official participation in the transfer (arresting and handing over), or facilitating a kidnapping (actively, or passively – not preventing a kidnapping which it was known would occur). The security/police action may occur with or without government knowledge.

29. If there is no legal basis for an active measure (arrest, handing over etc) under national law, then there will be in such cases a breach of national law on arrest, and consequently also a breach of Article 5 of the European Convention on Human Rights. This situation also raises the issue of governmental control over the security/police services, and parliamentary control over the government (see below, §§ 38-43).

30. As regards the terminology used to refer to irregular transfer and detention of prisoners, the Venice Commission notes that the public debate frequently uses the term "rendition". This is not a term used in international law. The term refers to one State obtaining custody over a person suspected of involvement in serious crime (e.g.

terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State. "Rendition" is thus a general term referring more to the result – obtaining of custody over a suspected person – rather than the means. Whether a particular "rendition" is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights law. Thus, even if a particular "rendition" is in accordance with the national law of one of the States involved (which may not forbid or even regulate extraterritorial activities of state organs), it may still be unlawful under the national law of the other State(s). Moreover, a "rendition" may be contrary to customary international law and treaty or customary obligations undertaken by the participating State(s) under human rights law and/or international humanitarian law.

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31. The term "extraordinary rendition" appears to be used when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applying in the State where the person was situated at the time.

c. International co-operation in the fight against terrorism

32. General international law allows States to cooperate in the transport of detainees, provided that such transport is carried out in full respect of human rights and other international legal obligations of the States concerned. Numerous international treaties confirm this rule.

33. As movement around the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that terrorist crimes be prevented and that persons who are suspected of having committed a very serious crime and are suspected to have acted from abroad or who have fled abroad should be brought to justice. Conversely, the establishment of safe havens for persons who are preparing terrorist crimes or who are suspected of having committed a serious crime would not only result in danger for the State harbouring the protected person but also tend to undermine the foundations of extradition[11].

34. The European Convention on Human Rights does not, in principle, prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing suspects of serious crimes to justice, provided that it does not interfere with any of the rights or freedoms recognised in the ECHR[12].

35. The Council of Europe has produced several international instruments and recommendations relating to the fight against terrorism, including three international treaties dealing with suppression of terrorism[13], prevention of terrorism[14] and money laundering and terrorist financing[15], and three recommendations of the Committee of Ministers to member States relating to special investigation techniques; protection of witnesses and collaborators of justice; and questions of identity documents which arise in connection with terrorism[16].

36. An additional set of standards aimed specifically at safeguarding human rights and fundamental freedoms has been produced after 2001, namely the Guidelines on Human Rights and the Fight Against Terrorism (2002), a Policy Recommendation on Combating Racism While Fighting Terrorism (2004), the additional Guidelines on the Protection of

Victims of Terrorist Acts (2005) and a Declaration on Freedom of expression and information in the media in the context of the fight against terrorism (2005).

d. Some observations on State responsibility

37. When a State commits, through its agents acting in their official capacity, an internationally wrongful act, it incurs responsibility and "is under an obligation to make full reparation for the injury caused by the internationally wrongful act" at the request of the injured State (see Article 31 para. 1 of the International Law Commission (ILC)'s Articles on State Responsibility).

38. With respect to the imputability of an international wrong, the question arises of whether and to what extent a State incurs responsibility when its agents have *ultra vires* . consented expressly or impliedly by rendering assistance, to acts of a foreign State infringing its territorial sovereignty (see above, paras. 27 and 29).

39. Ultra vires acts usually bind the State for the purposes of State responsibility (Article 7, ILC Articles on State Responsibility).

40. Consent to carry out activities which otherwise would be internationally wrongful renders them lawful, unless these activities are contrary to *jus cogens* (see para. 42 below). However, consent to an interference with sovereignty must be validly given (Article 20, ILC Articles on State Responsibility). In this context, Article 46 of the Vienna Convention of the Law of Treaties is pertinent. It provides that:

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1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

41. In the opinion of the Commission, if a public authority of a State would give a permission to the representative of another State to arrest and/or transfer a person against his will from the territory of that State and it is clear that this would be outside of the ordinary (judicial, administrative) procedures for such arrest/transfer, such permission would be a manifest violation of a rule of internal law of fundamental importance in any State under the rule of law. Such permission could therefore not be invoked by the other State as valid consent.

42. Even where such permission does not result in the conclusion of or accession to a treaty, the Law of Treaties insofar reflects the general principle of good faith.[17] This principle is "one of the most basic principles governing the creation and performance of legal obligations"[18]. The giving of a permission is comparable to the conclusion of a treaty insofar as the validity of consent is concerned. In any case, the validity of any consent as a circumstance precluding wrongfulness in international law is limited by the rule enunciated in Article 26 of the ILC Articles on State Responsibility:

"Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in

conformity with an obligation arising under a peremptory norm of general international law."

43. A norm is of peremptory character (*jus cogens*) when it "is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" (Article 53 of the Vienna Convention of the Law of Treaties). These norms include, *inter alia*, the prohibitions of genocide, aggression, crimes against humanity, slavery, piracy and torture.[19]

44. In order to be considered wrongful, an act must be inconsistent with an international obligation of the State which commits it. For Council of Europe member States, in the present context, the obligation in question stems directly from the European Convention on Human Rights, namely from the obligation not to expose anyone to the risk of treatment contrary to Article 3, the obligation to prevent any detention in breach of Article 5 and the obligation to investigate into any substantiated claim that an individual has been taken into unacknowledged custody. These obligations may be breached by a State also by merely but knowingly letting its territory be used by a third State in order to commit a breach of international law.

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45. For a State knowingly to provide transit facilities to another State may amount to providing assistance to the latter in committing a wrongful act, if the former State is aware of the wrongful character of the act concerned. Under general international law (see Article 16 ILC Articles on State Responsibility) "a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."

46. The consequences of irregular transfers and secret detentions from the viewpoint of human rights law for Council of Europe member States will be examined below (see paras. 137-153).

B. Human rights law

a. The rights at issue

47. Council of Europe member States are committed to respecting fundamental rights, as defined by a number of international treaties, both at the universal level (including the 1966 International Covenant on Civil and Political Rights ("ICCPR"), and the 1987 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and at the European level, *in primis* the European Convention on Human Rights, but also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment).

48. With respect to the matters which form the object of the present opinion, the fundamental rights which are at issue are primarily the right to liberty and security of person and the ban on torture and other inhuman or degrading treatments or punishments.

i) Liberty and security of person

49. Article 5 ECHR protects the right to liberty and security of person. Although this right is not absolute (see the authorized deprivations of liberty under paragraph 1 a) to f) of Article 5), a person may only be detained on the basis of and according to procedures set out by the law, and the law in question must be consistent with recognised European standards, that is inter alia with the (other) provisions of the ECHR. In addition, paragraph 4 of Article 5 provides for all forms of deprivation of liberty allowed under that article, that the detainee "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful" (habeas corpus).

50. Detention must be lawful and in accordance with a procedure prescribed by law: in the European Court of Human Rights' view, the requirement of lawfulness means that both domestic law and the ECHR must be respected. The possible reasons for detention are exhaustively enumerated in Article 5 (1) ECHR. Paragraph 1 (c) of Article 5 permits "the lawful arrest or detention of a person effected for the purpose of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so", while paragraph (f) of Article 5 permits "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." A detention for any reason other than those listed in Article 5 § 1 is unlawful and thus a violation of a human right. B5

51. As regards extradition arrangements between States, when one is a party to the ECHR and the other is not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest was lawful. The fact that a person has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or give rise to an issue under Article 5. However, for the member States of the Council of Europe the provisions of the extradition treaty or the practice of cooperation cannot justify any deviation of their obligations under the ECHR; for those States the decisive factor is whether the extradition is according to domestic law and respects the State's obligations under the ECHR.

52. The ECHR contains no provisions concerning the exact circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. Subject to its being the result of cooperation between the States concerned and provided that the legal basis for the order for the suspect's arrest is an arrest warrant issued by the authorities of the suspect's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the ECHR[20]. This being said, it has also to be stressed that several rights and freedoms protected by the ECHR, may be relevant in the case of extradition and will have to be respected, the most important being Articles 2 and 3, and in some circumstances Articles 5 and 6.

53. Article 5 must be seen as requiring the authorities of the territorial State to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into a substantiated claim that a person has been taken into custody and has not been seen since[21].

ii) Torture, inhuman and degrading treatment or punishment

54. Torture is prohibited by Article 3 ECHR, Article 7 ICCPR, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. It is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[22]

55. The crucial distinction between "torture", "inhuman treatment" and "degrading treatment" lies in the degree of suffering caused.

56. "Inhuman treatment" is such treatment which causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. Unlike torture, inhuman treatment does not need to be intended to cause suffering.[23] In its judgment in Ireland v. United Kingdom[24], the European Court of Human Rights held that the so-called "five techniques" were inhuman treatment. This decision has sometimes been misunderstood to mean that the same or similar techniques would not amount to torture. However, in the *Selmouni* case the Court later clarified that, since the Convention is a "living instrument which must be interpreted in the light of present-day conditions", acts which were classified in the past as "inhuman and degrading treatment" could be classified as torture in future.[25] The Court stated that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[26]

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57. "Degrading treatment" is treatment which grossly humiliates or debases a person before others or drives him to act against his will or conscience. Although causing less suffering than torture or inhuman treatment, it must attain a minimum level[27]. It too does not need to be intended to cause suffering.

58. The prohibition of torture and inhuman or degrading treatment or punishment enshrines one of the most fundamental values of democratic societies. As the European Court of Human Rights has stated on many occasions, even in the most difficult circumstances, such as the fight against terrorism and organised crime, the ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the ECHR and of Protocols Nos. 1 and 4, Article 3 makes no provision for limitations and no derogation from it is permissible under Article 15 § 2, not even in the event of a public emergency threatening the life of the nation.

59. Article 2, paragraph 2, of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the UN Convention against Torture")

expressly States that "No exceptional circumstances whatsoever, whether a State of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

60. The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment ("ECPT") establishes the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") which, "by means of visits, examines the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment." Pursuant to Article 2 of this Convention, CPT can visit any place on the territory of member States where a person is deprived of their liberty (i.e. including military bases, non-official detention centres such as the offices of the intelligence service or a particular police department - drugs, anti-terrorism - if CPT believes that persons are being held/interviewed in these offices).

61. Member States of the ECHR not only have the obligation not to torture but also the duty to prevent torture.[28] In addition they have an obligation of investigation. Under this obligation Member States must assure an efficient, effective and impartial investigation.[29] As soon as the authorities receive substantiated information giving rise to the suspicion that torture or inhuman or degrading treatment has been committed, a duty to investigate arises whether and in which circumstances torture has been committed.

b. Scope of the duty of Council of Europe member States to secure human rights

62. Under Article 1 of the ECHR, "The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention" [30]. According to the European Court of Human Rights, the notion of "jurisdiction" is primarily territorial. It does, however, exceptionally extend to certain other cases, such as acts of public authority performed abroad by diplomatic or consular representatives of the State, or by an occupying force; acts performed on board vessels flying the State flag or on aircraft or spacecraft registered there.

63. There is a presumption that jurisdiction is exercised by the State throughout its territory. States may also be held accountable for human rights violations occurring outside their territory in certain situations[31].

64. Article 2 of the International Covenant on Civil and Political Rights provides that a State Party undertakes to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."

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65. The term "jurisdiction" under the International Covenant on Civil and Political Rights is comparable to the same term under the European Convention on Human Rights. It is also not limited to territorial jurisdiction. The Human Rights Committee has held, for example, that communications by persons who were kidnapped by agents in a neighbouring States are admissible, reasoning that States Parties are responsible for the actions of their agents on foreign territory[32]. The Human Rights Committee also clarified in its General Comment no. 31 that "a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that

State Party, even if not situated within the territory of the State Party."[33]

66. The duty of State parties under Article 1 ECHR to "secure" to everyone within their jurisdiction "the rights and freedoms … of this Convention" is not limited to the duty of state organs not to violate these rights themselves. This duty also includes positive obligations to protect individuals against infringements of their rights by third parties, be they private individuals or organs of third States operating within the jurisdiction of the State party concerned (see para. 146 below). The European Court of Human Rights has, in particular, recognized positive obligations which flow from the prohibition of torture and inhuman treatment, the right to life, and the right to freedom and security. Such positive obligations include duties to investigate, especially in the case of disappeared persons, and to provide for effective remedies.

c. Limitations on the competence to transfer prisoners imposed by human rights obligations

67. The international condemnation of torture has a clear impact on extradition and deportation. Article 3 of the UN Convention against Torture prevents States Parties from "expelling, returning ("refouler") or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" [34].

68. The ECHR does not guarantee a right not to be extradited or deported. Nor is there a right to political asylum. Extradition and deportation are not *per se* in breach of Article 3 of the ECHR. Nonetheless, extradition or deportation may run counter to provisions of the ECHR. According to the Soering doctrine of the European Court of Human Rights, a State may be held responsible for a violation of Articles 2 and 3, in flagrant cases also of possible violations of Articles 5 and 6 ECHR, if its decision, permission or other action has created a real risk of a violation of these rights by the State to which the prisoner is to be transferred.[35] It is of no relevance in such case whether the State on whose territory the violation will or could ultimately take place is also bound by the ECHR[36].

69. Under what circumstances a State may be deemed to have known about a "real risk of a violation" is to be determined in each separate case. Indeed, the establishment of the responsibility of a State in respect of an extradition or deportation inevitably involves an assessment of conditions in the requesting or receiving country against the standards of Article 3 ECHR. Nonetheless, the responsibility of the requesting or receiving country, whether under general international law, under the ECHR or otherwise, is not decisive for the liability of the extraditing State under the ECHR. Such liability may have been incurred by the latter member State by reason of its having taken action which has as a direct consequence the exposure of an individual to ill-treatment prohibited by Article 3 ECHR[37].

70. In the Agiza case, the UN Committee against Torture found a violation of article 3, as Sweden, at the time of the complainant's removal to Egypt, knew or should have known that Egypt resorted to consistent and widespread use of torture against prisoners, and therefore that the complainant was at a real risk of torture. In the opinion of the Committee, the procurement of diplomatic assurances, which, moreover, had no effective

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mechanism for enforcement, did not suffice to protect against this risk[38].

71. In the Mamatkulov case, the European Court of Human Rights accepted that assurances leading to extradition/deportation can take away the real risk of torture, even when the follow-up procedures were not extensive[39]. However, the assessment of diplomatic assurances in this case should not be overestimated. The Court merely took "formal cognizance of the diplomatic notes from the Uzbek authorities that have been produced by the Turkish Government"[40]. Moreover, there was no substantiated evidence in the individual case that the people in question had in fact been tortured. Finally, according to the European Court of Human Rights, the existence of the risk must be assessed "primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion."[41]

d. Derogations

72. Under Article 15 ECHR, a Contracting State may derogate from certain of its obligations under the ECHR "in time of war or other public emergency threatening the life of the nation. Among these "derogable" obligations are also those laid down in Articles 5 and 6; but, under paragraph 2 of Article 15, not those laid down in Articles 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7[42]. However, a State may apply Article 15 only if and to the extent that a war or other public emergency threatening the life of the nation presents itself in that very same State, and the derogating measures are "strictly required by the exigencies of the situation" and "are not inconsistent with its other obligations under international law". When such a situation pertains, it is imperative for the State in question to make a formal derogation under Article 15 ECHR[43]. Moreover, in case of such derogation, the third paragraph of Article 15 requires that the State concerned keep the Secretary General of the Council of Europe fully informed of the measures that it has taken and the reasons therefore.

73. Article 4(1) of the International Covenant on Civil and Political Rights is expressed in terms very similar to those of article 15(1)[44].

74. In its Resolution 1271, adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe resolved (para 9) that: "In their fight against terrorism, Council of Europe members should not provide for any derogations to the European Convention on Human Rights". It also called on all member States (para 12) to "refrain from using Article 15 to limit the rights and liberties guaranteed under its Article 5."

75. In its 2002 Guidelines on human rights and the fight against terrorism, the Committee of Ministers of the Council of Europe reiterated that member States "may never, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law."[45]

76. In its General Comment no 29/2001 on Article 4 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee observed (in para 3) that

"On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation, in situations not covered by article 4."

77. In the era of "global terrorism" it has been put to debate whether fundamental human rights as they are discussed in this opinion or the extent of possible derogations from them should be reinterpreted. Recent decisions by several domestic courts in Europe and beyond, however, have confirmed that the existing rights and standards are, in principle, appropriate for the current situation of the fight against global terror.[46] It is also the Commission's opinion that no such reinterpretation is necessary or warranted.

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C. International Humanitarian law

78. At present, International Humanitarian Law has only limited relevance for the question of the law applicable to extraordinary transfers of prisoners and secret detention on the territory or through the airspace of member States of the Council of Europe. International Humanitarian Law applies during "armed conflict" and it distinguishes between international and non-international armed conflicts. "Armed conflict" in the sense of International Humanitarian Law refers to protracted armed violence between States or between governmental authorities and/or organised armed groups within a State.[47] "State practice indicates that banditry, criminal activity, riots, sporadic outbreaks of violence and acts of terrorism do not amount to an armed conflict."[48] This means, for example, that the organised hostilities in Afghanistan before and after 2001 have been an "armed conflict" which was at first a non-international armed conflict, and later became an international armed conflict after the involvement of US troops. On the other hand, sporadic bombings and other violent acts which terrorist networks perpetrate in different places around the globe and the ensuing counter-terrorism measures, even if they are occasionally undertaken by military units, cannot be said to amount to an "armed conflict" in the sense that they trigger the applicability of International Humanitarian Law.

79. The Venice Commission considers that counter-terrorist measures which are part of what has sometimes been called "war on terror" are not part of an "armed conflict" in the sense of making the regime of International Humanitarian Law applicable to them. It considers that further reflection is necessary to consider whether any additional instrument may be needed in the future to meet or anticipate the novel threats to international peace and security.[49]

80. International Humanitarian Law thus only applies to such transports of prisoners through the territory and/or airspace of the member States of the Council of Europe if such prisoners have been arrested/captured in the context of an "armed conflict" as explained above. This would be the case, for example, if a prisoner was captured in an area of Afghanistan in which organized fighting takes place at the time of the arrest. In this case his or her transfer or detention would be covered by International Humanitarian Law irrespective of where he or she is transferred to or detained in Europe. If, on the other hand, persons are transported or detained who have been arrested in the territory of a State where no armed conflict takes place, or in an area in which no armed conflict takes place, International Humanitarian Law does not apply. In such cases human rights

law fully applies.

81. Even in those limited cases in which International Humanitarian Law applies (in the context of extraordinary transport of prisoners) this body of law does not apply exclusively. As a general rule, human rights law applies at all times, whether in times of peace or concurrently in situations of armed conflict, to all persons subject to a State's authority and control ("jurisdiction"). However, once an armed conflict has begun, human rights law is normally partly superseded by International Humanitarian Law, which contains rules specifically regulating the behaviour of parties to an armed conflict. For example, human rights law does not specifically take account of the regime of belligerent occupation. This means that the rules of the Hague Regulations and the Fourth Geneva Convention of 1949 largely serve as *lex specialis*. However, as the Commission has previously pointed out[50], human rights law's non-derogable rules and those rules which have not been derogated from in accordance with the derogation mechanism provided for under the relevant treaty instrument are also applicable in situations of armed conflict.

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82. Under the 1949 Geneva Conventions, persons who are arrested by a power in the course of an international armed conflict are protected either as prisoners of war (hereinafter "POW") (Article 4 GCIII) or as other "protected persons" (all persons, in particular civilians, who are not nationals of the detaining Power or are not protected by other Conventions, Article 4 GCIV). The plain wording of Article 4 (1) and (4) GC IV makes it clear that there should be no category of persons that would remain unprotected. As the Commission has pointed out before, even those persons who do not fulfil the nationality requirements of Article 4 GC IV are protected by customary international humanitarian law, as it has been given expression in Article 75 of the First Additional Protocol of 1977 to the Geneva Conventions.

83. Persons who are suspected to be members of an international terrorist network, such as Al-Qaeda, and who have been arrested in connection with an armed conflict, will fall either into the category of other "protected persons" or into the category of POWs.

84. As far as the Fourth Geneva Convention, the First Additional Protocol and customary international humanitarian law apply, all protected persons, including terrorist suspects, must be treated according to the rules laid down in Articles 27-78 GCIV and the minimum requirements of Article 75 of the First Additional Protocol. This has been confirmed in recent years by national courts.[51]

85. In the case that suspected members of international terrorist networks qualify as POWs, their transfer would be regulated by the Third Geneva Convention (see in particular Articles 12 and 46-48).

D. General principles of civil aviation

86. International air law has a codified framework in the Convention on International Civil Aviation (commonly referred to as the "Chicago Convention"), signed in Chicago on 7 December 1944.

87. The Chicago Convention sets out in Article 1 the principle that every State has complete and exclusive sovereignty over the airspace above its territory, that is to say

above the land areas and territorial waters adjacent thereto.

88. Article 4 of the Chicago Convention provides that: *"Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention".*

89. The Chicago Convention sets out the regime for civil aircraft and civil aviation. According to Article 3 (a), such regime does not apply to State aircraft.

90. Under the Convention, aircraft "used in military, customs and police services" are deemed to be state aircraft (Article 3(b)). This presumption, however, is not irrebuttable [52]. Moreover, aircraft engaged in other state activities such as coast guard and search and rescue could also be either state aircraft or civil aircraft in the sense of the Convention.[53]

91. It has generally been admitted[54] that, in case of doubt, the status of an airplane as "civil aircraft" or "state aircraft" will be determined by the function it actually performs at a given time[55]. As a general rule, "aircraft are recognised as state aircraft when they are under the control of the State and used exclusively by the State for state intended purposes"[56]. Accordingly, the same airplane can be considered to be "civil aircraft" and "state aircraft" on different occasions.

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92. Civil aircraft that are not engaged in scheduled international air services of a State party to the Chicago Convention[57] are entitled to make flights into or in transit non-stop across the territory of another State party and to make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of the State flown over to require landing. The authorities of each State party have the right, without unreasonable delay, to search aircraft of the other State party on landing or departure, and to inspect the certificates and other documents prescribed by the Chicago Convention (Article 16).

93. State aircraft do not enjoy the overflight rights of civil aircraft. According to Article 3 (c), state aircraft are not permitted to fly over or land in foreign sovereign territory otherwise than with express authorisation of the State concerned, and in harmony with the terms of such authorisation. Such authorisation must be given by special agreement "or otherwise"; the practice of States indicates that the preferred form is a bilateral or multilateral agreement between the States concerned, valid for a given period of time, one year for example, or general permissions, or "ad hoc" permissions properly obtained through the diplomatic channels. In the latter case, the diplomatic notes are to be submitted to the competent authorities - to the Ministry of Foreign Affairs, for example - prior to the operation of the flight and usually contain *inter alia* the name of the foreign air operator, the type of aircraft and its registration and identification, the proposed flight routing (including last point of departure outside the State, the first point of entry, the date and time of arrival, the place of embarkation or disembarkation abroad of passengers or freight), the purpose of the flight (number of passengers and their names).

94. If "state aircraft" enter the foreign sovereign air space without a proper authorisation, they may be :

- intercepted for purposes of identification;

- directed to leave the violated air space;

- directed to land for the purpose of further investigation/prosecution;

- forced to land for further investigation/prosecution[58].

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95. Under customary international law[59], state aircraft enjoy immunity from foreign jurisdiction in respect of search and inspection. Accordingly, they cannot be boarded, searched or inspected by foreign authorities, including host State's authorities, without the captain's consent. However, because state aircraft need authorisation to enter another State's airspace, the extent of their immunity is conditioned on such an authorisation pursuant to Article 3 (c) of the ~~Chicago Convention~~[60].

96. A mere operational air traffic control clearance for the flight is not sufficient to satisfy the requirement for permission under Article 3 (c)[61], unless this corresponds to an accepted practice.

97. Article 3bis para. b) of the Chicago Convention provides that:

[E]very State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph a) of this Article[62]. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

98. The flag State of the violating aircraft is internationally responsible for the infraction; the consequences of such responsibility would impact on the overall relations of the States concerned and can range from the duty to apologise, a promise to penalise the individuals responsible, a promise not to repeat the infraction and so on, to more severe sanctions.

99. Pursuant to Article 54 of the Chicago Convention, any action which may be considered as an infraction, breach, violation or infringement of the Convention is potentially subject to action by the Council of the International Civil Aviation Organisation (ICAO) under Article 54 (j) or (k). For example, a contracting State which by its action contravenes the principle in Article 1 that every State has complete and exclusive sovereignty over the airspace above its territory, can be considered committing an infraction of the Convention. A similar conclusion could be drawn in respect of a State which by its action disregards the scope of "territory" given in Article 2; or whose regulations for State aircraft do not show "due regard for the safety of navigation of civil aircraft" (Article 3 (d)); or which uses weapons against civil aircraft in flight contrary to Article 3 bis; or which uses civil aviation for any purpose inconsistent with the aims of the Chicago Convention (Article 4). Infractions may be brought before the Council by a Contracting State or a group of Contracting States.

100. As long as an airplane is in the air and not on the ground, persons on board are subject to the concurrent jurisdiction of both the national State of the airplane and the territorial State[63]. In this context, it should be noted that Article 4 of the Convention on Offences and Certain other Acts Committed on Board Aircraft (the Tokyo Convention) [64] , to which practically all Council of Europe member States are party, provides that:

"A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

(a) the offence has effect on the territory of such State;

(b) the offence has been committed by or against a national or permanent resident of such State;

(c) the offence is against the security of such State;

(d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;

(e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement."

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101. This provision does not limit the jurisdiction of the territorial State but only the exercise of its right to interfere with an aircraft in flight. In the first place, serious offences of abduction, torture etc. certainly have "effect" on the territorial state. Where the conditions of a prisoner on a plane do not in themselves constitute inhuman or degrading treatment, all acts involved in transferring by air a prisoner to a place where he or she runs a real risk of being tortured may not necessarily be criminal offences in the territorial State. This will depend upon how the relevant offences and inchoate offences (preparation, conspiracy etc.) are formulated in the law in the territorial State (e.g. whether the acts in question constitute a continuing offence of abduction) and that State's rules on extraterritorial crime, in particular, whether the deliberate handing over of a person to extraterritorial torture is an offence. It should be stressed however that the obligations of a Council of Europe member State to ensure protection of human rights (see above, paras. 62-67, and below para. 146) are not limited simply to enforcing its criminal law. Thus, it is not decisive that, in a particular case, a territorial State may not, in fact, make all acts involved in transfer punishable, or exercise jurisdiction over these. In addition, according to subparagraph (e) of Article 4 of the Tokyo Convention, the limitation of the exercise of the right of the territorial State to interfere with an aircraft in flight does not apply when "the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement", such as the European Convention of Human Rights. Therefore, if the positive obligations arising under the ECHR require a member State of the Council of Europe to investigate possible violations of human rights committed in an aircraft in flight through its airspace, this member State is not barred by the Tokyo Convention to interfere with this aircraft in flight.

102. The question arises in this context of what would be the status of an airplane

registered in the flag State as civil aircraft but carrying out "State functions" (such as special missions for the transport of prisoners) which entered the airspace of another State without seeking a specific authorisation or without following the applicable procedures for State aircraft.

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103. In the opinion of the Venice Commission, state aircraft can only claim immunity inasmuch as they make their state function known to the territorial State through the appropriate channels. If the public purpose was not declared in order to circumvent the requirement of obtaining the necessary permission(s), then the State will be estopped from claiming State aircraft status[65] and the airplane will be deemed to be civil and thus falling within the scope of application of the Chicago Convention, including its Article 16 providing for the territorial State's right to search and inspection. The territorial State could request the airplane to land and could proceed to search and inspection and take the necessary measures to put an end to possible violations it might identify[66]. In addition, the flag State would face international responsibility for the breach of Article 4 of the Chicago Convention and of customary international law.

104. The relations between air law and human rights law will be analysed below (see paras 144-152).

E. Military bases

105. The lawfulness of the presence of the armed forces of one State on the territory of another State in peacetime is contingent on the consent of the host State. The initial decision to admit the force may take the form of a bilateral or multilateral treaty, often defence agreements. There follows a decision by the receiving State granting the use of facilities on its soil, which is normally done through a further agreement.

106. A State does not abandon its sovereignty when it consents to the presence of foreign armed forces on its territory. It guarantees the enjoyment of the privilege of user of its territory accorded to the sending State; it retains however the right to regulate this privilege within the framework of the applicable treaties and agreements. It follows that the sending State acquires various powers pertaining to the operation of its defence forces on a territory that remains subject to the sovereignty of the host State. The sending State may lawfully claim in or over the territory of the receiving State, only those rights and powers that are connected directly with the establishment and operation of, and access to, the sites at which the foreign forces and installations are located. The principle of sovereignty dictates that any further rights and powers can derive only from an express grant by the receiving States. In particular, the extent of the right for the receiving State to search a foreign military base on its territory depends on the terms of the defence agreement or of the "Status-of-forces agreement" (SOFA)[67].

107. SOFAs between the host State and a State stationing military forces in the host State define the legal status of the sending State's personnel and property in the territory of the host State. They are usually an integral part of the overall military bases agreements that allow the sending State's military forces to operate within the host State[68].

108. Foreign armed forces whose admission has been consented to by the receiving State are, as a rule, not subject to the normal immigration controls and entry formalities

applicable to foreign nationals. The NATO-SOFA agreement provides that "members of a force shall be exempted from passport and visa regulations and immigration inspection on entering or leaving the territory of a receiving State. They shall also be exempt from the regulations of the receiving State on the registration and control of aliens"[69]. This waiver of entry procedures is counter-balanced by the requirement for members of the force, to present on demand, whether on entry or at any time thereafter, identification and an individual or collective movement order certifying the status of the individual as a member of a force[70]. The receiving State has a discretion whether to require a movement order to be countersigned by its authorised representatives. Exemption from entry formalities is made conditional on compliance with the formalities established by the receiving State relating to the entry and departure of a force or the members thereof.

109. The sending State must have access to the base and, where it has more than one base on the territory of the same State, it must be allowed movement between them. To deny access would amount to a derogation from the grant made by the host State. It is therefore common for military base agreements to authorise the sending State to have access to its forces and to the ports or airfields which it has been accorded in the host State. This authorisation is essential, as in relation to public vessels and aircraft there is no right of access under customary international law. It is, however, often the practice in bilateral treaties for entry to the ports of the receiving State to be subject to "appropriate notification under normal conditions" made to the authorities of the latter[71].

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110. The sending State does not benefit from an unrestricted freedom of movement within, and overflight of, the receiving State, unless such rights are expressly granted in a base agreement. In any case, the national and international law that is applicable to military bases cannot, and does not claim to, diminish the obligations and responsibilities of the member States of the Council of Europe under human rights treaties.

F. Article V of the NATO Treaty[72]

111. Article V is the core clause of the Washington Treaty, NATO's founding charter. It states that an armed attack against one Ally shall be considered an attack against them all. In response to an invocation of Article 5, each Ally determines, in consultation with other Allies, how it can best contribute to any action deemed necessary to restore and maintain the security of the North Atlantic area, including by the use of armed force.

112. Article V was first invoked on 12 September 2001 immediately following the 11 September terrorist attacks against the United States. The invocation was initially provisional, pending determination that the attacks were directed from abroad. This was confirmed on 2 October 2001, after US officials presented findings on investigations into the attacks to the North Atlantic Council, concluding that the Al-Qaeda terrorist network was responsible.

113. On 4 October 2001, the Allies agreed on a series of measures to assist the US-led campaign against Al-Qaeda and related terrorism[73]. These include enhanced intelligence sharing and cooperation, blanket over-flight clearances in accordance with the necessary air traffic arrangements and national procedures, and access to ports and airfields for US and other Allied craft for operations against terrorism.

[redacted]

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114. In application of this agreement, certain NATO member-States granted US (and NATO member States') aircraft either blanket over-flight clearances for certain time-periods, or overflight rights upon request[74].

[redacted]

115. Article V of the North Atlantic Treaty does not contain an obligation for member States of the Council of Europe to allow irregular transfers of prisoners or to grant blanket overflight rights, for the purposes of fighting against terrorism. That treaty provision at most contains an obligation to take measures, including cooperation and consent, into consideration; but leaves any decision as to concrete measures to the appreciation of the State concerned of the necessity of such measures in order to restore and maintain security. In addition, neither Article 5 of the North Atlantic Treaty nor any Agreements in execution thereof can, or claim to, diminish the obligations and responsibilities of member States of the Council of Europe under human rights treaties.

SECTION II – THE INTERNATIONAL LEGAL OBLIGATIONS OF COUNCIL OF EUROPE MEMBER STATES

A. **Council of Europe member States' obligations in respect of arrests by foreign** authorities on their territory

116. A State party to the European Convention on Human Rights is presumed to exercise its jurisdiction over its whole territory. Any arrest of a person by foreign authorities on the territory of a Council of Europe member State without the agreement of this member State is a violation of its sovereignty and is therefore contrary to international law. In addition, the now defunct European Commission of Human Rights has stated that "an arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not only involve the State responsibility vis-à-vis the other State, but also affects that person's individual right to security under Article 5 § 1".[75]

117. The European Court of Human Rights has clearly expressed how the responsibility of a Council of Europe member State is engaged in relation to the arrest of an individual on its territory by foreign authorities: irrespective of whether the arrest amounts to a violation of the law of the State in which the suspect has been arrested, the responsibility of the host State is engaged unless it can be proved that the authorities of the State to which the applicant has been transferred have acted extra-territorially and without consent, and consequently in a manner that is inconsistent with the sovereignty of the host State[76].

[redacted]

118. Any form of involvement of the Council of Europe member State or receipt of information prior to the arrest taking place entails responsibility under Articles 1 and 5 ECHR (and possibly Article 3 in respect of the modalities of the arrest). A State must thus prevent the arrest from taking place, unless the arrest is effected by the foreign authorities in the exercise of their jurisdiction under the terms of an applicable SOFA (see footnote 68 above).

119. The responsibility of the Council of Europe member States is engaged also in the case that some section of its public authorities (police, security forces etc.) has co-operated with the foreign authorities or has not prevented an arrest *without government knowledge*. This situation raises the question of governmental control over the security/police services, and possibly, if the applicable national law so foresees, of parliamentary control over the government.

120. Different European States exercise different systems for political insight into, and control over, the operations of the security and intelligence services, depending upon constitutional structure, historical factors etc. Different mechanisms exist for ensuring that particularly sensitive operations are subject to approval and/or adequate control. Meaningful government accountability to the legislature is obviously conditioned upon meaningful governmental control over the security and intelligence services[77]. Where the law provides for governmental control, but this control does not exist in practice, the security and intelligence services risk becoming a "State within a State". Where, on the other hand, the law provides for a degree of distance between government ministers and officials and the day-to-day operations of the security and intelligence services, but government ministers in fact exercise influence or even control over these operations, then the phenomenon of "deniability" can arise. In such a case, the exercise of power is concealed, and there is no proper accountability. The Statute of the Council of Europe and the ECHR require respect for the rule of law which in turn requires accountability for all exercises of public power. Independently of how a State chooses to regulate political control over security and intelligence agencies, in any case effective oversight and control mechanisms must exist to avoid these two problems.[78]

B. Council of Europe member States' obligations in respect of alleged secret detention facilities

121. The term "secrecy" can have different meanings. In the context of the present opinion, the problematic aspect of the secrecy of detention lies in the first place in the impact which such secrecy has on the prisoner's defence rights under Articles 5[79] and 6 ECHR. In addition, prolonged secret detention may impinge on Article 3[80] and on other aspects of Article 6 ECHR.

122. For a State to provide facilities to another State to conduct voluntary interviews with suspects on its territory is, in principle, not in violation of international law. On the contrary, it is a feature of most modern Mutual Assistance Treaties. It depends upon the territorial States' constitutional and administrative rules on the exercise of public power whether this can go so far as involuntary interrogation. Some States will not allow any but their own officials to exercise public power on their territory. Others make exceptions by treaty rules[81].

[redacted] B5

123. The territorial State retains its full jurisdiction within the meaning of Article 1 ECHR over any place on its territory where such interviews take place, including any ad hoc detention facilities: : that State is therefore responsible for any infringement of the ECHR in relation to any suspect treated in violation of Articles 3 and 5, e.g. any prisoners who may be held incomunicado there. The modalities of the interrogation and detention,

[redacted]

and of treatment given, need to comply with the standards of the European Convention on Human Rights.

124. *Incomunicado* detention, that is detention without the possibility of contacting one's lawyer and of applying to a court, is clearly not "in accordance with a procedure prescribed by law" of any of the member States of the Council of Europe, if alone because the detention is not subject to judicial review. For the detainee, it is not possible to exercise his entitlement to *habeas corpus* guaranteed by Article 5, paragraph 4. The unlike possibility that such a detention is "in accordance with a procedure prescribed by law" under the law of the foreign State by whose authorities the detention was ordered and executed, is irrelevant for the issue of the responsibility under the European Convention on Human Rights of the State on whose territory it takes place.

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125. If and in so far as *incomunicado* detention takes place, is made possible or is continued on the territory of a member State of the Council of Europe, in view of its secret character that detention is by definition in violation of the European Convention on Human Rights and the applicable domestic law of that State.

126. Active and passive co-operation by a Council of Europe member State in imposing and executing secret detentions engages its responsibility under the European Convention on Human Rights. The European Court of Human Rights has ruled that "the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention"[82]. This is even more true in respect of acts of agents of foreign States.

127. While no such responsibility applies if the detention is carried out by foreign authorities without the territorial State actually knowing it, the territorial State must take effective measures to safeguard against the risk of disappearance and must conduct a prompt and effective investigation into a substantiated claim that a person has been taken into unacknowledged custody.

128. The possible obligation by a Council of Europe member State under bilateral or multilateral treaties to co-operate in prosecution measures does not affect or diminish this State's obligation not to allow or contribute to secret detention on its territory.

129. As the European Court of Human Rights has pointed out[83], the opinion of the State under whose authority the detention is decided and executed concerning the issue of whether the detention is in violation of fundamental rights is not conclusive for the question of whether cooperation engages responsibility of a member State of the Council of Europe under the European Convention on Human Rights; only the relevant provisions of the latter Convention, as interpreted by the European Court of Human Rights, are decisive. This means, for instance, that the opinion which has been put forward in certain quarters with respect to the US Government that "cruel and unusual punishment", if applied outside US territory, does not violate the US Constitution, is of no relevance whatsoever for the question of responsibility of member States under the European Convention on Human Rights. It also means that the individual opinion of specific Governments, or of certain public persons, about possible limits to the absolute character

of the scope of the prohibition of torture are not relevant either. In addition to the interpretation given by the European Court of Human Rights concerning the absolute character of the prohibition of torture, Article 2, paragraph 2, of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment expressly states that there is no room whatsoever and under any circumstances to justify torture

130. If a State is informed or has reasonable grounds to suspect that any persons are held *incomunicado* at foreign military bases on its territory, despite its limited jurisdiction over foreign military bases, its responsibility under the European Convention on Human Rights is still engaged, unless it takes all measures which are within its power in order for this irregular situation to end.

131. As a rule, a State cannot search foreign military bases on its territory unless this is allowed under the relevant treaties or unless the host State is authorised by the sending State to do so. However, the right to detain non-military personnel does not fall under the ordinary rights and powers that are connected directly with the establishment and operation of the sites at which the foreign forces and installations are located (see para. 106 above), unless the site falls under the jurisdiction of the sending State under the applicable SOFA, such as the NATO-SOFA (see footnote 68 above). B5

132. The host State is therefore entitled and even obliged to prevent, and react to such abuse of its territory. It could exercise its powers in respect of registration and control of aliens, and demand identification and movement orders of those present on the military base in question. Access to such military bases, assuming that it had been freely granted under the military base agreement, would require notification under normal conditions. In addition, appropriate diplomatic channels can be used in order to protest against such practice.

133. The case might arise that some section of the public authorities of the Council of Europe member State (police, security forces etc.) is informed and tolerates, or fails to prevent or even co-operates in the maintenance of secret detentions without government knowledge. While this situation raises the already mentioned constitutional issue of control over security forces, the State remains responsible under the European Convention on Human Rights.

134. States which have ratified the European Convention for the Prevention of Torture have the obligation to co-operate with the Committee for the Prevention of Torture and to provide it with a list of all the detention centres which are present on their territory. CPT must have access to all and any of these detention centres. Failure by a State to inform CPT of any detention facility can be seen as a lack of co-operation within the meaning of Article 3 ECPT[84], which, if not clarified appropriately, can result in procedures towards a public statement under Art 10(2)[85].

135. As concerns international humanitarian law, the Geneva Conventions (Articles 126 of GCIII and 143 GCIV) grant the International Committee of the Red Cross "permission to go to all places where prisoners of war or protected persons may be, particularly to places of internment, imprisonment and labour", and "access to all premises occupied by"

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them, including "the places of departure, passage and arrival of prisoners who are being transferred". Responsibility could arise in this respect too.

136. Insofar as detention can be "secret" vis-à-vis the national authorities, the Commission considers that a State is exempted from responsibility only if and as long as it does not have any knowledge of a detention carried out by foreign agents in breach of its territorial sovereignty. However, if any branch of the State is involved in or informed about the detention, irrespective of their acting *ultra vires*, the responsibility of the State as a subject of international law is engaged (see paras. 38-43 above).

C. Council of Europe member States' obligations in respect of inter-state transfers of prisoners

137. There are only four legal ways of transferring a prisoner to foreign authorities: deportation, extradition, transit and transfers of sentenced persons for the purpose of their serving the sentence in their country of origin.

138. Extradition and deportation proceedings must be specified by the applicable law, and the prisoners must be given access to the competent authorities. In addition, extradition and deportation proceedings cannot be carried out where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 of the ECHR and of the UN Convention against Torture in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to such a country.

139. In this context, it is worth underlining that Council of Europe member States are under an obligation to prevent prisoners' *exposure to the risk* of torture: the violation does not depend on whether the prisoner is eventually subjected to torture.

140. The assessment of the reality of the risk must be carried out very rigorously. The risk assessment will depend upon the circumstances, meaning both the rights which risk being violated and the situation in the receiving State. The diplomatic assurances which are usually provided by the requesting State in order to exclude human rights breaches in its territory after the extradition or deportation is carried out may be appropriate as concerns risks of application of the death penalty[86] or for fair trial violations, because such risks can in most instances be monitored satisfactorily. On the other hand, as regards the risk of torture, monitoring is impracticable in the vast majority of conceivable cases, especially bearing in mind the fact that, even after conviction in a criminal case, a State may torture a prisoner for the purpose of obtaining information. At the same time, it is impracticable to have a "life-long" responsibility for people who are removed out of the country.

141. This situation raises the question of the value of diplomatic assurances[87]. In the Venice Commission's view, the acceptance of such assurances is in principle the expression of the necessary good faith and mutual trust between friendly States, although, as far as assurances may be regarded as acceptable in principle (see para. 142 below), the terms of the diplomatic assurances need to be unequivocal (for instance, a reference to "torture" or to "inhuman or degrading treatment" should be interpreted within the meaning given to these terms by the ECtHR, the CAT and the HR Committee) and need

to reflect the scope of the obligation by which the State which issues them is legally bound.

142. However, this general mutual trust must not prevail over the accurate examination of each specific situation, particularly if there are precedents or even patterns of violation of previously accepted assurances[88]. For example, an important difference between the situation in the Mamatkulov case (see para. 71 above) and later ones is that recent experience has shown that the risk of torture seems to be greater than what was known before, despite assurances. In the Commission's view, under these circumstances the room for accepting guarantees against torture is reduced significantly. Where there is substantial evidence that a country practices or permits torture in respect of certain categories of prisoners, guarantees may not satisfactorily reduce this risk in cases of requests for extradition of prisoners belonging to those categories.

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143. The requirement of not exposing any prisoner to the real risk of ill-treatment also applies in respect of the transit of prisoners through the territory of Council of Europe member States: member States should therefore refuse to allow transit of prisoners in circumstances where there is such a risk.

144. The situation may arise that a Council of Europe member State has serious reasons to believe that the mission of an airplane crossing its airspace is to carry prisoners with the intention of transferring them to countries where they would face ill-treatment.

145. If such an airplane does not require landing, as long as the plane is in the air, all persons on board are subject to the jurisdiction of both the flag State and the territorial State. In the Commission's view, Council of Europe member States' responsibility under the European Convention on Human Rights is engaged if they do not take the preventive measures which are within their powers. In addition, their responsibility for aiding another State to commit an unlawful act would be at issue. It follows, in the Commission's view, that the territorial State is entitled to, and must take all possible measures in order to prevent the commission of human rights violations in its territory, including in its air space.

146. There are obviously practical difficulties involved in securing the effective enjoyment of Convention rights in aircraft transiting a Council of Europe member State's airspace or military base for foreign forces on its territory. Without prejudice to the wider question of how such difficulties can affect the scope of a State's obligations to secure generally the rights under the Convention, the case-law of the European Court of Human Rights makes it clear that the State's duty to secure the most elementary rights at issue in the present case (right to security of person; freedom from torture and right to life) continues to apply, regardless of acquiescence or connivance[89].

147. The territorial State possesses a different course of action in respect of the suspect airplane, depending on its status.

148. If the state airplane in question has presented itself as if it were a civil plane, that is to say it has not duly sought prior authorisation pursuant to Article 3 c) of the Chicago Convention, it is in breach of the Chicago Convention : the territorial State may therefore require landing. The airplane having failed to declare its State functions, it will not be

entitled to claim State aircraft status and subsequently not be entitled to immunity : the territorial State will therefore be entitled to search the plane pursuant to Article 16 of the Chicago Convention and take all necessary measures to secure human rights. In addition, it will be entitled to protest through appropriate diplomatic channels.

149. If the plane has presented itself as a State plane and has obtained overflight permission without however disclosing its mission, the territorial State can contend that the flag State has violated its international obligations. The flag State could thus face international responsibility. The airplane however will, in principle, be entitled to immunity according to general international law and to the applicable treaties: the territorial State will therefore be unable to search the plane, unless the captain consents.

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150. However, the territorial State may refuse further overflight clearances in favour of the flag State or impose, as a condition therefore, a duty to submit to searches. If the overflight permission derives from a bilateral treaty or a SOFA or a military base agreement, the terms of such treaty might be questioned if and to the extent that they do not allow for any control in order to ensure respect for human rights, or their abuse might be advanced. In this respect, the Venice Commission recalls that the legal framework concerning foreign military bases on the territory of Council of Europe member States must enable the latter to exercise sufficient powers to fulfil their human rights obligations.

151. While mutual trust and economic and military co-operation amongst friendly States need to be encouraged, in granting foreign state aircraft authorisation for overflight, Council of Europe member States must secure respect for their human rights obligations. This means that they may have to consider whether it is necessary to insert new clauses, including the right to search, as a condition for diplomatic clearances in favour of State planes carrying prisoners. If there are reasonable grounds to believe that, in certain categories of cases, the human rights of certain passengers risk being violated, States must indeed make overflight permission conditional upon respect of express human rights clauses. Compliance with the procedures for obtaining diplomatic clearance must be strictly monitored; requests for overflight authorisation should provide sufficient information as to allow effective monitoring (for example, the identity and status (voluntary or involuntary passenger) of all persons on board and the destination of the flight as well as the final destination of each passenger). Whenever necessary, the right to search civil planes must be exercised.

152. With a view to discouraging repetition of abuse, any violations of civil aviation principles in relation to irregular transport of prisoners should be denounced, and brought to the attention of the competent authorities and eventually of the public. Council of Europe member States could bring possible breaches of the Chicago Convention before the Council of the International Civil Aviation Organisation pursuant to Article 54 of the Chicago Convention.

153. As regards the treaty obligations of Council of Europe member States, the Commission considers that there is no international obligation for them to allow irregular transfers of prisoners to or to grant unconditional overflight rights, for the purposes of fighting terrorism. In the Commission's opinion, therefore, States must interpret and

perform their treaty obligations, including those deriving from the NATO treaty and from military base agreements and SOFAs, where these are applicable, in a manner compatible with their human rights obligations. As regards notably the NATO treaty, the Commission stresses that this principle is expressed in Article 7 according to which "[t]his Treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter [of the United Nations] of the Parties which are members of the United Nations." Even if NATO member states have undertaken obligations concerning irregular transfer or unconditional overflight, the Commission recalls that if the breach of a treaty obligation is determined by the need to comply with a peremptory norm (*jus cogens*), it does not give rise to an internationally wrongful act. As underlined above (para. 43), the prohibition of torture is a peremptory norm.

CONCLUSIONS

154. Council of Europe member States are under an obligation to fight terrorism, but in doing so they must safeguard human rights.

155. Council of Europe member States are under an international legal obligation to secure that everyone within their jurisdiction (see para. 146 above) enjoy internationally agreed fundamental rights, including and notably that they are not unlawfully deprived of their personal freedom and are not subjected to torture and inhuman and degrading treatment, including in breach of the prohibition to extradite or deport where there exists a risk of torture or ill-treatment. This obligation may also be violated by acquiescence or connivance in the conduct of foreign agents. There exists in particular a positive duty to investigate into substantiated claims of breaches of fundamental rights by foreign agents, particularly in case of allegations of torture or unacknowledged detention.

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156. Council of Europe member States are bound by numerous multilateral and bilateral treaties in different fields, such as collective self-defence, international civil aviation and military bases. The obligations arising out of these treaties do not prevent States from complying with their human rights obligations. These treaties must be interpreted and applied in a manner consistent with the Parties' human rights obligations. Indeed, an implied condition of any agreement is that, in carrying it out, the States will act in conformity with international law, in particular human rights law.

157. The Venice Commission considers that there is room to interpret and apply the different applicable treaties in a manner that is compatible with the principle of respect for fundamental rights. Council of Europe member States must do so. For example, the search of a state airplane which has presented itself as a civil aircraft is allowed under the Chicago Convention and must be effected whenever there are reasonable grounds to suspect that the plane may be used to commit human rights breaches. The relevant inter-state practice must be changed and adapted to this obligation, without however frustrating the legitimate aims pursued by the treaties in question. Diplomatic measures may also need to be taken.

158. To the extent that this due interpretation and application of the existing treaties in the light of human rights obligations is not possible, Council of Europe member States must take all the necessary measures to renegotiate and amend the treaty provisions to

this effect.

159. In reply to the questions put by the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe, the Venice Commission has reached the conclusions listed below:

As regards arrest and secret detention

[redacted] a) Any form of involvement of a Council of Europe member State or receipt of information prior to an arrest within its jurisdiction by foreign agents entails accountability under Articles 1 and 5 of the European Convention on Human Rights (and possibly Article 3 in respect of the modalities of the arrest). A State must thus prevent the arrest from taking place. If the arrest is effected by foreign authorities in the exercise of their jurisdiction under the terms of an applicable Status of Forces Agreement (SOFA), the Council of Europe member State concerned may remain accountable under the European Convention on Human Rights, as it is obliged to give priority to its jus cogens obligations, such as they ensue from Article 3. [redacted] B5

b) Active and passive co-operation by a Council of Europe member State in imposing and executing secret detentions engages its responsibility under the European Convention on Human Rights. While no such responsibility applies if the detention is carried out by foreign authorities without the territorial State actually knowing it, the latter must take effective measures to safeguard against the risk of disappearance and must conduct a prompt and effective investigation into a substantiated claim that a person has been taken into unacknowledged custody.

c) The Council of Europe member State's responsibility is engaged also in the case where its agents (police, security forces etc.) co-operate with the foreign authorities or do not prevent an arrest or unacknowledged detention *without government knowledge*, acting *ultra vires*. The Statute of the Council of Europe and the European Convention on Human Rights require respect for the rule of law, which in turn requires accountability for all form of exercise of public power. Regardless of how a State chooses to regulate political control over security and intelligence agencies, in any event effective oversight and control mechanisms must exist.

d) If a State is informed or has reasonable suspicions that any persons are held *incomunicado* at foreign military bases on its territory, its responsibility under the European Convention on Human Rights is engaged, unless it takes all measures which are within its power in order for this irregular situation to end.

[redacted] e) Council of Europe member States which have ratified the European Convention for the Prevention of Torture must inform the European Committee for the Prevention of Torture of any detention facility on their territory and must allow it to access such facilities. Insofar as international humanitarian law may be applicable, States must grant the International Committee of the Red Cross permission to visit these facilities.

As regards inter-state transfers of prisoners

f) There are only four legal ways for Council of Europe member States to transfer a

prisoner to foreign authorities: deportation, extradition, transit and transfer of sentenced persons for the purpose of their serving the sentence in another country. Extradition and deportation proceedings must be defined by the applicable law, and the prisoners must be provided appropriate legal guarantees and access to competent authorities. The prohibition to extradite or deport to a country where there exists a risk of torture or ill-treatment must be respected.

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g) Diplomatic assurances must be legally binding on the issuing State and must be unequivocal in terms; when there is substantial evidence that a country practices or permits torture in respect of certain categories of prisoners, Council of Europe member States must refuse the assurances in cases of requests for extradition of prisoners belonging to those categories.

h) The prohibition to transfer to a country where there exists a risk of torture or ill-treatment also applies in respect of the transit of prisoners through the territory of Council of Europe member States: they must therefore refuse to allow transit of prisoners in circumstances where there is such a risk.

As regards overflight

i) If a Council of Europe member State has serious reasons to believe that an airplane crossing its airspace carries prisoners with the intention of transferring them to countries where they would face ill-treatment in violation of Article 3 of the European Convention on Human Rights, it must take all the necessary measures in order to prevent this from taking place.

[redacted]

j) If the state airplane in question has presented itself as a civil plane, that is to say it has not duly sought prior authorisation pursuant to Article 3 c) of the Chicago Convention, the territorial State must require landing and must search it. In addition, it must protest through appropriate diplomatic channels.

k) If the plane has presented itself as a state plane and has obtained overflight permission without however disclosing its mission, the territorial State cannot search it unless the captain consents. However, the territorial State can refuse further overflight clearances in favour of the flag State or impose, as a condition therefor, the duty to submit to searches; if the overflight permission derives from a bilateral treaty or a Status of Forces Agreement or a military base agreement, the terms of such a treaty should be questioned if and to the extent that they do not allow for any control in order to ensure respect for human rights.

[redacted]

l) In granting foreign state aircraft authorisation for overflight, Council of Europe member States must secure respect for their human rights obligations. This means that they may have to consider whether it is necessary to insert new clauses, including the right to search, as a condition for diplomatic clearances in favour of State planes carrying prisoners. If there are reasonable grounds to believe that, in certain categories of cases, the human rights of certain passengers risk being violated, States must indeed make overflight permission conditional upon respect of express human rights clauses. Compliance with the procedures for obtaining diplomatic clearance must be strictly monitored; requests for overflight authorisation should provide sufficient information as

to allow effective monitoring (for example, the identity and status (voluntary or involuntary passenger) of all persons on board and the destination of the flight as well as the final destination of each passenger). Whenever necessary, the right to search civil planes must be exercised.

m) With a view to discouraging repetition of abuse, any violations of civil aviation principles in relation to irregular transport of prisoners should be denounced, and brought to the attention of the competent authorities and eventually of the public. Council of Europe member States could bring possible breaches of the Chicago Convention before the Council of the International Civil Aviation Organisation pursuant to Article 54 of the Chicago Convention.

n) As regards the treaty obligations of Council of Europe member States, the Commission considers that there is no international obligation for them to allow irregular transfers of prisoners or to grant unconditional overflight rights, for the purposes of combating terrorism. The Commission recalls that if the breach of a treaty obligation is determined by the need to comply with a peremptory norm (jus cogens), it does not give rise to an internationally wrongful act, and the prohibition of torture is a peremptory norm. In the Commission's opinion, therefore, States must interpret and perform their treaty obligations, including those deriving from the NATO treaty and from military base agreements and Status of Forces Agreements, in a manner compatible with their human rights obligations.

160. The Venice Commission hopes that this opinion will assist the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe in the completion of the inquiry into these matters. The Commission also hopes that this opinion will assist the Secretary General of the Council of Europe in his ongoing inquiry under Article 52 of the European Convention on Human Rights. The Commission is ready to pursue its reflection on these matters, if so requested.

[1] Article 1, Protocol 7 to the ECHR (Procedural safeguards relating to expulsion of aliens) provides:

"1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: a to submit reasons against his expulsion, b to have his case reviewed, and c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security." Similarly, Article 13 of the International Covenant on Civil and Political Rights provides:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed

to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

[2] European Court of Human Rights, Klass and others v. Federal Republic of Germany judgment of 24 October 1979, § 55.

[3] ETS no. 24. The European Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States simplifies and speeds up the procedure of extradition between EU member States, by requiring each national judicial authority (the executing judicial authority) to recognise, ipso facto, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority). As of 1 July 2004, it has replaced for the EU member States the 1957 European Extradition Convention and the 1978 European Convention on the suppression of terrorism as regards extradition; the agreement of 26 May 1989 between 12 Member States on simplifying the transmission of extradition requests; the 1995 Convention on the simplified extradition procedure ; the 1996 Convention on extradition and the relevant provisions of the Schengen agreement.

[4] Article 7 ECHR.

[5] ETS no. 90.

[6] The Explanatory report on the European Convention on Extradition underlines that different approaches were taken by the different States as to whether the transport of a person on board of a ship or aircraft of the nationality of a country other than the requesting or requested Parties was to be considered as transit through the territory of that country. This question was left to be settled in practice (see Explanatory Report on Article 21, at http:/conventions.Council of Europe.int/treaty/en/reports/htlm/024.htm).

[7] OJ L, 321, 6.12.2003, p. 26.

[8] The specific human rights obligations for Council of Europe member States in respect of extradition treaties, including this agreement, will be dealt with below (see paras 137-153)

[9] In the context of the present opinion, the term "prisoner" means "anyone deprived of their liberty by State authorities".

[10] European Court of Human Rights, Stocké v. Germany judgment of 12 October 1989, Series A no. 199, opinion of the Commission, p. 24, § 167.

[11] European Court of Human Rights, Soering v. the United Kingdom judgment of 7 July 1989, p. 35, § 89

[12] European Court of Human Rights, Stocké v. Germany, 12 October 1989, Series A no. 199, opinion of the Commission, p. 24, § 169

[13] European Convention on the Suppression of Terrorism, ETS 90

[14] European Convention on the Prevention of Terrorism, ETS No. 196

[15] European Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, ETS No. 198.

[16] Recommendation Rec(2005)10 of the Committee of Ministers to member States on "special investigation techniques" in relation to serious crimes including acts of terrorism; Recommendation REC(2005)09 of the Committee of Ministers to member States on the protection of witnesses and collaborators of justice; Recommendation Rec (2005)07 of the Committee of Ministers to member States on identity and travel documents and the fight against terrorism.

[17] See *Müller/Kolb*, Article 2(2), MN. 16, in: Simma (ed.), The Charter of the United Nations – A Commentary, Oxford, 2nd ed. 2002).

[18] *Border and Transborder Armed Actions, Nicaragua v. Honduras, Jurisdiction of the Court and Admissibility of the Application, ICJ Rep. 1988, 69, 105, para. 105.*

[19] See ICTY, Prosecutor v. Furundzija, International Legal Materials 38 (1999) 317, at p. 349; further references in: Andreas Paulus, Jus Cogens in a Time of Hegemony and Fragmentation, Nordic Journal of International Law 74 (2005) 297-334 (at p. 306).

[20] European Court of Human Rights, Öcalan v. Turkey judgment [GC] of 12 May 2005.

[21] European Court of Human Rights, Kurt v. Turkey judgment of 25 May 1988, § 124

[22] Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[23] European Court of Human Rights, Ireland v. UK judgment of 18 January 1978, § 167

[24] European Court of Human Rights, Ireland v.UK judgment, § 167.

[25] European Court of Human Rights Selmouni v. France judgment of 29 July 1999, § 101.

[26] European Court of Human Rights, Selmouni v. France judgment, § 101.

[27] European Court of Human Rights, Tyrer v. United Kingdom judgment of 25 April 1978, § 29.

[28] European Court of Human Rights, Z v. United Kingdom judgment of 10 May 2001; A. v. the United Kingdom judgment of 23 September 1998, § 22.

[29] European Court of Human Rights, Caloc v. France judgment of 20 July 2000.

[30] Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment similarly States that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in

any territory under its jurisdiction." See para. 146.

[31] See European Court of Human Rights, Issa v. Turkey judgment of 6 November 2004, §§ 71-74; International Court of Justice, Advisory Opinion on legal consequences of the construction of a wall in the occupied Palestinian territory, 9 July 2004, § 109. See also the views adopted by the Human Rights Committee on 29 July 1981 in the cases of Lopez Burgos v. Uruguay and Celiberti de Casariego v. Uruguay, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively. See Inter-American Commission on Human Rights, Coard v. US, Case 10.951, Report No. 109/99, 29 September 1999, § 37, and Alejandre Cuba, Case 11.589, Report No. 86/99 29 September 1999, § 23.

[32] Lopez Burgos, No 52/ 1979, § 12.3; Celiberti, No 56/1979, § 103.3; Persons who have fled abroad are not prevented by Art 2 (1) from submitting an individual communication, No 25/1978, § 7.2; No. 74/1980, § 4.1; No. 110/1981, § 6; States parties are responsible for violations of the Covenant by foreign diplomatic representatives, No 31/1978; No 57/1979; Nr 77/1980, No 106/1981; No 108/1981; No. 125/1982

[33] HRC General Comment 31, § 10.

[34] See Also Article 33 (Prohibition of expulsion or return ("refoulement")) of the 1951 UN Convention relating to the Status of Refugees. In 1990, the United Nations General Assembly sought to ensure that human rights would receive full respect in the extradition process when it gave approval to the UN Model Treaty on Extradition which excludes extradition not only if there are substantial grounds for believing that the person will be prosecuted or punished in the requesting State on account of his race, religion, nationality, ethnic origin, political opinion, sex or status, or subjected to torture or cruel inhuman or degrading treatment or punishment, but also "if that person has not received or would not receive the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights".

[35] European Court of Human Rights, Soering v. the United Kingdom judgment of 7 July 1989; Chahal v. United Kingdom judgment, of 15 November 1996, § 80.

[36] Soering judgment, § 86.

[37] Soering judgment, §§ 89-91.

[38] Ahmed Hussein Mustafa Kamil Agiza v. Sweden, Decision CAT/C/34/D/233/2003, 24 May 2005.

[39] European Court of Human Rights, Mamatkulov and Askerov v. Turkey judgment [GC] of 4 February 2005.

[40] European Court of Human Rights, Mamatkulov and Askerov judgment, § 76

[41] European Court of Human Rights, Cruz Varas and others v. Sweden judgment of 20 March 1991, § 75, Mamatkulov and Askerov judgment, § 69; Vilvarajah and others v. UK judgment of 30 October 1991, § 107.

[42] See e.g. European Court of Human Rights, Aksoy v. Turkey judgment of 18

December 1996, § 62.

[43] See European Court of Human Rights, Isayeva v. Russian Federation judgment of 24 February 2005, § 191; ICJ, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion of 9 July 2004, para. 127 ("The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory").

[44] Article 4(1) ICCPR has led to the formulation by the United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, of the so-called Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984). In paras 39-40, under the heading "Public Emergency which Threatens the Life of the Nation", it is said: "39. A State party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant. 40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4".

[45] Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 11 July 2002, article XV.

[46] House of Lords, Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004)A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals), [2005] UKHL 71; House of Lords, Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), [2004] UKHL 56; Bundesverfassungsgericht, Aviation Security Act, 1 BvR 357/05; Israeli Supreme Court, Public Committee Against Torture in Israel v. The State of Israel et al., Case HCJ 5100/94; Israeli Supreme Court, The Center for the Defense of the Individual v. The Commander of IDF Forces in the West Bank, Case HCJ 3278/02; Israeli Supreme Court, Marab v. The Commander of IDF Forces in the West Bank, Case HCJ 3239/02; see also US Supreme Court, Rasul v. Bush, Case No. 03-334, 542 US 466 (2004) 321 F.3d 1134.

[47] See Prosecutor v. Tadic (1996) 105 ILR 419, 488.

[48] The Manual of the Law of Armed Conflict, UK Ministry of Defence, Oxford (OUP) 2004, no. 3.5.1(at p. 31).

[49] See Venice Commission's opinion on possible need to further develop the Geneva

Convention, CDL-AD(2003)018, § 87.

[50] Opinion on the possible need for further development of the Geneva Conventions, CDL-AD (2003)018, § 56.

[51] See Supreme Court of Israel, HCJ 7015/02, Ajuri v. The Commander of the IDF Forces in the West Bank, in: Judgments of the Supreme Court of Israel – Fighting Terrorism within the Law, http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm, at pp. 144-178.

[52] The Secretariat of the ICAO Council stated that "the predominant view is that all such other aircraft [performing State services other than military, police and customs] would in fact be considered as falling within the scope of the Convention". In the study, it is recalled that under the Paris Convention of 1919 all State aircraft other than military, customs and police aircraft were treated as private aircraft and subjected to all the provisions of the Paris Convention (see Doc. C-WP/9835 of 22/09/1993, Secretariat Study on "Civil/State aircraft" presented by the Secretary General at the ICAO Council 140th Session, § 5.2).

[53] In Germany, for example, certain flights performing state functions, such as transports of high government officials or humanitarian/disaster relief flights are referred to as "civil State flights" (zivile Staatsflüge) and are regarded as civil flights in the sense of the ICAO Convention (but not necessarily in the sense of general public international law), see Bericht der Bundesregierung (Offene Fassung) gemäß Anforderung des Parlamentarischen Kontrollgremiums vom 25. Januar 2006 zu den Vorgängen im Zusammenhang mit dem Irakkrieg und der Bekämpfung des Internationalen Terrorismus, at http://www.bundesregierung.de/Anlage965868/Bericht+der+Bundesregierung+-+offene+Fassung.pdf., at pp. 62-67.

[54] ICAO Secretariat Study on "Civil/State Aircraft" LC/29-WP/2-1, Pellet, Dailler, Droit International Public, LGDJ, 7è edition, 2002, pp. 1250; Combacau (J.), Sur (S), Droit international Public, Montchristien, 5è édition, 2001, p. 473; "Status of military aircraft in international law", address at the Third International Law Seminar of 28 August 1999, by Professor Michael Milde, formerly the head of the legal bureau of the International Civil Aviation Organisation, at: http://www.mindef.gov.sg/dmg/ls/Il399.doc; Diederiks-Verschoor, Introduction to air law, Kluwer, pp. 30 and following.

[55] In the case of a civil aircraft (B-737, MisrAir flight 2843 from Cairo to Tunis) carrying, on the basis of charter by the Government, suspected terrorists out of the country under Military Police escort and intercepted and forced to land in Italy by the US military based in Italy, the US Government, in a letter to the International Federation of Air Line Pilots Association, stated: "It is our view that the aircraft was operating as a state aircraft at the time of interception. The relevant factors - including exclusive State purpose and function of the mission, the presence of armed military personnel on board and the secrecy under which the mission was attempted - compel this conclusion". This case, quoted in ICAO document LC/29-WP/2-1, pp. 11-12, was cited by Professor Milde,

see above, footnote 54. See also A. Cassese, Terrorism, Politics and Law, the Achille Lauro case, Polity Press, p. 39.

[56] Diederiks-Verschoor, Introduction to air law, Kluwer, pp. 30 § 12 . See also footnote 52.

[57] Status of ratifications of the Chicago Convention available at: http://www.ICAO.int/ICDB/HTML/English/Representative%20Bodies/Council/Working%20Papers%20by%20Session/163/c.163.wp.11641.en/C.163.WP.11641.ATT.EN.HTM

[58] See M. Milde, "Status of military aircraft in international law", address at the Third International Law Seminar of 28 August 1999, op. cit.

[59] The United Nations Convention on Jurisdictional Immunities of States and their Property, signed on 1 March 2004, provides in its Article 3 § 3 that "The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by the State".

[60] See Pellet, Dailler, Droit International Public, op. cit., p. 1252 ; A. Cassese, Terrorism, Politics and Law, op. cit., p. 39.

[61] See "Status of military aircraft in international law", address at the Third International Law Seminar of 28 August 1999, by Professor Michael Milde, formerly the head of the legal bureau of the International Civil Aviation Organisation, at: http://www.mindef.gov.sg/dmg/ls/Il399.doc.

[62] Para. a) of Article 3bis of the Chicago Convention provides that " The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

[63] For Germany see Schönke/Schröder, Strafgesetzbuch, 26th ed. 2001, Vor §§ 3-7, para. 30, and § 153 c Strafprozessordnung (Law on Criminal Procedure), according to which the Public Prosecutor *may* abstain from prosecuting a crime which has been committed by a foreigner in a foreign aircraft; this provision presupposes that full jurisdiction over foreign aircraft in flight exists and only gives the Prosecutor a discretionary power not to exercise this jurisdiction, see Meyer-Goßner, Strafprozessordnung, 48th ed. 2005. See also, e.g. Males (French Cour de Cassation, 29 June 1972, 27 June 1973, 73 ILR 698), Public Prosecutor v. Janos V. Austrian Supreme Court 17 May 1972, 71 ILR 229, Air India v. Wiggens, UK House of Lords, 3 July 1980, 77 ILR 276), US v. Georgescu, 723 F. Supp. 912 (1989).

[64] Tokyo, 14 September 1963, UNTS 704.

[65] ICJ judgment on the North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Reports 4

at 26 (§ 30).

[66] See ICAO Secretariat Study on "Civil/State Aircraft" LC/29-WP/2-1; Council Working paper C-WP/10588 Misuse of Civil Aviation (Request from Cuba).

[67] For example, the agreement of 26 July 1962 between Italy and the Supreme Commander of the NATO on the specific conditions of settling and operation on the Italian territory of the present or future international military General Quarters provides at Article 4 that the Italian Government accepts that the moveable and immoveable property of the General Quarters is immune from search.

[68] SOFAs are normally bilateral; there exists in addition a multilateral SOFA with NATO members, the NATO Status of Forces Agreement (SOFA) of 19 June 1951 (Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, http://www.nato.int/docu/basictxt/b510619a.htm). Pursuant to Article VII of the NATO SOFA, when only the sending State's law is violated, the sending State has the power to exercise sole criminal jurisdiction. When only the receiving State's law is violated, the receiving State has the power to exercise sole criminal jurisdiction. When a crime violated the laws of both countries, there is concurrent criminal jurisdiction: the receiving State maintains primary jurisdiction except for offences committed solely against the property or security or member of the sending State force, or for offences arising out of any act or omission done by the sending State service member in the performance of official duty. In all other cases, the receiving State has the primary right to exercise jurisdiction. In cases of concurrent jurisdiction, the receiving State may relinquish jurisdiction through waiver requests from the sending State.

[69] Article III.1

[70] Article III.2

[71] This is usual, for instance, in US treaty practice. See John Woodcliffe, "The peacetime use of foreign military installations under modern international law", Martinus Nijhoff, 1992, p. 144.

[72] There is a similar provision in the Treaty on Collective Security of the Commonwealth of Independent States (CIS). Two Council of Europe member States, Russia and Armenia, are currently party to this treaty.

[73] The Commission has not been able to see the text of this agreement.

[74] See US Department of Defense, Fact Sheet of 7 June 2002, International contributions to the War against terrorism, at http://www.defenselink.mil/news/Jun2002/d20020607contributions.pdf.

[75] European Court of Human Rights, Stocké v. Germany judgment of 12 October 1989, Series A no. 199, opinion of the Commission, p. 24, § 167.

[76] European Court of Human Rights, Öcalan v. Turkey judgment, § 90.

[77] Internal Security Services In Europe, Report adopted by the Venice Commission at

its 34th Plenary meeting, 7 March 1998CDL-INF(1998)006e)

[78] European Court of Human Rights, Klass and others v. Federal Republic of Germany judgment of 6 September 1978, § 75 in connection with § 71; Leander v. Sweden, judgment of 26 March 1987, § 84.

[79] European Court of Human Rights, Kurt v. Turkey judgment of 25 May 1998, § 124.

[80] Inter-American Court of Human Rights, Velasquez Rodrigues case, 29 July 1988, § 187 and Suarez Rosero case, 12 November 1997, §§ 90-91. UN Human Rights Committee, Polay Campos v. Peru, Communication 577/1994, 6 November 1997, §§ 8.4, 8.6 and 8.7. See also European Court of Human Rights, Ocalan v. Turkey judgment of 12 March 1993, §§ 31-232.

[81] The Schengen Treaty, for example.

[82] European Court of Human Rights, Ilascu and others v. Moldova and Russia judgment of 8 July 2004, § 318.

[83] European Court of Human Rights, Chahal v. United Kingdom judgment of 15 November 1996.

[84] Article 3 ECPT provides: "In the application of this Convention, the Committee and the competent national authorities of the Party concerned shall co operate with each other." See also Article 8 § 2 (b) ECPT.

[85] Article 10 § 2 ECPT provides: "If the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two thirds of its members to make a public Statement on the matter."

[86] And is indeed required: see European Court of Human Rights, Nivette v. France judgment of 3 July 2001, in which the European Court of Human Rights found that extradition to a State imposing the death sentence violated Protocol 6.

[87] The Council of Europe Steering Committee on Human Rights (CDDH) has set up a Group of Specialists with the task of "reflection on the issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures; and consider the appropriateness of a legal instrument, for example a recommendation on minimum requirements/standards of such diplomatic assurances, and, if need be, present concrete proposals".

[88] See European Committee for the Prevention of Torture and Inhuman and Degrading Treatment, 15th General Report on the CPT's activities, §§39-40, at http://www.cpt.coe.int/en/annual/rep-15.htm.

[89] See European Court of Human Rights, Ilascu and others v. Moldova and the Russian Federation, judgment of 8 July 2004, § 318, Riera Blume and others v. Spain judgment of 14 October 1999 (final 14/01/2000) §§ 34-35; Gongadze v. Ukraine, judgment of 8 November 205, § 165.

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UNITED STATES OF AMERICA

Below the radar: Secret flights to torture and 'disappearance'

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Below the radar: Secret flights to torture and 'disappearance'

1. The US rendition programme

1.1 Renditions

Amnesty International uses the term "rendition" to describe the transfer of individuals from one country to another, by means that bypass all judicial and administrative due process. In the "war on terror" context, the practice is mainly – although not exclusively – initiated by the USA, and carried out with the collaboration, complicity or acquiescence of other governments. The most widely known manifestation of rendition is the secret transfer of terror suspects into the custody of other states – including Egypt, Jordan and Syria – where physical and psychological brutality feature prominently in interrogations. The rendition network's aim is to use whatever means necessary to gather intelligence, and to keep detainees away from any judicial oversight.

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However, the rendition network also serves to transfer people into US custody, where they may end up in Guantánamo Bay in Cuba, detention centres in Iraq or Afghanistan, or in secret facilities known as "black sites" run by the USA's Central Intelligence Agency (CIA). In a number of cases, individuals have been transferred in and out of US custody several times. Muhammad Saad Iqbal Madni, for instance, was arrested by Indonesian intelligence agents in January 2002, allegedly on the instructions of the CIA, who flew him from Jakarta to Egypt, where he "disappeared" and was rumoured to have died under interrogation. In fact, he had been secretly returned to Afghanistan via Pakistan in April 2002 and held there for 11 months before being sent to Guantánamo Bay in March 2003. It was more than a year later that fellow detainees, who said he had been "driven mad" by his treatment, managed to get word of his existence to their lawyers.

Rendition is sometimes presented simply as an efficient means of transporting terror suspects from one place to another without red tape. Such benign characterizations conceal the truth about a system that puts the victim beyond the protection of the law, and sets the perpetrator above it.

Renditions involve multiple layers of human rights violations. Most victims of rendition were arrested and detained illegally in the first place: some were abducted; others were denied access to any legal process, including the ability to challenge the decision to transfer them because of the risk of torture. There is also a close link between renditions and enforced disappearances. Many of those who have been

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illegally detained in one country and illegally transported to another have subsequently "disappeared", including dozens who have "disappeared" in US custody. Every one of the victims of rendition interviewed by Amnesty International has described incidents of torture and other ill-treatment. B5

Because of the secrecy surrounding the practice of rendition, and because many of the victims have "disappeared", it is difficult to estimate the scope of the programme. In many countries, families are reluctant to report their relatives as missing, for fear that intelligence officials will turn their attention on them. Amnesty International has spoken to several people who have given credible accounts of rendition, but are unwilling to make their names or the circumstances of their arrests and transfers known. Some cases come to light when the victim is released or given access to a lawyer, although neither event is a common occurrence in the life of a rendition victim. The number of cases currently appears to be in the hundreds; Egypt's Prime Minister noted in 2005 that the USA had transferred some 60-70 detainees to Egypt alone, and a former CIA agent with experience in the region believes that hundreds of detainees have been sent by the USA to prisons in the Middle East. The USA has acknowledged the capture of about 30 "high value" detainees whose whereabouts remain unknown, and the CIA is reportedly investigating some three dozen additional cases of "erroneous rendition", in which people were detained based on flawed evidence or confusion over names.[1] B5

However, this is a minimum estimate. Rendition, like "disappearance", is designed to evade public and judicial scrutiny, to hide the identity of the perpetrators and the fate of the victims.

1.2 'Diplomatic assurances'

"They promptly tore his fingernails out and he started telling things."
Vincent Cannistraro, former Director of the CIA's Counterterrorism Center, describing what happened to a detainee who was rendered to Egypt

Those who have been rendered to other countries for interrogation have said they were beaten with hands or sticks, made to stand for days on end, hung up for *falaqa* (beatings on the sole of the foot)[2] or deprived of food or sleep. In some cases, the conditions of detention, including prolonged isolation, have themselves amounted to cruel treatment. Yet no one can investigate this, much less stop it, because the condition and whereabouts of most rendition victims remain concealed.

There is little doubt that transfers are intended to facilitate such abusive interrogation. The former director of the CIA's Counterterrorism Center, Vincent Cannistraro, told *Newsday* newspaper in February 2003 that a senior al-Qa'ida detainee had been sent from Guantánamo Bay to Egypt because he was refusing to cooperate with his B5

1 Dana Priest, "Wrongful Imprisonment: Anatomy of a CIA Mistake", Washington Post, 4 December 2005.

2 Falaqa involves beating the bare soles of the feet, often when the victim is suspended upside-down. It causes intense pain due to the numerous nerve endings in the foot, and often causes lasting damage to the foot's small bones and tendons.

interrogators. In Egypt, Vincent Cannistraro said, "they promptly tore his fingernails out and he started telling things."[3] Robert Baer, a former CIA official in the Middle East, told the *British Broadcasting Corporation (BBC)*: "As I understand it, there's a lot of franchising stuff out. Syria is a country, like Iraq, where they torture people. They use electrodes, water torture. They take torture to the point of death, like the Egyptians. The way you get around involving Americans in torture is to get someone else to do it."[4]

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The US government has claimed that renditions do not lead to a risk of torture. Secretary of State Condoleeza Rice insisted that: "the United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured."[5]

Even if one were to accept the premise that rendition is not intended to facilitate interrogation under torture, reliance on such "diplomatic assurances" would not satisfy the absolute obligation not to transfer any person to a country where they risk torture or other ill-treatment (the principle of *non-refoulement*). Indeed, the premise on which such assurances are based is inherently self-contradictory. If the risk of torture or ill-treatment in custody is so great that the USA must ask for assurances that the receiving state is not going to carry out such a crime, than the risk is obviously too great to permit the transfer. Most states asked to provide such assurances have already signed binding legal conventions prohibiting torture and ill-treatment, and have ignored them. Moreover, the use of diplomatic assurances creates a situation in which neither state has an interest in monitoring the agreement effectively, as any breach of the agreement would implicate both the sending and receiving states in internationally prohibited acts of torture or ill-treatment.

1.3 Establishment of the US rendition programme

Before 11 September 2001, rendition was largely thought of as a means of returning suspected terrorists to the USA for trial. President Bill Clinton's Presidential Decision Directive 39 of June 1995 states: "When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of the highest priority... If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government, consistent with the procedures outlined in [National Security Directive 77], which shall remain in effect."[6] National Security

3 Tom Brune, "An Aggressive Interrogation", Newsday, 4 March 2003.

4 "Stars, Stripes and Human Rights", interview broadcast on *British Broadcasting Corporation (BBC) Radio Three*, January 2006.

5 Secretary Condoleeza Rice, "Remarks Upon Her Departure for Europe", as-aired at Andrews Air Force Base, 5 December 2005, see http://www.state.gov/secretary/rm/2005/57602.htm

6 National Security Directive 77 was issued by President George Bush in January 1992, and its contents remain classified, http://www.fas.org/irp/offdocs/pdd39.htm.

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Directive 77 was issued by President George W. Bush in January 1992, and its contents remain classified.

Speaking before the Senate Judiciary Committee in September 1998, FBI Director Louis J. Freeh noted: "During the past decade, the United States has successfully returned 13 suspected international terrorists to stand trial in the United States for acts or planned acts of terrorism against U.S. citizens... Based on its policy of treating terrorists as criminals and applying the rule of law against them, the United States is one of the most visible and effective forces in identifying, locating, and apprehending terrorists on American soil and overseas."[7]

At the same time, however, other US agencies were making provision to render terrorist suspects to third countries, where the goal was not trial, but to keep them in custody, out of circulation, and without access to US courts. Michael Scheuer, former chief of the CIA's bin Laden unit, said that the CIA had originally proposed a programme to bring suspects back to the USA and hold them as prisoners of war. When this failed to gain administration approval, in 1995, the rendition programme to Egypt was proposed and accepted. The goal was to "get the guys off the streets", said Michael Scheuer, and to seize documents, computers and any other information that could be exploited for intelligence.[8] He also noted, however, that it was still White House officials who called the shots: they "told the CIA what to do, and decided how it should pursue, capture and detain terrorists... Having failed to find a legal means to keep all the detainees in American custody, they preferred to let other countries do our dirty work".[9]

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Publicly, however, it continued to be suggested that rendition was a means of ensuring that terrorist suspects stood trial. In 2000, in a statement before the US Senate Select Committee on Intelligence, CIA Director George Tenet said: "Since July 1998, working with foreign governments worldwide, we have helped to render more than two dozen terrorists to justice. More than half were associates of Usama Bin Ladin's Al-Qa'ida organization. These renditions have shattered terrorist cells and networks, thwarted terrorist plans, and in some cases even prevented attacks from occurring."[10] The meaning of the phrase "render... to justice" is not entirely clear. Amnesty International has asked the CIA for details of who was rendered and to where, and the dates of their trials, but has received no response.

In 2004, George Tenet testified to the US Congress' 9/11 Commission that the CIA's Counterterrorism Center, which added a Renditions Branch in 1997, "has racked up many successes, including the rendition of many dozens of terrorists prior to

7 1998 Congressional Hearings on Intelligence and Security, statement for the record from FBI Director Louis J Freeh, 3 September 1998.

8 Neil Mackay, "These two men are experts on rendition", Sunday Herald (Scotland), 16 October 2005.

9 Michael Scheuer, "A fine rendition", New York Times, 11 March 2005.

10 see:http://www.odci.gov/cia/public_affairs/speeches/2004/tenet_testimony_04142004.html.

September 11, 2001." In later remarks, he clarified that there had been at least 70 renditions to foreign countries; no trials were mentioned.[11]

11 Written Statement for the Record of the Director of Central Intelligence Before the National Commission on Terrorist Attacks Upon the United States, 24 March 2004.

1.4 Rendition practice since September 2001

"All I want to say is that there was 'before' 9/11 and 'after' 9/11. After 9/11 the gloves come off... 'No Limits' aggressive, relentless, worldwide pursuit of any terrorist who threatens us is the only way to go..."

Cofer Black, Director of the CIA's Counterterrorism Centre from 1999 until May 2002, in a statement before the 9/11 Commission

Since 11 September the focus of rendition practice has shifted emphatically; the aim now is to ensure that suspects are not brought to stand trial, but are handed over to foreign governments for interrogation – a process known in the USA as "extraordinary rendition" – or are kept in US custody on foreign sites. What was once an inter-agency operation was apparently turned largely over to the CIA under a still-classified directive signed by President Bush in September 2001.[12] The minority and majority leaders of both chambers of Congress were apparently notified of the CIA's new powers, but were not consulted on or even shown the directive.

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The directive is said to give the CIA the power to capture and hold terrorist suspects. Prior to its signing, the CIA could capture suspects, but had no authority to keep them in custody. This had been part of the reason for establishing the rendition programme in the first place; it enabled the CIA – and other US intelligence agencies – to capture suspects and ship them off to client states without having to produce the evidence that would justify detention or trial.[13] Roger Cressey, who was deputy counter-terrorism director at the White House in 2001, told *UPI*: "We are going to make mistakes. We are even going to kill the wrong people sometimes. That's the inherent risk of an aggressive counter-terrorism program."[14]

As the practice of rendition has shown, mistakes are indeed made and lives are ruined. Some in the US government have tried to justify rendition and "black sites" by saying they are a necessary means of capturing and holding the "worst of the worst", and that "renditions save lives", yet there is no legal or judicial mechanism to ensure that this is the case. The methodology is to grab first, sometimes on flimsy or non-existent evidence, and to ask questions later.

Without a transparent process, based on the international standards and customary rules that bind all states, the programme of rendition and secret detention is eroding the human security and rule of law it claims to protect. For all practical purposes, the

12 Douglas Jehl and David Johnston, "Rule Change Lets CIA Freely Send Suspects Abroad to Jails", *New York Times*, 6 March 2005.

13 There are 15 federal organizations in the US "intelligence community": National Security Agency/Central Security Service (NSA/CSS); Central Intelligence Agency (CIA); National Geospatial-Intelligence Agency (NGA); Federal Bureau of Investigation (FBI); Defense Intelligence Agency (DIA); National Reconnaissance Office (NRO); Department of Energy (DoE); Army Intelligence; Air Force Intelligence (AIA); Navy Intelligence (ONI); Marine Corps Intelligence; Department of Treasury (OIS); Department of State (INR); Coast Guard and the Department of Homeland Security (DHS).

14 Shaun Waterman, "CIA 'too cautious' in killing terrorists", UPI, 28 February 2005.

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USA has created a law-free zone, in which the human rights of certain individuals have simply been erased.

1.5 Pakistan

Hassan bin Attash was only 17 years old when he was detained in a house raid in Pakistan in September 2002. He was sent first to the "Dark Prison" in Afghanistan for about a week, then rendered again, this time to Jordan, where he said he was severely tortured while being interrogated about the activities of his brother, Walid bin Attash, who has "disappeared" and is presumed to be held in a secret US detention centre. Announcing Walid bin Attash's capture in 2003, President George W. Bush called him a "killer", adding "he is one less person that people who love freedom have to worry about". After 16 months in Jordan, Hassan bin Attash, a Yemeni national, was rendered back to US custody in Afghanistan, then resurfaced at Guantánamo Bay in May 2004.

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Although cases of rendition from Western countries have received substantial attention in the media and from human rights organizations, it remains the case that most of the known victims of rendition or secret detention were initially detained in Pakistan, where the government maintains a close working relationship with the USA on intelligence matters. Some of them are known to be in Guantánamo Bay[15]; others in "black sites"; some were rendered by the USA to Middle Eastern countries where they are believed to have been tortured. Transfers to US and other custody have been carried out in contravention of Pakistani national extradition law as well as the international prohibition of *refoulement*.

The Pakistani government has publicly stated that some 700 terrorist suspects have been arrested, many of whom have been handed over to US custody. Many of these detainees have "disappeared", including men, women and children; journalists reporting on the "war on terror"; and doctors alleged to have treated "terrorists". Given the degree of secrecy surrounding security operations, and the overlap between US and Pakistani intelligence interests, it is difficult to find out which detainees have been turned over to the USA and which have been kept in Pakistani custody.

Those who have been turned over to the USA include many of the "high value" detainees currently being held in CIA "black sites". Of the 12 detainees identified by *ABC* news as having been held in secret detention in Poland, nine had first been arrested by Pakistani forces; at least 19 of the 28 "disappeared" named by the Center

15 More than 85 per cent of the Guantánamo detainees, for instance, were arrested not in Afghanistan by US troops, but by the Northern Alliance and Pakistani forces; rewards of up to US$5,000 were paid for every "terrorist" turned over to the USA. One leaflet distributed in Pakistan by US forces read: "Get wealth and power beyond your dreams. Help the Anti-Taliban Forces rid Afghanistan of murderers and terrorists. You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers." See Mark Denbeaux et al, Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data, Seton Hall University School of Law, February 2006.

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for Human Rights and Global Justice at the New York University School of Law had likewise been detained in Pakistan.[16]

The most recent such detention appears to be that of Mustafa Setmariam Nasar, also known as Abu Musab al-Suri, who was reportedly arrested in Quetta by Pakistani counter-terrorism police in early November 2005. The subject of a US$5 million reward on the FBI's "Rewards for Justice" list, Mustafa Nasar's capture was described by US intelligence officials as an "intelligence bonanza", adding that "he is all pen, no action, but the man has amazing access to a lot of other key players."[17] The USA has not officially confirmed his arrest, and his current whereabouts remain unknown, but his photograph and details have been removed from the "Rewards for Justice" wanted list. Mustafa Nasar's wife Elena blames his continued "disappearance" on "non-Pakistani" agents.

Mustafa Nasar was one of 35 people listed in a 695-page indictment handed down in September 2003 by Spanish Judge Baltasar Garzon. The indictment called for the arrest of 34 other men, including Osama Bin Laden, on charges including membership of a terrorist group and planning terrorist acts. In the indictment, Judge Garzon alleged that Mustafa Nasar trained volunteers from Spain, Italy and France, then sent them home as "sleepers" awaiting orders. The judge also alleged that he worked closely with the leader of the Spanish cell, Imad Yarkus, a Syrian-born Spaniard who was tried and sentenced to a 25-year prison term in Spain in 2005. Judge Garzon issued an international arrest warrant for Mustafa Nasar in 2003, but the Spanish authorities have not been given any indication of his current whereabouts.

1.6 Torture, ill-treatment and 'disappearance': violations of international law

Incommunicado detention has been condemned by human rights bodies as a human rights violation that both facilitates torture, and constitutes a form of torture or cruel, inhuman and degrading treatment in itself. Prolonged isolation has been shown to cause depression, paranoia, aggression and hallucinations; the psychological trauma can last a lifetime. Where the detainee has "disappeared", the effects of enforced solitude are compounded by a pervasive sense of uncertainty and anxiety about the future, which can be similarly destructive.[18]

The Human Rights Committee, in an authoritative statement on the prohibition on torture and cruel, inhuman or degrading treatment, has stated that "to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and

16 List from: Brian Ross and Richard Esposito, *Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, 5 December 2005, checked against *FATE AND WHEREABOUTS UNKNOWN: DETAINEES IN THE "WAR ON TERROR"*, The Center for Human Rights and Global Justice (CHRGJ) at NYU School of Law, December 2005.

17 Robert Windrem, "US hunt for 'pen jihadist' ends", *NBC News*, 3 November 2005.

18 Combating torture: a manual for action, Amnesty International, 2003. See also Human Rights First, Behind the Wire: An Update to Ending Secret Detentions, March 2005, p30.

places of detention ... to be kept in registers readily available and accessible to those concerned, including relatives and friends".[19] The UN Special Rapporteur on torture has said: "the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention."[20]

"Disappearances" are crimes under international law involving multiple human rights violations. In certain circumstances they are crimes against humanity, and can be prosecuted in international criminal proceedings. The International Convention for the Protection of All Persons from Enforced Disappearance,[21] defines enforced disappearance as the "arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

The defining characteristic of a "disappearance" is that it puts the victim beyond the protection of the law while concealing the violations from outside scrutiny, making them harder to expose and condemn, and allowing governments to avoid accountability.

The UN Committee against Torture has determined that the uncertainty regarding the circumstances surrounding their loved ones' fate causes the families of disappeared persons serious and continuous suffering.[22]

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1.7 Secret detentions and secret transfers: the case of Muhammad Bashmilah, Salah Qaru and Muhammad al-Assad

"Every day here is another day stolen from my life."
Muhammad Bashmilah, who "disappeared" in US custody for 21 months and was then arbitrarily detained in Yemen

Secret detention is the corollary of a secret rendition programme. Without renditions, the US-run "black sites" could not exist. The USA has acknowledged that it is holding a number of "high value" detainees – those who are thought to be leading terrorist suspects or to have intelligence information too sensitive to be entrusted to client states. Rendition provides the means to transport them to the CIA-run system of

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19 Human Rights Committee, General Comment 20, Article 7, para. 11. Accurate and detailed registers of detainees are required under international law and standards, including the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

20 UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.

21 The Convention has not been adopted although text was finalized in September 2005: E/CN.4/2005/WG.22/WP.1/REV.4, 23 September 2005.

22 Concluding observations of the Committee against Torture: Guatemala, UN Doc. A/56/44, 6 December 2000, para. 73(e).

covert prisons that has reportedly operated at various times in at least eight countries. According to reports, these facilities tend to be used in rotation, with detainees transferred from site to site together, rather than being scattered in different locations. Although the existence of secret CIA detention facilities has been acknowledged since early 2002, the term "black sites" was first reported by the *Washington Post* in November 2005.

The only public testimony from those who have held in "black sites" comes from three Yemeni men who "disappeared" in US custody and were then held in secret detention for more than 18 months, before being returned to Yemen in May 2005. Muhammad Faraj Bashmilah and Salah Nasir Salim 'Ali Qaru[23], had been arrested in Jordan before being transferred to US custody in October 2003. The third man, Muhammad Abdullah Salah al-Assad, was arrested in Tanzania, also in 2003, and turned over to US custody a few hours later. Amnesty International first reported on their cases in 2005, and returned to Yemen to follow up in February and March 2006; Muhammad al-Assad was released on 14 March. Muhammad Bashmilah and Salah Qaru were conditionally released from the political security prison in Aden at around midnight on 27/28 March.

During their "disappearance", the three men were kept in at least four different secret facilities, likely to have been in at least three different countries, judging by the length of their transfer flights and other information they have been able to provide. Although not conclusive, the evidence suggests that they were held at various times in Djibouti, Afghanistan and Eastern Europe.

Muhammad Bashmilah and Salah Qaru were apparently taken from Jordan to Afghanistan in October 2003; other prisoners there managed to get word to them that they were in Afghanistan. The two men have separately described a transfer flight of about four hours from Jordan, which is consistent with a flight to Afghanistan.

It is not clear where in Afghanistan they were held, but it does not appear to be the same Afghan-run prison in Kabul in which Khaled el-Masri was detained at roughly the same time. Khaled el-Masri, a German citizen, had been arrested in Macedonia in December 2003 and rendered to Afghanistan, where he spent some four months in a prison he said was run by Afghans but controlled by US officials. In May 2004, apparently realizing that they had the wrong man, the USA flew him to Albania and dropped him off on a mountain road to make his own way back to Germany. Khaled el-Masri has drawn a detailed floor map of his Afghan prison; the map was immediately recognizable to Walid al-Qadasi, a Yemeni national who had been detained in Kabul in 2002.[24] Muhammad Bashmilah and Salah Qaru, however, did not recognize the drawing and insisted that there were no Afghan guards or staff at their

23 In previous Amnesty International documents, he has been referred to as Salah 'Ali, or as Salah Nasser Salim 'Ali.

24 Amnesty International showed him the map in March 2006, days after he was finally released and returned to his home in Yemen. Walid al Qadasi had been transferred to Guantánamo Bay from Afghanistan in 2002, and spent nearly two years there before being returned to Yemen in April 2004. He was arbitrarily detained in Yemen for almost two years, before being released on 3 March. He has never been charged with any offence, nor given any explanation for the more than four years he has spent in detention.

prison. Both men believe that all of their guards and interrogators were from the USA, although the translators included native Arabic speakers with Lebanese and Moroccan accents.

The men told Amnesty International that they were held with a group of "important, high ranking" prisoners, who were watched over very closely. One such detainee managed to tell them that he had not been held permanently in any one location, but had been transported with the group from place to place.

The security measures practiced in the facility were far stricter and more methodical than those described by other detainees who have been held in Afghanistan. Muhammad Bashmilah and Salah Qaru describe a regime in which each detainee was constantly and individually monitored. The men were held in complete isolation, in cells measuring about 2m x 3m. There was one camera above the door and another on the wall on the other side of the cell. The inmates were permanently shackled to a ring fixed in the floor; the chain was not quite long enough to allow them to reach the door.

If a guard needed to enter their room to take them to shower or for interrogation, for instance, they followed a set routine. When the guard opened the door, the inmate had to face the wall with his back to the door and his hands on the wall. The guard would hood them and handcuff them behind their backs before removing the shackles. The hood had a kind of noose that could be tightened around the neck if the detainee did not move fast enough or in the right direction. The guards were always covered, and wore masks and gloves, but the men said that none of them were Arabs or Afghans. When asked how they knew this, they replied that the guards "had a different kind of physique".

They were allowed outside for 20 minutes once a week, when they were brought into a courtyard with very high walls and made to sit in a chair facing the wall. Once seated, their hood was removed. They were not allowed to look to the left or the right, and a guard stood behind them to "enforce the rules".

Muhammad al-Assad was arrested in Dar es Salaam, Tanzania, on 26 December 2003 and flown out sometime before dawn the next day. Sources in Tanzania have said that he was flown to Djibouti on a small US plane. According to press reports, about 800 US personnel, part of a counter-terrorism task force, had been located in Djibouti in late 2002, and the site was known to be a base for the CIA's unmanned predator planes.[25] Speaking before the US Senate Armed Services Committee in March 2005, General John Abizaid noted: "Djibouti has given extraordinary support for US military basing, training, and counter-terrorism operations".[26]

Muhammad al-Assad says that he was questioned there by US officials, one man and one woman, who told him they were from the USA's Federal Bureau of Investigation (FBI); a picture of the President of Djibouti hung on the wall of the interrogation

25 *San Francisco Chronicle*, 12 January 2003.

26 Statement of General John P. Abizaid, United States Army Commander, United States Central Command, before the Senate Armed Services Committee on the 2005 posture of the United States Central Command, 1 March 2005.

room. Muhammad al-Assad spent about two weeks there before being processed for another transfer. This time he thinks he was in a larger plane as he entered it without having his head pushed down or bending. He believes he was strapped down to a bench and that the plane had a row of benches along the side. He knows the flight was long and that it touched down once before flying on to a place that was "cold and muddy". At this location, he was held in two different detention centres, about 20-40 minutes apart by car, over unpaved roads. The first room was large and dirty, with a rug and a high narrow window; the second was smaller and darker, and the walls were covered in graffiti. The bread he was given there, he said, was from Pakistan or Afghanistan. Muhammad al-Assad is diabetic and says that he was not given proper medication during this period, so was often dizzy or ill. It is not certain that he was held with Muhammad Bashmilah and Salah Qaru, although all three men were transferred to the same final secret destination at about the same time.

At the end of April 2004, probably around the 24th, the men were brought, one at a time, to be prepared for transfer. They were stripped naked before being given absorbent plastic underpants, a pair of knee length cotton trousers to wear over them, a cotton shirt, and a pair of blue overalls. They were handcuffed and their hands were strapped to a belt around the waist, their legs were shackled together and to the belt. Foam earplugs were inserted in their ears. They were blindfolded and had their mouths covered with a surgical facemask, presumably to prevent them from talking. They were then hooded, and tape or a bandage was wrapped around the hood to prevent movement. Finally, a pair of heavy, sound-deadening headphones were placed over the hood. A similar process was described by Swedish police officers who witnessed a US-led renditions team preparing two men for transfer in December 2001; the renditions team told them that the procedures had become policy for transporting terrorist suspects "post 9/11".

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"You lose most of your senses", said Muhammad Bashmilah, "but you can still feel a bit, and on this flight I felt the presence of a number of other bodies swaying back and forth." The preparations are done very quickly and professionally, he added, by a team of black masked "ninjas" who carried out the whole operation in about 20 minutes. After he was prepared, he was taken to a waiting room for a couple of hours, so he believes there must have been a number of others undergoing the same treatment.

Muhammad Bashmilah and Salah Qaru said that this flight lasted three to four hours, Muhammad al-Assad thought the flight was longer. Whether or not they were on the same plane for the first leg of their journey, all three describe landing and waiting for an hour or so before being thrown roughly into a helicopter with a number of other prisoners. All three noted separately that they felt that there were a number of prisoners being transported at the same time, perhaps a dozen or more. All three agree that the helicopter flew for about two and a half or three hours, and that once it had landed they were taken to the new detention centre by car.

The size and location of the final secret facility, where they spent 13 months, remains unconfirmed. Two of the men told Amnesty International in October 2005 that they believed this detention centre was in Europe. Other information they have since

provided, some of it confirmed or augmented by media reports, indicates a strong possibility that the men were indeed held in an Eastern European "black site". B5

As Amnesty International has reported, the facility was new or refurbished, and carefully designed and operated to ensure maximum security and secrecy, as well as disorientation, dependence and stress for the detainees.[27] Well-staffed and resourced, and highly organized, the system in operation there could not have been maintained solely for the purpose of interrogating low-level suspects like Muhammad Bashmilah, Salah Qaru and Muhammad al-Assad.[28] One of the men calculated that at least 20 people were being taken to the shower room in his section each week, although he does not know whether the facility contained more than one section.

The men were initially examined by a doctor or medic, who had access to the medical records that had been kept on the men throughout their detention. At each transfer, the men said, they were stripped and photographed, front and back, and any wounds or marks on their bodies were noted on a medical record, which followed them from place to place. Salah Qaru explained that the doctor used a template drawing, and that he has two scars that the doctors always recorded. The scales used at their checkups, he noted, measured weight only in pounds, the unit used in the USA.[29]

According to one of the men, "all of the guards and officials were Americans. One doctor we saw was an American and one spoke English with a European accent. Of the translators, some were native Arabic speakers, and some spoke Arabic with an American accent." The director of the prison was one of the few people they ever saw unmasked. When he arrived in late 2004, he told Muhammad al-Assad that he had been sent from Washington DC in order to decide who they should keep and who they should send home. "You are at the top of the list to be returned," he told Muhammad al-Assad.

Although the men were never allowed outside, or even to look through a window, they were given prayer schedules throughout the year. The schedules were not made up by the prison officials, but were downloaded from an Internet site (islamicfinder.org) which the men could see at the bottom of the printouts. On these schedules, they said that the time of sundown prayer over the course of the year changed by over three hours, from about 4.30pm to about 8.45pm (including an additional hour for daylight saving time). Such a degree of variation indicates a location north of the 41st parallel, well above the Middle East, and very likely to be within one of the member states of the Council of Europe (CoE). Countries that would fit the time range include Turkey, Azerbaijan, Georgia, Romania, Bulgaria, Albania and Macedonia. They were also in a location that observed daylight saving time, B5

27 *United States of America/Yemen: Secret Detention in CIA "Black Sites"*, Amnesty International, November 2005, AI Index: AMR 51/177/2005.

28 The fact that the men were released, that no terrorism-related charges have ever been brought against them, and that the Yemeni government has openly said that no such evidence exists all suggest that they were among the "erroneous renditions" reportedly being investigated by the CIA.

29 Even countries that still use imperial measures, like the UK or Australia, generally measure weight in stone, rather than pounds.

which is observed in all CoE member states, but not, for instance, in Afghanistan, Jordan or Pakistan.

Moreover, the men said that there was significant variation in the temperature. In particular, they noted the extreme cold during the winter. By December 2004, they said, it was so cold that they had to pray wearing their blankets. Even though they were issued new sets of extra warm blankets, they say the temperatures were colder than any they had ever known.

The detention centre had an on-site inventory of some 600 books, again suggesting that many more than three detainees were held there. Most of the books listed were in Arabic, but there were also titles in English, Farsi, Pashto, Russian and Indonesian. The men said that the Arabic books usually had a white and gold sticker, with Arabic and English writing, naming a bookshop in Washington DC and another in Chicago.[30] The detainees were given the book list one morning a week, and ticked off their choices; the book or books were delivered with their evening meal.

The men said that much of the food they were served seemed "European", once including pizza which they had never eaten before. Their description of the meals also echoes the account provided in an *ABC* news report on a "black site" facility allegedly located in Poland.[31] For breakfast, they were served two slices of bread with two triangles of cheese with the wrappers already removed, and yoghurt in a cup. Lunch was usually rice with tinned salty meat, sometimes fish or chicken, and olives or tomatoes. Dinner was more of the same, sometimes with some salad. For a short time in late 2004, they said, there was a dish of "normal" food, a spicy hot chicken with onions, but that stopped after Ramadan.

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On Fridays they got two fingers of a "Kit Kat" chocolate bar, again with the wrappers removed (although the name was on the bar itself); *ABC* news reported that Kit Kats were a favourite of Abu Zubaydah, a "high value" detainee allegedly held in Poland in 2005.[32] Labels were usually removed from their clothes and their bottles of water. They had some blankets and t-shirts made in Mexico, while their water cups, although made in China, had the name and telephone number of a US company embossed on the bottom.

The detention facility was about 10-15 minutes by car via a bumpy, possibly unpaved, road from the airstrip. When they got out of the car, they said, they walked up a flight of steps to get into the building, then once inside the building they walked down a ramp or slope of some kind. Their cells were new or refurbished – the walls were freshly painted and bare of any graffiti or identifying marks. The toilet facilities were modern – the men noted that the toilets were Western-style and faced in the direction of Mecca (which they had been given for prayers), which they thought meant they were unlikely to be in a Muslim country. There was artificial light in the cells, which

30 Amnesty International has confirmed the existence of both bookshops.

31 Brian Ross and Richard Esposito, Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons, 5 December 2005.

32 ibid.

was usually on 24 hours a day. On the few occasions when the electricity failed, the men said, the cells were absolutely pitch black, leading them to believe that they may have been in the basement of the building. "We don't have daylight here," one of the interrogators told them, "we have capsules". The men assumed that these capsules, which they were given every morning, contained vitamin C or D.

Although they were brought by helicopter, the facility was located within a 10-minute drive of an airbase or airstrip that is probably not a commercial airport, as it only receives light traffic. From their cells, Muhammad al-Assad said, they could hear planes taking off and landing. "Sometimes there were two or three a day," added Muhammad Bashmilah, "but some days there were none. A week wouldn't go by without planes and the most movement was on Wednesdays." B5

The information that the men provided about the duration of their flights provides general indications of where they might have been. However, without knowing the size, speed and route of the aircraft, as well as the exact duration of the flights, the locations cannot be pinpointed.

The flight that returned the men to Yemen in May 2005 was separately described by all three as a non-stop journey of approximately seven hours. The plane seems to have been a small jet. The men agree that there were about six steps from the ground to the door of the plane, and they think there were probably two seats on the aisle, at least on one side. They believe that they left in the early afternoon and arrived at about 10pm. An airport official said they might have arrived in Yemen in a military plane, although the Yemeni government has thus far refused to comment. Given that cruise speeds for likely aircraft vary from about 250 to more than 500 knots, the final flight could have been between 1,400-2,800 nautical miles (around 2,600-5,200 kilometres).[33]

The triangulation between this flight and the shorter journeys the men had apparently made from Afghanistan to their final secret destination rule out locations in Western Europe and the Middle East. If the flight times given by the men are accurate, the initial flight from Afghanistan could have reached Azerbaijan, Armenia, Turkey or Georgia or coastal Bulgaria or Romania; an additional helicopter flight of 150-180 minutes from such locations would have been unlikely to have gone more than 500 nautical miles (around 925km). Aviation experts note that it is not common for helicopter flights to cross international borders, although technically possible. Assuming that the flight from Afghanistan had reached Turkey, eastern Bulgaria or Romania, possible sites for the final detention centre could have included Turkey, Bulgaria, Romania, Albania, Bosnia-Herzegovina and the Slovak Republic.

Senior Yemeni officials told Amnesty International that they had first heard of the men on 4 May 2005, when the US Embassy in Yemen informed them that the three would be flown to Sana'a and transferred to Yemeni custody the following day. The

33 A Beech B300 has a maximum cruise speed of 311 knots, while certain models of the Gulfstream V can cruise at up to 585 knots. There are also turboprop planes with the capacity to fly seven hours non-stop; the CASA CN 235, for instance, has a cruising speed of about 246 knots. The men said they did not hear propellers, or sense the rhythm, but cannot be certain because of the headphones and ear plugs.

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USA provided no further information about what the men might have done, or any evidence or charges against the men, but Yemeni officials say they were instructed by the US Embassy to keep the men in custody until their case files were transferred from Washington DC. No files or evidence were ever received.

On 13 February 2006, after more than nine months in arbitrary detention in Yemen, and some two and a half years since they were first arrested, the three men were brought to trial in Sana'a. On the basis of statements they made during their interview with the prosecutor of the Special Penal Court,[34] each was charged with forgery in connection with obtaining a false travel document for personal use. None of the alleged forgeries was presented in evidence. None of the men was charged with any terrorism-related offence; the Chief of Special Prosecutions told Amnesty International that they were not suspected of any such offences. The men all pleaded guilty and the judge had it written into the trial record that they had been detained in an unknown place by US agents. On 27 February the judge sentenced the men each to two years in prison, adding the instructions: "to count the period that the accused spent in prisons outside the country as part of the sentence". He calculated that, in addition to their nine months in prison in Yemen, their time in secret US detention had been at least 18 months, and ordered their release.

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Muhammad al-Assad was released from custody in Sana'a on 14 March. Muhammad Bashmilah and Salah Qaru were transferred to Aden, where they were released at around midnight on 27/28 March. They were given instructions to report to political security every month and not to leave Aden without permission.

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The human cost of rendition and secret detention is too often ignored. Muhammad al-Assad told Amnesty International on his release that "for me now, it has to be a new life, because I will never recover the old one". His business is in ruins, he is in debt, and he does not yet know if he will even be allowed to return to Tanzania, where he had lived since 1985, to try and rebuild the life he had made there.

The prospects are also bleak for Muhammad Bashmilah and Salah Qaru. The men do not know if they will be reunited with their wives in Indonesia, who have been thrown into destitution by their absence. Even if they manage to raise the money, they may not get permission to travel to Indonesia. Nor will it be easy for them to support themselves in Yemen. Even though they were never charged with a terrorist offence, they believe that they will remain stigmatized because they were detained by the USA. Under suspicion by any potential employers, and harassed by the security and intelligence service, they fear they will never be able to lead normal lives or take care of their families. All three men have suffered emotional and physical trauma – Salah Qaru and Muhammad Bashmilah have described severe torture during their detention in Jordan and are in urgent need of medical attention for problems caused or exacerbated by the long months in isolation and secret detention.

34 Al-mahkama al-jaza'iyya al-mukhtassa.

1.8 Transfer to torture: the case of Muhammad Zammar

The secret arrest and subsequent "disappearance" of Muhammad Haydar Zammar has all the hallmarks of a case in which an individual has been rendered for the purposes of interrogation under torture. Muhammad Zammar, a German national of Syrian descent, was suspected of involvement with the "Hamburg Cell" – a group that included the presumed leaders of the 11 September 2001 attacks in the USA – and had been under surveillance in Germany for some years. He was questioned by German police after 11 September, and was brought before a court in Hamburg less than a week later. There was not enough evidence to hold him, but the Federal Public Prosecutor initiated an investigation into allegations that he had "supported a terrorist organization".[35] Intelligence information supplied by Germany is thought to have been instrumental in his arrest in Morocco and rendition to Syria.

On 27 October 2001 Muhammad Zammar left Germany for Morocco, travelling on his German passport, and spent some weeks there and 12 days in Mauritius before attempting to return to Germany. He was reportedly taken into custody by Moroccan intelligence agents at the airport in Casablanca in early December, and was then interrogated by Moroccan and US intelligence officials for over two weeks. Towards the end of December 2001, he was reportedly put on the CIA's Gulfstream V jet, N379P, and taken to Damascus, Syria. A US official declined to provide details on whether the USA was directly involved with Muhammad Zammar's capture or transfer, but said that the US government was aware of the detention and the transfer as they occurred.[36]

The German government was reportedly not informed of Muhammad Zammar's arrest by the USA, Morocco or Syria, and learned of the transfer through media reports during June of 2002.[37] While US officials have said they do not have direct access to Muhammad Zammar in Syria, they have reportedly provided written questions to his Syrian interrogators. Murhaf Jouejati, an expert on Syrian politics and a former adviser to the Syrian government, testified before the 9/11 Commission: "Syrian cooperation was also highlighted by an earlier revelation that a key figure in the September 11 plot, Muhammad Haydar Zammar, had been arrested in Morocco and sent to Syria for interrogation, with American knowledge. Although US officials have not been able to interrogate Zammar, Americans have submitted questions to the Syrians."[38]

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After learning through the media of his arrest and transfer, the German government reportedly ordered their intelligence agents to locate Muhammad Zammar, and was subsequently informed by US officials on 13 June 2002 that he was in the custody of the Syrian government. In November 2002, six German intelligence agents arrived in Damascus and interrogated Muhammad Zammar for three days. No details of these interrogations have been released or used in other investigations; as *Der Spiegel*

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35 Holger Stark, "The Forgotten Prisoner: A Tale of Extraordinary Renditions and Double-Standards", Der Spiegel, November 2005.

36 Peter Finn, "Al Qaeda Recruiter Reportedly Tortured", *Washington Post*, 31 January 2003.

37 Peter Finn, "Syria Interrogating Al Qaeda Recruiter", *Washington Post*, at A01, 19 June 2002.

38 See: http://www.globalsecurity.org/security/library/congress/9-11_commission/030709-joujati.htm.

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magazine noted: "no court operating under the rule of law would ever accept an interrogation conducted in a Damascus prison notorious for its torture practices".[39] German diplomatic officials, on the other hand, have not been able to visit Muhammad Zammar; they have filed eight *notes verbale* seeking clarification of the reasons for Muhammad Zammar's detention and seeking a lawyer for him. The Syrian government has not responded to these notes.[40]

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In early 2003, a Moroccan national, recently released from the Far' Falastin (Palestine Branch) of Military Intelligence in Damascus, said that Muhammad Zammar was being tortured by Syrian officials. The former CIA official Robert Baer told Amnesty International that he had sought an interview with Muhammad Zammar in April 2003, while working in Syria for a US television network, but was told that "he is no longer with us". In an interview with a Swedish television channel, Robert Baer said: "there was not enough evidence obviously that he broke US law, but we still wanted him off the streets so we arranged with the Moroccan government to have him arrested, sent to Jordan and then to Syria where he is either dead or alive, I don't know. With the Syrians engaging in torture, there is no bones about it."[41] There were persistent reports that Muhammad Zammar's physical condition had deteriorated, and even that he had died.

In 2004 Amnesty International learned through former prisoners that Muhammad Zammar had been held in solitary confinement at the Far' Falastin since he was brought to Damascus in late 2001. His underground cell was believed to be 185cm long, less than 90cm wide, and under 2m high. Although photographs taken before he left Germany show him as a large, heavy-set man, Amnesty International was told that his condition was now "skeletal".

Former detainees have told Amnesty International that the underground section of Far' Falastin is infested with rats and lice. There is no bed or mattress in a "tomb" cell, just a couple of old and filthy blankets. One plastic bottle is provided for drinking water, and another for urination. Three short visits to the bathroom are allowed daily -- usually limited to several minutes each time, with 10 minutes allowed on Fridays to also take a shower or bath and to wash clothes. Access to fresh air and sunlight in the yard is restricted to a maximum of 10 minutes each month, but can be as infrequent as 10 minutes each six to eight months. Released detainees have told Amnesty International that the food provided is barely enough to keep a person alive, and is often rotten and always dirty, resulting in frequent bouts of diarrhoea.

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Torture and ill-treatment are commonly reported at Far' Falastin. In addition to the prolonged solitary confinement in cramped and wretched conditions, detainees are commonly beaten or subjected to other methods of torture. Amnesty International has documented some 40 different types of torture and ill-treatment reportedly used against detainees in prisons and detention centres in Syria.

39 Holger Stark, "A Tale of Extraordinary Renditions and Double-Standards", *Der Spiegel*, November 2005.

40 «German, CIA Roles in Terror Suspect's Torture in Syria", BBC Monitoring International Reports, 22 November 2005.

41 *Sweden TV4*, Kalla Fakta Programme, broadcast 22 November 2004.

Amnesty International received information that Muhammad Zammar was taken from his solitary confinement cell in the Far' Falastin in October 2004. He may then have been held in Sednaya prison on the outskirts of Damascus. His family in Germany was given their first real indication that he was still alive when a letter from him, dated 8 June 2005, was sent to them through the International Committee of the Red Cross (ICRC) in Damascus. The letter, which contains just 43 words, suggests that he had been returned to the Far' Falastin. His current whereabouts are unknown, and he has yet to be seen by his family or anyone known to them since he was first detained.

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1.9 A practice predating 2001: the case of Abdul Rahman al-Yaf'i

"'We're going to kill you and bury you here', they told me, and all the time I was wishing that they would."

Abdul Rahman al-Yaf'i, on his interrogation in Jordan in 2000

Although shipping people off to third countries for "vigorous" interrogation has become a more common practice since September 2001, it was already an established means of trying to gather intelligence about al-Qa'ida. A network of intelligence agencies from different countries helped to carry out the practice of rendition, and US involvement may not always have been direct, although the aims and results of the interrogations were the same.

Abdul Rahman Muhammad Nasir Qasim al-Yaf'i, now 38 years old, was one of the pre-2001 victims of rendition. He spoke to Amnesty International in February 2006 about his rendition from Egypt to Jordan five years before. As with most of the other rendition victims interviewed by Amnesty International[42], his interrogations did not appear to have been aimed at investigating a specific criminal offence, but at gathering intelligence about the activities of others. As in the cases of Muhammad Bashmilah and Salah 'Ali Qaru described above, it appears that the standard of evidence needed to warrant months of torture and interrogation was nothing stronger than his admission of a previous visit to Afghanistan.

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Abdul Rahman al-Yaf'i, who lives in Sana'a in Yemen with his wife and six children, said that he took his aunt and brother to Cairo in Egypt for medical treatment in October 2000. When he told airport immigration officials, in response to a question, that he had visited Afghanistan 10 years before, they detained him at the airport for about 13 hours, then told him he would have to return for his passport. When he came back for it two days later, an Egyptian policeman cuffed and blindfolded him, and took him to a place where they put him in a cell so small he could not stand upright. When he asked why they were holding him, he said he was told "we just want some general information".

42 Most of the rendition victims interviewed by Amnesty International have been released, suggesting that their captors determined they did not have valuable or specific information. Their experiences of interrogation may therefore be substantively different from those who are believed to have "high value" intelligence.

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After some hours in the tiny cell, he said, they took him to interrogation, and began calling him names and making him stand up and sit down over and over again. They asked him repeatedly about what he had done in Afghanistan, where he had gone, and whom he had met there. He was also questioned about bombings in Kenya, Tanzania and Riyadh in Saudi Arabia. When he could not answer, he said, they strangled him, all the while insulting his parents, wife and religion. He was interrogated like this three times a day. "If they beat me in Egypt", he said, "it would have been more bearable than what they did... They accused me of everything that ever happened in the world... perhaps it is the price you have to pay for having been in Afghanistan". They asked him to work with them, and offered to put his aunt and brother in the "finest hospitals in Cairo". He refused, and they told him he would now be turned over to the USA.

After four days, they returned him to the airport, where they took him through the VIP entrance and straight to a waiting plane.[43] The plane was "full of military, you could feel the presence of military even if it was a civilian plane." He says he kept asking what was happening to him and where he was going, but eventually "stopped asking questions because there were no answers". He said he was surprised when the plane took him to Amman airport in Jordan, where his guards handed him over to Jordanian security. He was again blindfolded and taken by car to a detention centre, which he described as a new building, about four stories tall, with good facilities. He thought it might be the General Intelligence Department (Mukhabarat al-'amma), which is indeed a modern building, located near Wadi Sir in Amman, about 30 minutes from the airport. "I was exhausted from the Egyptian terrorism [sic] and asked for some medication," he said, "and then I prayed and slept". B5

The next evening he was taken to interrogation, cuffed and blindfolded, and was told to write down everything that had happened in Egypt. After he finished, he said, they kept asking him "do you love Osama bin Laden?", and then they beat him and forced him to stand in his cell for more than 24 hours without sleep.

The following evening, they took him to a covered yard, where he saw large stains of what looked like blood on the concrete ground. His ankles were tied to a stick, and two soldiers picked it up from either end, so that he was suspended upside-down above the ground. They then took turns beating the soles of his feet until the stick they were using broke. "They reach a point where the blood is about to come out of your feet," he said, "and they stop there for a little while." There was a man in white clothes, who he thought was a doctor, supervising the procedure, and giving instructions on how long and how hard he should be beaten. *Falaqa*, sleep deprivation and long-term standing are commonly used forms of torture in Jordan.

Abdul Rahman al-Yaf'i felt that the interrogators were fishing for information. "They just kept saying 'confess, confess. Confess to Kenya, confess to Riyadh.' I kept saying the *Shahadah* [Muslim statement of faith] and they kept beating me and

43 The typical processing of transfer for rendition – including the hooding, shackling and jumpsuits – was established after 11 September 2001.

mocking my religion." When his feet swelled from the beating, they took him down and made him run around the yard, then made him stand in salt, while they poured cold water on his feet to bring the swelling down. Then they strung him back up and it started all over again. On the first day this happened at least three times. "They told me: 'We're going to kill you and bury you here', and all the time I was wishing that they would."

He "disappeared" in Jordan for more than four months. His family never discovered his whereabouts; a brother living in the USA came to Egypt to search for him, while members of his tribe made persistent inquiries with the Egyptian ambassador in Yemen, who finally said that he did not know where Abdul Rahman al-Yaf'i was, only that he had left Egypt.

Abdul Rahman al-Yaf'i told Amnesty International that about twice a month, when the ICRC visited the detention centre, he and other detainees were told to get their things together and they would then be taken to underground cells, which he thinks might have been underneath the kitchen. In these cells, he and other prisoners wrote their names on the walls with the soot from the lantern wicks. He was not held in the same cell every time and could read on the walls the names of other detainees; there had been Saudis, Palestinians, Tunisians and Egyptians there. He thinks he was moved with about a dozen other people each time. B5

The interrogation was intensive for the first week or two, and after that intermittent, but always focused on general information. He was often shown photographs of people, most of whom he said he did not know. Throughout interrogation, he said, they would smack him (here he mimed a full back and forth open-handed blow) until his face swelled. He told us that even now, after five years, his ears are still ringing. There were three or four interrogators, he said, and "you really felt like they had been specially trained to insult religion, in particular beards... What I was most worried about all the time I was there was being raped. The interrogators threatened me tens of times with rape. I kept the same clothes on all the time I was there, I didn't take my robe off even when I went to the washroom, I never washed my clothes, I hoped that the smell would put them off." B5

Abdul Rahman al-Yaf'i was returned to Yemen in March 2001. One day guards came to his cell and told him they were sending him to the USA, a threat he said that they often used. Instead, he was taken to the airport with another Yemeni, where they were turned over to Yemeni guards and put on a Yemeni airlines passenger plane.

When the plane landed in Sana'a, he was taken directly to the Political Security prison, where he stayed for just under two months. It was better in Yemen, he said, "because they didn't hit me". When he asked why they were holding him, the Yemeni authorities said: "American pressure". He believes that his eventual release was due to the insistence of powerful tribal leaders.

Abdul Rahman al-Yaf'i knew of several other cases similar to his own, but said that most of these people are too frightened to talk to anyone about their experiences – a point which underscores the difficulty of getting any precise idea of the number of people who may have been subjected to rendition.

2. Planes and airports – the support network for rendition flights

"Yes. It's very convenient. It's finding someone else to do your dirty work."
Michael Scheuer, who as a senior counter-terrorism official with the CIA, helped establish the rendition programme

2.1 International aviation law and renditions

The Convention on International Civil Aviation, also known as the Chicago Convention, establishes the rules of airspace, plane registration and safety, and sets out the rights of the signatory states in relation to air travel. It establishes a system under which all transit and landing rights for airlines and their aircraft require the explicit or tacit approval of the national governments in or above whose territory they operate. The current version of the Convention was adopted in 2000 and it has 189 contracting states.[44]

Of particular importance for rendition cases is the clause that allows private, non-commercial flights to fly over a country, or make technical stops there, without prior authorization or notification. The CIA planes identified to date have been chartered from private companies, real or fictional. "State aircraft" – defined by the Convention as those "used in military, customs and police services" – do require specific agreement or authorization to fly over the territory of another state or to use its airports. Experts on rendition believe that this is one of the main reasons why privately contracted aircraft are used in rendition operations, rather than military or other official aircraft.

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The intelligence and military community of the USA has long used private air carriers for secret operations. Some of the covert carriers identified by past US congressional inquiries and other investigations[45] are still in business. In November 2003, for example, carriers such as Southern Air, Kalitta Air, Evergreen International Airways, and Tepper Aviation – all known for their connections to covert intelligence and military operations – received a "US Transportation Command Certificate of Appreciation" for their support of Operations Enduring Freedom and Iraqi Freedom, in the "Global War on Terrorism".[46]

The use of planes able operating as private aircraft, without the restrictions placed on official or military flights, has been a key component of the rendition programme since the mid-1990s. According to Michael Scheuer, when the outlines of the current

44 Further information: 'Enabling Torture: International Law Applicable to State Participation in the Unlawful Activities of other States', Briefing Paper by The Center for Human Rights and Global Justice, New York University School of Law, February 2006

45 Ariadne's Thread, report to the MacArthur Foundation, 2003; J Peleman, The logistics of sanction busting: the airborne component, in Angola's War Economy, Pretoria, ISS, 2000; Netherlands Institute for War Documentation, http://213.222.3.5/srebrenica/ Appendix II.

46 USTRANSCOM News Service, Release Number: 031113-1, 13 November 2003.

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system were established in 1995, the CIA needed the means to locate, detain and remove terror suspects.[47] A small fleet of private jets able to land discreetly at both commercial airports and US military bases worldwide was the essential ingredient for making the system work.

2.2 CIA-front companies

The CIA rendition programme has relied on private planes contracted from companies listed as private air charter services. In some cases, these are CIA front companies that exist only on paper. Premier Executive Transport, for instance, first appeared as a Delaware company in 1994, and was then re-registered in Massachusetts in 1996 as a "Foreign Corporation".[48] It listed a President and Treasurer whose only known addresses were post office boxes outside Washington DC, who appeared to have no credit or personal history, and who both had Social Security numbers issued in the mid-1990s.[49]

Premier was the listed owner of only two planes: the Gulfstream jet most frequently identified with rendition operations, originally registered as N379P; and a Boeing 737, initially N313P, which appeared regularly in locations such as Afghanistan, Libya, Jordan, Baghdad, Germany and the UK, and which Amnesty International believes was used to render Khaled el-Masri from Macedonia to Afghanistan in January 2004. Flight records show that the plane flew from Skopje to Kabul, touching down in Baghdad, on 24 January 2004, the day Khaled el-Masri was transferred from Macedonia to Afghanistan. Both planes had previously been registered by Stevens Express Leasing and Amnesty International has landing declarations showing that both continued to identify Stevens Express as their operator in 2003 and 2004. Stevens Express has an office address in Tennessee, but no actual premises, although it currently appears in US Federal Aviation Administration (FAA) records as the operator of four planes.[50] Stevens Express was in turn incorporated by the same lawyer listed as the official representative of Devon Holding, another company identified with rendition flights. Premier Executive Transport ceased operations in late 2004; the Boeing's ownership was transferred in November 2004 to Keeler and Tate Management, another non-existent front company with no other planes, no website and no premises. A few days later, the Gulfstream was transferred to Bayard Foreign Marketing, a company whose named corporate officer, Leonard Bayard, cannot be found in any public record.

Other transport contractors have actual premises and staff, but appear to be largely controlled by the CIA. Aero Contractors, for instance, was described by the *New York*

47 Jane Mayer, "Outsourcing Torture", *New Yorker*, February 2005.

48 Massachusetts registration certificate 521857292, can be viewed at:
http://corp.sec.state.ma.us/corp/corpsearch/CorpSearchSummary.asp?ReadFromDB=True&UpdateAllowed=&FEIN=521857292.

49 All US citizens are now required to have a Social Security number before their first birthday. The US Social Security Administration told the Boston Globe that those who receive their numbers in adulthood are either recent immigrants or people being given a new identity. Farah Stockman, Terror suspects' torture claims have Massachusetts Link, 29 November 2004.

50 FAA Registry Inquiry, 22 March 2006, see: http://registry.faa.gov/aircraftinquiry.

Times newspaper as "a major domestic hub of the Central Intelligence Agency's secret air service". The *New York Times* went on to say that the CIA owns at least 26 planes, and "concealed its ownership behind a web of seven shell corporations that appear to have no employees and no function apart from owning the aircraft. The planes, regularly supplemented by private charters, are operated by real companies controlled by or tied to the agency, including Aero Contractors and two Florida companies, Pegasus Technologies and Tepper Aviation."[51]

In other cases, the CIA leases their planes from ordinary charter agents, such as Richmor Aviation, which the *Boston Globe* newspaper identified as "one of the nation's oldest aircraft chartering and management companies". The CIA has made frequent use of Richmor's Gulfstream IV, N85VM, later N227SV, which has made over 100 trips to Guantánamo Bay, and which appears to have carried out the rendition of Abu Omar from Ramstein to Cairo in 2003.[52] The plane's owner confirmed to the *Boston Globe* in March 2005 that he charters his plane through Richmor to the CIA, as well as to other clients. The plane is currently advertised for charter at a rate of US$5,365 per hour.

Individual aircraft may change their registration numbers, but they remain largely traceable. Given the concentrated attention now being devoted to tracking rendition flights, it seems that the intelligence services have now decided that the notorious Gulfstream V, variously registered as N379P, N8068V and N44982, has become too conspicuous. It was put up for sale in November 2005; the advertisement on www.usaircraftsales.com emphasized its "16 pax capacity, dual DVD players, mid and aft seating in Brown leather, and Walnut matte finish woodwork", but the plane had to be "priced below market" due to its heavy usage.[53] Premier Executive Transport itself seems to have vanished as well; there are no planes registered with the company and its landing contracts expired in 2005 and have not been renewed. It is likely that other companies have been created to take Premier's place, and that other, less well-known planes are now being used for CIA rendition activities.

It is likewise the case that the number of flights carried out by the planes identified for monitoring in this report have fallen over the last year. This does not necessarily indicate that renditions are not being carried out, but that companies and aircraft previously involved in the programme are being replaced, making the rendition programme increasingly difficult to monitor.

2.3 Other US agencies involved in rendition

Although renditions have largely been carried out under the auspices of the CIA, other US agencies have apparently been involved in both flight leasing and operations. Contracts for identified rendition planes have been issued through an obscure US Navy office, rather than the CIA, according to US Department of Defense (DoD)

51 Scott Shane, Stephen Grey and Margot Williams, *CIA Expanding Terror Battle Under Guise of Charter Flights*, New York Times, 31 May 2005.

52 Abu Omar, an Egyptian cleric, was kidnapped in Italy and then flown on this jet from Germany to Egypt.

53 http://www.usaircraftsales.com/Forsale/SPECS%20GV%20581%20%202.pdf.

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documents obtained by *Associated Press* (*AP*).[54] In September 2005, *AP* reported that the Navy Engineering Logistics Office (NELO)[55] had issued classified contracts with 10 different companies and 33 planes for the "occasional airlift of USN (Navy) cargo worldwide." This was the first indication that the DoD had participated in the rendition programme; the companies previously identified as operators of rendition planes were widely believed to be under CIA contracts.

According to the *AP* article, permits to land and buy fuel in US bases worldwide were granted to all of the 10 companies under NELO contract between 2001 and 2004. The 2004, 2005 and 2006 contract lists examined by Amnesty International show that permission to land in US bases worldwide is currently held by 12 companies, but had previously been granted to a total of 38 companies, among them Aviation Specialties; Devon Holding & Leasing; Path Corporation; Rapid Air Trans; Richmor Aviation; Stevens Express Leasing; and Tepper Aviation, all allegedly involved in rendition operations through one or more of their planes.[56] Many of these companies also appeared in lists of commercial agreements for buying fuel under US Defense Energy Support Center contracts.[57]

There have been other indications that responsibility for the rendition programme should not be laid solely at the door of the CIA. It has been reported that the teams that actually carry out the rendition operations include members of military Special Forces units, as well as CIA personnel. Amnesty International has copies of police investigation reports into CIA flights in Spain that suggest that the pilots of the rendition planes were US military officers; when their names were checked against FAA databases, it was found that not all were currently registered as private pilots. If any pilots involved in rendition flights were found to be US military officers, the legal implications would be important: members of the armed forces are not only subject to

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54 Seth Hettena, *Navy Secretly Contracted Jets Used by CIA*, Associated Press, 24 September 2005.

55 Further research carried out by Amnesty International has shown that the Office's name and address were removed from the US DoD's DARF (Defense Federal Acquisition Regulations Supplement - Appendix G, Activity Address Numbers) March 2000. NELO was until 1999 listed in Appendix G with the identification number N41756 and addressed as Navy Engineering Logistics Office, LE Washington, DC 20000. Since 14 November 2003, Appendix G has been entirely removed from the Defense Federal Acquisition Regulations Supplement. (See: http://farsite.hill.af.mil/archive/DFars/DCN19990101/DFARSApxG.htm, http://www.acq.osd.mil/dpap/dars/dfars/html/previous/r20031001/appendix_g-3.htm). NELO also appears as contracting agent in a "Broad Agency Announcement in Joint Support of the Technical Support Working Group and Defense Advanced Research Projects Agency/Information Exploitation Office, Srcsgt" dated 5 June 2003 (solicitation number 03-Q-4110) and its address is posted as "Department of the Navy, Navy Engineering Logistics Office TSWG, P.O. Box 16224 Arlington, VA 22202". According to *AP*, NELO "operates under different names: it is also known as the Navy Office of Special Projects and its San Diego location is called the Navy Regional Plant Equipment Office." Its principal function is "the conduct of foreign intelligence or counterintelligence activities."

56 The list also includes the following companies: Aeromet (L-3/Aeromet); Air Transport International; Air Trek; Airmed International; Atlas Air; BK Associates; Centurion Aviation Services; Continental Airlines; Continental Micronesia; Crowell Aviation Technologies; Delta Air Lines; Eastern Shore Holding; Evergreen International Airlines; Falcon Air Express; Federal Express; Gemini Air Cargo; North American Airlines; Omni Air International; Orbital Sciences Corp.; Raytheon Aircraft Company; Southern Air; United Parcel Service, Co.; US Airways Group; Vantage Leasing; World Airways.

57 Defense Energy Support Center, Commercial Purchase Agreement Customers - DODAAC Database, various editions from 2001 to 2005.

international legal standards and to US criminal law, but also to the Uniform Code of Military Justice, which explicitly forbids both "unlawful detention" and "cruelty and maltreatment". The armed forces do not appear to be covered by the memorandum authorizing the CIA to carry out renditions.

According to a former CIA officer interviewed by the *Chicago Tribune*, Gulfstream N379P/ N8068V/ N44982 was operated by "the Joint Special Operations Command, an inter-agency unit that organizes counter-terrorist operations in conjunction with the CIA and military special forces."[58] The Joint Special Operations Command is the coordinating agency for all military special operations forces and operations, and its headquarters are at Fort Bragg, North Carolina. According to its website, Fort Bragg is the "Home of the Airborne and Special Operations Forces. Fort Bragg houses the 82nd Airborne Division and the XVIII Airborne Corps, the US Army Special Operations Command and the US Army Parachute Team." The CIA's deputy executive director Christopher Kojm told the 9/11 Commission that "the CIA had two main operational responsibilities for combating terrorism: rendition and disruption... The CIA often plays an active role, sometimes calling upon the support of other agencies for logistical or transportation assistance."[59]

A *United Press International* (*UPI*) report in January 2005 noted that the FBI also carries out renditions, but that it transports its suspects by US Air Force jet rather than private plane.[60]

2.4 Role of third countries

Countries that allow CIA planes to cross their air space and use their airports have defended these actions by citing their obligations under the Chicago Convention. They may claim that the state party has no authority to question the reasons for the flight or to board the airplane during the stay in the airport because of the rights guaranteed by the Convention.

However, the Chicago Convention holds that every state has the right to require that an aircraft flying over its territory must land at a designated airport for inspection if there are "reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of the convention". Given that the practice of rendition violates international human rights law, it follows that transferring or aiding and abetting in the transfer of a detainee in such circumstances cannot be a purpose consistent with the aims of the Chicago Convention, especially considering the internationally recognized, absolute prohibition of torture. The extensive reporting by the media, human rights organizations and parliamentary bodies of specific flight numbers and chartering companies which appear to be involved in renditions constitutes "reasonable grounds" for suspicion. This would give states the right to stop certain aircraft suspected of being involved in the unlawful transfer of detainees.

58 "Mystery man takes to skies; Elusive owner's jet linked to CIA torture", *Chicago Tribune*, 9 January 2005.

59 Transcript: Wednesday's 9/11 Commission Hearings, FDCH E-Media, Wednesday, 24 March 2004.

60 Richard Sale, "Renditions pro and con", UPI, 19 January 2005.

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2.5 Flight movements: 2001-2005

Amnesty International and TransArms[61] have records of nearly 1,000 flights directly linked to the CIA, most of which have used European airspace; these are flights by planes that appear to have been permanently operated by the CIA through front companies. In a second category, there are records of some 600 other flights made by planes confirmed as having been used at least temporarily by the CIA. Finally there are well over 1,000 other flights made by planes owned by companies that have been linked to the CIA, but which are not known to be connected to any known cases of rendition.

The flight information comes from several sources: FAA flight records; European flight records; actual flight logs; aircraft movements recorded by airport authorities; airport records acquired in police and parliamentary investigations; photographs of aircraft in selected airports; and some press reports. Flight logs contain all movements carried out by the plane, including all stopovers between origin and destination airports.

Flight records, however, only tell part of the story. Records maintained by the FAA, for instance, do not include all of the stops a plane has made during a trip away from US airspace. The information usually provided includes the origin airport in the USA or in FAA monitored airspace – including Ireland and the UK – and the first destination of the flight outside monitored airspace. It does not pick up again until the plane reappears in FAA monitored airspace. It also shows the flight date, time and duration.

What this means in practice is that large parts of a flight's itinerary may not be shown by FAA flight records. In January 2004, for instance, the CIA's Boeing 737, N313P, left from Washington DC and stopped off in Ireland, Cyprus, Morocco, Algeria, Spain, Macedonia, Iraq, Afghanistan, Romania and Spain before returning to Washington DC, apparently carrying out the rendition of Khaled el-Masri on the way. FAA records show the Washington to Ireland and Ireland to Cyprus flights, but do not record the landings in Morocco, Algeria, Spain, Macedonia, Iraq, Afghanistan or Romania. Amnesty International has obtained this information from another source. The final leg of the journey, the return flight from Spain to the USA, is also shown. The shortcomings – for the purposes of monitoring – are obvious; such flight records do not show the precise activities of the planes in locations where renditions are most likely to occur, they can only show whether planes were active in a certain region at the time in question.

It also seems likely that not all relevant traffic is recorded by the FAA; between 2001 and 2005, for instance, two of Premier Executive Transport's jets made a total of 50 landings at Shannon Airport in Ireland, yet the records show that they only took off 35

61 TransArms, Research Center for the Logistics of Arms Transfers.

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times. Flight records originating from European sources provide additional information on flights that have originated or terminated in European airspace.

Flight lists are useful, but they cannot tell whether or not any particular plane has carried out a rendition. The information they contain is indicative rather than conclusive; Amnesty International has constructed a database of flights in order to check it against case information as it becomes available. It remains the case that raw data on the flights themselves is of limited use without specific details of cases; case details are hard to come by precisely because the secret nature of the practice is aimed at avoiding scrutiny and oversight. Where cases become known, and the details and dates of the abduction or transfer can be pinpointed, it has often been able to match a rendition with a flight record. Amnesty International cannot, however, infer possible cases or even make estimates of the extent of the rendition programme solely from the flight information.

2.6 Companies and aircraft

Amnesty International and TransArms have compiled a list of companies likely to have had some level of involvement in renditions and other covert operations. This includes the owners or operators of aircraft that have been detected in known cases of rendition or in other CIA operations, as well as some of the companies – believed to be intelligence-linked – that are mentioned in both the US Army Aeronautical Service Agency's worldwide landing permits and in US DoD fuelling contracts.

The tentative list of companies involved in covert activities has in turn formed the basis for the list of aircraft whose flights Amnesty International has tracked over the 2001-2006 period. Once the flight logs were analysed, some of these companies and aircraft were dropped from the list, because flight logs indicated that they had only flown in and out of locations unlikely to have been connected to either the rendition programme or to covert CIA activities. In a number of cases, there was mixed activity – a plane which has made repeated flights in and out of bases in Afghanistan and Egypt, for instance, has also appeared in holiday resorts or business centres in the USA – suggesting that the agency may be trying to vary its use of planes, so that individual aircraft cannot be so closely linked to covert activity.

The other indication of a shifting landscape in the world of front companies is the current list of companies with a Civil Aircraft Landing Permit (CALP) that authorizes them to land on US military bases worldwide. The 10 companies that currently hold such certificates are listed below, but equally important are those that are no longer listed. Notably absent from the 2006 list are some of the companies with the most widely and frequently reported rendition links: Aeromet, Inc; Devon Holding and Leasing, Inc; Premier Executive Transport Services, Inc; Rapid Air Trans; Raython Aircraft Company; Richmor Aviation, Inc; Stevens Express Leasing, Inc; and Tepper Aviation, Inc. The permits of all of these companies expired in 2005 and none has been renewed.

PRIVATE COMPANIES WITH CURRENT PERMITS TO LAND IN US MILITARY BASES WORLDWIDE[62]

NAME	CALP	EXPIRATION
CENTURION AVIATION SERVICES, INC. *	01-04-121 01-05-132	1 OCTOBER 2005 1 OCTOBER 2006
EVERGREEN INTERNATIONAL AIRLINES, INC. *	01-04-179 01-05-059	1 APRIL 2005 1 APRIL 2006
FALCON AIR EXPRESS*	01-04-021 01-05-163	8 NOVEMBER 2004 16 JULY 2006
GEMINI AIR CARGO, INC. *	01-04-124 01-05-117	22 JULY 2005 1 AUGUST 2006
OMNI AIR INTERNATIONAL, INC.	01-04-141 01-05-130	1 AUGUST 2005 1 AUGUST 2006
ORBITAL SCIENCES CORPORATION *	01-04-020 01-04-117 01-05-118	1 JULY 2004 1 JULY 2005 1 JULY 2006
PHOENIX AIR GROUP	01-05-113	1 AUGUST 2006
POLAR AIR CARGO, INC *	01-05-037	31 DECEMBER 2006
RYAN INTERNATIONAL AIRLINES	01-05-152	15 MAY 2006
SOUTHERN AIR, INC.	01-04-161 01-05-166*	13 NOVEMBER 2005 13 NOVEMBER 2006

(*) EXCEPT THE BUCHOLZ US ARMY AIRFIELD, KWAJALEIN ATOLL, KIRIBATI, MARSHALL ISLANDS

COMPANIES AND AIRCRAFT LINKED TO RENDITION FLIGHTS IN PRESS AND PARLIAMENTARY REPORTS

OWNER/OPERATOR	REGISTRATION NUMBER	MANUFACTURER'S NUMBER	AIRCRAFT TYPE
AERO CONTRACTORS			
APACHE AVIATION	N404AC	1384	G-IV
AVIATION SPECIALTIES	N5139A	BL-144	BEECH B200C
AVIATION SPECIALTIES	N4489A	BL-145	BEECH B200C
BAYARD FOREIGN MARKETING LLC	N44982	581	G-V
BRAXTON MNG/CENTURION AVIATION SERVICES	N478GS	1478	G-IV
DEVON HOLDING/AEROCONTRACTORS	N168D	C-135	CASA CN-235-300
DEVON HOLDING/AEROCONTRACTORS	N196D	C-139	CASA CN-235
DEVON HOLDING/AEROCONTRACTORS	N187D	C-143	CASA CN-235
GEMINI LEASING INC.	N600GC	46965	DC-10-

62 www.usaasa.belvoir.army.mil, various period 2004-2006.

OWNER/OPERATOR	REGISTRATION NUMBER	MANUFACTURER'S NUMBER	AIRCRAFT TYPE
			30F
IMPERIAL AIR	N331P	7323	DC3-G202A
KEELER & TATE MGM	N4476S	33010	B-737-7ET BBJ
MARK J. GORDON	N829MG	327	G-III
PEGASUS TECHNOLOGIES			
PHOENIX AVIATION GROUP	N547PA	012	LEARJET 36
PHOENIX AVIATION GROUP	N541PA	053	LEARJET 35
PHOENIX AVIATION GROUP/CFF AIR INC	N549PA	119	LEARJET 35A
PREMIER EXECUTIVE TRANSPORT SERVICES	N313P	33010	B-737-7ET BBJ
PREMIER EXECUTIVE TRANSPORT SERVICES, INC	N379P	581	G-V
PREMIER EXECUTIVE TRANSPORT SERVICES, INC	N8068V	581	G-V
RAPID AIR TRANS INC./TEPPER AVIATION	N2189M	4582	L-382G-44K-30
RAPID AIR TRANS INC./TEPPER AVIATION	N8183J	4796	L-382G-44K-30
RICHMOR AVIATION-ASSEMBLY POINT AV	N85VM	1172	G-IV
RICHMOR AVIATION-ASSEMBLY POINT AV.	N227SV	1172	G-IV
S&K AVIATION LLC	N259SK	327	G-III
STEVENS EXPRESS LEASING	N4009L	B300C	Raytheon

3. Amnesty International's recommendations

Amnesty International makes the following recommendations as immediate and essential steps towards putting an end to the rendition programme and its associated practices, including enforced disappearance, torture and incommunicado and secret detention.

Recommendations to all governments:

No renditions

- Do not render or otherwise transfer to the custody of another state anyone suspected or accused of security offences unless the transfer is carried out under judicial supervision and in full observance of due legal process. B5
- Ensure that anyone subject to transfer has the right to challenge its legality before an independent tribunal, and that they have access to an independent lawyer and an effective right of appeal.
- Do not receive into custody anyone suspected or accused of security offences unless the transfer is carried out under judicial supervision and in full observance of due legal process.
- Information on the numbers, nationalities and current whereabouts of all terror suspects rendered, extradited or otherwise transferred into custody from abroad should be publicly available. Full personal details should be promptly supplied to the families and lawyers of the detainees, and to the International Committee of the Red Cross (ICRC). B5

enemy cont?

- Bring all such detainees before a judicial authority within 24 hours of entry into custody.
- Ensure that detainees have prompt access to legal counsel and to family members, and that lawyers and family members are kept informed of the detainee's whereabouts.
- Ensure that detainees who are not nationals of the detaining country have access to diplomatic or other representatives of their country of nationality or former habitual residence.

No 'disappearances', no secret detention

- End immediately the practices of incommunicado and secret detention wherever and under whatever agency it occurs.
- Hold detainees only in officially recognized places of detention with access to family, legal counsel and courts.
- Ensure that those responsible for "disappearances" are brought to justice, and that victims and families receive restitution, compensation and rehabilitation.
- Investigate any allegations that their territory hosts or has hosted secret detention facilities, and make public the results of such investigations.

No torture or other ill-treatment

- Ensure that interrogations are carried out in accordance with international standards, in particular without any use of torture or other cruel, inhuman or degrading treatment.
- Investigate all complaints and reports of torture or other ill-treatment promptly, impartially and effectively, using an agency independent of the alleged perpetrators, and ensure that anyone found responsible is brought to justice.
- Ensure that victims of torture obtain prompt reparation from the state including restitution, fair and adequate financial compensation and appropriate medical care and rehabilitation.

No diplomatic assurances

- Prohibit the return or transfer of people to places where they are at risk of torture or other ill-treatment.
- Do not require or accept "diplomatic assurances" or similar bilateral agreements to justify renditions or any other form of involuntary transfers of individuals to countries where there is a risk of torture or other ill-treatment.

No renditions flights

- Identify to the aviation authorities any plane or helicopter used to carry out the missions of the intelligence services as a state aircraft, even if the aircraft in question is chartered from a private company.
- Ensure that airports and airspace are not used to support and facilitate renditions or rendition flights.
- Maintain and update a register of aircraft operators whose planes have been implicated in rendition flights, and require them to provide detailed information before allowing them landing or flyover rights. Such information should include: the full flight plan of the aircraft, including onward stops and full itinerary, the full names and nationalities of all passengers on board, and the purposes of their travel.
- If any passengers are listed as prisoners or detainees, more detailed information about their status and the status of their flight should be required, including their destination and the legal basis for their transfer.
- Refuse access to airspace and airfields if requested information is not provided.
- If there are grounds to believe that an aircraft is being used in connection with renditions or other human rights violations, board the plane or require it to land for inspection.
- If such inspection indicates that the flight is being used for the unlawful transfer of people, or other human rights violations, the flight should be held until the lawfulness or otherwise of its purpose can be established, and appropriate law enforcement action taken.

B5

Additional recommendations to the US government:

- Ensure that anyone held in US custody in any part of the world can exercise the right to legal representation and to a fair and transparent legal process;
- Disclose the location and status of the detention centres where Muhammad Abdullah Salah al-Assad, Muhammad Faraj Ahmed Bashmilah and Salah Nasser Salim 'Ali Qaru were held between October 2003 and May 2005;
- Disclose the identities and whereabouts of all others held in secret locations and their legal status, and invite the ICRC to have full and regular access to all those detained;
- Release all detainees in US custody at undisclosed locations unless they are to be charged with internationally recognizable criminal offences and brought to trial promptly and fairly, in full accordance with relevant international standards, and without recourse to the death penalty;
- Promptly and thoroughly investigate all allegations of "disappearance", and bring those suspected of having committed, ordered or authorized a "disappearance" before the competent civil authorities for prosecution and trial.

B5

Recommendations to private aircraft operators and leasing agents:

- Ensure that the company is aware of the end use of any aircraft it is leasing or operating;
- Do not lease or otherwise allow the operation of any aircraft where there is reason to believe it might be used in human rights violations, including rendition or associated operations;
- Develop an explicit human rights policy, ensuring that it complies with the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.

Appendix: Planes monitored

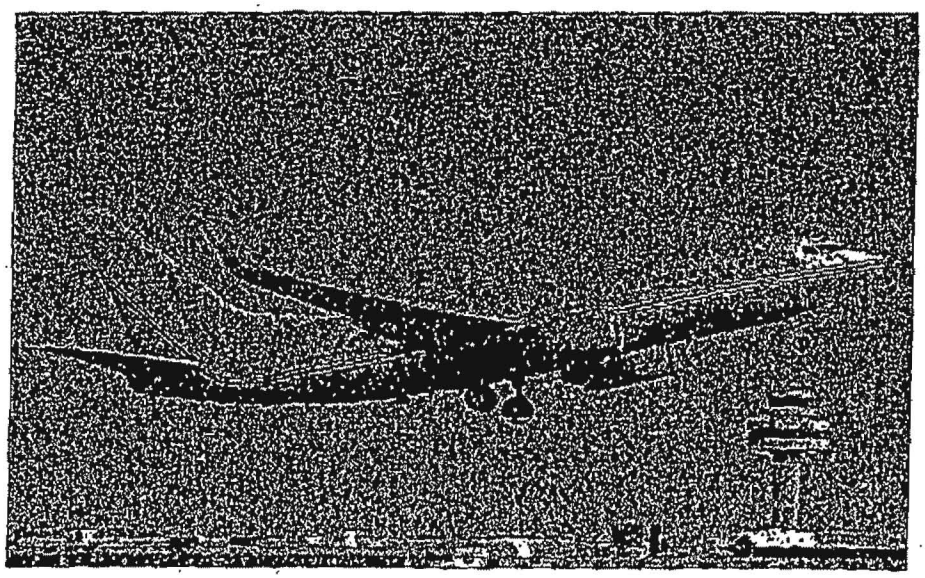
1. N313P-N4476S

N313P-N4476S is a Boeing 737-7ET (BBJ) aircraft (m/n 33010) for which there are 396 recorded landings or taking offs between 22 November 2002 and 8 September 2005. Flight records show that it was the plane that took Khaled el-Masri from Skopje to Afghanistan in January 2004, and Human Rights Watch has identified it as the "plane that the CIA used to move several prisoners to and from Europe, Afghanistan, and the Middle East in 2003 and 2004 – it landed in Poland and Romania on direct flights from Afghanistan on two occasions in 2003 and 2004."

Registration: First registered by Stevens Express Leasing Inc, and then re-registered on 1 May 2002 by Premier Executive Transport Services. Keeler & Tate Management re-registered the aircraft on 1 December 2004, as N4476S. This is the only aircraft registered under this company name.

Landing rights: Stevens Express Leasing Inc. and Premier Executive Transport Services were both permitted to land at US military bases worldwide. Their permits expired in 2005 and have not been renewed.

Range and capacity: average range of 5,510 nautical miles at 522/542 knots (non-stop Washington Dulles-Tashkent in 11 hours, for example), and can transport up to 127 passengers.



N313P plane used in rendition flights. Later re-registered as N4476S. © Toni Marimon

Destinations: movements of N313P-N4476S include landings and take offs from the following airports:

COUNTRY	CITY / AIRPORT	PASSAGES THROUGH THE AIRPORT
AFGHANISTAN	KANDAHAR	1
AFGHANISTAN	KHWAJA RAWASH (KABUL)	9
ALGERIA	ALGIERS	3
AZERBAIJAN	BAKU	1
BAHRAIN	BAHRAIN	1
CROATIA	DUBROVNIK	2
CYPRUS	LARNACA	8
CZECH REPUBLIC	PRAGUE	6
ESTONIA	PARNU	3
FIJI	NADI, VITI LEVU	2
GERMANY	FRANKFURT	73
GERMANY	RAMSTEIN	3
GREECE	ATHENS	1
IRAQ	BAGHDAD	10
IRELAND	DUBLIN	2
IRELAND	SHANNON	23
ITALY	PISA	2
JORDAN	AMMAN	20
KUWAIT	KUWAIT	6
LIBYA	MITIGA	17
LIBYA	TRIPOLI	2
MACEDONIA	SKOPJE	2
MALTA	VALLETTA	2
MOROCCO	RABAT	8
PAKISTAN	ISLAMABAD	5
PAKISTAN	KARACHI	1
PORTUGAL	PORTO (OPORTO)	5
PORTUGAL	SANTA MARIA (AZORES)	2
ROMANIA	BUCHAREST	1
ROMANIA	TIMISOARA	1
RUSSIA	MOSCOW	1
SAUDI ARABIA	RIYADH	1
SPAIN	PALMA DE MALLORCA	8
SWITZERLAND	GENEVA	2
UNITED ARAB EMIRATES	ABU DHABI	1
UNITED ARAB EMIRATES	DUBAI	4
UNITED KINGDOM	GLASGOW	19
UNITED KINGDOM	LONDON GATWICK	1
UNITED KINGDOM	LUTON	9
UNITED KINGDOM	MANCHESTER	2
UNITED KINGDOM	MILDENHALL	3
UNITED KINGDOM	NORTHOLT	9
UNITED KINGDOM	OXFORD BRIZE NORTON	3
UNITED KINGDOM	PROVIDENCIALES (TURKS AND CAICOS)	8
UNITED STATES OF AMERICA	GUANTÁNAMO BAY US NAVAL AIR STATION, CUBA	7
UZBEKISTAN	TASHKENT	1

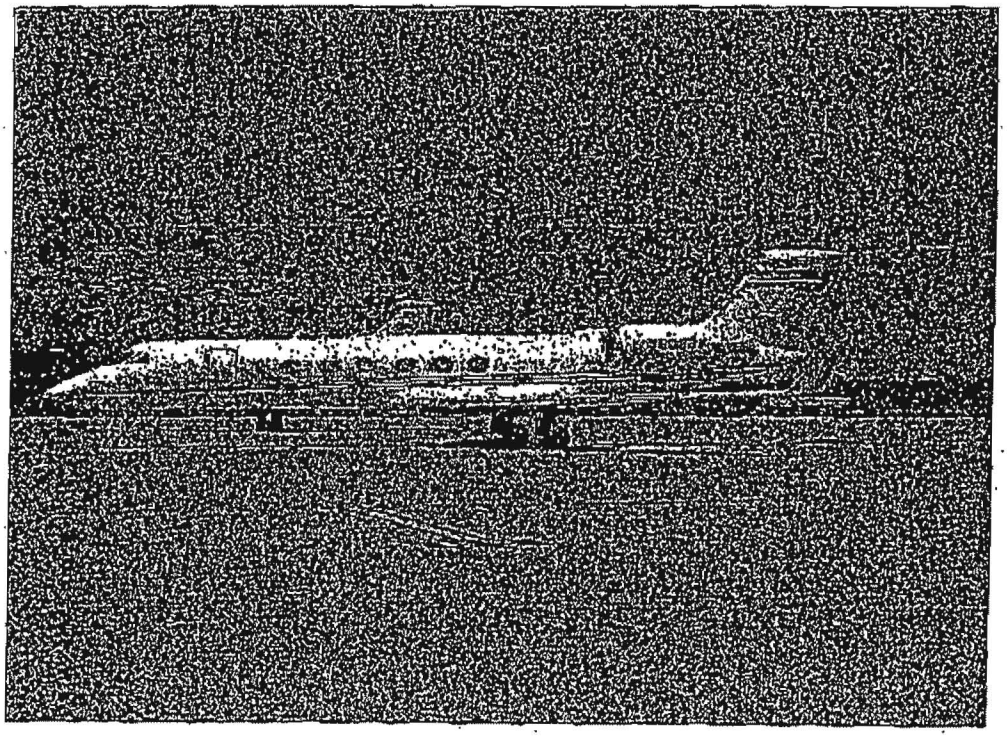
2. N379P-N8068V-N44982

The Gulfstream V executive jet, variously registered as N379P, N8068V and N44982 has been the plane most often identified with known cases of rendition. AI has records of 590 landings and take offs between February 2001 and September 2005.

Registration: registered in February 2000 by Premier Executive Transport Services; it was re-registered as N8068V at the beginning of 2004; and again re-registered as N44982 in December 2004 by Bayard Foreign Marketing, a phantom company registered in Oregon State since August 2003. No other aircraft were registered by Bayard Foreign Marketing. The aircraft was put up for sale in late 2005, and is now the property of a company based in Miami, Florida.[63]

Landing rights: Premier Executive Transport Services aircraft were permitted to land in the US bases worldwide (expiration 15 October 2005).

Range and capacity: average range of 5,800 nautical miles at 459/585 knots (non-stop Washington Dulles-Kabul in 12 hours, for example). The aircraft can transport up to 18 passengers, but it is usually configured for 8 passengers.



N8068V plane used in rendition flights. Earlier registered as N379P and later re-registered as N44982.
© Jean Luc Althert

Destinations: movements of N379P-N8068V-N44982 include landings and take offs from the following airports:

COUNTRY	CITY / AIRPORT	PASSAGES THROUGH THE AIRPORT
AFGHANISTAN	KHWAJA RAWASH (KABUL)	6
ALGERIA	ALGIERS	1
AZERBAIJAN	BAKU	1
BAHRAIN	MUHARRAQ MILITARY AIRPORT	1
CYPRUS	LARNACA	10
CYPRUS	PAPHOS	2
CZECH REPUBLIC	PRAGUE	11
DJIBOUTI	DJIBOUTI	2
EGYPT	CAIRO	14
GAMBIA	BANJUL	2
GERMANY	FRANKFURT	70
GERMANY	MUNICH	2
GERMANY	RAMSTEIN	2
GERMANY	STUTTGART	2
GREECE	ATHENS	7
IRAQ	BAGHDAD	6
IRELAND	SHANNON	22
ITALY	ROME	4
ISRAEL	TEL AVIV	4
JORDAN	AMMAN	18
KUWAIT	KUWAIT	3
LIBYA	MITIGA	2
MALAYSIA	KUALA LUMPUR	1
MOROCCO	MARRAKECH	2
MOROCCO	RABAT	7
NETHERLANDS	AMSTERDAM	1
PAKISTAN	KARACHI	2
POLAND	WARSAW	2
PORTUGAL	LISBON	1
PORTUGAL	PORTO (OPORTO)	15
QATAR	DOHA	2
SAUDI ARABIA	RIYADH	2
SPAIN	PALMA DE MALLORCA	3
SPAIN	SANTA CRUZ DE TENERIFE (CANARY ISLANDS)	3
SWITZERLAND	GENEVA	3
THAILAND	BANGKOK	1
TURKEY	DIYARBAKIR	2
UNITED ARAB EMIRATES	ABU DHABI	1
UNITED ARAB EMIRATES	DUBAI	4
UNITED KINGDOM	GLASGOW	20
UNITED KINGDOM	LUTON	4
UNITED KINGDOM	OXFORD BRIZE NORTON	2
UNITED KINGDOM	PRESTWICK	36
UNITED KINGDOM	PROVIDENCIALES (TURKS AND CAICOS)	6
UNITED STATES OF AMERICA	GUANTÁNAMO BAY US NAVAL AIR STATION,	20

[63] See an advertisement for the sale of this Gulfstream V executive jet at US Aircraft Sales: http://www.usaircraftsales.com/Forsale/SPECS%20GV%20581%20%202.pdf.

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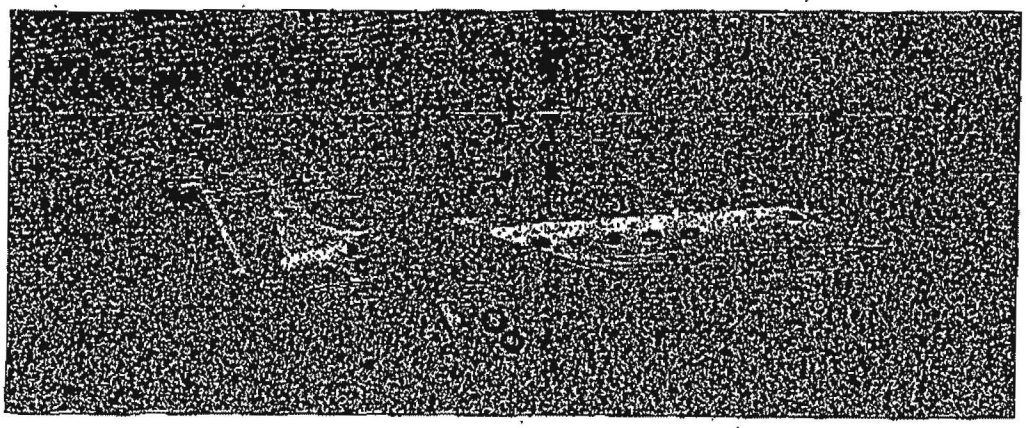
	CUBA	
UZBEKISTAN	KARSHI AIRBASE	1
UZBEKISTAN	TASHKENT	13

3. N829MG-N259SK

A Gulfstream III (Grumman G-1159A), this plane carried Canadian national Maher Arar from the US to Jordan, where he was transferred overland to Syria. He was tortured during 13 months of detention without charge, and was released in October 2003. The plane has also made over 100 trips to Guantánamo Bay. There are 380 relevant FAA recorded landings or takeoffs between March 2001 and May 2005.

Registration: registered by MJG Aviation in October 2000 in Florida; the company dissolved July 2004. MJG's owner also owned Presidential Aviation, a company first registered in Florida in 1998 and dissolved November 2004. The aircraft was re-registered as 259SK in March 2004 by S&K Aviation LLC. S&K Aviation was first registered in Florida in December 2003 and is an active company with a registered agent.

Range and capacity: average range of 3,715 nautical miles. The aircraft can transport up to 22 passengers, but it is usually configured for 10/12 people.



Gulfstream III: N829MG (Later re-registered as N259SK). © Sam Chui

Destinations: Recorded movements of N829MG-N259SK include landings and take offs from the following airports:

COUNTRY	CITY / AIRPORT	PASSAGES THROUGH THE AIRPORT
BELGIUM	ANTWERP	1
CANADA	GANDER, NEWFOUNDLAND	10
FRANCE	LE BOURGET	2
GERMANY	FRANKFURT	1
GERMANY	FRANKFURT-HAHN	1
GERMANY	NURNBERG	1
IRELAND	SHANNON	2
ITALY	ROME	3
JORDAN	AMMAN	2
NETHERLANDS	AMSTERDAM	2
NETHERLANDS	GRONINGEN	1
PORTUGAL	SANTA MARIA (AZORES)	6
SPAIN	MALAGA	2
UNITED KINGDOM	BIGGIN HILL	2
UNITED KINGDOM	HAMILTON US NAVAL AIR STATION, BERMUDA	6
UNITED KINGDOM	LONDONDERRY	2
UNITED KINGDOM	PROVIDENCIALES (TURKS AND CAICOS)	7
UNITED STATES OF AMERICA	GUANTÁNAMO BAY US NAVAL AIR STATION, CUBA	2
UNITED STATES OF AMERICA	TETERBORO	3
UNITED STATES OF AMERICA	WASHINGTON, DC	2

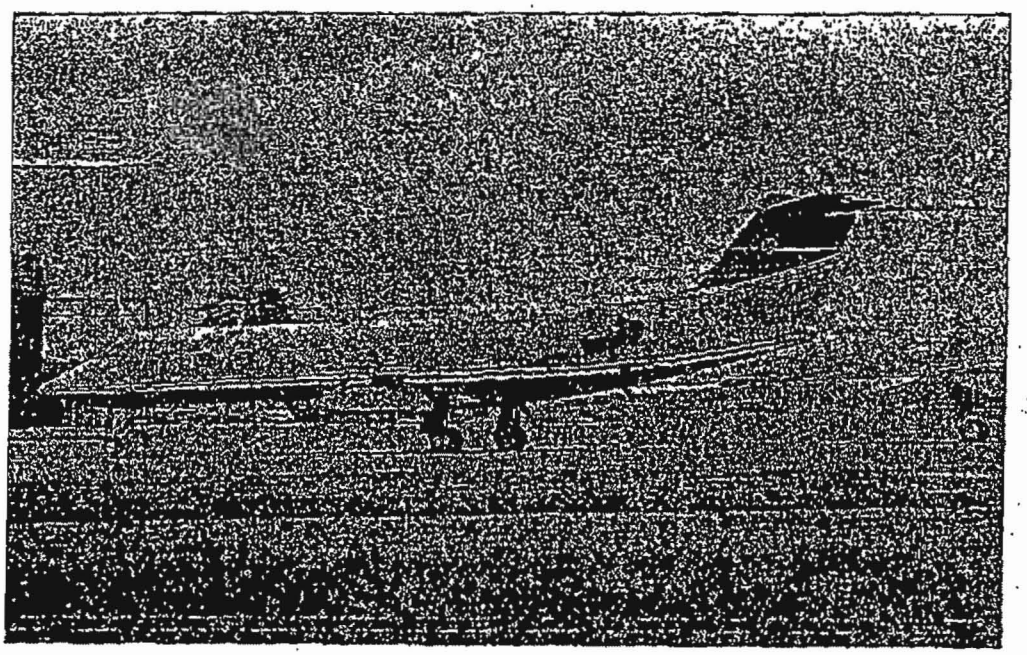
4. N85VM-N227SV

The Gulfstream IV plane that took Abu Omar to Egypt from Germany after his kidnapping in Italy. Its owners have admitted leasing the plane to the CIA, but have said it is not used exclusively by the agency. There are 488 relevant recorded landings or takeoffs between February 2001 and July 2005.

Registration: owned by Assembly Point Aviation Inc., registered May 1995 in New York State. The aircraft was registered as N85VM until September 2004, when it was re-registered as N227SV. Operated by Richmor Aviation, a company based at the Columbia County airport (Hudson, New York) and Scotia (New York). Richmor Aviation owns or manages a fleet of about 15 business jets.

Landing rights: Richmor Aviation aircraft were permitted to land at US military bases worldwide (expiration February 15, 2005).

Range and capacity: average range of 3,633 nautical miles at 460/582 knots; can transport up to 19 passengers, but it is usually configured for 8/14 passengers.



Gulfstream IV: N227SV plane used in rendition flights. Earlier registered as N85VM. This aircraft is currently available for charter at a rate of US$5365 per hour. © Wallace

Destinations: Recorded movements of N85VM-N227SV include landings and take offs from the following airports:

COUNTRY	CITY / AIRPORT	PASSAGES THROUGH THE AIRPORT
AFGHANISTAN	KHWAJA RAWASH (KABUL)	1
AZERBAIJAN	BAKU	2
BAHRAIN	MUHARRAQ MILITARY AIRPORT	2
CANADA	GANDER, NEWFOUNDLAND	2
CYPRUS	LARNACA	1
CYPRUS	PAPHOS	2
CZECH REPUBLIC	PRAGUE	3
EGYPT	CAIRO	1
EGYPT	SHARM EL SHEIKH	1
FINLAND	HELSINKI	1
FRANCE	LE BOURGET	4
GERMANY	FRANKFURT	10
GERMANY	KOLN-BONN	2
GERMANY	RAMSTEIN	1
ICELAND	KEFLAVIK	1
IRELAND	DUBLIN	1
IRELAND	SHANNON	30
ITALY	ROME	1
JAPAN	OSAKA	1
KUWAIT	KUWAIT	1
MOROCCO	RABAT	7
NORWAY	EVENES	2
PORTUGAL	LISBON	2
PORTUGAL	SANTA MARIA (AZORES)	4
SPAIN	BARCELONA	1
SPAIN	PALMA DE MALLORCA	3
SPAIN	SAN CRISTOBAL (CANARY ISLANDS)	2
SPAIN	SANTA CRUZ DE TENERIFE (CANARY ISLANDS)	2
SWITZERLAND	GENEVA	2
SWITZERLAND	ZURICH	2
UNITED ARAB EMIRATES	DUBAI	3
UNITED KINGDOM	BELFAST	2
UNITED KINGDOM	EDINBURGH	1
UNITED KINGDOM	GLASGOW	2
UNITED KINGDOM	HAMILTON US NAVAL AIR STATION, BERMUDA	2
UNITED KINGDOM	LEUCHARS	10
UNITED KINGDOM	LONDON STANSTED	1
UNITED KINGDOM	LONDONDERRY	1
UNITED KINGDOM	LUTON	6
UNITED KINGDOM	PROVIDENCIALES (TURKS AND CAICOS)	21
UNITED STATES OF AMERICA	GUANTÁNAMO BAY US NAVAL AIR STATION, CUBA	114

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L Press Guidance
June 7, 2006

MARTY REPORT ON RENDITIONS

Question:

Comment on Marty report to the Council of Europe regarding rendition flights. Is there anything new in this report?

Answer:

- While we continue to review today's report, based on an initial review, we are disappointed with the tone and content of the report. It appears that the report is filled with inaccuracies and innuendo. We are particularly disappointed that the report failed to account for much of the information we recently provided the European parliamentarians and U.N. Committee Against Torture on this issue.

- As we've said before, we're not in a position to confirm or deny specific intelligence activities.

- As Secretary Rice made clear in discussions with the European Foreign Ministers in December, we believe that renditions are a useful tool in fighting terrorism in certain rare circumstances where an individual would otherwise not be able to be brought to justice or would otherwise be able to escape and avoid capture.

- We note that the Marty Report affirms our previous statement that it would be irresponsible to speak of thousands or even hundreds of rendition flights through Europe. The overwhelming majority of intelligence flights have no connection at all to renditions.

- As the Secretary of State made clear in December, the United States complies with its laws and its treaty obligations, and respects the sovereignty of other countries, in engaging in such activities.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 06 AUG 2009 200706444

- The suggestion that intelligence flights are engaged in illegal activity is unfounded and undermines cooperation between the United States and Europe that is essential to foiling deadly plots.

- We never transfer persons where we believe it is more likely than not that the person would be tortured.

[redacted] B5

Background:

Swiss Senator Dick Marty presented a report to the 46 members of the Council of Europe today in response to allegations that the CIA was running secret prisons in Europe. The report found there was no direct evidence that any such prisons existed in Europe, although it stated, "a number of coherent and convergent elements indicated that secret detention centers have indeed existed and unlawful inter-state transfers have taken place in Europe." The report alleges that Romania and Poland were stops on a "rendition circuit," and accused 14 European countries, including the U.K., Germany, and Italy of violating human rights in connection with CIA activities.

Drafted:	L/PM:	VPadmanabhan (x7-7965) Doc # 125873 June 7, 2006
Cleared:	L:	JBellinger (ok)
	L/PM:	JDorosin (ok)
	L/HRR:	RHarris (ok)
	S/WCI:	KMcGeeney (ok)
	DRL:	JNoyes (ok)
	EUR/PPD:	TDavidson (ok)

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went on to claim—*in his defense*—that scientists "don't know....They just don't know."

So, presumably, those scientists do not belong to the "consensus." Yet their research is forced [redacted] global-warming [redacted] alarmism. To be[redacted] ignore the truly inconvenient facts. To take the issue of rising sea levels, these include: that the Arctic was as warm or warmer in 1940; that icebergs have been known since time immemorial; that the evidence so far suggests that the Greenland ice sheet is actually growing on average. A likely result of all this is increased pressure pushing ice off the coastal perimeter of that country, which is depicted so ominously in Mr. Gore's movie.

[redacted]

[redacted] timidate the public and even scientists—especially those outside the area of climate dynamics. Secondly, given that the question of human attribution largely cannot be resolved, its use in promoting visions of disaster constitutes nothing so much as a bait-and-switch scam. That is an inauspicious beginning to what Mr. Gore claims is not a political issue but a "moral" crusade.

Lastly, there is a clear attempt to establish truth not by scientific methods but by [redacted]. An earlier attempt at [redacted] by tragedy. Perhaps [redacted] time around we may [redacted] lucky.

Mr. Lindzen is the Alfred P. Sloan Professor of Atmospheric Science at MIT.

Extraordinarily Unjust Renditions

focuses on arrest warrant

27 JUNE 06

By Terry Davis

W55

At about 10 in the morning on Sunday August 15, 1994, a small plane landed at Villacoublay military airport outside Paris. On board was a team of agents from the *Direction de la Surveillance du Territoire*, or DST—broadly speaking, the French equivalent to the CIA. Their handcuffed and hooded prisoner had been captured only hours before in the Sudanese capital of Khartoum. His name was Illich Sanchez Ramirez, better known as Carlos the Jackal, self-styled revolutionary, terrorist and murderer.

Two years later, the European Commission on Human Rights, a predecessor of the European Court of Human Rights, rejected his complaint and ruled that the circumstances of his arrest and transfer to France did not violate the European Convention on Human Rights.

This ruling by a Council of Europe body has been repeatedly used by the highest officials in the U.S. State Department to try to prove that so-called extraordinary renditions are justified and lawful under [redacted] European hu[redacted] this is noth[redacted] in the case of *Sanchez Ramirez v. France* is only seven pages long and can be read in a couple of minutes. It is available on the Council of Europe's Web site [redacted] straightforw[redacted] guistic difficulties.

> 'In Europe, we reject the bogus choice between our security and our freedom.'

[redacted] Carlos and so-called extraordinary renditions of al Qaeda terrorist suspects are a few basic and very important details.

Carlos did not disappear, nor did he end up in some Caribbean gulag. He was taken to Paris and brought before a judge, [redacted]

tional law, which was drafted in difficult and uncertain times and has been tested in [redacted] Convention balances [redacted] of individuals [redacted] of the larger commu[redacted] robust, effective and [redacted] threats faced by soci[redacted] terrorism. In Europe, [redacted] choice between our se[redacted]

After his arrest, Illich Ramirez Sanchez [redacted] and was sentenced to [redacted] he may be an an[redacted] not a martyr. He [redacted] complaints through [redacted] set out to destroy [redacted] Carlos has atoned [redacted] is important is that [redacted] prived of the opportunity to commit new crimes or alternatively inspire other people to follow his example.

There is a message in all that. A really effective fight against terrorism is one which stops more terrorists than it helps to recruit.

Mr. Davis is secretary general of the Council of Europe.

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UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444

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Deeks, Ashley S

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From: Deeks, Ashley S
Sent: Tuesday, December 05, 2006 10:52 AM
To: Bellinger, John B(Legal)
Cc: Dorosin, Joshua L; Padmanabhan, Vijay M; Filippatos, James
Subject: FW: possible letter to editor on renditions

B5

"The United States has been in a useful dialogue with the EU, both in a multilateral context and with individual EU member states, about the appropriate legal framework for the fight against terrorism. However, contrary to recent press reports, the United States has not tried to develop a "framework agreement" on renditions with either Austria or the EU. Rather, as part of our constructive dialogue with the EU on legal issues, the United States has explained the limited circumstances under which the United States has used renditions and the legal basis for those renditions.

The United States has also pointed out that European countries have used renditions. The U.S. Government is well aware that the renditions reviewed and upheld by the European Court of Human Rights involved renditions of an individual to face criminal prosecution, but renditions of suspects to stand trial are not the only situations in which renditions are appropriate. The Council of Europe's Venice Commission asserts that there are only four legal ways to transfer a prisoner to foreign authorities: deportation, extradition, transit, and transfer of a sentenced person to serve that sentence in his country of origin. Thus, under the Venice guidelines, even the French rendition of Carlos the Jackal would have been improper.

We disagree with the Venice Commission's conclusion. Renditions are not per se unlawful, though renditions should not be used to transfer terrorist suspects to face torture, and the United States does not transport anyone, and will not transport anyone, for this purpose. We believe, however, that the international community must continue to be able to use renditions not only to bring terrorists to justice but also to prevent terrorist suspects from remaining at large to plan future attacks."

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CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 06 AUG 2009 200706444

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EUROPEAN PARLIAMENT

L154

2004 2009

Session document

FINAL
A6-9999/2007

26.1.2007

REPORT

on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners
(2006/2200(INI))Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners

Rapporteur: Giovanni Claudio Fava

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 05 SEP 2008 200706444

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners
(2006/2200(INI))

The European Parliament,

– having regard to its resolution of 15 December 2005 on the presumed use of European countries for the transportation and illegal detention of prisoners by the CIA[1],

– having regard to its decision of 18 January 2006 setting up a Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners[2],

– having regard to its resolution of 6 July 2006 on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, adopted midway through the work of the Temporary Committee[3],

– having regard to the delegations which the Temporary Committee sent to the Former Yugoslav Republic of Macedonia, the United States, Germany, the United Kingdom, Romania, Poland and Portugal,

– having regard to the hearings, numbering no fewer than 130, held by the Temporary Committee in the course of its meetings, delegation missions and confidential interviews,

– having regard to all the written contributions received by the Temporary Committee or to which it has had access, particularly the confidential documents forwarded to it (in particular by the European Organisation for the Safety of Air Navigation (Eurocontrol) and the German Government or which it has obtained from various sources,

– having regard to its resolution of 30 November 2006 on the progress made in the EU towards the Area of freedom, security and justice (AFSJ) (Articles 2 and 39 of the EU Treaty)[4], notably its paragraph 3,

– having regard to its resolution of 13 June 2006 on the situation of prisoners at Guantánamo[5],

– having regard to Rule 175 of its Rules of Procedure,

– having regard to the report of the Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (A6-0000/2006),

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1 *Texts Adopted*, P6_TA(2005)0529.
2 *Texts Adopted*, P6_TA(2006)0012.
3 *Texts Adopted*, P6_TA(2006)0316.
4 *Texts Adopted*, P6_TA-PROV(2006)0525.
5 *Texts Adopted*, P6_TA(2006)0254.

A. whereas, in its resolution of 6 July 2006, Parliament decided that 'the Temporary Committee would continue its work for the remainder of its established twelve-month term, without prejudice to the provisions of Rule 175 of its Rules of Procedure on the possibility of extending the term',

B. whereas, in adopting its resolution of 22 November 1990 on the Gladio affair[1], it drew attention, more than 16 years ago, to the existence of clandestine operations involving intelligence services and military organisations without adequate democratic control,

C. whereas the Member States cannot circumvent the requirements imposed on them by European Community (EC) and international law by allowing other countries' intelligence services, which are subject to less stringent legal provisions, to work on their territory; whereas, in addition, the operations of intelligence services are consistent with fundamental rights only if adequate arrangements exist for monitoring them;

D. whereas the principle of the inviolability of human dignity is enshrined in international human rights law, notably in the preamble to the Universal Declaration of Human Rights and the preamble to and Article 10 of the International Covenant on Civil and Political Rights, and whereas that principle is guaranteed by the jurisprudence of the European Court of Human Rights; whereas this principle appears in most Member States' constitutions, as well as in Article 1 of the Charter of Fundamental Rights of the European Union[2] and whereas that principle should not be undermined, even for the purposes of security, in times of peace or war,

E. whereas the principle of inviolability of human dignity underlies every other fundamental right guaranteed by international, European and national human rights instruments, in particular the right to life, the right to freedom from torture and inhuman or degrading treatment or punishment, the right to liberty and security, the right to protection in the event of removal, expulsion or extradition and the right to an effective remedy and to a fair trial,

F. whereas extraordinary rendition and secret detention involve multiple violations of human rights, in particular violations of the right to liberty and security, the freedom from torture and other inhuman or degrading treatment, the right to an effective remedy, and, in extreme cases, the right to life; whereas, in some cases, where rendition leads to secret detention, it constitutes enforced disappearance,

G. whereas the prohibition of torture is a peremptory norm of international law (*jus cogens*) from which no derogation is possible and the obligation to protect against, investigate and sanction torture is an obligation owed by all states (*erga omnes*), as provided by Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the related case law, Article 4 of the Charter of Fundamental Rights, and national constitutions and laws; whereas specific conventions and protocols on torture and monitoring mechanisms adopted at the European and international level demonstrate the importance attached to this inviolable norm by the international community; whereas the use of diplomatic assurances is incompatible with this obligation,

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[1] OJ C 324, 24.12.1990, p. 201.
[2] OJ C 364, 18.12.2000, p. 1.

H. whereas in democracies in which the respect for the rules of law is inherent, the fight against terrorism cannot be won by sacrificing or limiting the very principles that terrorism seeks to destroy, notably, the protection of human rights and fundamental freedoms must never be compromised; whereas terrorism can and must be fought by legal means and must be defeated while respecting international and national law,

I. whereas the United States (US) administration's strategy to combat terrorism has made use of pervasive instruments to monitor sensitive data relating to European citizens, such as the Passenger Names Record (PNR) agreement, and to monitor bank details through the Society for Worldwide Interbank Financial Telecommunication (Swift) network,

J. whereas on 6 September 2006, US President George W. Bush confirmed that the Central Intelligence Agency (CIA) was operating a secret detention programme outside the United States,

K. whereas President George W. Bush said that the vital information derived from the extraordinary rendition and secret detention programme had been shared with other countries and that the programme would continue, which raises the strong possibility that some European countries may have received, knowingly or unknowingly, information obtained under torture,

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L. whereas the Temporary Committee has obtained, from a confidential source, records of the informal transatlantic meeting of European Union (EU) and North Atlantic Treaty Organisation (NATO) foreign ministers, including US Secretary of State Condoleezza Rice, of 7 December 2005, confirming that Member States had knowledge of the programme of extraordinary rendition, while all official interlocutors of the Temporary Committee provided inaccurate information on this matter,

M. whereas the Temporary Committee has obtained, from a confidential source, records of meetings of the Council's Working Party on Public International Law (COJUR) and Transatlantic Relations Working Party (COTRA) with senior representatives of the US Department of State during the first half of 2006 (notably on 8 February and 3 May 2006), while it was provided by the Council Presidency only with a summarised version of these documents; whereas the documents sent by the Council to Parliament concerning those meetings in answer to Parliament's specific request, were incomplete summaries of the proceedings with essential parts missing,

N. whereas the information on these meetings was not notified to Parliament and absolute secrecy was maintained in relation to their proceedings,

O. whereas, in the present resolution, 'European countries' should be understood as meaning Member States and candidate and associate countries, as outlined in the mandate of the Temporary Committee adopted on 18 January 2006,

1. Recalls that terrorism represents one of the main threats to the security of the European Union and that it must be fought with lawful and coordinated efforts by all European governments, in close collaboration with international partners and notably with the United States, along the lines of the strategy defined at United Nations (UN) level; underlines that the fight against terrorism must be fought on the basis of, and in order to

protect, our common values of democracy, the rule of law, human rights and fundamental freedoms; furthermore stresses that all the work carried out by the Temporary Committee is intended to make a contribution towards the development of clear and focused measures in the fight against terrorism, which are commonly accepted and respect national and international law;

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2. Considers that after 11 September 2001, the so-called 'war on terror', in its excesses, has produced a serious and dangerous erosion of human rights and fundamental freedoms, as noted by the outgoing UN Secretary-General Kofi Annan;

3. Is convinced that the rights of the individual and full respect for human rights contribute to security; considers it necessary that in the relationship between the need for security and the rights of individuals, human rights must always be fully respected, ensuring that suspected terrorists are tried and sentenced while due process is observed;

4. Emphasises that the positive obligation to respect, protect and promote human rights is binding, regardless of the legal status of the individual concerned, and that any discrimination among EU nationals, residents of Member States or any other person entitled to protection from, or otherwise under the jurisdiction of, the Member States must be avoided;

5. Recalls that the purpose of this resolution, based on the report of the Temporary Committee, is to determine responsibilities for the facts that it has been able to examine on the one hand and to consider ways of preventing any repetition of the abuses and violations perpetrated in connection with measures against terrorism on the other;

6. Notes the statement made by US President George W. Bush on 6 September 2006, according to whom "a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate programme operated by the CIA" and that many of the persons who had been detained there, had subsequently been transferred to Guantánamo and it is strongly suspected that other prisoners are still held in secret places of detention; notes the report of the Federal Bureau of Investigation (FBI) of 2 January 2007 mentioning 26 testimonies of mistreatment in Guantánamo since 11 September 2001;

7. Deplores, in this context, the inability of the Council - due to the opposition of certain Member States - to adopt conclusions in response to that statement at the General Affairs and External Relations Council of 15 September 2006, and requests that the Council adopt them urgently, to dissipate any doubt as to the Member State governments' cooperation with and connivance in the extraordinary rendition and secret prisons programme in the past, present and future;

8. Calls on the Council and the Member States to issue a clear and forceful declaration calling on the US Administration to put an end to the practice of extraordinary arrests and renditions, in line with the position of Parliament;

9. Deplores the fact that the governments of European countries did not feel the need to ask the US administration for clarifications regarding the existence of secret prisons outside US territory;

10. Notes the statements by the legal adviser to the US State Department at a meeting on 3 May 2006 with representatives of the Member States meeting within the Council,

according to which, in carrying out the extraordinary rendition programme, whose existence he confirmed, the sovereignty of the countries concerned had always been fully respected; notes that this remark was subsequently confirmed at the meeting with the Temporary Committee delegation which visited Washington;

11. Thanks the former CIA agents who agreed to cooperate with the Temporary Committee, particularly at certain confidential meetings at which they confirmed that the extraordinary rendition programme had already begun during the 1990s;

12. Welcomes the announcement by the new majority established by the elections to the US Senate that it will investigate the CIA's extraordinary rendition programme; notes that this is further confirmation of the relevance of the work of the Temporary Committee;

13. Denounces the lack of cooperation of many Member States, and of the Council of the European Union towards the Temporary Committee; stresses that the behaviour of Member States, and in particular the Council and its Presidencies, has fallen far below the standard that Parliament is entitled to expect;

14. Believes that the serious lack of concrete answers to the questions raised by victims, non-governmental organisations (NGOs), the media and parliamentarians has only strengthened the validity of already well-documented allegations;

15. Stresses the serious and rigorous work undertaken by the judicial authorities of Italy, Germany and Spain concerning the allegations which fall within the remit of the Temporary Committee, and invites the judicial authorities in other Member States to act similarly on the basis of the substantial information made available by the Temporary Committee;

16. Encourages the national parliaments of European countries to continue or launch thorough investigations, in the ways they consider most appropriate and efficient, into these allegations, including by setting up parliamentary committees of inquiry;

17. Pays tribute to the world press, in particular the US journalists who were the first to disclose the abuses and breaches of human rights related to extraordinary rendition, thus demonstrating the great democratic tradition of the US press; also recognises the efforts and good work undertaken by several NGOs on these matters, in particular Statewatch, Amnesty International and Human Rights Watch;

18. Recognises that some information in this report, including the existence of secret CIA prisons, comes from official or unofficial US sources, demonstrating the vitality and self-policing inherent in the US democracy;

19. Expresses its profound gratitude to all victims who had the courage to share their very traumatic experiences with the Temporary Committee;

20. Calls on all European countries to refrain from taking any action against officials, former officials, journalists or others who, by providing testimony or other information, either to the Temporary Committee or to other investigating bodies, have helped shed light on the system of extraordinary rendition, illegal detention and the transportation of terrorism suspects;

21. Reiterates its call on the Council, as expressed in its resolution of 6 July 2006, to adopt a

[redacted] where there are substantial grounds for believing that individuals would be in danger of being subjected to torture or ill-treatment;

Cooperation with EU institutions and international organisations

22. Deplores the failure by the Council and its Presidency to comply with their obligations to keep Parliament fully informed of the main aspects and basic choices of the common foreign and security policy (CFSP) and of work carried out in the field of police and judicial cooperation in criminal matters pursuant to Articles 21 and 39 of the Treaty on European Union;

23. Stresses, in this context, that it is wholly unacceptable that the Council should first have concealed and then, at Parliament's request, only supplied piecemeal information on the regular discussions held with senior officials of the US Administration, asserting that this was the only available version; furthermore denounces the fact that the Council also referred to the request by the government of a third country that the information remain confidential; B5

24. Points out that these shortcomings of the Council implicate all Member State governments since they have collective responsibility as members of the Council;

25. Is outraged by the proposal which was to have been made by the then Council Presidency to set-up a joint "framework" with the US on standards for the rendition of terrorism suspects, as confirmed by those who took part in the meeting of the Council's Working Party on Public International Law (COJUR) and the Transatlantic Relations Working Party (COTRA) with senior representatives of the US Department of State held in Brussels on 3 May 2006;

? 26. Calls for the disclosure of the results of the discussions conducted with the United States, according to Gijs de Vries, on the definitions of "rendition" and "extraordinary rendition";

27. Takes note of the fact that the Secretary-General (and High Representative for the Common Foreign and Security Policy (CFSP)) of the Council of the European Union, Javier Solana, reaffirmed that Member States must ensure that any measures they take to combat terrorism comply with their obligations under international law; expresses its concern about the omissions in the statements made to the Temporary Committee by the Secretary-General, regarding the Council's discussions and knowledge of the methods used by the United States in its campaign against terrorism; deplores the fact that he was unable to supplement the evidence already in the possession of the Temporary Committee; asks him to declare all facts and discussions that are within his knowledge and to promote a European foreign policy and an international anti-terrorism strategy that respect human rights and fundamental freedoms;

28. Questions the real substance of the post of EU Counter-terrorism Coordinator

occupied by Gijs de Vries, since he was unable to give satisfactory answers to the questions raised by the Temporary Committee; is of the opinion that a revision and strengthening of his competences and powers, as well as the increased transparency and monitoring of his activities by Parliament must be undertaken in the near future, so as to enhance the European dimension of the fight against terrorism;

29. Deplores the refusal by the Director of the European Police Office (Europol), Max-Peter Ratzel, to appear before the Temporary Committee, particularly because it has emerged that liaison officers, in particular for the US intelligence services, were seconded to the Office; requests that he provide Parliament with comprehensive information concerning the role of those liaison officers, their tasks, the data to which they had access and the conditions for such access;

30. Thanks Commission Vice-President Franco Frattini for his cooperation with the work of the Temporary Committee and encourages the Commission to step up its work in the context of the continuing efforts to ascertain the truth and find ways of preventing any repetition of the facts analysed by the Temporary Committee;

31. Welcomes, in particular, the commitment shown by Vice-President Frattini to launching a Euro-Atlantic cooperation framework in the fight against international terrorism, with harmonised rules on the protection of human rights and fundamental freedoms;

32. Thanks Eurocontrol, and notably its Director, for its excellent cooperation and for the very useful information which it shared with the Temporary Committee;

33. Appreciates the close cooperation which it has maintained with the Council of Europe, particularly its Parliamentary Assembly and its Secretary-General, and encourages the Committee on Legal Affairs and Human Rights - and its Chairman, Senator Dick Marty - to continue its work; endorses the recommendations made to the Committee of Ministers by the Secretary-General, Terry Davis; stresses the convergence of the findings of the two committees to date;

34. Expresses its deep concern with the refusals of the former and current Secretaries-General of NATO, Lord Robertson and Jaap de Hoop Scheffer, to appear before the Temporary Committee or with that organisation's rejection of its request for access to the decision taken by the North Atlantic Council on 4 October 2001 concerning the implementation of Article 5 of the North Atlantic Treaty following the attacks on the United States on 11 September 2001; reiterates its request to make the document public and at least to provide information on its contents, its past and current implementation, whether it still remains into force and whether CIA flights have operated within its framework;

35. Thanks the special rapporteurs of the United Nations, Manfred Nowak (on torture) and Martin Scheinin (on the promotion and protection of human rights in connection with counter-terrorism measures) for their contributions to the work of the Temporary Committee, while regretting that it was not possible for the High Commissioner for Human Rights, Louise Arbour, to meet it; thanks the European Network of Experts on Human Rights and notably its Co-ordinator, Olivier De Schutter, for their contribution to the works of the Temporary Committee;

Information analysed by the Temporary Committee

Extraordinary rendition and the misuse of airspace and airports

36. Recalls that the programme of extraordinary rendition is an extra-judicial practice which contravenes established international human rights standards and whereby an individual suspected of involvement in terrorism is illegally abducted, arrested and/or transferred into the custody of US officials and/or transported to another country for interrogation which, in the majority of cases, involves *incommunicado* detention and torture; B5

37. Deplores the fact that the families of the victims are kept in complete ignorance of the fate of their relatives;

38. Underlines, notwithstanding an intended confusion created by some US representatives in private and public speeches, that extraordinary rendition is a wholly different practice from one that has been used by some European countries only in very exceptional circumstances, namely the detention or reception into custody in third countries of individuals formally accused of very serious crimes, in order to transfer them to European soil in order to face criminal charges before a court with all the legal guarantees of a judicial system; B5

39. Condemns extraordinary rendition as an illegal instrument used by the United States in the fight against terrorism; condemns, further, the acceptance and concealing of the practice, on several occasions, by the secret services and governmental authorities of certain European countries;

40. Condemns any participation in the interrogation of individuals who are victims of extraordinary rendition, because it represents a deplorable legitimisation of that type of illegal procedure, even where those participating in the interrogation do not bear direct responsibility for the kidnapping, detention, torture or ill-treatment of the victims;

41. Considers that the practice of extraordinary rendition has been shown to be counterproductive in the fight against terrorism and that extraordinary rendition in fact damages and undermines regular police and judicial procedures against terrorism suspects;

42. Stresses that at least 1 245 flights operated by the CIA flew into European airspace or stopped over at European airports between the end of 2001 and the end of 2005, to which should be added an unspecified number of military flights for the same purpose; recalls that, on one hand, there may have been more CIA flights than those confirmed by the investigations carried out by the Temporary Committee, while, on the other hand, not all those flights have been used for extraordinary rendition; B5

43. Regrets that European countries have been relinquishing their control over their airspace and airports by turning a blind eye or admitting flights operated by the CIA which, on some occasions, were being used for extraordinary rendition or the illegal

transportation of detainees, and recalls their positive obligations arising out of European Court of Human Rights case law, as reiterated by the European Commission for Democracy through Law (Venice Commission);

44. Is concerned, in particular, that the blanket overflight and stopover clearances granted to CIA-operated aircraft may have been based, inter alia, on the NATO agreement on the implementation of Article 3 of the North Atlantic Treaty, adopted on 4 October 2001;

45. Recalls that Article 1 of the Convention on International Civil Aviation (the Chicago Convention) sets out the principle that contracting States have complete and exclusive sovereignty over the airspace above its territory, and accordingly does not imply any exclusion from the States' full responsibility for the observance of human rights within their territory, including the airspace above it;

46. Emphasises that the CIA has been using civil aviation rules to bypass the legal obligations for state aircraft, including those operated by the military and the police, as provided in the Chicago Convention; recalls that Article 4 of the Chicago Convention provides that: "Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention";

47. Confirms, in view of the additional information received during the second part of the proceedings of the Temporary Committee, that it is unlikely that certain European governments were unaware of the extraordinary rendition activities taking place in their territory;

48. Stresses that the Temporary Committee's working documents Nos 7 and 8[1] provide strong evidence of the extraordinary renditions analysed by the committee, as well as of the companies linked to the CIA, the aircraft used by the CIA and the European countries in which CIA aircraft made stopovers;

→ ITALY →

B5

49. Deplores the fact that the representatives of the current and former Italian Governments who are or were responsible for the Italian secret services declined the invitation to appear before the Temporary Committee;

50. Condemns the extraordinary rendition by the CIA of the Egyptian cleric Abu Omar, who had been granted asylum in Italy and who was abducted in Milan on 17 February 2003, transferred from Milan to the NATO military base of Aviano by car, and then flown, via the NATO military base of Ramstein in Germany, to Egypt, where he has been held *incommunicado* and tortured ever since;

51. Condemns the active role played by a carabinieri marshal and certain officials of the Italian military security and intelligence services (SISMI) in the abduction of Abu Omar, as shown by the judicial investigation and the evidence collated by Milan's Public Prosecutor Armando Spataro;

52. Concludes, and deplores the fact, that General Nicolò Pollari, former Director of the

[1] Reference numbers: PE 380.593v04-00 and PE 380.984v02-00.

SISMI, concealed the truth while appearing before the Temporary Committee on 6 March 2006, when he stated that Italian agents had played no part in any CIA kidnapping and that the Italian intelligence services were not aware of the plan to kidnap Abu Omar;

53. Considers it very likely, in view of the involvement of its secret services, that the Italian Government at the time was aware of the extraordinary rendition of Abu Omar from within its territory;

54. Thanks Public Prosecutor Spataro for his testimony to the Temporary Committee, applauds the efficient and independent investigations he carried out in order to shed light on the extraordinary rendition of Abu Omar and fully endorses his conclusions and the decision to bring to judgment 26 US nationals, CIA agents, seven senior officials of the SISMI, an ROS carabiniere and the assistant editor of the Libero daily newspaper; welcomes the opening of the proceedings at the Milan Court;

55. Regrets that the abduction of Abu Omar jeopardised Public Prosecutor Spataro's investigation into the terrorist network to which Abu Omar was connected; recalls that had Abu Omar not been illegally seized and transported to another country, he would have faced a regular and fair trial in Italy;

56. Takes note that the testimony provided by General Pollari is inconsistent with a number of documents found on SISMI premises and confiscated by Milan prosecutors; considers that such documents show that the SISMI was regularly informed by the CIA about the detention of Abu Omar in Egypt;

57. Deeply regrets the systematic misleading, among others, of Milan prosecutors by the SISMI board with the aim of jeopardising the investigation into the extraordinary rendition of Abu Omar; is extremely concerned about the fact that the SISMI board appeared to be working to a parallel agenda , and about the lack of appropriate internal and governmental controls; requests the Italian Government to remedy this situation urgently by establishing enhanced parliamentary and governmental controls;

58. Condemns the fact that Italian journalists investigating the extraordinary rendition of Abu Omar were illegally pursued, that their telephone conversations were tapped and their computers were confiscated; stresses that testimonies from those journalists have been of the utmost benefit to the work of the Temporary Committee;

59. Criticises the length of time it took for the Italian Government to decide to remove from office and replace General Pollari;

60. Regrets that a document on US-Italian cooperation in the fight against terrorism, which would have assisted the investigation into the extraordinary rendition of Abu Omar, was classified by the former Italian Government and that the current government has confirmed the classified status of this document;

61. Urges the Italian Minister of Justice to process, as soon as possible, the requests for extradition of the 26 US nationals referred to, for the purpose of standing trial in Italy;

62. Condemns the extraordinary rendition of Italian citizen Abou Elkassim Britel, who was arrested in Pakistan in March 2002 by the Pakistani police and interrogated by US and Pakistani officials, and subsequently rendered to the Moroccan authorities and

imprisoned in the detention facility 'Temara', where he remains detained; emphasises that the criminal investigations in Italy against Abou Elkassim Britel were closed without any charges being brought;

63. Regrets that, according to the documentation provided to the Temporary Committee by Abou Elkassim Britel's lawyer, the Italian Ministry of Internal Affairs was at the time in 'constant cooperation' with foreign secret services concerning the case of Abou Elkassim Britel following his arrest in Pakistan;

64. Urges the Italian Government to take concrete steps in order to obtain the immediate release of Abou Elkassim Britel and Abu Omar so that proceedings against the latter can be prosecuted in the Court of Milan;

65. Deeply regrets that Italian territory was used by the CIA to make a stopover during the flight that was used to carry out the extraordinary rendition of Maher Arar, who gave testimony to the Temporary Committee, from the United States to Syria, via Rome; B5

66. Notes the 46 stopovers made by CIA-operated aircraft at Italian airports and expresses serious concern about the purpose of those flights which came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; deplores the stopovers at Italian airports of aircraft which have been shown to have been used by the CIA on other occasions for the extraordinary rendition of , Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Khaled El-Masri, Binyam Mohammed, Abu Omar and Maher Arar and for the expulsion of Ahmed Agiza and Mohammed El Zari;

THE UNITED KINGDOM B5

67. Deplores the manner in which the UK Government, as represented by its Minister for Europe, cooperated with the Temporary Committee; is extremely surprised at the letter of the Minister sent to Parliament's President,

68. Thanks the All-Party Parliamentary Group on Extraordinary Renditions (APPG), comprising members of the House of Commons and the House of Lords, for its work and for providing the Temporary Committee delegation to London with a number of highly valuable documents;

69. Condemns the extraordinary rendition of Bisher Al-Rawi, an Iraqi citizen and resident of the United Kingdom, and Jamil El-Banna, a Jordanian citizen and resident of the United Kingdom, who were arrested by Gambian authorities in Gambia in November 2002, turned over to US agents, and flown to Afghanistan and then to Guantánamo, where they remain detained without trial or any form of judicial assistance; B5

70. Points out that the telegrams from the UK security service MI5 to an unspecified foreign government which were released to the Chairman of the APPG, Andrew Tyrie, suggest that the abduction of Bisher Al-Rawi and Jamil El-Banna was facilitated by partly erroneous information supplied by the UK security service;

71. Criticises the unwillingness of the UK Government to provide consular assistance to Bisher Al-Rawi and Jamil El-Banna on the grounds that they are not UK citizens;

72. Condemns the multiple extraordinary rendition of Binyam Mohammed, Ethiopian citizen and resident of the United Kingdom; points out that Binyam Mohammed has

been held in at least two secret detention facilities, in addition to military prisons;

73. Is deeply disturbed by the testimony of Binyam Mohammed's lawyer, who gave an account of the most horrific torture endured by his client to the official delegation of the Temporary Committee to the United Kingdom;

74. Emphasises that the former UK Secretary of State for Foreign and Commonwealth Affairs, Jack Straw, conceded in December 2005 that UK intelligence officials met Binyam Mohammed when he was arrested in Pakistan; points out in this respect that some of the questions put by the Moroccan officials to Binyam Mohammed appear to have been inspired by information supplied by the UK;

75. Condemns the extraordinary rendition of UK citizen Martin Mubanga, who met the official delegation of the Temporary Committee to the United Kingdom, and who was arrested in Zambia in March 2002 and subsequently flown to Guantánamo; regrets the fact that Martin Mubanga was interrogated by British officials at Guantánamo, where he was detained and tortured for four years without trial or any form of judicial assistance and then released without charge;

76. Thanks Craig Murray, former UK Ambassador to Uzbekistan, for his very valuable testimony to the Temporary Committee on the exchange of intelligence obtained under torture and for providing a copy of the legal opinion of Michael Wood, former legal advisor to the UK Foreign and Commonwealth Office;

77. Is outraged by Michael Wood's legal opinion, according to which 'receiving or possessing' information extracted under torture, in so far as there is no direct participation in the torture, is not per se prohibited by the UN Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment; expresses its outrage at any attempt to obtain information by means of torture, regardless of who is involved; B5

78. Expresses serious concern about the 170 stopovers made by CIA-operated aircraft at UK airports, which on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; deplores the stopovers at UK airports of aircraft which have been shown to have been used by the CIA, on other occasions, for the extraordinary rendition of Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Khaled El-Masri, Binyam Mohammed, Abu Omar and Maher Arar and for the expulsion of Ahmed Agiza and Mohammed El Zari;

GERMANY B5

79. Acknowledges the good cooperation on the part of the German Government by providing restricted documents to the Chairman and the rapporteur of the Temporary Committee; regrets, on the other hand, that no representative of the German Government was able to appear before the Temporary Committee;

80. Welcomes the excellent work of the German Parliament inquiry committee and expresses its full support for the continuation of that committee's work;

81. Thanks Munich Public Prosecutor Martin Hofmann for his testimony to the Temporary Committee and applauds all ongoing judicial inquiries in Germany;

82. Deplores the fact that German authorities at least had knowledge of the illegal abduction of German citizen Khaled El-Masri, who gave testimony to the Temporary Committee, and regrets that the German Parliament's inquiry committee is examining further and clarifying the role of German agents in this case;

83. Condemns the extraordinary rendition of Turkish citizen and resident of Germany Murat Kurnaz, who gave testimony to the Temporary Committee and who was arrested in Pakistan in November 2001, transferred to the US units across the border in Afghanistan by the Pakistani police on no legal basis and with no judicial assistance, and finally flown to Guantánamo at the end of January 2002, from where he was released on 24 August 2006 without charge, having been tortured in all the locations where he had been held;

84 Points out that, according to confidential institutional information, the German Government did not accept the US offer, made in 2002, to release Murat Kurnaz from Guantánamo; notes that on many occasions since 2002, Murat Kurnaz's lawyer was told by the German Government that it was impossible to open negotiations with the US Government on his release because Murat Kurnaz was a Turkish citizen; notes that all investigations concluded, as early as the end of October 2002, that Murat Kurnaz posed no terrorist threat;

85. Regrets the fact that Murat Kurnaz was interrogated twice, in 2002 and in 2004, by German officials at Guantánamo, where he was detained subject to neither formal charge nor trial and without judicial assistance; regrets the fact that German officials denied him any assistance and were only interested in questioning him;

86. Fully supports the investigation launched by the public prosecutor in Potsdam, transferred to the Public Prosecutor in Tübingen/Karlsruhe on 25 October 2006, into unknown perpetrators in order to establish whether Murat Kurnaz was ill-treated in Afghanistan by German soldiers belonging to the Kommando Spezialkräfte (KSK), the German army's special operational forces, before being sent to Guantánamo;

87. Notes that during his interrogations Murat Kurnaz was confronted with details from his personal life; notes that this gives rise to the suspicion that even before he left the country Murat Kurnaz was the subject of surveillance of a closeness which can normally only be provided by domestic intelligence services;

88. Appreciates the German Government's initiative in January 2006 which led to the release of Murat Kurnaz;

89. Condemns the extraordinary rendition of the German citizen Mohammed Zammar, arrested without formal charge on 8 December 2001 at Casablanca airport in Morocco and detained and tortured in Morocco and Syria;

90. Notes that, according to a confidential institutional source, on 26 November 2001 the German Federal Criminal Police Office provided details of Mohammed Zammar's

whereabouts to the US Federal Bureau of Investigation (FBI), and that this facilitated Mohammed Zammar's arrest;

91. Points out that, subsequently to a meeting between the officials of the German Federal Chancellery and Syrian intelligence officials in July 2002, German prosecutors dropped charges against several Syrian citizens in Germany while the Syrian authorities allowed German officials to meet Mohammed Zammar in the Syrian prison Far' Falastin, as also confirmed by a confidential institutional source; regrets that Mohammed Zammar was interrogated by German agents in that prison;

92. Calls on the German Bundestag's First Committee of Inquiry, in the context of the forthcoming expansion of its remit, to investigate the case which recently came to light involving the illegal rendition of the Egyptian national Abdel-Halim Khafagy, who had long been resident in Germany; Abdel-Halim Khafagy was probably arrested in Bosnia and Herzegovina in September 2001 on suspicion of being a terrorist and abducted to a prison on the US 'Eagle Base' military base in Tuzla, where he was severely mistreated and detained under inhumane conditions;

93. Is deeply concerned at information contained in an unclassified document made available to the Temporary Committee which shows that the illegal rendition of at least six Algerians from Tuzla via Incirlik to Guantánamo was planned at the US European Command (USEUCOM) military base near Stuttgart; calls on the German Bundestag to investigate without delay whether those alleged renditions involved breaches of the Forces Status Agreement or other agreements or treaties concluded with US military forces on German territory, whether further illegal renditions were planned by USEUCOM and whether German liaison officers were involved in any way; B5

94. Expresses serious concern about the 336 stopovers made by CIA-operated aircraft at German airports that on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; deplores the stopovers in Germany of aircraft which have been shown to have been used by the CIA, on other occasions, for the extraordinary renditions of Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Khaled El-Masri, Binyam Mohammed, Abu Omar and Maher Arar and for the expulsionof Ahmed Agiza and Mohammed El Zari; is particularly concerned that one of the flights referred to was destined for Guantánamo; strongly encourages the German authorities further to investigate that flight;

95. Notes the allegations concerning the temporary detention and mistreatment of suspected terrorists at the US military prison in Mannheim-Blumenau, welcomes the investigations opened by the Federal Public Prosecutor's Office and hopes that the German Bundestag and/or the competent committee of inquiry will investigate this case more closely; ?

SWEDEN

96. Takes note of the position of the Swedish Government expressed in the letter transmitted to the Temporary Committee by its Foreign Minister Carl Bildt; regrets that no representative of the government was able to appear before the Temporary Committee in order to hold an exchange of views on its position;

97. Condemns the fact that Sweden's expulsion in December 2001 of Mohammed El-Zari and Ahmed Agiza, Egyptian nationals who were seeking asylum in Sweden, was based solely on diplomatic assurances from the Egyptian Government, which did not provide effective safeguards against torture; also acknowledges that the Swedish government hindered them from exercising their rights in accordance with the European convention, by not informing their lawyers until before they had arrived in Cairo; deplores the fact that the Swedish authorities accepted an US offer to place at their disposal an aircraft which benefited from special overflight authorisation in order to transport the two men to Egypt;

B5

98. Deplores the fact that the Swedish security police lost control over the enforcement of the expulsion of Ahmed Agiza and Mohammed El-Zari to Egypt, outside the rule of law, by remaining passive during the degrading treatment of the men by US agents at Bromma airport;

99. Underlines that the decision of the expulsion was taken at the highest executive level, from which no appeal was possible;

100. Fully endorses the UN Human Rights Committee's decision of 6 November 2006 in which it found that Sweden had breached the absolute ban on torture; similarly endorses a separate ruling by the UN Committee against Torture of 20 May 2005, which concluded that Sweden had violated the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and stated that "procurement of diplomatic assurances (from Egypt), which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk";

101. Thanks the Swedish Chief Parliamentary Ombudsman, Mats Melin, for his testimony to the Temporary Committee and applauds his investigation which concluded that the Swedish security service and airport police "were remarkably submissive to the American officials" and "lost control of the enforcement", resulting in the ill-treatment of Ahmed Agiza and Mohammed El-Zari, including physical abuse and other humiliation, at the airport immediately before they were transported to Cairo;

AUSTRIA

102. Notes the written explanations given on behalf of the Austrian Government but regrets that the Austrian Government did not consider it appropriate to appear before the Temporary Committee in order to hold an exchange of views about its position;

103. Notes that the persons referred to in the following paragraphs, Masaad Omer Behari and Gamal Menshawi, are individuals who did not and still do not have Austrian citizenship, whose freedom of movement was unrestricted; notes that the two men left Austria voluntarily and without undergoing checks by the Austrian authorities, and that they were arrested by foreign agencies, outside Austrian territory and outside the area of influence of the Austrian authorities, with no Austrian involvement; notes that, accordingly, these are clearly not cases of rendition of persons to foreign authorities;

104. Condemns the fact that Masaad Omer Behari, a Sudanese citizen and resident of Austria since 1989 who gave testimony to the Temporary Committee, was abducted at Amman airport on 12 January 2003 on his way back to Vienna from Sudan;

105. Deplores the fact that Masaad Omer Behari was later illegally secretly detained in a

prison close to Amman run by the Jordan General Intelligence Department, without trial orlegal assistance, and that he was tortured and ill-treated there until 8 April 2003, when he was released without charge; recalls that a judicial procedure was started by the Austrian authorities against Masaad Omer Behari in September 2001, which was subsequently closed in August 2002, without charge;

106. Deplores the fact that, according to Masaad Omer Behari's statement to the Temporary Committee, there may have been cooperation between the US, Austrian and Jordanian authorities in respect of his case;

107. Condemns the abduction of Egyptian citizen and resident of Austria, Gamal Menshawi, who was arrested on his way to Mecca at Amman airport in February 2003, and later brought to Egypt where he was secretly detained until 2005 without trial or legal rights; recalls that no allegations have ever been made against Gamal Menshawi in Austria;

108. Regrets that, having considered the above paragraphs, neither a special nor a parliamentary inquiry was carried out in Austria into the possible involvement of the Austrian authorities in the two cases referred to; urges the Austrian Parliament to start appropriate inquiries as soon as possible;

SPAIN

109. Welcomes the declaration of good cooperation with the Temporary Committee of the Spanish Government, in particular, the testimony given to the Temporary Committee by its Minister for Foreign Affairs; regrets, nevertheless, that the Spanish Government ultimately did not authorise the Director of the Spanish Intelligence Services to appear before the Temporary Committee, several months after having been requested to do so;

110. Thanks the Chief Prosecutor Javier Zaragoza and Prosecutor Vicente González Mota of the *Audiencia Nacional* for their testimony to the Temporary Committee and applauds their investigations into the use of Spanish airports for the transit of CIA aircraft within the context of the programme of extraordinary rendition; encourages the prosecutors to investigate further the stopovers of the aircraft involved in the extraordinary rendition of Khaled El-Masri;

111. Applauds the investigative journalism of Diario de Mallorca, which played an important role in revealing the transit of CIA aircrafts through the Balearic Island airports and the identification of their crews;

112. Recalls the words of Chief Prosecutor Zaragoza that "there was no obstacle, objection or trouble from the Spanish Government side in the investigations by the *Audiencia Nacional*";

113. Calls on the Spanish authorities to take all necessary steps to allow Spanish citizen Mustafa Setmariam Nasarwho, abducted in Syria in October 2005 and rendered to US agents, to face a fair trial before competent judicial authorities;

114. Expresses serious concern about the 68 stopovers made by CIA-operated aircraft at Spanish airports that on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; deplores the

stopovers in Spain of aircraft which have been shown to have been used by the CIA in other countries for the extraordinary rendition of Ahmed Agiza, Mohammed El-Zari, Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Khaled El-Masri, Binyam Mohammed, Abu Omar and Maher Arar, according to the legal investigations under way in Spain and Italy; is particularly concerned that, of the above flights, three originated from or were destined for Guantánamo; strongly encourages the Spanish Prosecutors further to investigate those flights;

PORTUGAL

115. Welcomes the meeting in Lisbon with the Portuguese Minister of Foreign Affairs and the fact that the Portuguese Government supplied documents and explanations; regrets that the Portuguese authorities were unable or reluctant to answer all the questions raised by the Temporary Committee delegation in Portugal;

116. Asks the Portuguese authorities to investigate the case of Abdurahman Khadr, allegedly carried on board the Gulfstream IV N85VM from Guantánamo to Tuzla in Bosnia and Herzegovina on 6 November 2003, with a stopover in Santa Maria on the Azores Islands on 7 November 2003; calls on the Portuguese authorities to examine this case and those of other possible victims transported via Portugal with a view to determining whether there should be compensation for violations of human rights;

117. Welcomes the establishment of the inter-ministerial working group on 26 September 2006 and the entry into force, on 13 October 2006, of a regulation stipulating that lists of the names of crew members and passengers on private flights must be submitted to the Portuguese frontier authorities;

118. Deplores the fact that the former Minister of Defence, Paulo Portas, and the former Minister of the Interior, António Figueiredo Lopes, declined invitations to meet the delegation ofthe Temporary Committee;

119. Notes that some of the 91 stopovers made in Portugal enabled the CIA and US military bodies to carry out the extraordinary rendition of Bisher Al-Rawi, Jamil El-Banna, Khaled El-Masri, Binyam Mohammed and Abu Omar and for the expulsion of Ahmed Agiza and Mohammed El Zari; is particularly concerned that of those flights, at least three originated from or were destined for Guantánamo; notes that the aircraft involved in the rendition of Maher Arar and Abou Elkassim Britel made stopovers in Portugal on their return flights;

120. Expresses deep concern at an additional list that the Temporary Committee has obtained, the authenticity of which the Portuguese Government has not denied, which indicates that, in addition to the 91 stopovers made, aircraft from a number of countries, travelling to or from Guantánamo, made 17 stopovers (including three contained in Eurocontrol lists) at the Portuguese airports of Lajes and Santa Maria between 11 January 2002 and 24 June 2006;

IRELAND

121. Welcomes the testimony given to the Temporary Committee by the Irish Minister for Foreign Affairs on behalf of the Irish Government as well as his unequivocal criticism

of the process of extraordinary rendition; notes the fact, however, that he failed to answer all the questions in relation to the concerns that Irish airports may have been used by CIA aircraft travelling to or from extraordinary rendition missions (as in the case of Abu Omar);

122. Thanks the Irish Human Rights Commission (IHRC) for its testimony to the Temporary Committee and endorses its view which considers that acceptance by the Irish government of diplomatic assurances do not fulfil Ireland's human rights obligations, which oblige the government actively to seek to prevent any actions that could in any way facilitate torture or ill-treatment in Ireland or abroad; regrets the decision of the Irish Government not to follow the IHRC's advice on this matter to date; notes that there is continuing dialogue between the IHRC and the Irish Government;

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123. Expresses serious concern about the 147 stopovers made by CIA-operated aircraft at Irish airports that on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; deplores the stopovers in Ireland of aircraft which have been shown to have been used by the CIA, on other occasions, for the extraordinary rendition of Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Khaled El-Masri, Binyam Mohammed, Abu Omar and Maher Arar and for the expulsion of Ahmed Agiza and Mohammed El Zari;

124. Notes the absence of Irish parliamentary scrutiny of either Irish or foreign intelligence services and the potential that this creates for abuse;

125. Considers, that, in the absence of a system of random searches, a ban should be imposed on all CIA-operated aircraft landing in Ireland;

126. Urges the Irish Government, in view of the findings of the Temporary Committee, to agree to launch a parliamentary inquiry into the use of Irish territory as part of the CIA rendition circuit;

GREECE

127. Expresses serious concern about the 64 stopovers made by CIA-operated aircraft at Greek airports that on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; deplores the stopovers in Greece of aircraft which have been shown to have been used by the CIA, on other occasions, for the extraordinary rendition of Ahmed Agiza, Mohammed El-Zari, Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Khaled El-Masri, Binyam Mohammed and Maher Arar;

CYPRUS

128. Expresses serious concern about the 57 stopovers made by CIA-operated aircraft at Cypriot airports that on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; deplores the stopovers in Cyprus of aircraft which have been shown to have been used by the CIA, on other occasions, for the extraordinary rendition of Ahmed Agiza, Mohammed El-Zari, Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Khaled El-Masri, Binyam Mohammed and Abu Omar;

DENMARK

129. Welcomes the cooperation received from the Danish authorities, while regretting that no representative of the government considered it appropriate to appear before the Temporary Committee;

BELGIUM

130. Calls on the Belgian Government to disclose the results of all investigations that have taken place and deplores the fact that Belgium did not conduct a thorough investigation concerning the use of Belgian airports and the Belgian airspace by aircraft clearly involved in the extraordinary rendition programme or the transport of detainees;

131. Notes the statements of the President of the Belgian Senate Anne-Marie Lizin and refers to the conclusions of the report of the Belgian Senate which deplore the lack of cooperation by the Belgian intelligent services and the Belgian authorities;

TURKEY

132. Expresses its serious concern about the failure of the Turkish authorities to extend diplomatic protection to their national Murat Kurnaz and about the absence of any step to secure his release from the prison at Guantánamo;

133. Regrets that, on the contrary, the same authorities used the illegal detention of their national to interrogate him at Guantánamo;

134. Deplores the silence of the Turkish authorities concerning the use of their territory for the stopover of an aircraft which had taken to Guantánamo the six nationals of or residents in Bosnia and Herzogovina, of Algerian origin, who were illegally arrested in Bosnia and Herzegovina;

FORMER YUGOSLAV REPUBLIC OF MACEDONIA

135. Emphasises that a delegation of the Temporary Committee was received in Skopje in April 2006 by the President of the Republic, members of the government and several officials and thanks them for the welcome given to the delegation; notes, however, a lack of thorough investigation into the Khaled El-Masri case by the authorities of the Former Yugoslav Republic of Macedonia;

136. Condemns the extraordinary rendition of the German citizen Khaled El-Masri, abducted at the border-crossing Tabanovce in the Former Yugoslav Republic of Macedonia on 31 December 2003, illegally held in Skopje from 31 December 2003 to 23 January 2004 and then transported to Afghanistan on 23-24 January 2004, where he was held until May 2004 and subjected to degrading and inhuman treatment;

137. Urges the Council and its High Representative for the CFSP to shed full light on the fact that the EU police mission (PROXIMA) was incorporated into the Ministry of Interior of the Former Yugoslav Republic of Macedonia and was involved in the work of the Macedonian Security and Counter-Espionage Service (DBK) at the time when Khaled El-Masri was handed over to the CIA; would like to know if it is true that the Council questioned the EU staff involved in the PROXIMA mission so as to evaluate the level of information in their possession regarding the case of Khaled el Masri; if appropriate, asks the Council to provide Parliament with a full account of the investigation;

138. Fully endorses the preliminary findings of Munich Public Prosecutor Martin Hofmann that there is no evidence on the basis of which to refute Khaled El-Masri's version of events;

139. Deeply regrets the fact that the authorities of the Former Yugoslav Republic of Macedonia failed to follow up the recommendations made by the Temporary Committee in its interim report of 6 July 2006;

140. Points out again that the Former Yugoslav Republic of Macedonia authorities are expected to carry out investigations; urges the newly elected national parliament of the Former Yugoslav Republic of Macedonia to set up a committee of inquiry as soon as possible to deal with the case of Khaled El-Masri and to cooperate fully with the ongoing inquiry of the German Parliament;

BOSNIA AND HERZEGOVINA [redacted] B5

141. Welcomes the fact that the Government of Bosnia and Herzegovina is the only European government that does not deny its participation in the extraordinary rendition of four citizens of and two residents in Bosnia and Herzegovina, all of Algerian origin, and stresses that the Government of Bosnia and Herzegovina is the only European government to have accepted formal responsibility for its illegal actions; regrets, however, that the steps undertaken by the Government of Bosnia and Herzegovina have not yet resulted in the release of the six men from Guantánamo;

142. Condemns the extraordinary rendition of those six men, who were abducted in Sarajevo on 17 January 2002, turned over to US soldiers and then flown to Guantánamo, where they remain detained without trial or legal guarantees;

143. Takes note of the testimony given to the Temporary Committee by Wolfgang Petritsch, former High Representative of the international community in Bosnia and Herzegovina, and by Michèle Picard, former President of the Human Rights Chamber of Bosnia and Herzegovina, which stated that representatives of the international community in Bosnia and Herzegovina were given adequate notice of the imminent handing-over of the men referred to the US forces before events unfolded; condemns in this respect the Member States for their lack of action;

144. Regrets the fact that the international community as represented in Bosnia and Herzegovina turned a blind eye when the decisions of the Supreme Court and the Human Rights Chamber of Bosnia and Herzegovina ordering the release of the men from custody were not implemented;

145. Points out that, according to the information that the Temporary Committee received from the lawyers of the six men, the authorities of Bosnia and Herzegovina were subject to unprecedented pressure from the US Government, which threatened to close its embassy, withdraw all staff and cease diplomatic relations with Bosnia and Herzegovina unless the Government of Bosnia and Herzegovina immediately arrested the six men on terrorism charges;

146. Notes that Wolfgang Petritsch confirmed that the United States put considerable pressure on the authorities of Bosnia and Herzegovina and the international community not to interfere in the renditions and that the commander of the international NATO-led Stabilisation Force in particular rejected any questioning of his activities since he acted

in his capacity as US military officer;

OTHER EUROPEAN COUNTRIES

147. Is concerned about the stopovers made by CIA-operated aircraft in other European countries' airports and expresses serious concern about the purpose of those flights which came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; encourages the authorities of those European countries to launch adequate investigations into this matter;

Secret detention facilities

148. Welcomes the investigations carried out into the existence of secret detention facilities in Europe by Human Rights Watch, the Washington Post and American Broadcasting Company News (ABC News);

149. Recalls that some journalists at the Washington Post and ABC News, as they confirmed to the Temporary Committee, were put under pressure not to name the eastern European countries, namely Poland and Romania, where there were said to have been secret detention facilities;

150. Emphasises that the concept of "secret detention facility" includes not only prisons, but also all places where somebody is held *incommunicado*, such as private apartments, police stations or hotel rooms, as in the case of Khaled El-Masri in Skopje;

151. Is deeply concerned that, in some cases, temporary secret detention facilities in European countries may have been located at US military bases;

152. Calls for the appropriate implementation of bilateral agreements, Status of Forces Agreements and similar agreements (between Member States and third countries) to ensure the monitoring of respect for human rights and, where appropriate, for a review and renegotiation of those agreements to this effect, stresses that, according to the Venice Commission, the legal framework of foreign military bases on the territory of Council of Europe's Member States must enable them to exercise sufficient powers to fulfil their human rights obligations;

153. Points out in this regard the allegations concerning the US Coleman Barracks in Mannheim, Germany, and calls on both the judiciary and the German Bundestag's inquiry Committee to investigate this case further;

154. Regrets that there may have been a lack of control over US military bases by host European countries; recalls, however, that the ECHR provides that all State parties are bound to exercise jurisdiction over their whole territory, including foreign military bases;

155. Recalls that the ECHR also provides that every case of detention must be lawful and must be the result of proceedings prescribed by law, whether national or international;

156. Recalls that imposing or executing or allowing directly or indirectly secret and illegal

detentions, which are instruments resulting in people's 'disappearance', per se constitute serious violations of human rights and that the active or passive involvement in such secret and illegal detentions by a European country renders that county responsible under the ECHR;

ROMANIA

157. Welcomes the excellent hospitality and good cooperation extended by the Romanian authorities to the Temporary Committee, including meetings with members of the Romanian Government, as well as the establishment of an ad hoc inquiry committee of the Romanian Senate;

158. Notes, however, the reluctance on the part of the Romanian authorities to investigate thoroughly the existence of secret detention facilities on its territory;

159. Regrets that the report issued by the Romanian inquiry committee was entirely secret except for its conclusions, included in Chapter 7, categorically denying the possibility that secret detention facilities could be hosted on Romanian soil; regrets that the Romanian inquiry committee heard no testimony from journalists, NGOs, or officials working in airports, and has not yet provided the Temporary Committee with the report contrary to its commitment to do so; regrets that taking these elements into consideration, the conclusions drawn in the Romanian inquiry committee's report appear premature and superficial; takes note, however, of the intention expressed by the Chairwoman of the inquiry committee to the Temporary Committee delegation to consider the conclusions provisional;

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160. Regrets the lack of control of the Gulfstream aircraft with Registration Number N478GS that suffered an accident on 6 December 2004 when landing in Bucharest; recalls that the aircraft took off from Bagram Air Base in Afghanistan, and that its seven passengers disappeared following the accident; appreciates, however, the good cooperation of the Romanian authorities in handing over the report on the accident to the Temporary Committee;

161. Is deeply concerned to see that Romanian authorities did not initiate an official investigation process, as any democratic country should have done, into the case of a passenger on the aircraft Gulfstream N478GS , who was found carrying a Beretta 9 mm Parabellum pistol with ammunition;

162. Expresses serious concern about the 21 stopovers made by CIA-operated aircraft at Romanian airports, which on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; deplores the stopovers in Romania of aircraft which have been shown to have been used by the CIA, on other occasions, for the extraordinary rendition of Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Khaled El-Masri, Binyam Mohammed and Abu Omar and for the expulsion of Ahmed Agiza and Mohammed El Zari; is particularly concerned that, of the flights referred to, two originated from or were destined for Guantánamo; strongly encourages the Romanian authorities further to investigate those flights;

163. Is extremely concerned that the Romanian authorities may have lacked control over US activities in the military base at Kogalniceanu airport;

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164. Cannot exclude, based only on the statements made by Romanian authorities to the

Temporary Committee delegation to Romania, the possibility that US secret services operated in Romania on a clandestine basis and that no definitive evidence has been provided to contradict any of the allegations concerning the running of a secret detention facility on Romanian soil;

POLAND

165. Deplores the glaring lack of cooperation by the Polish Government with the Temporary Committee, in particular when receiving the Temporary Committee delegation at an inappropriate level; deeply regrets that all those representatives of the Polish Government and Parliament who were invited to do so, declined to meet the Temporary Committee;

166. Believes that this attitude reflected an overall rejection on the part of the Polish Government of the Temporary Committee and its objective to examine allegations and establish facts;

167. Regrets that no special inquiry committee has been established and that the Polish Parliament has not conducted an independent investigation;

168. Recalls that on 21 December 2005, the Special Services Committee held a private meeting with the Minister Coordinator of Special Services and the heads of both intelligence services; emphasises that the meeting was conducted speedily and in secret, in the absence of any hearing or testimony and subject to no scrutiny; stresses that such an investigation cannot be defined as independent and regrets that the committee released no documentation, save for a single final statement in this regard;

169. Expresses serious concern about the 11 stopovers made by CIA-operated aircraft at Polish airports that on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; deplores the stopovers in Poland of aircraft which have been shown to have been used by the CIA, on other occasions, for the extraordinary rendition of Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Khaled El-Masri and Binyam Mohammed and for the expulsion of Ahmed Agiza and Mohammed El Zar;

170. Regrets that following the hearings carried out by the Temporary Committee delegation in Poland, there was confusion and contradictory statements were made about the flight logs for those CIA flights, which were first said not to have been retained and then said to have probably been archived at the airport and finally claimed to have been sent by the Polish Government to the Council of Europe; acknowledges that in November 2006, the Szymany Airport's management provided the Temporary Committee with partial information on flight logs;

171. Thanks the former manager of the Szymany airport, for the valuable testimony given before the Temporary Committee; notes the fact that during 2006 he or she was questioned in the framework of a late enquiry concerning the CIA flights, immediately after his or her testimony was made public;

172. Takes note that, according to different sources, several high-value detainees who had been held secretly in Afghanistan in 2003 were transferred out of the country in September and October 2003; underlines with concern that a Boeing 737 with Registration Number N313P, used by the CIA for ascertained renditions, flew from

Kabul to Szymany airport on 22 September 2003 and was then directed to Guantánamo;

173. Recalls that, concerning the landing of the aircraft referred to at Szymany airport, seven staff on board were joined by five passengers and that no customs control was carried out on those passengers;

174. Takes note of the declarations made by Szymany airport employees, and notably by its former manager, according to which:

- in 2002, two Gulfstream jets, and in 2003, four Gulfstream jets with civilian registration numbers were parked at the edge of the airport and did not enter customs clearance;
- orders were given directly by the regional border guards about the arrivals of the aircraft referred to, emphasising that the airport authorities should not approach the aircraft and that military staff and services alone were to handle those aircraft and only to complete the technical arrangements after the landing;
- according to a former senior official of the airport, no Polish civilian or military staff were permitted to approach the aircraft;
- excessive landing fees were paid in cash - usually between EUR 2 000 and EUR 4 000;
- one or two vehicles waited for the arrival of the aircraft;
- the vehicles had military registration numbers starting with "H", which are associated with the intelligence training base in nearby Stare Kiejkuty;
- in one case, a medical emergency vehicle belonging either to the police academy or the military base was involved;
- one airport staff member reported following the vehicles on one occasion and seeing them heading towards the intelligence training centre at Stare Kiejkuty;

175. Acknowledges that shortly after, and in accordance with, President George W. Bush's statements on 6 September 2006, a list of the 14 detainees who had been transferred from a secret detention facility to Guantánamo was published; notes that 7 of the 14 detainees had been referred to in a report by ABC News, which was published nine months previously on 5 December 2005 but was withdrawn shortly thereafter from ABC's webpage, listing the names of twelve top Al Qaeda suspects held in Poland;

176. Encourages the Polish Parliament to establish a proper inquiry committee, independent of the Government and capable of carrying out serious and thorough investigations;

177. Regrets that Polish human rights NGOs and investigative journalists have faced a lack of cooperation from the government and refusals to divulge information;

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178. Considers that in the light of the above circumstantial evidences, it is not possible to acknowledge that secret detention centres were based in Poland;

179. Notes with concern that the official reply of 10 March 2006 from Under-Secretary of State Witold Waszykowski to Terry Davis indicates the existence of secret cooperation

agreements, initialled by the two countries' secret services themselves, which exclude the activities of foreign secret services from the jurisdiction of Polish judicial bodies;

KOSOVO (UNDER UN SECURITY COUNCIL RESOLUTION 1244)

180. Expresses deep concern over the fact that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) obtained access to NATO-run detention facilities in Kosovo only in July 2006;

181. Regrets the refusal of NATO to provide evidence on the allegations of illegal detention of terrorist suspects in the prison run by the NATO-led peacekeeping force in Kosovo (KFOR) at Camp Bondsteel, the only detention facility in Europe where CPT inspectors were not allowed unlimited access until very recently;

182. Points out in this respect that the testimony given to the Temporary Committee by the former Kosovo Ombudsman, Marek Antoni Nowicki, confirmed that from July 1999, inmates were frequently detained at Camp Bondsteel, subject only to a decision by the Commander of KFOR and subject to no judicial decision or any form of other external control; recalls that from 2000 to 2001, a number of people were detained also following administrative decisions of the Special Representative of the UN Secretary-General and that, according to official data available, 23 people were imprisoned at Camp Bondsteel for a short period of time by the KFOR Commander in connection with violent events in Kosovo in spring 2004;

Other relevant information collected by the Temporary Committee

183. Points out that the Temporary Committee came across information - including the direct testimony of Murat Kurnaz - about the interrogation of Guantánamo detainees carried out by agents of Member State governments; emphasises that those interrogations were aimed at collecting information from individuals illegally detained, which is clearly in contradiction with the public condemnation of Guantánamo, as expressed at both EU and Member State level on several occasions;

184. Encourages the Member States involved to launch adequate investigations into this matter;

Recommendations

Political recommendations

185. Considers it necessary that those European countries that have started inquiries and investigations at governmental, parliamentary and/or judicial level on matters within the remit of the Temporary Committee should conduct their work as speedily as possible

and make public the results of the investigations;

186. Urges European countries in relation to which serious allegations have been made regarding active or passive cooperation with extraordinary rendition and that have not undertaken governmental, parliamentary and/or judicial investigations to commence such proceedings as soon as possible; recalls that, according to the case law of the European Court of Human Rights, there is a positive obligation on Member States to investigate allegations of and sanction human rights violations in breach of the ECHR;

187. Calls for the closure of Guantánamo and for European countries immediately to seek the return of their citizens and residents who are being held illegally by US authorities;

188. Considers that all European countries that have not done so should initiate independent investigations into all stopovers made by civilian aircraft carried out by the CIA, at least since 2001, including those cases already analysed by the Temporary Committee;

189. Expects to be kept fully informed on all developments concerning all the above-mentioned procedures;

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190. Calls on European countries to compensate the innocent victims of extraordinary rendition and to ensure that they have access to effective and speedy compensation, including access to rehabilitation programmes, guarantees that there will be no repetition of what happened as well as appropriate financial compensation;

191. Asks the Commission to undertake an evaluation of all anti-terrorist legislation, in the Member States and of both formal and informal arrangements between Member State and third-country intelligence services, from a human rights perspective, to review legislation where international or European human rights bodies considers that it could lead to breach of human rights and to present proposals for actions in order to avoid any repetition of the matters under the remit of the Temporary Committee;

192. Considers it necessary to review by limiting and restrictively defining the exceptions that flow from the notion of 'State secret', also in the framework of the impending review of Regulation 1049/01[1], as well as the adoption of common principles by the EU institutions as regards the treatment of confidential information, to avoid abuses and deviations that are more and more unacceptable in modern democratic States and that contradict human rights obligations; deems it necessary to establish specific mechanisms to allow for access to secret information by parliaments and judges, as well as for the release of the information after a certain period of time;

B5

193. Notes the recent creation of a High-Level Working Group composed of representatives of the Commission, the Council and US governmental representatives of the Justice Ministry and the Homeland Security, which constitutes the political framework for EU-US dialogue on security matters, including differences in the approach to terrorism as well as the concerns raised by the Temporary Committee; deems it necessary to associate in this High-Level Working Group the European Parliament and the US

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[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 ding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

Congress, as well as to publish its agendas, minutes, documents examined and decisions taken, in order to ensure and increase its democratic legitimacy and transparency;

194. Encourages European countries when they conduct military operations in third countries to:

– ensure that any detention centre established by their military forces is subject to civilian and judicial supervision and that *incommunicado* detention is not permitted;

– take active steps to prevent any other authority from operating detention centres which are not subject to political and judicial oversight or where *incommunicado* detention is permitted;

Legal recommendations

195. Considers that the powers of Parliament's temporary inquiry committees should be reinforced and the inter-institutional decision governing the exercise of Parliament's right of inquiry be amended accordingly;

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196. Considers that Parliament should be adequately involved when the Community or the Union adopt measures affecting civil rights and liberties;

197. Calls for the establishment of an adequate and structured system of cooperation between Parliament and competent bodies of the United Nations and the Council of Europe when dealing with matters related to internal security of the European Union;

198. Calls for enhanced cooperation with national parliaments in order to share all information related to the fight against international terrorism;

199. Underlines the importance of a common definition of 'terrorism'; believes that the United Nations is the most suitable organisation to define the concept;

SECRET SERVICES

200. Fully endorses the conclusions of the Secretary-General of the Council of Europe, Terry Davis, about the lack of oversight and judicial control mechanisms in respect of security services, as expressed in the "Follow-up to the Secretary General's reports under Article 52 ECHR" and expects his recommendations to be duly taken into consideration; calls on Member States to provide adequate and effective parliamentary monitoring (by establishing oversight committees with appropriate powers to access documents and budgetary information) and legal supervision over their secret and intelligence services and the formal and informal networks of which they are part;

201. Considers it necessary to enhance the Conference of the Oversight Committees on the Intelligence bodies of the Member States, in which Parliament should be fully involved;

202. [redacted] ensure a better monitoring and supervision also of their activities, as well as to sanction illegal acts or activities, notably in violation of human rights;

203. Considers the reinforcement of cooperation between the secret and security services of Member States to be highly desirable, either on a multilateral basis, preferably within an EU framework, or on a bilateral basis, provided that a legal framework for it is created ensuring full democratic parliamentary and judicial control and human rights are respected and protected at all times;

204. Urges the Council and the Member States to establish as a matter of priority a system for the democratic monitoring and control over the joint and coordinated intelligence activities at EU level; proposes an important role for Parliament in this monitoring and control system;

AIR TRAFFIC

205. Urges the Member States to ensure that Article 3 of the Chicago Convention, which excludes state aircraft from the scope of the Convention, is properly implemented in order that all military and/or police aircraft fly over or land on another State's territory only if they have prior authorisation;

206. [redacted] that human rights will be respected and monitored;

207. Considers it necessary to enforce effectively, both at EU and national level, the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft so that the exercise of jurisdiction is used to ensure the observance of any obligation under a multilateral international agreement, in particular concerning the protection of human rights, and that, when appropriate, inspections on board should be undertaken;

208. Calls on the Commission to adopt adequate legislative proposals on transport safety, as provided for in Article 71 EC Treaty, taking into account the recommendations included in this resolution;

209. Recalls the Community competence in the field of transport, and notably transport security; asks the Commission, therefore, to take immediate action to ensure that the recommendations made by the Secretary-General of the Council of Europe as well as by Parliament are implemented;

210. Calls on the Commission to consider adopting rules on the use, monitoring and management of European airspace, on the use of EU airports and on the monitoring of non-commercial aviation;

INTERNATIONAL CONVENTIONS AND AGREEMENTS

211. Urges the Member States that have not yet done so to complete as soon as possible ratification of the 2003 EU-US Extradition Agreement, while taking adequate steps to avoid wrongly interpreting Article 12 of the Agreement, thereby ensuring that its scope does not extend beyond formal extradition and does not legitimise extraordinary

renditions;

212. Calls on European countries to support the rapid adoption by the UN General Assembly of the International Convention for the Protection of All Persons Against Enforced Disappearance, adopted on 29 June 2006 by the UN Human Rights Council;

213. Believes that, in providing for the adequate interpretation and enforcement of the UN Convention Against Torture, all European countries should ensure that their definition of torture is in accordance with Article 1 of the Convention and that, moreover, the obligations relating to the prohibition of torture are also fulfilled with respect to other acts of cruel, inhuman, degrading treatment referred to in Article 16 of the Convention; considers that all European countries should ensure that Article 3 of the Convention is properly enforced, in particular in relation to the activities of their secret services;

214. States that, given that the protection against *refoulement* is higher under the ECHR than under the Convention against Torture, European countries should ensure in any event the protection afforded by the ECHR; recalls, in this context, that the principle of *non-refoulement* is also recognised by the Court of Justice of the European Communities;

215. Calls on all European countries to sign and ratify the Optional Protocol to the Convention Against Torture and establish independent national mechanisms to monitor places of detention; emphasises the need to ensure that all such procedures used by the different international conventions on human rights are compatible;

216. Takes the view that the CPT should be granted access without delay or obstruction to any place of detention within the European countries, including foreign military bases, and provided with all relevant information concerning such detention, and that, to this end, any bilateral agreements that restrict the access of the CPT should be revised;

217. Urges all European countries to comply with the provisions of the Rome Statute of the International Criminal Court;

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218. Believes that the European Union should encourage all third countries to become party to the Optional Protocol to the Convention against Torture and to the Convention on Enforced Disappearances;

219. Asks European countries to establish clear rules that provide for the possibility of State immunity being waived where illegal actions violate human rights;

Administrative recommendations (at EU level)

220. Takes the view that all internal services within the Council (inter alia, the Policy Unit and the Joint Situation Centre) and the Commission (the Crisis Management and Conflict Prevention Unit in the Directorate-General for External Relations and relevant services in the Directorate-General for Justice, Freedom and Security), should be strengthened in the framework of the implementation of the EU Security Strategy and the counter-terrorism strategy in close cooperation with all Member States, and that their cooperation with each other, as well as with Member States, be clearly regulated

and data protection be ensured; considers that Parliament should be involved fully in this regard by granting it oversight powers similar to those of national parliamentary oversight committees, and that the Court of Justice be granted competence in this area; underlines that the competence of the EU in the field of combating terrorism should be significantly strengthened;

EU relations with third countries

221. Urges the European Union to stress in its contacts with third countries that the appropriate legal framework for governing the international fight against terrorism is criminal law and international human rights law;

222. Stresses the necessity of political dialogue with the US, as well as with other strategic partners of the European Union, on security matters in order to combat terrorism effectively and by legal means;

223. Calls on the European Union to recall that the full application of the 'democratic clause' is fundamental in its relations with third countries, especially those with which it has concluded agreements; calls on Egypt, Jordan, Syria and Morocco to provide clarity on their role in the extraordinary renditions programme;

224. Strongly believes that it is necessary to promote within the UN framework codes of conduct for all security and military services based on respect for human rights, humanitarian law and democratic political control, similar to the 1994 Code of Conduct on Politico-Military Aspects of Security of the Organisation for Security and Cooperation in Europe;

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Final conclusions

225. Stresses, in view of the powers it was provided with and of the time which it had at its disposal, and the secret nature of the investigated actions, that the Temporary Committee was not put in a position fully to investigate all the cases of abuses and violations falling within its remit and that its conclusions are therefore not exhaustive;

226. Recalls the principles and values on which the European Union is based, as provided in Article 6 of the Treaty on European Union, and calls on the EU institutions to meet their responsibilities in relation to Article 7 of the Treaty on European Union and all other relevant provisions of the Treaties, and to take all appropriate measures in the light of the conclusions of the work of the Temporary Committee, the facts revealed in the course of the Temporary Committee's investigation and any other facts that may emerge in the future; expects the Council to start hearings and commission an independent investigation without delay, as foreseen in Article 7, and, where necessary, to impose sanctions on Member States in case of a serious and persistent breaches of Article 6,

including where a violation of human rights has been declared by an international body but no measure has been taken to redress the violation;

227. Believes that the principle of loyal cooperation enshrined in the Treaties -which requires Member States and the EU institutions to take measures to ensure the fulfilment of their obligations under the Treaties, such as the respect of human rights, or resulting from action taken by the EU institutions, such as ascertaining the truth about alleged CIA flights and prisons, and to facilitate the achievement of EU tasks and objectives – has not been respected;

228. Recalls that in light of European Court of Human Rights case law, a signatory State bears responsibility for the material breach of the provisions of the ECHR, and therefore also of Article 6 of the Treaty on the European Union, not only if its direct responsibility can be established beyond reasonable doubt, but also by failing to comply with its positive obligation to conduct an independent and impartial investigation into reasonable allegations of such violations;

229. Notes the reports by reputable media operators that extraordinary rendition, illegal detention, and systematic torture involving many people is continuing, and considering the declaration by the current US Government that the use of extraordinary rendition and secret places of detention will be continued; therefore calls for an EU-US counter-terrorism summit to seek an end to such inhumane and illegal practices, and to insist that cooperation with regard to counter-terrorism is consistent with international human rights and anti-torture treaty obligations;

230. Instructs its Committee on Civil Liberties, Justice and Home Affairs, where necessary in cooperation with the Committee on Foreign Affairs, notably its Sub-Committee on Human Rights, to follow up politically the proceedings of the Temporary Committee and to monitor the developments, and in particular, in the event that no appropriate action has been taken by the Council and/or the Commission, to determine whether there is a clear risk of a serious breach of the principles and values on which the European Union is based, and to recommend to it any resolution, taking as a basis Articles 6 and 7 of the Treaty on European Union, which may prove necessary in this context;

231. Calls on its Secretary-General to publish, at least in compliance with Regulation 1049/2001, all the documents received, produced and examined, as well as the records of the proceedings of the Temporary Committee on the Internet as well as in any other appropriate manner and calls on the Secretary-General to ensure that the developments in fields falling within the remit of the Temporary Committee after its disbandment are monitored;

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232. Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States, of the candidate Member States and the associated countries, and to the Council of Europe, NATO, the United Nations and the Government and two Houses of Congress of the United States, and to request

them to keep Parliament informed of any development that may take place in the fields falling in the remit of the Temporary Committee.

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Parliamentary **Assembly**
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COUNCIL OF EUROPE · CONSEIL DE L'EUROPE

UNDER EMBARGO until 13h00 French time on Friday 8 June 2007

7 June 2007

Committee on Legal Affairs and Human Rights

Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report

Explanatory memorandum*
Rapporteur: Mr Dick Marty, Switzerland, ALDE

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 06 AUG 2009 200706444

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* The Rapporteur, the secretariat and the translators had to work in extremely difficult conditions because of the lack of time due to the delays in receiving certain information. This explains why there may be some linguistic mistakes and imprecision. The Rapporteur wishes to apologise for this.

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Introductory remarks – an overview

1. What was previously just a set of allegations is now proven: large numbers of people have been abducted from various locations across the world and transferred to countries where they have been persecuted and where it is known that torture is common practice. Others have been held in arbitrary detention, without any precise charges levelled against them and without any judicial oversight – denied the possibility of defending themselves. Still others have simply disappeared for indefinite periods and have been held in secret prisons, including in member states of the Council of Europe, the existence and operations of which have been concealed ever since.

2. Some individuals were kept in secret detention centres for periods of several years, where they were subjected to degrading treatment and so-called "enhanced interrogation techniques" (essentially a euphemism for a kind of torture), in the name of gathering information, however unsound, which the United States claims has protected our common security. Elsewhere, others have been transferred thousands of miles into prisons whose locations they may never know, interrogated ceaselessly, physically and psychologically abused, before being released because they were plainly not the people being sought. After the suffering they went through, they were released without a word of apology or any compensation – with one remarkable exception owing to the ethical and responsible approach of the Canadian authorities – and also have to put up with the opprobrium of doubts surrounding their innocence and, right here in Europe, racist harassment fuelled by certain media outlets. These are the terrible consequences of what in some quarters is called the "war on terror."

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3. While the strategy in question was devised and put in place by the current United States administration to deal with the threat of global terrorism, it has only been made possible by the collaboration at various institutional levels of America's many partner countries. As was already shown in my report of 12 June 2006 (PACE Doc 10957), these partners have included several Council of Europe member states. Only exceptionally have any of them acknowledged their responsibility – as in the case of Bosnia and Herzegovina, for instance – while the majority have done nothing to seek out the truth. Indeed many governments have done everything to disguise the true nature and extent of their activities and are persistent in their unco-operative attitude. Moreover, only very few countries have responded favourably to the proposals made by the Secretary General of the Council of Europe at the end of the procedure initiated under Article 52 of the European Convention of Human Rights ("ECHR") (see document SG(2006)01).

4. The rendition, abduction and detention of terrorist suspects have always taken place outside the territory of the United States, where such actions would no doubt have been ruled unlawful and unconstitutional. Obviously, these actions are also unacceptable under the laws of European countries, who nonetheless tolerated them or colluded actively in carrying them out. This export of illegal activities overseas is all the more shocking in that it shows fundamental contempt for the countries on whose territories it was decided to commit the relevant acts. The fact that the measures only apply to non-American citizens is just as disturbing: it reflects a kind of "legal apartheid" and an exaggerated sense of superiority. Once again, the blame does not lie solely with the Americans but also, above all, with European political leaders who have knowingly acquiesced in this state of affairs.

5. Some European governments have obstructed the search for the truth and are continuing to do so by invoking the concept of "state secrets". Secrecy is invoked so as not to provide explanations to parliamentary bodies or to prevent judicial authorities from establishing the facts and prosecuting those guilty of offences. This criticism applies to Germany and Italy, in particular. It is striking to note that state secrets are invoked on grounds almost identical to those advanced by the authorities in the Russian Federation in its crackdown on scientists, journalists and lawyers, many of whom have been prosecuted and sentenced for alleged acts of espionage. The same approach led the authorities of "the former Yugoslav Republic of Macedonia" to hide the truth and give an obviously false account of the actions of its own national agencies and the CIA in carrying out the secret detention and rendition of Khaled El-Masri.

6. Invoking state secrets in such a way that they apply even years after the event is unacceptable in a democratic state based on the rule of law. It is frankly all the more shocking when the very body invoking such secrets attempts to define their concept and scope, as a means of shirking responsibility. The invocation of state secrets should not be permitted when it is used to conceal human rights violations and it should, in any case, be subject to rigorous oversight. Here again, Canada seems to demonstrate the right approach, as will be seen later in this report.

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7. There is now enough evidence to state that secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland and Romania. These two countries were already named in connection with secret detentions by Human Rights Watch in November 2005. At the explicit request of the American government, the Washington Post simply referred generically to "eastern European democracies", although it was aware of the countries actually concerned. It should be noted that ABC did also name Poland and Romania in an item on its website, but their names were removed very quickly in circumstances which were explained in our previous report. We have also had clear and detailed confirmation from our own sources, in both the American intelligence services and the countries concerned, that the two countries did host secret detention centres under a special CIA programme established by the American administration in the aftermath of 11 September 2001 to "kill, capture and detain" terrorist suspects deemed to be of "high value". Our findings are further corroborated by flight data of which Poland, in particular, claims to be unaware and which we have been able to verify using various other documentary sources.

8. The secret detention facilities in Europe were run directly and exclusively by the CIA. To our knowledge, the local staff had no meaningful contact with the prisoners and performed purely logistical duties such as securing the outer perimeter. The local authorities were not supposed to be aware of the exact number or the identities of the prisoners who passed through the facilities – this was information they did not "need to know." While it is likely that very few people in the countries concerned, including in the governments themselves, knew of the existence of the centres, we have sufficient grounds to declare that the highest state authorities were aware of the CIA's illegal activities on their territories.

9. We are not an investigating authority: we have neither the powers nor the resources. It is not therefore our aim to pass judgments, still less to hand down sentences. However, our task is clear: to assess, as far as possible, allegations of serious violations of human rights committed on the territory of Council of Europe member states, which therefore involve violations of the European Convention on Human Rights. We believe we have shown that the CIA committed a whole series of illegal acts in Europe by abducting individuals, detaining them in secret locations and subjecting them to interrogation techniques tantamount to torture.

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10. In most cases, the acts took place with the requisite permissions, protections or active assistance of government agencies. We believe that the framework for such assistance was developed around NATO authorisations agreed on 4 October 2001, some of which are public and some of which remain secret. According to several concurring sources, these authorisations served as a platform for bilateral agreements, which – of course – also remain secret.

11. In our view, the countries implicated in these programmes have failed in their duty to establish the truth: the evidence of the existence of violations of fundamental human rights is concrete, reliable and corroborative. At the very least, it is such as to require the authorities concerned at last to order proper independent and thorough inquiries and stop obstructing the efforts under way in judicial and parliamentary bodies to establish the truth. International organisations, in particular the Council of Europe, the European Union and NATO, must give serious consideration to ways of avoiding similar abuses in future and ensuring compliance with the formal and binding commitments which states have entered into in terms of the protection of human rights and human dignity.

12. Without investigative powers or the necessary resources, our investigations were based solely on astute use of existing materials – for instance, the analysis of thousands of international flight records – and a network of sources established in numerous countries. With very modest means, we had to do real "intelligence" work. We were able to establish contacts with people who had worked or still worked for the relevant authorities, in particular intelligence agencies. We have never based our conclusions on single statements and we have only used information that is confirmed by other, totally independent sources. Where possible we have cross-checked our information both in the European countries concerned and on the other side of the Atlantic or through objective documents or data. Clearly, our individual sources were only willing to talk to us on the condition of absolute anonymity. At the start of our investigations, the Committee on Legal Affairs and Human Rights authorised us to guarantee our contacts strict confidentiality where necessary. This willingness to grant confidentiality to potential "whistleblowers" was also communicated to Mr Franco Frattini, Vice-President of the European Commission with responsibility for the area of freedom, security and justice, so that he could also notify the relevant ministers in EU countries. Guarantees of confidentiality undoubtedly contributed to a climate of trust and made it possible for many sources to agree to talk to us. The individuals concerned are not prepared at present to testify in public, but some of them may be in the future if the circumstances were to change.

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13. The Polish authorities recently criticised us for not travelling to their country to visit the facility suspected of having housed a detention centre. However, we see no point in visiting the site: we are not forensic science experts and we have no doubts about the capability of those who would have removed any traces of the prisoners' presence. Moreover, a meeting at the site would only have been worthwhile if the Polish authorities had first replied to the questions we put to them on numerous occasions and to which we are still awaiting replies.

14. We are fully aware of the seriousness of the terrorist threat and the danger it poses to our societies. However, we believe that the end does not justify the means in this area either. The fight against terrorism must not serve as an excuse for systematic recourse to illegal acts, massive violation of fundamental human rights and contempt for the rule of law. I hold this view not only because methods of this nature conflict with the constitutional order of all civilised countries and are ethically unacceptable, but also because they are not effective from the perspective of a genuine long-term response to terrorism.

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15. We have said it before and others have said it much more forcefully, but we must repeat it here: having recourse to abuse and illegal acts actually amounts to a resounding failure of our system and plays right into the hands of the criminals who seek to destroy our societies through terror. Moreover, in the process, we give these criminals a degree of legitimacy – that of fighting an unfair system – and also generate sympathy for their cause, which cannot but serve as an encouragement to them and their supporters.

16. The fact is that there is no real international strategy against terrorism, and Europe seems to have been tragically passive in this regard. The refusal to establish and recognise a functioning international judicial and prosecution system is also a major weakness in our efforts to combat international terrorism. We also agree with the view expressed by Amnesty International in its recent annual report: governments are taking advantage of the fear generated by the terrorist threat to impose arbitrary restrictions on fundamental freedoms. At the same time, they are paying no attention to developments in other areas that claim many more lives, or they display a disconcerting degree of passivity. We need only cast our minds to human trafficking or the arms trade: how is it possible, for example, that aeroplanes full of weapons continue to land regularly in Darfur, where a human tragedy with tens of thousands of victims is unfolding?

17. In our view, it is also necessary to draw attention to an aspect we believe to be very dangerous: the legitimate fight against terrorism must not serve as a pretext for provoking racist and islamophobic reactions among the public. The Council of Europe has rightly recognised the fundamental importance of intercultural and interfaith dialogue. The member states and observers really should carry these efforts forward and maintain the utmost of vigilance on the issue. Any excesses in this respect could have disastrous consequences in terms of an expanded future terrorist threat.

18. In the course of our investigations and through various specific circumstances, we have become aware of certain special mechanisms, many of them covert, employed by intelligence services in their counter-terrorist activities. It is not for us to judge these methods, although in this area, too, great liberties appear to be taken with lawfulness. Many of these methods give rise to chain reactions of blackmail and lies between different agencies and institutions in individual states, as well as between states. Therein may lie at least a partial explanation for certain governments' fierce opposition to revealing the truth. We cannot go into the details of this phenomenon without putting human lives at risk. Let me reiterate that we are fully convinced of the strategic importance of the work of intelligence services in combating terrorism. However, we believe equally strongly that the relevant agencies need to be subject to codes of conduct, accompanied by robust and thorough supervision.

19. With the mandate assigned to us, we believe that the Assembly has reached the limits of its possibilities. The resources at our disposal to address the issues presented to us are totally inadequate for the task. The Council of Europe should give serious consideration to equipping itself with more effective and more binding instruments for dealing with such grave instances of massive and systematic violations of human rights. This is more necessary now than ever before, since it is clear that we are facing a worrying process of the erosion of fundamental freedoms and rights.

20. We must condemn the attitude of the many countries that did not deem it necessary to reply to the questionnaire we sent them through their national delegations. Similarly, NATO has never replied to our correspondence.

21. In presenting this report, the Rapporteur expresses his gratitude to the staff of the Committee's secretariat for their outstanding commitment and dedication. Very special thanks and acknowledgment go to the young staff member who was specifically assigned to this investigation: he has displayed absolutely amazing analytical skills and tenacity.

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I. The "dynamics of truth"

i. How President Bush's disclosure of the Central Intelligence Agency (CIA) secret detention programme has accelerated the "dynamics of truth"

22. When President Bush decided on 6 September 2006 to reveal the existence of the covert programme implemented by the CIA to arrest, detain and interrogate overseas high-value terrorist suspects [1], he simply glossed over the most delicate aspects, such as the implementation means chosen and (not) obtaining the prior support from the United States Congress for his Administration's "war against terrorism".

23. President Bush's disclosure was carefully worded so as to provide very little factual insight that was genuinely new or unknown. It was instead couched in imperative terms that portrayed the President as a strong Commander-in-Chief trying to prevent threats to the United States by methods - such as the CIA's interrogation techniques - which were *"tough safe, and lawful, and necessary"*.

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24. The end was portrayed as paramount – *"we're getting vital information necessary to do our jobs, and that's to protect the American people and our allies"*; the means of getting there inconsequential – *"I cannot describe the specific methods used – I think you understand why"*.

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25. Just under six weeks later, the US Congress responded to President Bush's clarion call[2] by passing the Military Commissions Act 2006 into law. As President Bush had expressly requested, the legislation draws distinctions between United States citizens and non-citizens, strips away the time-honoured right of detainees to challenge the basis for their detention (*habeas corpus*), and insulates US service personnel from prosecution for violations of Common Article 3 of the four Geneva Conventions. The process that lay ahead for captured terrorist suspects was thereby mapped out, whilst the Administration tried to cover the tracks that had led them there.

26. The "limited disclosures" of 6 September 2006, afforded a fresh focus to the mandate of my inquiry. One thing was now certain, personally acknowledged by the President of the United States: the existence of secret detention centres, which I had already confirmed in my June 2006 report. We are, however, faced with unresolved allegations that Council of Europe member States have colluded with the United States in serious human rights violations such as enforced disappearances, incommunicado (secret) detentions, and torture or cruel, inhuman and degrading treatment. President Bush's assertion that Europeans too had benefited from the programme[3] - which has not been substantiated by any evidence – must be put into its proper perspective if it were shown that we had forsaken our democratic values and the rule of law in order to share in those benefits.

27. In my view the protection of fundamental human rights is every bit as important as the preservation of national security cited by President Bush; indeed I hold these two objectives to be complementary, mutually reinforcing and in no way contradictory.

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[1] The White House, Office of the Press Secretary, "Remarks by the President on the Global War on Terror" (*War against terrorism is a struggle for freedom and liberty, Bush says*), speech delivered in the East Room of the White House, 06.09.2006; hereinafter "Remarks by President Bush, 06.09.2006".

[2] *Ibidem*. The transcript shows that President Bush struck a chord with his White House audience, which included relatives of victims of the 9/11 attacks: *"Congress is in session just for a few more weeks, and passing this legislation ought to be the top priority. (Applause.) For the sake of our security, Congress needs to act, and update our laws to meet the threats of this new era. And I know they will."*

[3] *Ibid. "Information from the terrorists questioned in this program helped unravel plots and terrorist cells in Europe and other places. It's helped our allies to protect their people from deadly attacks."*

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28. If we are to understand clearly the relationship between human rights and national security imperatives for the future, then we cannot content ourselves with partial truths about how the policies in question have been developed and implemented in the past. It is therefore our duty to get right to the bottom of the CIA's secret detention programme in all its systemic components. The programme must not simply pass into history as a policy that seemed to breach our supposedly inviolable human rights, but about which we never learned the truth and for which we never exercised political and legal accountability. We have a right and the duty to know the truth and to analyse critically the means and methods being used in our name towards the stated goal of enhancing our common security. It is therefore indispensable to clarify the precise operational and legal basis of the CIA's covert programme, and in particular to establish the extent to which Council of Europe member states were involved.

29. Building upon the June 2006 interim report[4], I have now concentrated on placing the CIA programme properly within the "global spider's web" – the image I used to describe the system of secret detentions and detainee transfers spun out around the world by the US Government and its allies. In this context, our interest has been concentrated on the role played by the member States of the Council of Europe that acted as "hosts" for CIA secret detentions.

30. As this report will make clear, the HVD programme has depended on extraordinary authorisations – unprecedented in nature and scope – at both national and international levels. The secret of its very existence was successfully guarded for several years, and until today, very little detail has been published about the terms used to refer to it, the way the system has operated, the underlying authorisations and arrangements that have sustained it, or even the reasons as to why it has so successfully been covered up.

31. Questions such as where the detention sites have been located and what conditions the detainees have been kept in were declared last year by President Bush to be too sensitive for him to answer officially, on the grounds that "*doing so would provide our enemies with information they could use to take retribution*".[5]

32. Indeed, even when the revelations of secret detentions in "several democracies in Eastern Europe" first emerged in November 2005,[6] the publication responsible for breaking the story, *The Washington Post*, made a decision not to publish the names of the states which had hosted CIA "black sites", although it was aware of this information. *The Post*'s decision followed a meeting at the White House and an explicit appeal from the US Government to refrain from naming the countries involved.[7] *The Post*'s Staff Writer Dana Priest, who wrote the article in question, explained the rationale behind the newspaper's decision in the following terms:

> *"Political embarrassment was not a consideration; it really turned on the safety and co-operation questions. We did not publish the names of the countries involved because those countries were co-operating on other efforts that were not controversial, some of which the Post knew about from independent sources and which we considered to be valuable. Knowing those efforts to be vital to our international programmes, we thought that those efforts might stop if the countries' names were published, and that this would not be good."*[8]

[4] See Dick Marty, Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, "Alleged secret detentions and unlawful inter-state transfers of detainees involving CoE member States", Doc. 10957, 12.06.2006, available at http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10957.htm (hereinafter "Marty Report 2006, Council of Europe Doc. 10957").

[5] Remarks by President Bush, 06.09.2006, *supra* note 3.

[6] See Dana Priest, "CIA Holds Terror Suspects in Secret Prisons – Debate is Growing within Agency about Legality and Morality of Overseas System set up after 9/11", *The Washington Post*, 02.11.2005.

[7] See Howard Kurtz, "Bush Presses Editors on Security", *The Washington Post*, 28.12.2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/12/25/AR2005122500665_pf.html. For further commentary, see also Marty Report 2006, section 1.3, at p. 9.

[8] Dana Priest, speaking at the seminar entitled "Secrecy and Government: America Faces the Future", hosted by the Center on Law and Security, NYU School of Law, New York, 12.04.2007.

33. While one might understand this decision, I have chosen to adopt a different position from that of *The Washington Post* on this issue, whilst maintaining a strict policy of confidentiality with regard to my individual sources. It should also be borne in mind that the very earnest American NGO Human rights Watch had explicitly cited Poland and Romania among the countries in which there had been secret detention centres. Moreover, it is difficult to accept that the reasons given at the time by the *Washington Post* are still valid today.

ii. The responsibility to provide a truthful account and the importance of confidential sources

34. Especially in light of its unparalleled pedigree for protecting and promoting human rights on our continent, the Council of Europe holds a unique responsibility in providing a truthful account. It has been said that the paradigm of US detainee treatment in the course of the "war on terrorism" has been to carry out its most odious acts extra-territorially – including in Europe – because it knows that such acts would not be permissible at home under the laws and Constitution of the United States. This is a paradigm of political expediency. But how not to see in it a form of contempt towards other countries, notably Cuba (Guantanamo!) and Europe: what is not good enough for the United States is for others!

35. In direct response, the paradigm of this report is one based on principles and values. We assert that in order to retain the moral authority necessary to defeat the global terrorist threat, we must ensure that every detainee in our custody – notwithstanding the acts of which he is accused, or whether he is held in Europe or elsewhere – is accorded the same fundamental human rights we would expect to be accorded ourselves and which, moreover, we uphold for even the worst criminals. Not even war authorises conduct of any sort; for example, the Geneva Conventions, the cornerstone of international humanitarian law laying down the limits to the barbarity of war, also prohibit secret detention centres.

36. From the outset of my mandate as Rapporteur on this issue, I have argued that transparency and accountability would in fact prove to be healthy for all the member States of the Council of Europe, not least for the countries which have hosted CIA "black sites".

37. The perpetual cycle of allegations and unsubstantiated rumours since November 2005 has merely served to fuel mutual suspicion and distrust between our Governments and peoples. The uncertainty has disrupted open political debate and provided an unwelcome distraction from the most urgent task of developing more viable democratic strategies to combat the growing terrorist threat in accordance with the rule of law.

38. Thus my decision to name the countries concerned should not be construed as an attempt to single out scapegoats or to drive a wedge between members of the European family. On the contrary, my investigations demonstrate clearly that responsibility is broadly shared on both sides of the Atlantic and on our continent.

39. From the very beginnings of the "war on terror" advocated by the United States, European governments could not ignore its true nature ; all the members and partners of NATO signed up to the same "permissive" – not to say illegal – terms that allowed CIA operations to permeate throughout the European continent and beyond; all knew that CIA practices for the detention, transfer and treatment of terrorist suspects left open considerable scope for abuses and unlawful measures; yet all remained silent and kept the operations, the practices, their agreements and their participation secret.

40. Now it is time for the member States of the Council of Europe to muster a similar collective spirit in acknowledging the truth about the past and regrouping to face the considerable challenges to be faced in the future. The methods used not only proved to be of questionable usefulness, but above all they also gave a semblance of legitimacy to terrorist movements and even gave rise to some feeling of sympathy for them.

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41. As Council of Europe Rapporteur I have talked persistently about my belief in the "dynamics of truth" – that each drop of truth will lead forward to another drop of truth, and that a steady trickle will ultimately develop into an irreversible flow. Seen in this regard, my report of June 2006, which mapped out the "global spider's web" and exposed CIA "rendition circuits" for the first time, was but a small contribution to a pool of outstanding investigative work by journalists[9] and non-governmental organisations[10] that continues to grow to the present day.

42. Yet while the momentum was gathering last year, we were perfectly aware that we would still have to overcome formidable obstacles in order to get to the truth about the CIA programme of secret detentions in Europe. State secrecy has been systematically invoked at national level in several instances both to deny us access to classified documents and to thwart action taken by the competent judicial and parliamentary authorities.[11] Moreover, as I demonstrate later in this report,[12] the secrecy and security of information policies adopted by states in the framework of the North Atlantic Treaty Organisation (NATO) are just as impenetrable when applied as barriers to transparency as they have proven since they were selected to act as coverage for CIA clandestine operations.

43. To encourage even a minor departure from strict adherence to these regimes of silence, secrecy and cover-up would require a rare convergence of factors. The first signs of cracks would have to appear in alliances that had hitherto been absolutely watertight. The motivation for insiders on one or both sides of the Atlantic to talk to us would surely derive only from their fear of betrayal – either by their colleagues, their political masters or their transatlantic partners.

44. The catalyst for those involved in the HVD programme to talk candidly to our team appears ultimately to have come from the American side – albeit that a degree of ambiguity about who was "allowed" to say what appears to have worked in our favour. My representative, who was on-the-spot in Washington, DC when President Bush disclosed the existence of the CIA's covert overseas detention and interrogation programme, received an off-the-record briefing.

45. Thereafter, one of the most challenging aspects of our investigation has been our effort to access the structures where the information is held within the different European states. Towards this end our team has undertaken visits and developed sources in both the political and intelligence spheres in various countries, sometimes pursuing multiple contacts over a period of months.

[9] In particular, I wish to recognise the following journalistic contributions, which depended on original investigative work to bring to light original facts and new dimensions to the global system of secret detentions and detainee transfers: Stephen Grey on extraordinary renditions (see "America's Gulag," in *The New Statesman*, 17.05.2004, "US Accused of Torture Flights," in *The Sunday Times*, 14.11.2004, and "Les Etats-Unis investent la délocalisation de la torture," in *Le Monde Diplomatique*, April 2005); Dana Priest on CIA programmes, including secret detentions in Europe ("CIA Holds Terror Suspects in Secret Prisons – Debate is Growing within Agency about Legality and Morality of Overseas System set up after 9/11," in *The Washington Post*, 2.11.2005; and "Foreign Network at Front of CIA's Terror Fight – Joint Facilities in Two Dozen Countries account for bulk of Agency's post-9/11 successes," in *The Washington Post*, 18.11.2005); Jane Mayer on rendition policies, interrogation techniques and torture memos ("Outsourcing Torture: The secret history of America's 'extraordinary rendition' programme," in *The New Yorker*, 14 and 21.02.2005, "A Deadly Interrogation – Can the CIA legally kill a prisoner?" in *The New Yorker*, 14.11.2005; and "The Memo – How an internal effort to ban the abuse and torture of detainees was thwarted," in *The New Yorker*, 27.02.2006) ; Brian Ross and Richard Esposito on enhanced interrogations and the clear-out of European sites ("CIA's Harsh Interrogation Techniques Described – Sources Say Agency's Tactics lead to Questionable Confessions, Sometimes to Death", *ABC News*, 18.11.2005, and "Sources Tell ABC News Top Al-Qaeda Figures held in Secret CIA Prisons: 10 out of 11 Terror Leaders subjected to 'Enhanced Interrogation Techniques,' *ABC News*, 5.12.2005); Don Van Natta Jr. and Souad Mekhennet on the El-Masri case ("German's Claim of Kidnapping brings Investigation of US link," in *The New York Times*, 9.01.2005); Nick Hawton on the cover-up regarding secret flights into Poland ("Chasing Shadows," *BBC Radio 4*, 2.01.2007), and *The Chicago Tribune* on undeclared flights in both Poland and Romania (John Crewdson, "Elusive jet may hold clue to secret prisons – Mystery Gulfstream landed in Romania," in *The Chicago Tribune*, 13.09.2005; and Tom Hundley, "Remote Polish airstrip holds clues to secret CIA flights," 06.02.2007).

[10] I am deeply grateful to all our allies in the non-governmental field, whose dedication to the cause and tireless support for my inquiry – much of it behind the scenes – has proven invaluable. For their professional approach throughout the last two years and for their reporting, research and representations too extensive to enumerate individually here, I wish to thank in particular: the American Civil Liberties Union, Amnesty International, the Brennan Centre for Justice at NYU School of Law, the Centre for Human Rights and Global Justice at NYU School of Law, the Centre for Constitutional Rights, Human Rights First, Human Rights Watch, the International Commission of Jurists, REPRIEVE, Statewatch and the Swedish Helsinki Committee for Human Rights. I salute your work and that of the many other NGOs active in the field who have supported me anonymously or whose names I have inadvertently failed to mention.

[11] Pertinent examples of the invocation of state secrecy in at least two different jurisdictions are provided in the section entitled "A case study of Khaled El-Masri," at section VI.i later in this report.

[12] See section entitled "Preserving Secrecy and the NATO Security Policy," at section II.iii. later in this report.

46. Consequently, all of the conclusions drawn in this report rely upon multiple sources, which validate and corroborate one another. Indeed, in the course of my inquiry, our team has spoken – and in many cases conducted interviews – with over 30 one-time members (serving, retired or having carried out contract work) of intelligence services in the United States and Europe.

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47. However, by necessity, the majority of these conversations have taken place under conditions of strict confidentiality, in order to enable the individuals concerned to be able to speak freely and without fear of consequence.

48. It is my firm conviction that what I publish here poses no threat to the individual or collective safety of any of my sources, some of whom have taken considerable personal risks to speak to us. Thus I do not identify by name the sources of many specific quotes and other items of information, nor do I attribute them too specifically to the office held by the speaker, such that no reader is able to identify the individuals who spoke in confidence to us and whose anonymity, at least for the moment, must be preserved.

49. These rules on confidentiality, imposed upon us because of the lack of collaboration from the states concerned, cannot and should not prevent me from naming individual office-holders who occupied key positions of power at the relevant times and who thus answer for the decisions they took on behalf of their states.

50. In the sections that follow, I have therefore drawn upon multiple sources in the US and European intelligence communities in an attempt to lay bare the anatomy of this controversial programme. In so doing, I believe that I have been able to provide the most in-depth account to date of the conceptual development of the HVD programme, the NATO framework so vital to the programme's operations, details of the bilateral arrangements for its operations, and important strands of evidence that belie the repeated denials of high-ranking officials – including several Presidents and Prime Ministers – about what took place and what they knew. Certainly we are far from knowing the whole truth. The information we have gathered is, however, sufficiently concrete – and worrying – to encourage states at last to do all they can to get to the bottom of what took place in their countries and within certain of their institutions.

iii. The concept: the development of the "High-Value Detainee" (HVD) Programme operated by the Central Intelligence Agency (CIA)

51. For the sake of clarity reference should be made to the CIA's covert programme using the correct terminology: among well-informed quarters, the programme is known as the "High-Value Detainee" programme, or simply the "HVD Programme".

52. The HVD programme has formed a very specific, narrow and unique strand of the United States' counter-terrorist operations in the period since 11 September 2001. Indeed, one reason why it has been so successfully covered up is that one can easily lose sight of this programme among the sizeable and still growing tally of people detained in the course of the "war on terror".

53. There have been scores of sites in which thousands of prisoners have been held for varying periods of time either by one or more agencies of the US Government, or on its behalf by foreign allies.

54. Among the most highly-populated and well-known of these detention sites – and indeed, hosts to CIA detainees at one time or another – have been the various internment "Camps" on the US Naval Base at Guantanamo Bay, the Bagram Airfield in Kabul, Afghanistan and the Abu Ghraib facility in Baghdad, Iraq. The public has been able to get some sort of picture of these sites, not from transparent information provided by the competent authorities but rather from leaks, statements from former inmates and secretly filmed images of detainee abuse.

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55. Even in this context, the HVD programme is different. One senior source in the CIA Counterterrorism Centre told us: "If a guy is captured on the battlefield and sent to [Guantanamo], that's got nothing to do with it. But I think there is a tendency in the media, in Europe and in America, to blend together what the FBI is doing, what the military is doing and what the CIA is doing – to attribute it all to the same programme. And frankly, you can't do that. The HVD programme is a very structured, very rigorous programme."

56. In my understanding, the narrative of the HVD programme has played out largely over a five-year period, from September 2001 to September 2006. CIA insiders told us that there was widespread surprise that it operated and remained secret quite as long as it did. From 2004 onwards, the President was being strongly advised to place a time limit on the programme because it was regarded as having been somewhat improvisational in its nature and therefore could not be sustained: "every period in history has its bookends".

57. The conception of the HVD programme can be traced to the days immediately after 11 September 2001, when senior CIA officials (including CIA Director George Tenet) worked with the political principals of the Bush Administration (including President Bush himself) to conceive, debate and formulate strategies to "give some extra potency" to America's "frontline officials" in combating and countering the global terrorist threat.

58. On 17 September 2001 President Bush signed a classified Presidential Finding[13] as a means of granting the CIA important new competences relating to its covert actions: new choices it could make and new ways it could respond to confronted with Al-Qaeda targets in the field. On the day this document was signed – the Sunday after the 11 September attacks – senior members of the CIA's Counter-Terrorism Center (CTC) and selected foreign counterparts were made familiar with its contents in a meeting in Washington, DC.[14]

59. Our team has spoken with several American officials who have seen the text of the Presidential Finding and participated in the operations that put it into action. Two particularly striking observations have emerged from these discussions. First, by putting "*a lot of stock in Special Activities*"[15] the Finding "*redefined the role of the Agency*", even in the eyes of some of its own, more conservative senior officials. Second, the "*really broad, not specific*" scope of the covert actions authorised in the Finding meant that the CIA was instantly granted enough room for manoeuvre to design a secret detentions programme overseas[16].

[13] The US Government finally conceded the existence of this classified Presidential Finding in response to a Freedom of Information Act (FoIA) litigation brought by the American Civil Liberties Union (ACLU) in 2006. Nonetheless, the precise scope and contents of the Finding remain unknown and, according to Congressional staffers, even senior members of the relevant House and Senate Select Committees have not been allowed to access it. See ACLU Press Release, "CIA Finally Acknowledges Existence of Presidential Order on Detention Facilities Abroad", 14.11.2006, available at http://www.aclu.org/safefree/torture/27382prs20061114.html; see also US Senator Patrick Leahy, "Comments of Senator Patrick Leahy (D-Vt.), Incoming Chairman, Senate Judiciary Committee, on Department of Justice's Response to Request for Documents relating to Bush Administration's Interrogation Policies", 2.01.2007, available at http://leahy.senate.gov/press/200701/010207.html.

[14] The former Chief of CIA Clandestine Operations in Europe, Tyler Drumheller, recounts the meeting of 17.09.2001 in his memoirs: "*Cofer [Black, then Chief of the CTC] presented a new Presidential authorization that broadened our options for dealing with terrorist targets – one of the few times such a thing had happened since the CIA was officially banned from carrying out assassinations in 1976. It was clear that the Administration saw this as a war that would largely be fought by intelligence assets. This required a new way of operating*". See Tyler Drumheller, *On the Brink: An Insider's Account of How the White House Compromised American Intelligence*, Carroll & Graf, New York, 2006 (hereinafter "Tyler Drumheller, *On the Brink*"), at p. 35.

[15] The Special Activities Division is akin to a paramilitary wing of the CIA; the kinds of "activities" referred to here include renditions and, in exceptional circumstances, assassinations of suspected Al-Qaeda members.

[16] I am certain that the HVD programme has its general origins in the 17.09.2001 Finding. Because our sources were unanimous on the question of the latitude this document afforded to the CIA. However we were also told separately of the existence of further classified documents (thought to have been signed in 2002) that actually use the term "black sites" in relation to *specific* facilities.

60. One senior former CTC official said the broad scope and enhanced paramilitary powers for the CIA were negotiated into the terms of the Finding with "*revenge for the 9/11 attacks*" in mind. Another former CTC official with direct responsibility for geographical areas in which Al Qaeda was operating told us: "This Administration needed some public successes, so they put a lot more pressure on us to find these people, and they decided to hold these people themselves. I think those are the two major changes post-9/11."

61. Thus, there had emerged a category of terrorist suspects whom the CIA considered of high value and to whose capture, detention, transfer and interrogation it would ultimately dedicate an entire covert programme. The men in this category had mostly been picked out already as "High-Value Targets", or HVTs,[17] and once in the custody of the CIA they would become "High-Value Detainees", or HVDs.[18]

62. The profile of the HVTs was that of orchestrators, planners, leading operatives and providers of logistics for some of the most devastating terrorist plots attributed to Al-Qaeda and to its associates. In our discussions, current and former CIA officials have been keen to emphasise, even in hindsight, that their targets span only a very limited range. One asserted: "if you look down the list of the people we've picked up since 9/11, the Agency has maintained a very high level of pertinence in terms of our targets." Another confirmed: "we didn't want the insurgents; we wanted the leadership."

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63. CIA dossiers compiled on these men were comprehensive and constantly being updated. As my representative was told by Michael Scheuer, former Chief of the Bin Laden Unit: "the one problem we never had was lack of information."[19] Intelligence on the HVTs was replete with references to their involvement in the 9/11 attacks and the evolution of its feeder cells, or in other major events in the global escalation of terrorism, such as the dual attack on US Embassies in East Africa, the assault on the US Navy ship USS Cole, or the Bali nightclub bombings.

64. Just as the CIA rendition programme - instigated in the 1990s and escalated in the post-9/11 years - maintained its "safety net" of having obtained legal approval for every operation it launched,[20] the CIA's post-9/11 HVD programme was designed and vetted in consultation with various lawyers in the Justice Department, the CIA and in the Presidential Administration. All three of these sets of lawyers, as our sources confirmed, have approved so-called "Kill, Capture or Detain" orders, or "K-C-D orders", for high-value targets with whom the CIA came into contact.

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65. The template for the High-Value Detainee programme was not drawn out of the KCD's Detain (or "D") category, since this was said to be a more general responsibility (shared with the military and local counterparts) for those persons picked up in the course of counter-terrorist activities about whose intelligence value the CIA unit on the ground was less certain:

> *"D was like our default option: Detain. Like if we pick up some guy in a raid where we also got one of the HVTs, like [Ramzi] bin Al-Shibh, and maybe we've got nothing on this guy, but obviously we're still gonna hold him."*

[17] Public citations of the acronym "HVT" have become more common in the course of the "war on terror". It is commonly used, for example, among members of the US Armed Forces, particularly those who have been deployed to track down prominent Baathists and insurgents in Iraq, such as Uday and Qu'say Hussein, or Abu Musab al-Zarqawi. See Defense Technical Information Center, "Loss of High-Value Targets" available at http://www.dtic.mil/doctrine/jel/doddict/data/h/02467.html.

[18] The acronym "HVD" has also now been adopted in public citations used by the Office of the Director of National Intelligence (DNI) and the Department of Defense (DoD). See, for example, Office of the Director of National Intelligence (DNI), "Summary of the High-Value Terrorist Detainee Program", 06.09.2006, available at http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf.

[19] Michael Scheuer, former Chief of the Bin Laden Unit in the CIA's Counterterrorism Center, interview carried out by the Rapporteur's representative in Washington, DC, May 2006. Scheuer told us: "We had built up dossiers on all the important people in Al Qaeda within six months after we started the rendition programme. So it was just a matter of keeping those files updated. The approval of the senior levels of the Government and the lawyers' approval, if you pushed them, could be gotten very quickly because everything was ready."

[20] For my comprehensive account of "The evolution of the rendition programme', including its legal and operational considerations, see The Marty Report 2006, *supra* note 8.

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66. According to our sources, the tailor-made HVD programme actually grew out of the KCD's Capture (or "C") category, which comprised targets whom the CIA set out expressly to capture, sometimes offering multi-million dollar US Government rewards for decisive tip-offs. The design of a special HVD programme helped to address a key "what next?" question, as one well-placed source explained:

> *"We knew that we would have some successes when we went out to get these guys, with the resources we were throwing at it and the support of our friends in the Pakistani Services[27]. So the real question was "what are we gonna do with them when we got them?"*

67. The CIA ruled out the prospect of having its HVTs handed over to or shared with the US military or the FBI, let alone foreign services – "these high-value targets are not moved between agencies or nations" – believing that the security and integrity of the resultant interrogations, in particular, could not be guaranteed. On the same grounds Guantanamo Bay "offered nothing" akin to the secrecy and isolation that the CIA demanded: "Guantanamo was a real mess. The interrogators there were FBI and military... [who] thought they knew what they were looking for, but they didn't know who they were talking to. The United States had a laboratory at Guantanamo, for the first time, to understand the insurgent arm of Al Qaeda... [but] we screwed it up!"

68. Hence the concept of "black sites", a handful of facilities of limited size and capacity in different parts of the world, where the CIA exclusively would be the jailer.

iv. The evolution of specific "black sites" in the HVD programme

69. A significant breakthrough, which became the trigger for the operations of the HVD programme, was the CIA's capture of Abu Zubaydah in March 2002. Mr Zubaydah's peculiar importance from the US Government's perspective has been well documented – not least in President Bush's speech of 6 September 2006 – in which he was mentioned 12 times, including to acknowledge that an "*alternative set of procedures*"[28] was introduced specifically for his interrogation. In the ensuing period of approximately two-and-a-half years, information garnered from HVD interrogations using these procedures is said to have proved crucial in combating Al-Qaeda's worldwide terrorist operations.[29]

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70. There are two more specific locations to be considered as "black sites" and about which we have received information sufficiently serious to demand further investigation; we are however not in a position to carry out adequate analysis in order to reach definitive conclusions in this report. First we have received concurring confirmations that United States agencies have used the island territory of Diego Garcia, which is the international legal responsibility of the United Kingdom, in the "processing" of high-value detainees. It is true that the UK Government has readily accepted "assurances"[34] from US authorities to the contrary, without ever independently or transparently inquiring into the allegations itself, or accounting to the public in a sufficiently thorough manner. Second we have been told that Thailand hosted the first CIA "black site," and that Abu Zubaydah was held there after his capture in 2002. CIA sources indicated to us that Thailand was used because of the ready availability of the network of local knowledge and bilateral relationships that dated back to the Vietnam War.[35] In line

[27] The phrase used here is understood to be a reference to the Inter Services Intelligence Agency, or ISI, which is Pakistan's military intelligence branch and is renowned for its close co-operation with the CIA.
[28] This phrase is understood to be a reference to the regime of CIA "enhanced interrogation techniques", which were subsequently used to interrogate several other HVDs. For a description of these techniques and the (operational and legal) implications of resorting to them, please see section V. and VIII. later in this report.
[29] As President Bush has presented it, when all the leads yielded from these interrogations are taken together ("corroborated by intelligence ... that helped us to connect the dots"), then the cumulative product has "played a role in the capture or questioning of nearly every senior Al-Qaeda member or associate detained by the US and its allies since this programme began". See also Office of the Director of National Intelligence (DNI), "Summary of the High-Value Terrorist Detainee Program", 06.09.2006, available at http://www.defenselink.mil/pdf/thehighvalueterrorists.pdf.
[34] See, for example, United Kingdom Parliament, Publications and Records: "Written Answers for 21.06.2004", in *House of Commons Hansard*, point 13, column 1222W, Questions to the Rt Hon. Jack Straw, UK Foreign Secretary, available at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040621/text/40621w13.htm#4062lw13.html_wqn6 Mr. Straw said: "The United States authorities have repeatedly assured us that no detainees have at any time passed in transit through Diego Garcia or its territorial waters or have disembarked there and that the allegations to that effect are totally without foundation. The Government are satisfied that their assurances are correct.
[35] One CIA source told us "In Thailand, it was a case of 'you stick with what you know'," however, since the allegations pertaining to Thailand were not the direct focus of our inquiry, we did not elaborate further on these references in our discussions. The specific location of the "black site" in Thailand has been publicly alleged to be a facility in Udon Thani, near to the Udon Royal Thai Air Force Base in the north-east of the country. This base does have long-standing connections to

with the approach of most US partner countries, the Thai Government has denied these allegations outright.[36]

71. The HVD programme has, to a certain extent, grown out of an assertion of *independence* on the part of the CIA in the exercise of "exclusive custody" over its high-value detainees for as long as it continues to question them. However, as my findings in the following sections demonstrate, the CIA's clandestine operations in Europe – including its transfers and secret detentions of HVDs - were sustained and kept secret only through their operational *dependence* on alliances and partnerships in what is more traditionally the military sphere.

II. Secret detentions in Council of Europe member states

i. The framework

a. Securing CIA clandestine operations overseas on the platform of the North Atlantic Treaty Organisation (NATO)

72. By enacting an extraordinary authorisation for CIA covert action through a Presidential Finding within national law, the Bush Administration furnished the Agency with the first half of the operational framework it required to spearhead the United States' "global war on terror."[37] To recap, the key elements of this authorisation were permissions that were as broad as possible, and protections (from interference and oversight) that were as robust as possible.

73. The second half of the equation was then to identify the means by which to integrate the key elements of US national policy into an international, intergovernmental approach.

74. According to our sources, the CIA simply could not embark upon sensitive covert action to dismantle terrorist networks and kill, capture or detain their members overseas without the express knowledge and approval of key US allies – particularly European allies: "we wouldn't have even dreamed of it."[40] On the contrary, the CIA depended on the US Government to secure equally broad permissions and equally robust protections from its foreign allies and their respective intelligence agencies as the ones that had been granted at home.

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American defence and intelligence activities overseas: during the Vietnam War it served as both a deployment base for the US Air Force and the Asian headquarters of the CIA-linked aviation enterprise, Air America.
[36] See, for example, *The Bangkok Post*, "Thaksin denies Thailand had 'CIA secret prison'," 5.11.2005, available at http://www.bangkokpost.com/breaking_news/breakhomenews.php?id=53604.
[37] At this point I shall leave aside my discomfort with the phrase "war on terror" as a characterisation of the broad spectrum of counterterrorist policies pursued by the United States in recent years – it was the phrase accepted in all quarters in the immediate post-9/11 period. In this regard I agree with Anderson and Massimino, the authors of an excellent policy study recently released in the US: "The very idea of a 'global war on terror' is today seen as the policy of a particular presidential administration in a way that it was not immediately following September 11"; see Kenneth Anderson and Elisa Massimino, "The Cost of Confusion: Resolving Ambiguities in Detainee Treatment", part of the series entitled *Bridging the Foreign Policy Divide*, The Stanley Foundation, March 2007; hereinafter "Anderson and Massimino, "Resolving Ambiguities in Detainee Treatment". My conclusion that President Bush put the CIA at the forefront of his "war machinery" is corroborated by numerous CIA insiders; see, for example, Tyler Drumheller, *On the Brink*, *supra* note 18, at p. 35: "It was clear that the administration saw this as a war that would largely be fought by intelligence assets". See also, Michael Scheuer, interview with the Rapporteur's representative, *supra* note 21: "The Agency felt the brunt of the executive branch's desire to show the American people victories."
[40] Our sources have continually emphasised to us how keenly the United States has sought to observe the "sovereignty" of its allies, particularly those in Europe. From an intelligence perspective, the notion of "unilateral actions on European turf has been characterised to us as "counter-productive" and "a surefire way of destroying the trust". More importantly, from a political perspective, the art of "coalition-building" is just as important for covert action as for large-scale military operations. It affords the US Government the opportunity, as one official described it to us, "to cover our backs by saying 'hey, we're not the only ones". In this regard, it is relevant to consider the policy statements made by members of the Bush administration to defend its detention and rendition practices after the fact: see, in particular, Secretary Condoleezza Rice, US Secretary of State, "Remarks Upon Her Departure for Europe", Andrews Air Force Base, 5 December 2005: "The intelligence so gathered has stopped terrorist attacks and saved innocent lives – in Europe as well as in the United States and other countries. The United States has fully respected the sovereignty of other countries that co-operate in these matters."

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75. The need for unprecedented permissions, according to our sources, arose directly from the CIA's resolve to lay greater emphasis on the paramilitary activities of its Counterterrorism Center in the pursuit of high-value targets, or HVTs. The US Government therefore had to seek means of forging intergovernmental partnerships with well-developed military components, rather than simply relying upon the existing liaison networks through which CIA agents had been working for decades.

76. One former senior CIA official told us that administration officials approached multilateral negotiations "like they wanted to raise [the CIA]'s status up to a kind of super military-civilian Agency". Specifically the US Government set out to achieve permissions "from as many allied countries as possible" that would allow CIA agents to collaborate directly with foreign military officials, operate "on a no-questions-asked basis" at military installations, and travel free from inspection in military or civilian vehicles and aircraft.

77. In relation to the last point, as I discussed in my report last year,[29] the lines between civilian and military classifications in the aviation world were about to become incredibly blurred. Conventional legal understandings of civilian and state flights[30] were about to be fundamentally challenged, or at least the latitude in those definitions exploited to its maximum potential.

78. The US Government's post-9/11 detainee transfer operations would frequently make use of practices that were previously considered "anomalies,"[31] such as: civilian aircraft landing on state duty at military airfields; military cargo planes registered under civilian operators; and civilian agents and contractors travelling on military travel orders. The CIA's expanding and evolving "rendition" programme, which would ultimately also be used for the transportation of High-Value Detainees, required cover that would encompass all of these anomalies and more.

79. In terms of protections, the US Government insisted on the most stringent levels of **physical security for its personnel**, as well as **secrecy and security of information** during the operations the CIA would carry out in other countries.

80. Reflecting on what our sources have described in this regard, I consider that the stated US policy has, in fact, on the pretext of guaranteeing security, intentionally created a framework enabling it to evade all accountability. We have been told that the US Government sought a means of "insulating" the CIA's activities (and those of its partner intelligence agencies) from conventional democratic controls in the foreign countries it operated in, not to mention from what it saw as any "unsavoury disputes over jurisdictional issues."

[29] For my discussion of means of transporting detainees between points on the "global spider's web", see The Marty Report 2006, *supra* note 9, at sections 2.2 to 2.4, pages 15 to 18.

[30] For an authoritative analysis of the applicable general principles of aviation law, see the Opinion on the International Legal Obligations of CoE Member States in respect of Secret Detention Facilities and Inter-state Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session, 17.03.2006; Opinion No. 363/2005, CDL-AD(2006)009, available at http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp (hereinafter "Venice Commission Opinion, 17.03.2006"); at §§ 86-104

[31] An aviation expert whom we consulted confidentially used the phrase "anomalies" to describe the practices I refer to here. There are numerous examples of each of these "anomalies" in the comprehensive database of aircraft movements I have compiled since the outset of my inquiry (database held confidentially by the Rapporteur). In this regard I am especially grateful to Eurocontrol, the European Organisation for the Safety of Air Navigation, for having provided me with extensive records in various formats in response to my requests for information. I have been able to supplement and verify Eurocontrol records with information from multiple sources, including from the US Federal Aviation Authority (FAA) and state institutions in different CoE member States, such as transport ministries, aviation authorities, airport operators and state airlines. Hereinafter my database of aircraft movements is referred to simply as "The Marty Database".

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81. Yet in my view, checks and balances through national parliamentary and judicial oversight, as well as accepted international laws governing territorial sovereignty, are the very foundations upon which our systems of democratic accountability are built. In times of crisis, such as the immediate aftermath of the 9/11 attacks, these foundations must be strengthened by demonstrations of collective resolve, not weakened by acts of unilateral brinkmanship.

82. It is now clear to me that as they went to their international allies with their proposals, the United States insisted – non-officially but explicitly – upon a clear set of unilateral prerogatives: only American officials would choose exactly who they wanted to work with; only US policies would define exactly the terms of the relationship; and only US interpretations of the applicable law (including whether or not it applied) would be held to bind its actions overseas.

83. Based upon my investigations, confirmed by multiple sources in the governmental and intelligence sectors of several countries, I consider that I can assert that the means to cater to the CIA's key operational needs on a multilateral level were developed under the framework of the North Atlantic Treaty Organisation (NATO).

b. Invocation of Article V of the North Atlantic Treaty

84. It should be recalled that the United States turned to the international community at an unprecedented moment in history. As a prominent US Congressman remarked recently, "In the wake of the horrific attack on the United States on September 11th [2001], we were moved by the extraordinary support and the outpouring of sympathy from across the globe."[32] These sentiments manifested themselves in a unique and almost universally shared conviction that the United States should be granted strong support for its international counter-terrorist efforts, including for the use of military force.

85. This conviction was most pronounced within the NATO Alliance. On 12 September 2001, NATO thereby invoked the principle of collective defence according to Article 5 of the North Atlantic Treaty,[33] and this for the first time in its 52-year existence. Initially, the invocation was considered provisional because it began with a conditional clause:

> *"If it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty."*[34]

86. During the weeks that followed, several of the most senior officials in the Bush Administration delivered "a series of classified briefings for the NATO members presenting evidence that Al Qaeda had planned and executed the attacks"[35] and outlining their intended response. There is evidence in the following excerpt from an account by a then NATO Assistant Secretary-General that some of the United States' "unilateral prerogatives" described by our sources were articulated in quite explicit terms during these briefings:

> *"I was present in the [North Atlantic] Council two weeks after NATO invoked Article 5 when then US Deputy Secretary of Defence Paul Wolfowitz set out his post-9/11 doctrine to the effect that the mission determines the coalition. This was, in my opinion, a fundamental*

[32] Representative William Delahunt (D-Ma), Chairman of the International Organizations, Human Rights and Oversight Sub-Committee of the House Foreign Affairs Committee, opening remarks on the subject "Extraordinary Rendition in US Counterterrorism Policy: The Impact on Transatlantic Relations", 17.04.2007. Mr Delahunt also said: "I shall never forget the headline from the French newspaper *Le Monde* that proclaimed, 'Today, we are all Americans.' Sadly, that support has eroded dramatically... World opinion has turned against the United States in recent years [and]... this reality, this trend of opinion against the United States has profound negative consequences for our national interests."

[33] Article 5 of the North Atlantic Treaty provides as follows: *"The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."*

[34] See NATO Press Release (2001) 124, "Statement by the North Atlantic Council", 12.09.2001.

[35] See Nora Bensahel, *Counterterror Coalitions: Co-operation with Europe, NATO and the European Union*, The Rand Corporation, USA, 2003 (hereinafter "Bensahel, *Counterterror Coalitions*"); at pp. 6-7. According to Bensahel, the US policy-makers who briefed NATO included Deputy Secretary of State Richard Armitage, Deputy Secretary of Defence, Paul Wolfowitz and State Department Co-ordinator for Counterterrorism, Frank Taylor.

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misjudgement about the nature of the Alliance that devalued the importance of strategic solidarity."[36]

87. The US Administration's briefings had their desired effect of lifting the conditional clause in the North Atlantic Council's original statement. On 2 October 2001, the NATO Allies declared their unanimous assessment that the 9/11 attacks had been directed against the United States from abroad and that Article 5 was therefore activated.[37]

88. Collective measures in the context of a military intervention in Afghanistan were widely anticipated – indeed, as one study noted, "many NATO members hoped that invoking Article 5 would lead the United States to conduct any military response against Al Qaeda under the NATO flag, or at least co-ordinate its actions with the integrated military structure and political institutions."[38]

89. However, the expected mobilisation of NATO forces for a multilateral action in Afghanistan never materialised. In fact, NATO support in the conventional military sense was neither an automatic consequence in the invocation of Article 5[39] nor, as our sources have confirmed, what the US Government was looking for.[40] It is precisely upon this unexpected dynamic that my finding regarding the development of CIA clandestine operations under the NATO framework hinges.

90. There was a **critical, almost paradoxical policy choice** in the US Government's stance towards the NATO alliance in early October 2001. The invocation of Article 5 could have been developed[41] as a basis upon which to conduct a military campaign of a conventional nature, deploying Army, Navy and Air Force troops in a joint NATO operation. Instead it became a **platform from which the United States obtained the essential permissions and protections it required to launch CIA covert action in the "war on terror".**

c. NATO authorisations for US operations in the "war on terror"

91. The key date in terms of the NATO framework is **4 October 2001**, when the NATO Allies met in a session of the North Atlantic Council to consider a set of concrete proposals from the United States. In a press statement after the session,[42] NATO Secretary-General Lord Robertson announced that the Allies had "agreed today – at the request of the United States – to take eight measures, individually and collectively, to expand the options available in the campaign against terrorism."[43] The eight specific measures agreed to[44] were as follows:

[36] See Edgar Buckley, former NATO Assistant Secretary-General for Defence Planning and Operations (from 1999 to 2003), "Invoking Article 5", in *NATO Review*, Summer 2006, available at http://www.nato.int/docu/review/2006/issue2/english/art2.html (hereinafter "Buckley, "Invoking Article 5"").

[37] See NATO Press Release of 02.10.2001, "Statement by NATO Secretary-General Lord Robertson".

[38] See Bensahel, *Counterterror Coalitions*, *supra* note 37, at p. 7.

[39] Article 5 refers to "such action as [each Party] deems necessary" and does not limit this action to the use of military force. It should be noted that France and Germany emphasised the fact that the obligation to assist under Article 5 did not automatically incur a duty to take part in US-led military action. In this regard, see Tom Lansford, *All for One: Terrorism, NATO and the United States*, Ashgate, UK, 2003, at p. 88; and Martin Reichard, *The EU-NATO Relationship: A Legal and Political Perspective*, 2006, at p. 190.

[40] See also Philip Gordon, "NATO After 11 September", in *Survival*, Vol. 43, No. 4, Winter 2001 – 2002, at p. 92. A senior US official stated: "I think it's safe to say that we won't be asking SACEUR [the NATO Supreme Allied Commander for Europe] to put together a Kosovo plan for Afghanistan." Further, see Nicholas Florenza, "Alliance Solidarity", *Armed Forces Journal International*, December 2001, at p. 22. A military official asked rhetorically: "If you were the US, would you want 19 other nations watering down your military planning". Both cited in Bensahel, *Counterterror Coalitions*, *supra* note 37, at pp. 7 and 19.

[41] For a perspective on how the invocation of Article 5 did not unfold entirely as NATO had expected, see, for example, Buckley, "Invoking Article 5", *supra* note 36: "In the intervening years, I have heard frequent criticism of the decision to invoke Article 5. I have, for example, heard people say that we were unwise to commit ourselves to a course of action which was not fully implemented and which turned out to be unwanted by the United States... I share the frustration of those who believe that the United States could have done more to engage the Alliance in its efforts against the Taliban and Al Qaeda."

[42] See NATO, "Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty following the 11 September Attacks against the United States", Brussels, 04.10.2001, available at http://www.nato.int/docu/speech/2001/s011004b.htm (hereinafter referred to as "Statement to the Press by NATO Secretary General, Lord Robertson, 4.10.2001").

[43] *Ibidem*. Note the similarity in the language of "options" used to describe the intergovernmental NATO authorisation and likewise (ref. Tyler Drumheller, *supra* note 18) the US domestic covert action authority in the Presidential Finding of 17.09.2001: "broadened our options for dealing with terrorist targets."

[44] Some of the descriptions of the measures have been shortened or paraphrased here in order to present them more simply. For the original language in which they were presented to the public, see the Statement to the Press by NATO Secretary General, Lord Robertson, 04.10.2001, *supra* note 44.

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- Enhance intelligence-sharing and co-operation, both bilaterally and in the appropriate NATO bodies, relating to the threats posed by terrorism and the actions to be taken against it
- Assist states subject to increased terrorist threats as a result of their support for the campaign against terrorism
- Provide increased security for US and other allied facilities on NATO territory
- Backfill selected Allied assets in NATO's area of responsibility that are redeployed in support of counterterrorism operations
- Provide blanket overflight clearances for the United States' and other Allies' aircraft for military flights related to operations against terrorism
- Provide access to ports and airfields on NATO territory, including for refuelling, for United States and other Allies for operations against terrorism
- Deploy elements of the NATO Standing Naval Forces to the eastern Mediterranean, if called upon
- Deploy elements of NATO Airborne Early Warning Force to support operations against terrorism, if called upon.

92. The first criterion on which these measures were extraordinary was in the nature of their conception. According to a former senior NATO official, "in contrast to many other international organisations, responsibility for drafting documents and resolutions in NATO lies with the International Staff."[45] Yet as Lord Robertson reiterated in his statement, "these measures were requested by the United States following the determination that the 11 September attack was directed from abroad."[46] Indeed, as our American sources told us, even the exact language in which the actual measures were formulated and agreed upon was conceived, drafted, re-drafted and put forward unilaterally by the United States.

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93. Second and most significant, these measures do not constitute an agreement to undertake collective self-defence.[47] In my analysis these measures more closely comprise the very permissions and protections the United States had sought for itself as it embarked on its own military, paramilitary and intelligence-led counterterrorism operations.[48] Just as President Bush had done on 17 September 2001, the NATO Allies, on 4 October 2001, afforded the CIA a mandate to pursue its "war on terror", without a published text.

94. Council of Europe officials attempted to obtain a copy of the "agreement" of 4 October 2001 from NATO Legal Services on several occasions.[49] In a response dated 6 April 2006,[50] NATO's Legal Advisor, Mr Baldwin De Vidts, submitted that the "agreement" in question was actually more properly characterised as a set of "decisions taken by the North Atlantic Council on that date"; he explained:

> *"It is to be noted that your request does not relate to a formal document signed by the member States but to an internal decision noted in a corresponding decision sheet drawn up by the International Secretariat to reflect the decisions as taken by the Council on that date."*

[45] See Buckley, "Invoking Article 5", *supra* note 36.

[46] See Statement to the Press by NATO Secretary General, Lord Robertson, 04.10.2001, *supra* note 44.

[47] I take the view that only the last two measures could be considered as responses in the category of "classic" collective self-defence. In recognising this point, one observer has argued that a broad approach to military and non-military measures was consistent with the US approach to counterterrorism: see Reichard, *supra* note 41, at p. 188: I would add, however, these measures are somewhat ceremonial in character, both of them begin with a phrase "that the Alliance is ready to deploy", and the first of them states that the purpose of such a deployment would be "to provide a NATO presence and demonstrate resolve." The "classic" self-defence provisions therefore stop short of any genuine commitment to military action. The real practical substance of these measures is to be found in the other clauses.

[48] In its published material, NATO makes clear that the period after the invocation of Article 5 accommodates a range of individual and collective policy choices: "Any collective action by NATO will be decided by the North Atlantic Council. The United States can also carry out independent actions, consistent with its rights and obligations under the UN charter. Allies can provide any form of assistance they deem necessary to respond to the situation." See NATO, *What is Article 5?*, available at http://www.nato.int/terrorism/five.htm.

[49] I refer here to various individual items of correspondence sent to Mr Baldwin De Vidts, NATO Legal Advisor, by both Mr G. Buquicchio, Secretary of the European Commission for Democracy through Law (Venice Commission), and Mr A. Drzemczewski, Head of Secretariat of the PACE Committee on Legal Affairs and Human Rights (AS/Jur). Copies of all correspondence on file with the Rapporteur.

[50] Letter to Mr G. Buquicchio, Secretary of the Venice Commission, from Mr Baldwin De Vidts, NATO Legal Advisor, Reference CAJ(2006)0230, dated 06.04.2006. Regrettably this response came three weeks after the issue of the Venice Commission's opinion on the matter, dated 17.03.2006. See the reference to this correspondence in the Opinion on the International Legal Obligations of CoE Member States in respect of Secret Detention Facilities and Inter-state Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session, 17.03.2006; Opinion No. 363/2006, CDL-AD(2006)009 (hereinafter "Venice Commission Opinion, 17.03.2006"), at § 4.

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95. In the same letter, Mr De Vidts stated that "in principle, such documents are not made public, which is certainly the case if they are classified."[51] In a subsequent follow-up letter sent on my behalf, I indicated to NATO Legal Services, in accordance with my authorisation as AS/Jur Rapporteur, that I would be prepared to treat the document in a confidential manner.[52] However, Mr De Vidts replied in the following terms:

> *"I can only but confirm that the decision sheet of the North Atlantic Council dated 4 October 2001 is a classified document. I have to state that in order to have access to NATO classified information, such person should have an appropriate security clearance."*[53]

96. Notwithstanding this general rule, which I understand to be a reflection of broader issues around transparency within NATO,[54] there was a further noteworthy feature of the 4 October 2001 measures to emerge from our correspondence with NATO Legal Services. Qualifying his earlier point, Mr De Vidts stated:

> *"However, with regard to certain decisions separate communications to the public in general are made. This has also been the case for some of the decisions taken on 4 October 2001 by the North Atlantic Council"* (emphasis added)

97. The clear indication here is that the public record[55] is not a complete reflection of the measures agreed by the NATO Allies and the considerations underpinning them. It is my conclusion, again confirmed by my American sources, that there were **additional components to the NATO authorisation of 4 October 2001 that have remained secret.**

98. In the course of my inquiry, I have made repeated requests for information regarding the full scope of the NATO authorisation, specific elements of its practical application, and whether its provisions remain in force to the present day. Regrettably, NATO itself has been largely unresponsive to my requests.[56]

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[51] Letter to Mr G. Buquicchio, Secretary of the Venice Commission, dated 06.04.2006, *ibidem*.
[52] Letter to Mr De Vidts from Mr Drzemczewski, Head of the Secretariat, PACE Committee on Legal Affairs and Human Rights (AS/Jur), dated 24.03.2006.
[53] Letter in reply to Mr Drzemczewski's letter of 24.03.2006 from Mr De Vidts, NATO Legal Advisor, Reference CJ(2006)0330, dated 13.04.2006. It should be noted that NATO is accustomed to rejecting requests for "NATO information". Even unclassified information remains for the most part inaccessible, based on the following principle: "NATO unclassified information... can only be used *for official purposes*. Only individuals, bodies or organisations that require it for official NATO purposes may have access to it... NATO information marked in this manner is subject to release via agreement from its originators and subject to recognised storage procedures for its protection" – see letter from Wayne Ryshak, Director, NATO Office of Security, to Jacob Visscher, General Secretariat of the Council of the European Union 6.02.2002 (emphasis in original); cited in Alasdair Roberts, "Entangling Alliances: NATO's Security of Information Policy and the Entrenchment of State Secrecy", Cornell International Law Journal, 36 2 (November 2003): 329 – 360, at page 9 in the text.
[54] For insight into the NATO secrecy and security of information regime and its negative impact on transparency in general, I have found the work of the Canadian specialist on transparency issues, Professor Alasdair Roberts, very informative. Specific articles can be found at www.aroberts.us/research.html.
[55] The only public record of the 4.10.2001 meeting of the North Atlantic Council is the Statement to the Press by NATO Secretary General, Lord Robertson, 4.10.2001, *supra* note 4. Mr De Vidts attached a print-out of this statement from the NATO website to his letter of 13.04.2006.
[56] Regrettably, NATO itself has been largely unresponsive to our repeated requests for information regarding the full scope of the authorisation, elements of its practical application, and whether its provisions remain in force to the present day. We have sent five separate items of correspondence to Mr De Vidts: letters from Mr Drzemczewski, Head of the Secretariat, PACE Committee on Legal Affairs and Human Rights (AS/Jur) dated 24.03.2006 and 25.04.2006; e-mails of 27.09.2006 and 09.11.2006; and fax of 09.11.2006, receipt of which was confirmed in a telephone conversation with Mr De Vidts' office on 05.12.2006. We have thus far received only a single, incomplete reply: letter from Mr De Vidts, dated 13.04.2006; the reply was incomplete because Mr De Vidts said that one of our questions "is under consideration and at our earliest convenience I will contact you about these issues". On 27.03.2007 I wrote to Mr Jaap de Hoop Scheffer, Secretary-General of NATO, requesting clarification on the outstanding questions. I have yet to receive any response to my letter.

99. Nevertheless, my further analysis of the NATO framework has shown that the authorisations of 4 October 2001 were vital in paving the way for the United States to develop its most important partnerships in the context of the "war on terror". In particular, the CIA would exploit both the blanket overflight clearances and the access to airfields to carry out its clandestine operations through the airspace and on the territory of a broad range of foreign states.

100. **The blanket overflight clearances** granted in this regard were especially significant. In the NATO public statement, the clearances were said to apply to "*military flights related to operations against terrorism*" but, even without sight of the classified parts of the authorisation, this characterisation is misleadingly narrow.

101. "Military flights" is a term relating to the *function* of the flight, not the type of aircraft used. In international aviation law, the status of an aircraft is determined by the function it is performing at any given time[57] - and flights performing "military" functions would necessarily fall into the category of "state aircraft."[58]

102. "State aircraft" enjoy precisely the type of immunity from the jurisdiction of other states that the US Government sought to achieve for aircraft operating on behalf of the CIA: "*they cannot be boarded, searched or inspected by foreign authorities, including host State's authorities.*"[59] The conventional constraint on "state aircraft" is that they are usually "*not permitted to fly over or land in foreign sovereign territory otherwise than with express authorisation of the State concerned.*"[60] However, with "blanket overflight clearances" under the NATO framework this constraint could be conveniently circumvented.[61]

103. Similarly, the provision of **access to airfields** for operations against terrorism secured landing rights at military bases and dual military-civilian airfields for aircraft operating on behalf of the CIA under a NATO "cover".[62]

104. Accordingly there would be two prerequisites for CIA clandestine operations to fulfil in order to remain within the NATO framework. The first would be to ensure that the aircraft used in such operations were, in their function, designated as "military flights" or "state flights". The second would depend on the state whose airspace or territory was at issue having agreed to the terms of the "blanket" NATO authorisations of 4 October 2001.

105. It is therefore all the more pertinent to note that the range of countries who agreed to these authorisations in the context of the US "war on terror" extended well beyond the NATO member states, into a total of as many as 40 countries.[63] One year after the NATO authorisations, the United States Government declared: "*Our Allies have delivered on that [Article 5] obligation with concrete actions, both individually and collectively: all 18 NATO Allies*[64] *and the 9 NATO 'aspirants'*[65] *have*

[57] See the Venice Commission Opinion, 17.03.2006, *supra* note 52, at § 91.
[58] The Venice Commission notes that "*as a general rule, 'aircraft are recognised as state aircraft when they are under the control of the State and used exclusively by the State for state intended purposes',*" citing Diederiks-Verschoor, Introduction to air law, Kluwer, p. 30, § 12. "Military flights," as defined by the NATO Allies in the context of this authorisation, cannot be interpreted to be anything other than "for state intended purposes." See the Venice Commission Opinion, 17.03.2006, *ibidem*, at § 91.
[59] See the Venice Commission Opinion, 17.03.2006, *ibidem*, at § 93.
[60] Article 3(c) of the Chicago Convention on International Civil Aviation, 1944, as cited in the Venice Commission Opinion, 17.03.2006, *ibidem*, at § 93.
[61] For another in-depth analysis of the law applicable to civil and state aircraft, including the applicable permissions / immunities and selected references to NATO, see Center for Human Rights and Global Justice, *Enabling Torture: International Law Applicable to State Participation in the Unlawful Activities of Other States*, NYU School of Law, 2006, available at http://www.chrgj.org.
[62] See the reference in Lansford, *supra* note 41, at p. 112: this agreement "allowed for more streamlined planning and the formulation of missions, especially the transfer of assets from one theater to another." Further references to the terminology of "theaters" in the "war on terror" – specifically relating to the transfer of detainees – were used frequently in our discussions with sources concerning secret detentions in Romania.
[63] See Lansford, *supra* note 41, at p. 112: "when the American-led attacks began, some 40 nations gave the coalition permission to use their airspace for operations."
[64] At the time of this statement, the United States' 18 NATO Allies were: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom. All of them except Canada were then and are now also member States of the Council of Europe.
[65] At the time of this statement, the 9 NATO "aspirants" (or candidates for accession) were: Albania, Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, Slovenia and "the former Yugoslav Republic of Macedonia". All of them were then and are now also member States of the Council of Europe.

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provided blanket overflight rights, ports / bases access, refuelling assistance, and increased law-enforcement co-operation."[69]

d. The wider NATO system and the "war on terror"

106. Aside from the specific authorisations detailed above, the wider NATO system comprises further important elements that have been developed as part of the post-9/11 framework for CIA clandestine operations – including the High-Value Detainee Programme. I intend to examine these elements in the following section as they have been applied to specific countries with which the United States has agreed bilateral arrangements in the course of the "war on terror". For now it suffices to acknowledge the general NATO multilateral treaties or policies on which those arrangements are based.

107. First is the system of NATO "SOFAs" (Status of Forces Agreements), which define the legal status of one state's armed forces on the territory of another state. The general rules of such relationships are set out in the multilateral SOFA for all NATO members,[70] the provisions of which also apply to "aspirant" states through their participation in the "Partnership for Peace"[71].

108. A state does not abandon its sovereignty when it signs a SOFA; on the contrary, SOFAs usually reflect different sets of legal rights and responsibilities that accrue for both the sending state and the host state.[72] The majority of SOFAs are agreed on the bilateral level and are sometimes complemented by further, more finite defence agreements that cover foreign forces stationed at particular bases or facilities. Several CoE member states have acknowledged the applicability of SOFA-type agreements to their relationships with the United States in the context of the "war on terror."[73]

109. An additional relevant element of the wider NATO system is its **secrecy and security-of-information regime**. The NATO Security Policy[74] and its supporting Directive on the Security of Information[75] are among the most formidable barriers to disclosure of information that one might ever

[69] See US Department of State, "NATO: Coalition Contributions to the War on Terrorism", Fact Sheet of 31.10.2002, available at http://www.state.gov/p/eur/rls/fs/14627.htm. Indeed, within days of the authorisations, US Secretary of State Colin Powell made special mention of "*all the NATO nations making commitments under the Article 5 invocation to give us overflight rights and other things that have proven so helpful to our efforts.*" See US Department of State, "Colin Powell Holds Media Availability with NATO Secretary General George Robertson, 10.10.2001, available at http://transcripts.cnn.com/TRANSCRIPTS/0110/10/se.16.html.

[70] See NATO Status of Forces Agreement (SOFA) of 19.06.1951, "Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces", available at http://www.nato.int/docu/basictxt/b510619a.htm.

[71] See NATO Partnership for Peace SOFA (PfP-SOFA) of 1995, "Agreement among the State Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace Regarding the Status of their Forces", available at http://www.nato.int/docu/basictxt/b950613a.htm. It is important to note that, since it came into force in 1995, this PfP-SOFA has entitled signatories to the Partnership for Peace (PfP) that are not yet members of NATO to nevertheless sign so-called "SOFA Supplementals" with NATO member States. Signatories to the PfP are available at http://www.nato.int/pfp/sig-date.htm.

[72] See the Venice Commission Opinion, 17.03.2006, *supra* note 52, at §§ 106 and 107. For a general overview, see also the EU Network of Independent Experts on Fundamental Rights, "The Human Rights Responsibilities of the EU Member States in the context of the CIA activities in Europe," 25.05.2006, available at: http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2006_3_en.pdf.

[73] In this regard, it should be noted that nine different CoE member States made reference to NATO, SOFAs or defence agreements with the United States in their replies to the Secretary General of the Council of Europe in the context of his enquiry under Article 52 ECHR. For copies of all member States' replies and the SG's report on his findings, SG/Inf(2006)5, see the Special File at http://www.coe.int/T/E/Com/Files/Events/2006-SG/. In particular, Germany, the Netherlands, Poland and Romania made reference to Article 7 of the NATO SOFA as a provision that determines their potential jurisdiction over foreign forces operating on their territories. Article 7 of the multilateral NATO SOFA provides: "The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences related to the security of that State, punishable by its law but not by the law of the sending State."

[74] NATO's comprehensive Security Policy was modified and updated through a Fundamental Review by the NATO Security Committee (NSC), which concluded in early 2002. The policy is now contained in two documents approved by the North Atlantic Council: C-M(2002)49, "Security within the North Atlantic Treaty Organisation (NATO)"; and C-M(2002)50, "Protection Measures for NATO Civil and Military Bodies, deployed NATO Forces and Installations (Assets) against Terrorist Threats". The first of these documents, C-M(2002)49, which entered into force on 17.06.2002, contains the applicable rules on classification, handling and protection of sensitive information, as well as rules on establishment of and access to NATO Security Areas, and rules relating to NATO personnel. C-M(2002)49 was released on 01.09.2006 by the Hungarian National Security Superintendence in response to a freedom of information request by the Hungarian Civil Liberties Union (HCLU); copy on file with the Rapporteur. C-M(2002)49 is hereinafter referred to as "NATO, Security within the North Atlantic Treaty Organisation, 17.06.2002".

[75] NATO Security Committee, "Directive on the Security of Information", Document AC/35-D/2002, Second Revision, issued 04.02.2005. AC/35-D/2002-REV2 was released in October 2006 by the Hungarian National Security Superintendence in response to a freedom of information request by the Hungarian Civil Liberties Union (HCLU); copy on file with the Rapporteur. AC/35-D/2002-REV2 is hereinafter referred to as "NATO Security Committee, Directive on the Security of Information, 04.02.2005".

come across. It is easy to understand why an institution or state agency wishing to carry out clandestine operations would opt to bring them under the protections of the NATO model.

110. In addition to its own rules, NATO insists that strict regimes protecting classified information exist on a national level. The Membership Action Plan of 1999 implored the NATO "aspirants" – specifically, nine countries in Central and Eastern Europe – to introduce "*sufficient safeguards and procedures to ensure the security of the most sensitive information as laid down in the NATO security policy.*"[76] Indeed commentators have rightly raised concern around the stringent rules on state secrecy that several countries have introduced as part of their accession to NATO[77] and, particularly, "*whether NATO's requirements are unduly biased against transparency [and] tilted toward secrecy to an unwarranted degree.*"[78] It seems natural that such a security of information regime suited the purposes of the CIA.

111. Finally, with regard to the particular scope of my inquiry, it is apt to point out that NATO Allies and Partners have also developed various forms of co-operation in the realms of Air Defence and Air Traffic Management.[79] Inevitably these initiatives have developed new dimensions and complexities in the worlds of civil and military aviation, some of which may not yet be properly regulated and may permit unlawful clandestine operations using aircraft to pass "under the radar." In the course of analysing my database of aircraft movements, I have also noted that NATO has established a co-operation with Eurocontrol, which aims at "*developing civil-military air traffic procedures in the light of the new security environment.*"[80]

II. Bilateral arrangements

a. Securing agreements with certain countries to host "black sites" for HVDs

112. Despite the importance of the multilateral NATO framework in creating the broad authorisation for US counter-terrorism operations, it is important to emphasise that the key arrangements for CIA clandestine operations in Europe were secured on a bilateral level.

113. According to US sources, such bilateral arrangements (referred to simply as "bilaterals") exist under many different forms in Europe alone. For example, at the lower end of the range, bilaterals can institute ad hoc collaboration on a single operation to capture, detain or transfer a particular target. The well-documented cases of Abu Omar's abduction in Milan[81] and Khaled El-Masri's 23-day ordeal in a hotel in Skopje before being handed over to a rendition team[82] are instances in which the CIA worked with partner intelligence services in Italy[83] and the "former Yugoslav Republic of Macedonia"[84] respectively, in this manner.

[76] See NATO, "Membership Action Plan", Press Release NAC-S(99)66, Brussels, 24.04.1999.

[77] For insight into the NATO secrecy and security of information regime and its negative impact on transparency in general, I have drawn from the work of the Canadian specialist on transparency issues, Professor Alasdair Roberts, who is based at the Maxwell School of Syracuse University in the United States. For specific articles, refer to Professor Roberts' website at www.aroberts.us/research.html.

[78] See Alasdair Roberts, "NATO, Secrecy and the Right to Information", *East European Constitutional Review*, (Fall / Winter 2003) 88, at p. 97.

[79] See NATO Partnership Action Plan against Terrorism, 22.11.2002, available at http://www.nato.int/docu/basictxt/b021122e.htm; at § 15.2.3.

[80] See Report on the Partnership Action Plan against Terrorism, 23.06.2004, available at http://www.nato.int/docu/basictxt/b040623e.htm; at § 7.4.

[81] For a detailed account of the abduction of the Egyptian citizen Hassan Osama Mustafa Nasr (known as Abu Omar) in Milan, see the Marty Report 2006, *supra* note 6, at p. 37, § 182. For an analysis of this case based on extensive contact with insider sources in the CIA, see the recent article by Matthew Cole, "Blowback", *GQ Magazine*, March 2007, available at http://www.matthewacole.com/pdfs/Blowback-GQ.pdf.

[82] For a detailed account of the ordeal experienced by the German citizen Khaled El-Masri in Macedonia and Afghanistan, see the Marty Report 2006, *supra* note 6, at pages 25 to 32, paragraphs 93 to 132. For new details of this case, refer to section VI.I in the present report entitled "A case study of Khaled El-Masri."

[83] Reference to the particular service involved – SISMI – based on material from the prosecution case documents compiled by Armando Spataro.

[84] In "the former Yugoslav Republic of Macedonia", as I described last year, the partner service with which the CIA collaborated to detain and transfer Khaled El-Masri was the UBK – Uprava za Bezbednost I Kontrarazuznavanje, or the Security and Counter-Intelligence Service. See the Marty Report 2006, *supra* note 6, in particular at pp. 29 to 30, §§ 116 to 119.

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114. In the middle of this range, bilateral agreements signed pursuant to the multilateral NATO framework, and in conformity with NATO standards, have often encompassed elements of intelligence co-operation. Alternatively they have granted "civilian" components – a phrase often used loosely for those operating on behalf of the CIA – the same privileges and permissions that would normally be reserved for members of the military forces. Romania's "SOFA supplemental" agreement with the United States on 31 October 2001, analysed later in this section, appears to be a good example of such a middle-range "bilateral". It also demonstrates the potential for partnership and co-operation to intensify over a period of several years.

115. The bilaterals at the top of this range are classified, highly guarded mandates for "deep" forms of co-operation that afford – for example – "infrastructure", "material support" and / or "operational security" to the CIA's covert programmes. This high-end category has been described to us as the intelligence sector equivalent of "host nation" defence agreements – whereby one country is conducting operations it perceives as being vital to its own national security on another country's territory.

116. The classified "host nation" arrangements made to accommodate CIA "black sites" in Council of Europe member states fall into the last of these categories.

117. The CIA brokered "operating agreements" with the Governments of Poland and Romania to hold its High-Value Detainees (HVDs) in secret detention facilities on their respective territories. Poland and Romania agreed to provide the premises in which these facilities were established, the highest degrees of physical security and secrecy, and steadfast guarantees of non-interference.

118. We have not seen the text of any specific agreement that refers to the holding of High-Value Detainees in Poland or Romania; indeed it is practically impossible to lay eyes on the classified documents in question or read the precise agreed language because of the rigours of the security-of-information regime, itself kept secret, by which these materials are protected.

119. However, we have spoken about the High-Value Detainee programme with multiple well-placed sources in the governments and intelligence services of several countries, including the United States, Poland and Romania. Several of these persons occupied positions of direct involvement in and/ or influence over the negotiations that led to these bilateral arrangements being agreed upon. Several of them have knowledge at different levels of the operations of the HVD programme in Europe.

120. These persons spoke to us upon strict assurances of confidentiality, extended to them under the terms of the special authorisation I received from my Committee last year.[82] For this reason, in the interests of protecting my sources and preserving the integrity of my investigations, I will not divulge individual names. Yet I can state unambiguously that their testimonies – insofar as they corroborate and validate one another – count as credible, plausible and authoritative.

121. I am convinced that these individuals who were or still are in highly-placed positions within the system spoke the truth to us. This was not always simply because they valued truth. In most cases they did so because, to paraphrase one high-ranking politician we interviewed, they did not want the truth to come out *on somebody else's terms*.

[82] Reference to the written record of the meeting of the PACE Committee on Legal Affairs and Human Rights (AS/Jur) in Paris on 13.03.2006 (Synopsis No 2006/25), by which the Committee authorised my inquiry to treat information in confidence. Based upon this authorisation, I engaged in an exchange of letters with European Commissioner Franco Frattini. Copies of this correspondence as well as the above-mentioned synopsis are held on file with the Rapporteur. The assurance of absolute confidentiality with which I have provided my sources, scrupulously observed by the team members who attended the interviews, has proven to be an important, if not decisive, asset to progress in our inquiry.

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122. In short, we used our considerable network of contacts in Poland, Romania, the United States and elsewhere, along with our own form of "intelligence work", to ensure that in our discussions with our sources, the "dynamics of truth" were also at play.

b. The United States' choice of European partners

123. It is interesting to note that the United States chose, in the case of Poland and Romania, to form special partnerships with countries that were economically vulnerable, emerging from difficult transitional periods in their history, and dependent on American support for their strategic development.

124. In terms of both political and intelligence considerations, several sources confirmed that much of the Eastern European "bloc" was considered "out of bounds" for the CIA in contemplating sites for its covert HVD programme. A long-serving CIA officer shared the following analysis with us:

> *"In a lot of those countries, there is still a mindset formed during the Cold War that we are not always on their side. There's a certain tendency to be less than open to our advances. You have to remember most of the East European services are KGB services and that doesn't change overnight.*
>
> *I think Poland is the main exception; we have an extraordinary relationship with Poland. My experience is that if the Poles can help us they will. Whether it's intelligence, or economics, or politics or diplomacy – they are our allies. I guess if there is a special relationship outside of the "four eyes"[83] group, then it is the Americans and the Poles."*

125. In Poland's case, a specific strategic incentive tied in with the NATO framework was the United States' staunch support for the establishment in Poland of the lucrative "NATINADS" programme – the NATO Integrated Air Defence System. Poland participated in the US-led military coalitions in both Afghanistan and Iraq, notably contributing significant Special Forces deployments to Operation Enduring Freedom,[84] and later assuming control of one of the "zones" of allied control in Iraq. An ongoing process of realignment and reform of intelligence structures is dedicated primarily to purging the secret services of so-called "communist remnants".

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126. The United States negotiated its agreement with Poland to detain CIA High-Value Detainees on Polish territory in 2002 and early 2003. We have established that the first HVDs were transferred to Poland in the first half of 2003. In accordance with the operational arrangements described below, Poland housed what the CIA's Counterterrorism Centre considered its "most sensitive HVDs," a category which included several of the men whose transfer to Guantanamo Bay was announced by President Bush on 6 September 2006.

127. We received confirmations – each name from more than one source – of eight names of HVDs who were held in Poland between 2003 and 2005[85]. Specifically, our sources in the CIA named Poland as the "black site" where both Abu Zubaydah and Khalid Sheikh Mohamed (KSM) were held and questioned using "enhanced interrogation techniques." The information known about these interrogations has formed the basis of heated debate in the United States and the wider international community, leading, in Zubaydah's case[86], to high-level political and legislative manoeuvres and, in KSM's case, to the admission of some troubling judicial precedents[87].

[83] The "four eyes" group is the CIA officer's reference to the very strong four-way co-operation on intelligence matters between the secret services of the United States, Canada, the United Kingdom and Australia: "It's just a whole different degree of trust between those four."

[84] See Bensahel, *Counterterror Coalitions*, *supra* note 37, at p. 10; Table 2.1, "Summary of European and Canadian Contributions to Operation Enduring Freedom".

[85] In addition to these sources, a single CIA source told us that there were "up to a dozen" HVDs in Poland in 2005, but we were unable to confirm this number. Among the eight names repeated to us from several sources were Ramzi bin al-Shibh, Tawfiq bin Attash and Ahmed Khalfan Ghailani.

[86] The individual circumstances of Abu Zubaydah's interrogations remain largely unknown, but the introduction of "enhanced interrogation techniques" for the CIA's use on him has sparked the debate to which I refer. For an insightful early account of CIA interrogation practices, see Jane Mayer, "A Deadly Interrogation – Can the CIA legally kill a prisoner?" in *The New Yorker*, 14.11.2005, available at http://www.newyorker.com/archive/2005/11/14/051114fa_fact.

[87] Specifically I refer to the admission into evidence of the "Substitution for the Testimony of Khalid Sheikh Mohamed" in the context of the trial of Zacarias Moussaoui; as well as the well-founded reservations that the testimony in question had been procured under torture or other forms of ill-treatment. It is worth mentioning the troubling preamble transmitted to the jury introducing KSM's testimony: "Although you do not have the ability to see the witness' demeanour as he testifies, you must approach these statements with the understanding that they were made under circumstances designed to elicit truthful

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128. For reasons of both security and capacity, the CIA determined that the Polish strand of the HVD programme should remain limited in size. Thus a "second European site" was sought to which the CIA could transfer its detainees with "no major logistical overhaul". Romania, used extensively by United States forces during Operation Iraqi Freedom in early 2003, had distinct benefits in this regard: as a member of the CIA's Counterterrorist Centre remarked about the location of the proposed detention facility, "our guys were familiar with the area".

129. Our sources on both sides of the agreement – in Romania and the United States – emphasised the importance of both trust and national interest as factors underpinning their negotiations. Military assistance – reflected since in the Agreement of December 2005[48] – also significantly influenced the decision to provide facilities and resources, as one American source reflected:

> *"The bilateral arrangements were built on two things: personal relationships and material investment. If your men on the ground have a very good personal relationship with the men in the partner service; that means a lot. And it also means a lot if the Romanians are gonna get their runways improved, new barracks built and new military hardware; that means a lot."*

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130. Romania was developed into a site to which more detainees were transferred only as the HVD programme expanded. I understand that the Romanian "black site" was incorporated into the programme in 2003, attained its greatest significance in 2004 and operated until the second half of 2005. The detainees who were held in Romania belonged to a category of HVDs whose intelligence value had been assessed as lower but in respect of whom the Agency still considered it worthwhile pursuing further investigations.

131. Asked to provide names of those held in Romania, a senior official in the CIA's Counterterrorism Centre, who was directly involved in operating the programme, said: "*Look we don't talk about names, okay. We've got a target range that we know less about. We're acting on their intelligence] value when we're less certain.*"

132. Our sources told us that some of the targets in this "lower" HVD category had in fact been identified, and sometimes even apprehended, by a foreign intelligence service before they were made available to the CIA. Upon our strict assurance of anonymity, one CIA case officer was willing to describe limited details of a scenario in which a detainee had been "*offered to us by our liaisons*" and was later transferred to Romania. The detainee was of Afghan nationality.

133. Examples of the profile of those held in Romania were provided to us by two separate American sources. We understand that the profile fits categories such as:

- associates and suspected operatives of key Taliban leaders like Mullah Omar;
- foreign fighters suspected of having performed roles for the Taliban in Afghanistan, including provision of logistics;
- leaders of branches of suspected "support networks" for the insurgencies in Iraq and Afghanistan; or
- suspected leaders of terrorist factions in the Middle East.

statements from the witness." For the full testimony, and other materials related to the Moussaoui trial, see Reporters Committee for Freedom of the Press, "Moussaoui Trial exhibits and documents," available at http://www.rcfp.org/moussaoui/.

[48] For detailed discussion of the Agreement between Romania and the United States of December, dated 5 December 2005, refer to section II.iii.b entitled "Application of the NATO framework in Romania."

134. The majority of the detainees brought to Romania were, according to our sources, extracted *"out of [the] theater or country"*. This phrase is understood as a reference to detainee transfers originating from Afghanistan and, later, Iraq.

135. More specifically, the description of an "out-of-theater" detention facility presents the mirror image of the kinds of prisons operated "in-theater," which are customarily referred to by United States Forces as "Theater Internment Facilities" – one notable example being the "Bagram Theater Internment Facility."[49] CIA detainees are known to have been held at facilities such as Bagram both before[50] and after[51] having been subjected to rendition, and to secret detention in other countries.

iii. Responsible political authorities and preservation of secrecy in Poland and Romania

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136. To reveal the means by which bilateral arrangements were put in place for CIA detentions in Poland and Romania, we must trace a trajectory of deepening co-operation with the United States that spans over several years. During the immediate post-9/11 period, when America was identifying its key strategic partnerships for the "war on terror," both Poland and Romania were in the midst of their own processes of "strategic realignment", eager to secure their positions as indispensable members of the NATO Alliance and friends of the United States.

137. In the course of a lengthy discussion with us about the CIA's choice of partner countries in Eastern Europe, one high-ranking Eastern European politician involved in the programme said to us:

> *"Poland and Romania; you don't know why? [it is] because we are the only two countries who are truly pro-Western. But now we are in danger of being seen as an experiment. It is most unfortunate."*

138. When America began developing its strategy for the "war on terror" under the NATO framework, Poland was already a member of the NATO Alliance, while Romania was a NATO "aspirant", or accession candidate. This difference in status proved to be of little consequence, however, as both countries followed remarkably similar paths in terms of harmonising their laws and structures with the NATO framework. The role of the United States was crucial to the reform processes in both countries, particularly in terms of the intelligence services and oversight structures that monitor them.

a. Application of the NATO framework in Poland

139. Poland became a member of NATO on 12 March 1999 and the multilateral NATO SOFA agreement entered into force in Poland in 2000.[52] In the five years directly preceding its NATO accession, Poland had signed several noteworthy agreements with the United States[53] in the realms

[49] For example, official documents refer extensively to the "Bagram Theater Internment Facility" (or "BTIF") as the name given to the detention facility operated by the US Department of Defense at the Bagram Airbase in Afghanistan. See, *inter alia*, Declaration of Colonel Rose M. Miller, Commander of Detention Operations, CJTF-76, in *Rasoulah et al v. Rumsfeld*, before the US District Court for the District of Columbia, 19.11.2005; at § 3.

[50] I have information in my possession relating to at least three different detainees who were held at Bagram before being transferred out to secret detention in another country. I have undertaken to treat this information in confidence, so I shall not refer here to names or precise periods in which they were detained.

[51] I reported last year on the case of Binyam Mohamed al-Habashi, an Ethiopian citizen and former UK resident, who was detained at Bagram between May and September 2004 after having been held in CIA custody in Pakistan, Morocco and the 'Dark Prison' in Kabul, and subjected to two separate renditions. See the Marty Report 2006, *supra* note 6, at section 3.9, pp. 42 to 45.

[52] See Stefan Meller, Minister of Foreign Affairs of the Republic of Poland, Response of the Republic of Poland to Questions addressed by the Secretary-General of the Council of Europe with regard to Article 52 ECHR, dated 17.02.2006 (hereinafter 'Response of Poland to CoE Secretary General under Article 52 ECHR'), available at http://www.coe.int/T/E/Com/Files/Events/2006-cia/Poland.pdf, at p. 6. The Polish authorities pointed out that: "The [NATO SOFA] Agreement, however, does not confer jurisdictional immunity on members of foreign armed forces, but elaborates the rules of determining jurisdiction with regard to prohibited acts on the territory of the host State. In particular, the Agreement grants the sending State the primary right to exercise jurisdiction over a member of its forces or of their civilian component in relation to offences arising out of any act or omission done in the performance of official duty [SOFA, Article 7(2),(iii)]. It should also be underlined that in the light of the NATO SOFA, all members of the armed forces of a foreign State staying on the territory of the Republic of Poland are obliged to respect Polish law."

[53] For a full record of (unclassified) bilateral treaties between the United States and Poland, see US Department of State, *Treaties in Force – A list of Treaties and other International Agreements of the United States in Force on January 1, 2006*, "Poland", at pp. 263-266.

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of defence,[94] aviation,[95] extradition[96] and judicial assistance,[97] which paved the way for a very close co-operation both within and outside the NATO Alliance.

140. Poland told the Council of Europe that, in addition to its obligations under multilateral treaties, it has concluded an unspecified number of "agreements governing special forms of co-operation."[98] Whilst we do not know the precise scope of these agreements, the one example given by the Polish authorities – that of "trans-frontier surveillance" – confirms that in at least some of their thematic coverage they pertain directly to the work of the intelligence services. We have been unable to obtain copies of Poland's "bilaterals" with the United States, which it is safe to assume fall under this bracket, because they are classified.

141. Poland's Classified Information Act, which entered into force in March 1999,[99] is part of a fairly typical apparatus among new NATO members[100] for dealing with sensitive information in accordance with the NATO Security Policy. For example, the Act's restrictive procedures for granting or denying "security clearance"[101] to individuals wishing to access classified information were challenged as unconstitutional by the Polish ombudsman.[102] However these provisions were compulsory for NATO membership and – of no small coincidence – would transpire to be vital to the preservation of secrecy around the operations of the CIA's HVD programme in Poland.

b. Application of the NATO framework in Romania

142. In the case of Romania, the processes of acceding to NATO and developing a bilateral framework with the United States, under which the CIA could operate on Romanian territory, proceeded almost simultaneously.

143. According to our sources, the statement of President Ion Iliescu[103] in response to the attacks of 11 September 2001 was Romania's "critical turning point." In that statement, President Iliescu signalled Romania's intention "to act as a *de facto* member of the NATO alliance," setting a clear tone at a time when fellow former Eastern-bloc countries were likewise scrambling to demonstrate their loyalty to the United States.

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[94] See, for example, *Acquisition and Cross-Servicing Agreement*, with annexes, signed at Warsaw, 22.11.1996; entered into force 22.11.1996, TIAS.
[95] See, for example, *Memorandum of Agreement concerning Assistance in developing and modernising Poland's Civil Aviation Structure*, signed at Washington and Warsaw, 5 and 14.01.1998; entered into force 14.01.1998, TIAS.
[96] See *Extradition Treaty between the United States and the Republic of Poland*, signed at Washington, 10.07.1996, entered into force 17.09.1999, TIAS.
[97] See *Treaty on Judicial Assistance with Criminal Matters*, with forms. Done at Washington, 10.07.1996; entered into force 17.09.1999, TIAS.
[98] See Response of Poland to CoE Secretary General under Article 52 ECHR, *supra* note 94, at p. 3.
[99] See *Classified Information Act*, Polish Journal of Laws, No. 11, item 95; copy available from the Helsinki Foundation for Human Rights and the Helsinki Committee for Human Rights in Poland.
[100] On this point, see Alasdair Roberts, "NATO, Secrecy and the Right to Information", *supra* note 56.
[101] For commentary on the security clearance procedures by a local journalist, see Paweł Wronski, "Przeswiet sie i dowiedz sie. Z tajemnicami do NATO" (Submitting to clearance and getting to know. Our secrets and NATO), in *Gazeta Wyborcza*, No. 7, 8-10.01.1999.
[102] See International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region: Report 2000 (Events of 1999)*, "Annual Report on Poland", available at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=1784, at p. 256.
[103] See Xinhua News Agency, "Romanian President Firmly Condems Terrorism", Bucharest, Romania, 11.09.2001; excerpt available as part of a compilation entitled "NATO Aspirant Countries condemn the terrorist attacks on the USA", at http://stolanov.president.bol.bg/nato_summit/en/condemnation.html. Just over a year later, in a statement during President Bush's visit to Bucharest on 23.11.2002, President Iliescu declared that the United States and Romania had "identical positions on the way to address the great challenges that the international community is facing, including the threat of terrorism."

144. Indeed, Romania could be said to have outdone even many NATO members in the immediacy of its demonstrations of support for the "war on terror." In its session of 19 September 2001, the Romanian Parliament gave its "formal approval" to President Iliescu's stated position and "approved basing and overflight permission for all US and coalition partners"[104] – thus pre-empting the North Atlantic Council's multilateral authorisations of 4 October 2001 by more than two weeks. A source involved in drafting this permission confirmed to us that its scope was deliberately designed to cover aircraft operated by or on behalf of the CIA.

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145. Furthermore the most important domestic implication of the Romanian Parliament's approval for President Iliescu's pro-American stance was that, in the process, it effectively mandated the President, working through his Office of National Security, to sign NATO-type agreements and bilateral operational orders with the United States.

146. In exercise of this mandate, President Iliescu negotiated and signed what the Romanian authorities describe as a "SOFA Supplemental"[105] – the *Agreement between Romania and the United States of America regarding the Status of US Forces in Romania*[106] - on 30 October 2001. Along with the multilateral NATO SOFA, this agreement is said by the Romanian authorities *generally* to "settle the jurisdiction, the legal responsibilities and other aspects regarding the status of one party's armed forces personnel... and of contractors of those armed forces when acting on the other party's territory".[107] In reality, however, they are *specifically* one-way arrangements, legislating for an increased size and scope of US activity on Romanian soil.

147. When examined with hindsight, the 2001 agreement reveals a permissive attitude on the part of the Romanian authorities, broadly towards US military and quasi-military operations on Romanian territory, and in particular towards the actions of American service personnel. The "SOFA Supplemental" created a "special regime of access on national territory",[108] which it extended not only to "members of the military forces"[109] in a conventional sense, but also to "members of the civilian airline companies"[110] and anyone else who is "declared by the American authorities to be part of the US armed forces, and can present a travel order issued by the US military". The breadth of this designation used here represented the perfect opening for the CIA to conduct its clandestine operations in the country.[111]

[104] See US Department of Defence, Fact Sheet of 7.06.2002, "International Contributions to the War against Terrorism", available at http://www.defenselink.mil/news/Jun2002/d20020607contributions.pdf.
[105] "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20.01.2006; at p. 1. This agreement is said to be supplementary to the NATO SOFA of 1951, of which Romania only became a party when it joined NATO on 29.03.2004. It should be noted that in 2001, when Romania was not a party to the 1951 Agreement, it at the time relied upon its signature of the PfP SOFA of 1995 as the basis for its supplemental. See the section III. earlier in this report on the the wider NATO system and the 'war on terror', and the accompanying references, *supra* notes 42.
[106] See the *Agreement between Romania and the United States of America regarding the Status of US Forces in Romania*, signed at Washington, DC on 30.10.2001; entered into force on 10.06.2002, TIAS (hereinafter referred to as "Romanian SOFA Supplemental"). For a full record of (unclassified) bilateral treaties between the United States and Romania, see US Department of State, *Treaties in Force – A list of Treaties and other International Agreements of the United States in Force on January 1, 2006*, "Romania", at pp. 270 to 272.
[107] "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20.01.2006; at p. 1.
[108] This phrase is understood to describe the permission given to "enter, exit and move freely within the territory", with a US military travel order sufficing as identification.
[109] See Romanian SOFA Supplemental, 30.10.2001, *supra* note 106, at Article II(2).
[110] It is unclear whether this reference to "the civilian airline companies" indicates that there is a specific numbered or named list of US-registered companies whose members fall under the "special regime of access" referred to. However, in a comparable scenario, it has in the past been disclosed in documents released by the US Department of Defence under a Freedom of Information Act request that specific US aviation companies (including several of those known to be involved in detainee transfer operations) have been awarded "classified contracts" by certain units of the US armed forces. See Seth Hettena, The Associated Press, "Navy contracted planes used in CIA missions", 24.09.2006, available at http://www.washpost.com/news/washington/2005-09-24-navy-cia_x.htm
[111] In addition, it is known that the meanings of important "cover" designations often used by the CIA are set forth in the 2001 SOFA Supplemental. These include the terms "civilian component", "dependent" and "United States contractor" – all of which categories were also granted the same permissions and protections as conventional military officers. Unfortunately, I have not as yet been able to obtain the sections of the agreement in which the meanings of those terms are defined.

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148. It is my conclusion that under the October 2001 bilateral agreement, along with any additional classified annexes agreed at that time or subsequently, personnel brought into the country under the banner of the United States military have in practice operated on Romanian territory with complete freedom from scrutiny or interference by their national counterparts ever since.

149. In this context it is important to consider a more recent "access agreement" between Romania and the United States, signed on 6 December 2005, which deals primarily with the activities of US forces based at a selected number of Romanian military facilities.[112]

150. Under this new agreement, US forces – including their "civilian component" – enjoy extraordinarily free use of certain Romanian airbases and other facilities for "training, transit... refuelling of aircraft, accommodation of personnel, communications, staging and deploying of troops and material ... and for other such purposes as the Parties or their Designated Authorities may agree."[113]

151. In terms of permissions, all US Government aircraft and vehicles are "free from inspection." In addition, an apparently blanket authorisation to "over-fly, conduct aerial refuelling, land and takeoff in the territory of Romania" is granted to both US Government aircraft and "civil aircraft ... operating exclusively under contract to the United States Department of Defense."[114] Indeed, an equally permissive approach is applied to almost every aspect of the agreement, from the "construction activities" undertaken by US forces[115] to the apparently unquestioning acceptance as "valid" of "all professional licences."[116]

152. In terms of protections, Romania's key obligations seem to be to give "due regard to United States' operational and security concerns,"[117] and to "take all reasonable measures within its power to ensure the protection, safety and security of United States forces property."[118]

153. I have viewed the Romanian Access Agreement in sharpest focus, however, when I consider it in the light of testimony received from Romanian and American officials about the bilateral "operating agreements" that prevailed previously. Sources on both sides confirmed to me that the provisions of the December 2005 Access Agreement are best understood as arrangements that have prevailed for several years but have only latterly been formalised.

154. This incremental method of formalising such "bilaterals" has in fact been used by the US in other countries in which its forces have been undertaking important detention operations in the context of the "war on terror." The most conspicuous example is Afghanistan, where last year's Accommodation and Consignment Agreement for Lands and Facilities at Bagram Airfield[119] (signed on 28 September 2006) represents the furthest extension of the US model of permissions and protections that I have yet to encounter.[120] It was described in testimony before a US court as being an agreement

[112] See *Agreement between the United States of America and Romania regarding the activities of United States Forces located on the territory of Romania*, done at Bucharest, 6.12.2005; (hereinafter "Romanian Access Agreement"); copy on file, submitted officially to the Rapporteur in May 2006 after its adoption by the Romanian Parliament. It is worth pointing out that the references to "implementing Arrangements" in this text afford the Parties a considerable degree of latitude as to how they put the agreement into practice: "The technical details regarding the agreed facilities and areas shall be in accordance with Implementing Arrangements to be concluded for each facility and area" [at Article II(1)]; and "As appropriate, the Parties or their Designated Authorities may enter into Implementing Arrangements to carry out the provisions of this Agreement" [at Article XI].

[113] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article II(1). It is relevant to note that the "Designated Authorities" in question are the Ministry of National Defence of Romania and the Department of Defense of the United States of America, respectively.

[114] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article VII. In the final clause, the fact that the exempted civil aircraft have to be under exclusive contract to the Department of Defense (rather than the US Government more generally) is a clear indication of the military nature of the arrangements.

[115] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article II(4).

[116] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article IX.

[117] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article II(3).

[118] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article VI(1).

[119] See the *Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield between the Islamic Republic of Afghanistan (represented by HE General Abdul Rahim Wardak, Minister of Defense) and the United States of America*, made and entered into by the Host Nation and the Lessee on 28.09.2006 (hereinafter referred to as the "Bagram Agreement"); copy on file with the Rapporteur.

[120] See, for example, the Bagram Agreement, 28.09.2006, *Ibidem*, at § 9: "The Host Nation [Afghanistan] covenants and warrants that the United States shall have exclusive, peaceable, undisturbed and uninterrupted possession of the Premises during the existence of this agreement. The United States shall hold and enjoy the Premises during the period of the agreement without any interruption whatsoever by the Host Nation or its agents." As is clearly stated in § 13, the Bagram Agreement of 2006 "supersedes all previous agreements between the United States and Host Nation for the use of Bagram Airfield" – implicitly meaning that any formal or informal arrangements that had prevailed prior to September 2006 had finally been brought into one coherent written text. A similar situation can surely be said to apply in Romania with the signature of the Access Agreement of December 2005.

that "follows similar such arrangements dating back to at least 2003".[121] Indeed, I am aware of an earlier document referred to as "Note No. 202",[122] which indicates that the initial bilateral arrangements in Afghanistan – in strikingly similar terms to the situation in Romania – were agreed upon essentially by members of the executive[123] without reference to parliamentary oversight mechanisms.

155. The Romanian authorities have indicated to us on two occasions that the NATO framework described here has been the basis for the operations of the CIA in Romania. The first reference came in response to my question about whether the Government is "systematically informed of the activities of foreign secret services (in particular the CIA) on national territory."[124] Romania replied[125] by citing the NATO framework's *Agreement on Classified Information* and a bilateral *military* instrument, the *Agreement on the Protection of Military Classified Information*,[126] thus making clear that CIA activities now fall unambiguously under the secrecy regime instituted under the NATO Security Policy. As in several other Eastern European countries who adopted more stringent secrecy policies as part of their NATO accession, Romania's legislation on classified information was expedited through Parliament[127] and criticised by civil society for being unbalanced.[128]

156. The second reference was part of an apparent acceptance, in principle, that United States agencies and personnel have carried out detainee transfer operations in Romania in the context of the NATO framework. The following statement was delivered by the Chairperson of the Romanian Delegation to PACE, Mr Gyorgy Frunda, during the PACE Plenary Debate on my report in June 2006:

> *"Concerning the transfer of prisoners, from the first moment we said that Romania collaborated with the United States and with other members of NATO. Aircraft landed in Romania and transported persons. We did not and do not know who the persons are because, do not forget, the aircraft are under the authority of the countries where they are registered. The countries in which the airports are located do not have legal instruments to see what happens on board. That is why United States authorities have to answer not only political but juridical questions about whether persons were harassed or wrongly treated on the airplanes."*[129]

[121] See Declaration of Colonel Rose M. Miller, Commander of Detention Operations, CJTF-76, in *Rasmkhah et al v. Rumsfeld*, before the US District Court for the District of Columbia, 19.11.2006; at § 5. Also note Colonel Miller's statements that "each nation separately controls access to its respective compound on the Airfield" and that "the US does not have complete, plenary jurisdiction".

[122] Note No. 202, dated 28.09.2002, is reproduced in a translated document obtained by Amnesty International, which transmits the concurrence of the Afghanistan Ministry of Foreign Affairs with this note to the US Embassy in Kabul; see Document No. 93 of the Ministry of Foreign Affairs (America and Canada Political Affairs Division), dated 25.05.2003.

[123] Note No. 202 was signed by the Minister of Foreign Affairs of the Transitional Islamic State of Afghanistan, Doctor Abdullah, on behalf of the transitional government. No reference is made to any pursuant procedure for approval of this document, nor am I aware of one having taken place. Furthermore, in the final paragraph, "the parties waive any and all claims against each other for damage to or loss or destruction of property owned by either party, or death or injury to any military or civilian personnel of the armed forces of either party, as a result of activities in Afghanistan under this agreement."

[124] See my letter of 19.12.2005 to Chairpersons of National Delegations to PACE, which contained "Questions which members of the Parliamentary Assembly might put to their respective governments in their national parliaments," reproduced as Appendix II to *Information Memorandum II*, 22.01.2006.

[125] "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20.01.2006; at p. 1.

[126] See the *Agreement between Romania and the United States of America on the Protection of Military Classified Information*, done in Washington, 21.06.1995, entered into force 2003; cited *Ibidem*.

[127] Alasdair Roberts cites a revealing news report about the passage of the Romanian legislation in April 2002: "[On 3 April] a certain Colonel Constantin Raicu [of the Romanian Intelligence Service], who is in charge of the protection of state secrets, came down like a storm on the members of the Senate Juridical Commission, telling them: 'This morning we have received signals from [NATO in] Brussels indicating that if the bill on classified information is not passed before 18 April, they cannot exclude adopting a critical attitude regarding Romania. We agree with any form – the colonel added – but please, pass it as soon as possible, or we will be facing huge problems.' The Senators... grasped the situation very quickly, and they approved the draft bill in the form passed by the Chamber of Deputies." See *Bucharest Zile*, "NATO used as a Scarecrow to pass Law on Secrets," 08.04.2002, www.ziua.ro, cited in Alasdair Roberts, "NATO, Secrecy and the Right to Information", *supra* note 56, at p. 87.

[128] See International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region: Report 2002 (Events of 2001)*, "Annual Report on Romania", available at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=1782, at p. 257.

[129] Contribution of Mr Gyorgy Frunda, Chairperson of the Delegation of Romania to PACE, at the 17th Sitting of the Plenary of the Parliamentary Assembly during its 2006 Session, Strasbourg, 27.06.2006.

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157. Our continuing investigations since June 2006 have allowed us to put this statement into context. Romania is right to state that the NATO framework on the multilateral level did enable detainee transfers through many Council of Europe member states, including larger nations like Germany mentioned in my report last year. Romania, like Poland, went beyond the multilateral framework, however, when it expanded the scope and purpose of the authorisations it granted the United States. According to one of our sources involved in making the key bilateral arrangements, Romania "knew what the United States needed from its allies and in what areas we could assist them." It was therefore perceived to be in the national interest to extend a further level of support: "[having] worked on the secret flights... we worked directly with associates of the CIA on establishing prisons here."

c. Preserving secrecy through military intelligence partnerships

158. In the course of our discussions with intelligence officials in the United States, a senior member of the CIA Counterterrorist Center made the following remarks to our team:

> "Many European countries have multiple security services. And in most countries the Agency deals with all of them: with the police, with the anti-terrorism police, with foreign intelligence, with other units – and of course with military intelligence ... But for the HVD programme we worked strictly in line with 'need-to-know'."

159. There are two essential items of information in this statement, both of which have ultimately proved indispensable to our understanding of how the HVD programme worked in Europe. One item – military intelligence partnerships – goes to the heart of how the CIA formed its relationships; the other – preservation of secrecy – reveals important structural considerations. I shall deal with the structural considerations first.

d. Preserving secrecy and NATO Security Policy

160. Our source's use of the expression "need-to-know" encapsulates one of the means used to keep the HVD programme in Europe secret.[130] Through discussion with several other sources we have established that classified information about the bilateral arrangements between the CIA and its partner services in Poland and Romania **was treated according to a strict security of information regime drawn from the terms of NATO's Security Policy.**

161. Under the terms of the NATO Security Policy,[131] "individuals in NATO nations ... shall only have access to NATO classified information for which they have a need-to-know. No individual is entitled solely by virtue of rank or appointment or PSC [Personnel Security Clearance] to have access to NATO classified information."[132] In the context of the HVD programme, according to a senior CIA official, the CIA classified its operational information into "tiny little pieces," each of which would be assessed separately under the "need-to-know" principle in order to prevent any single foreign official from seeing the "bigger picture" of what was actually happening:

> "The Agency could be bringing UBL [Usama bin Laden] himself from an airplane into a prison in your country, but on every tiny little piece of the classified operational information, if we figure you don't need to know that information then frankly, as an individual, you will never know it."

[130] We initially probed into the means used to keep the HVD programme secret because of a tip-off from an insider source. The source had indicated that the NATO framework "holds the key" to understanding the European dimension of the programme, in terms of both "physical security and security of information."

[131] See NATO, Security within the North Atlantic Treaty Organisation, 17.06.2002, *supra* note 73. The policy is designed to ensure that a "common degree of protection" is applied both to NATO's own information and to information exchanged among NATO members on a bilateral level. Both categories of information are referred to as "NATO classified information" in the context of this policy.

[132] *Ibidem*, in Enclosure "C" – Personnel Security, at the section entitled "Application of the 'Need-to-Know' Principle," p. 2, § 6. In a handbook accompanying an earlier version of the policy, this "fundamental principle" was reiterated to mean that information should be limited in its distribution for *work purposes only*, and not "merely because a person occupies a particular position, however senior." See NATO Security Committee, *A Short Guide to the Handling of Classified Information*, Document AC/35-WP/14.4, Brussels, 22.09.1958

162. The body that generates any piece of classified information retains what is known as "originator control,"[133] an undisputed right to set parameters as to which individuals receive the information, how they are briefed, what they are allowed to do with the information, and whether the information will ever be declassified, or have its classification reduced.[134] It is generally accepted that "the principle of originator control trumps the need-to-know principle;"[135] otherwise put, based on this principle, the CIA was able to exclude from the information loop even those individuals (specifically, some politicians) whom it might have perceived to have a genuine need to know the "bigger picture."

163. Finally, the CIA's choice of its "point men" in Poland and Romania – key individuals in each country who vouched for absolute, unwavering adherence to the rules by their own national services – reflected the same considerations of "loyalty, trustworthiness and reliability"[136] integral to NATO rules on personnel security. When discussing the kinds of people as their liaisons, our CIA sources referred to relationships of "trust developed over decades" and interpretations of national security issues that were "99% in harmony with one another".

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164. By preserving the secrecy of the covert HVD programme on a NATO-compliant basis, the CIA achieved several of its central objectives: it hand-picked the services and the "point men" it would work with in the countries in question; it limited to an absolute minimum the number of Polish and Romanian counterparts who knew about even "tiny little pieces" of these operations in their own countries; and it ruled out any distribution whatsoever of the classified information beyond these small circles, unless expressly approved by the US Government itself.

165. Yet none of these restrictive rules mitigates the fact that Poland and Romania, as host countries, were knowingly complicit in the CIA's secret detention programme. When we sought confirmation from one of our sources in the CIA that these were *bilateral* (rather than unilateral) arrangements, and that every programme was carried out with the express authorisation of the relevant partner state, we received this emphatic response:

> "One of the great enduring legacies of the Cold War, which has carried into these alliances, is that NATO countries don't run unilateral operations in other NATO countries. It's a tradition that is almost sacrosanct. We [the CIA] just don't go trampling on other people's turf, especially not in Europe."

166. Hence the importance of our source's affirmation that the CIA forms important intelligence partnerships **not just with civilian counterparts but also in the *military sphere*.** As our inquiry progressed, we realised that the CIA's fellow civilian intelligence agencies (domestic and foreign) are not necessarily the most appropriate choices as partners or liaisons on highly secretive operations due to their encumbered civilian oversight mechanisms. Thus, an integral part of our investigative strategy, building on our knowledge of the NATO framework, was to apply equal scrutiny to the **CIA's partnerships with Military Intelligence services.**

[133] *Ibidem*, in Enclosure "B" – Basic Principles and Minimum Standards of Security, at the section entitled "Basic Principles," p. 3, § 9(g).

[134] *Ibidem*. See, *inter alia*, Enclosure "B" – Basic Principles and Minimum Standards of Security, at the section entitled "Basic Principles," p. 2, § 9(b): "classified information shall be disseminated solely on the basis of the principle of need-to-know to individuals who have been briefed on the relevant security procedures... only security cleared individuals shall have access."

[135] See Alasdair Roberts, "NATO, Secrecy and the Right to Information", *supra* note 56, at p. 69.

[136] *Ibidem*, in Enclosure "B" – Basic Principles and Minimum Standards of Security, at the section entitled "Personnel Security," p. 4, § 11; see also the supporting provisions in Enclosure "C" – Personnel Security, pp. 1-4. In the previous version of the NATO policy, C-M(55)15(Final) as released in 1964, anyone receiving a security clearance was assessed to have shown "unquestioned loyalty [and] such character, habits, associates and discretion as to cast no doubt upon their trustworthiness."

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III. Secret detention operations in Poland

i. Partnering with military intelligence in Poland

167. Since the May 2002 "quasi-reform"[137] of its secret services, Poland has had two civilian intelligence agencies: the Internal Security Agency (*Agencja Bezpieczeństwa Wewnętrznego, or ABW*); and the Foreign Intelligence Agency (*Agencja Wywiadu, or AW*). Neither of these services was considered a viable choice as a CIA partner for the sensitive operations of the HVD programme in Poland, precisely because they are "subject to civil supervision, both by Parliament and Government."[138] Since their creation, the Heads of both the *ABW* and the *AW* have been appointed and tasked by the Prime Minister, and are directly accountable to the Council of Ministers, initially through a Cabinet Committee chaired by the PM (*Kolegium do Spraw Służb Specjalnych*) and latterly through the position of Minister-Coordinator for the Special Services.[139] The *ABW* and the *AW* are both also answerable to the Commission for Special Services in the Polish Parliament (*Sejmowa Komisja do Spraw Służb Specjalnych*).

168. According to our sources, the CIA determined that the bilateral arrangements for operation of its HVD programme had to remain absolutely outside of the mechanisms of civilian oversight. For this reason the CIA's chosen partner intelligence agency in Poland was the Military Information Services (*Wojskowe Służby Informacyjne, or WSI*), whose officials are part of the Polish Armed Forces and enjoy "military status" in defence agreements under the NATO framework. The *WSI* was able to maintain far higher levels of secrecy than the two civilian agencies due to its recurring ability to emerge "virtually unscathed"[140] from post-Communism reform processes designed at achieving democratic oversight.

169. The *WSI* was formally accountable to the Minister of Defence, but our sources describe it as having operated more as a kind of "cartel" serving the self-interests of particular elite groups. I find it especially interesting that Polish we spoke to regard the processes of military intelligence reform[141] as smokescreens aimed at *obstructing* transparency and *preserving* corrupt access to state resources.[142] There is no doubt that the *WSI* is an agency quite accustomed to covert action that challenges the boundaries of legality and morality.

[137] See Andrzej Zybertowicz, 'An Unresolved Game – The role of the Intelligence Services in the nascent Polish Democracy', conference paper published jointly by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), the Norwegian Parliamentary Intelligence Oversight Committee, and the Human Rights Centre at the Department of Law, Durham University, Oslo, September 2003, copy on file with the Rapporteur (hereinafter "Zybertowicz, The Role of the Polish Intelligence Services"), at p. 2: "when the Polish Parliament passed the new law on secret services... instead of explanation of [the] many scandals and taking legal measures towards those responsible, instead of accountability, the public opinion has been offered a quasi-reform of the services. It deserves this label because, among other things, it did not meet [the] objects of its own designers."

[138] See Response of Poland to CoE Secretary General under Article 52 ECHR, *supra* note 94, at p. 2. The phrase is used in this context to describe the system of oversight for the AW: "Parliament [the *Sejm*] exercising its prerogatives through the Commission for Special Services, also controls the Polish Foreign Intelligence Agency in matters relating to its co-operation with partner secret services of other States."

[139] The position of Minister-Coordinator for the Special Services was created in November 2005 and is presently filled by Minister Zbigniew Wassermann.

[140] See Zybertowicz, The Role of the Polish Intelligence Services, *supra* note 139, at pages 3 and 6-7.

[141] Reform of the military intelligence services in Poland has been a contentious issue since the early 1990s, and a topical one throughout my mandate as Rapporteur. Prior attempts at regulating the *WSI* appear to have been half-hearted, at best. From its creation in August 1991 to December 1995 it operated exclusively under secret military orders; then until July 2003 it came under the nominal control of the Ministry of Defence, but without close legal oversight. Even the Law on the Military Secret Services passed by Parliament on 9.07.2003 contained no external verification procedures. Since late 2005, at the instruction of Prime Minister Jarosław Kaczyński, the *WSI* has been gradually dissolved and replaced by a restructured military counter-intelligence unit. Deputy defence minister Antoni Macierewicz, who heads the new unit, published a report on the dissolution in February 2007, but the process appears to have done little to assuage public scepticism or criticism. For analysis of the report and reactions to it, see *inter alia* Joanna Najfeld, "Polish Military Intelligence Involved in Illegal Activities," Network Europe, 23.02.2007, available at http://networkeurope.rapho.cz/feature/polish-military-intelligence-involved-in-illegal-activities.

[142] See also Zybertowicz, The Role of the Polish Intelligence Services, *supra* note 139, at pages 6-7. The author lists what he sees as the objects of "self-reform" in the *WSI*, including "to prevent outsiders – including democratically established control and oversight bodies – from obtaining thorough access to the Services", "to present the *WSI* as a useful ally to the NATO authorities", and to retain an "upper hand in economic institutional rearrangements, including key financial flows and major privatisation schemes."

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170. From our interviews with current and former Polish military intelligence officials, we have established that the *WSI*'s role in the HVD programme comprised two levels of co-operation. On the first level, military intelligence officers provided extraordinary levels of physical security by setting up temporary or permanent military-style "buffer zones" around the CIA's detainee transfer and interrogation activities. This approach was deployed most notably to protect the CIA's movements to and from, as well as its activities within, the military training base at Stare Kiejkuty. Classified documents, the existence of which was made known to our team, describe how *WSI* agents performed these security roles under the guise of a Polish Army Unit (*Jednostka Wojskowa*) denoted by the code *JW-2669*, which was the formal occupant of the Stare Kiejkuty facility.[143]

171. On the second level, the *WSI*'s assistance depended to a large extent on its covert penetration of other state and parastatal institutions through its collaboration with undercover "functionaries" in their ranks. Our sources have indicated to us that *WSI* collaborators were present within institutions including: the Polish Air Navigation Services Agency (*Polska Agencja Żeglugi Powietrznej*), where they assisted in disguising the existence and exact movements of incoming CIA flights;[144] the Polish Border Guard (*Straży Granicznej*), where they ensured that normal procedures for incoming foreign passengers were not strictly applied when those CIA flights landed; and the national Customs Office (*Główny Urząd Celny*), where they resolved irregularities in the non-payment of fees related to CIA operations. Thus the military intelligence partnership brought with it influence throughout a society-wide "undercover community,"[145] none of which was checked by the conventional civilian oversight mechanisms.

172. When asked to give an example of a *WSI* collaborator who occupied an important position in the operation of the CIA's covert programme, several Polish sources named Mr Jerzy Kos, former Chairman of the Board of Mazury-Szczytno Airport Company (*Porty Lotnicze "Mazury Szczytno"*) and Director of Szymany Airport throughout 2003 and 2004.[146] A source in Polish military intelligence said: "anyone who has contact with the Americans is our man. The Director [Kos] is our man". Another senior Polish official familiar with the arrangements explained to us:

> "Polish military intelligence operatives were appointed to these positions. We said to place them anywhere with importance to the way this programme is run. This is how you come to know Mr Kos as the Director at Szymany Airport."

173. Mr Jerzy Kos went on to become a director of the Polish private construction company "*Jedynka Wrocławska SA*" and was taken hostage in Iraq in June 2004 whilst pursuing company projects there. When Mr Kos was brought to safety shortly afterwards in a rare raid by US Special Forces,[147] media outlets reported that the rescue operation attested to Mr Kos' links to the intelligence services.[148] Indeed, my inquiry has been informed that Mr Kos' "connections with [the] Polish secret service" in his business affairs have been "confirmed quite unambiguously"[149] during judicial

[143] One of the few means of verifying – through independent public sources – the fact that *JW-2669* was stationed at Stare Kiejkuty during this period is through photogrammetric studies of activity on internet servers by users with particular "net-names". In outputs from such studies, *inter alia* of 23.10.2003, the "net-name" *JW-2669* is registered as being assigned to "Jednostka Wojskowa 2669, Stare Kiejkuty".

[144] For more information on the means used to cover up CIA flights into Poland, see section III.ii below, entitled "The anatomy of CIA secret transfers and detentions in Poland."

[145] As in many former communist countries, the secret services in Poland are accustomed to using networks of operatives and informants that span many of the most important institutions of the state, as well as the private sector. These networks comprise what is known as the "undercover community." For a description of this "crucial notion" in Poland, which the author refers to as "the security complex," see Zybertowicz, The Role of the Polish Intelligence Services, *supra* note 139, at pages 4-5.

[146] Between 2002 and 2004, the commercial company headed by Mr Kos shared responsibility for operating Szymany Airport with a military unit stationed on site. The airport had a mixed "civil-military" character, whereby aircraft registered as undertaking "military flights" were dealt with under special procedures.

[147] See, for example., Fox News, "Polish Iraq Hostage Praises US Rescuers", Warsaw, 10.06.2004; available at http://www.foxnews.com/story/0,2933,122359,00.html.

[148] The Italian press, for example, reported that Mr Kos was the "007 of Warsaw" and bore a "subcutaneous microchip" that allowed rescuers to trace the location at which he and his fellow hostages were being held: see *La Repubblica*, "Ostaggi liberati grazie a un microchip sottopelle", 16.06.2004, available at http://www.repubblica.it/2004/f/esteri/politica/rapiditerzi2/chipindiesta/chipindiesta.html. On 15.06.2004 AP quoted Mr Kos himself as having said: "They [the kidnappers] thought I am an American co-operating with the CIA and I tried to explain that I am a Pole, that I was there to build houses."

[149] Letter to my inquiry from Justice Jarosław Horoblowski, Judge in the District Court for Wrocław-Fabryczna (Bankruptcy and Pre-Insolvency Proceedings), dated 7.11.2006, copy on file with the Rapporteur. Mr Kos' business affairs given as examples by Justice Horoblowski in this regard are "his role [with] Jedynka Wrocławska in Iraq, his mysterious kidnapping, then [the] strange circumstances of his rescuing, and his being director of the (former military) airport in Szymany." Justice Horoblowski also states that the revelations about secret service connections were made by some former directors of the company.

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proceedings[150] relating to the subsequent bankruptcy of *Jedynka Wroclawska*. As a military intelligence operative facilitating the uniquely sensitive covert actions of the CIA in Poland, Mr Kos was one link in a chain of operations that led right to the top of Polish Government.

ii. Responsible political authorities in Poland

174. During several months of investigations, our team has held discussions with various Polish sources, including civilian and military intelligence operatives, representatives of state or municipal authorities, and high-ranking officials who hold first-hand knowledge of the operations of the HVD programme in Poland. Based upon these discussions, which have come to the same conclusions, my inquiry allows me to state that some individual high office-holders knew about and authorised Poland's role in the CIA's operation of secret detention facilities for High-Value Detainees on Polish territory, from 2002 to 2005. The following persons could therefore be held accountable for these activities: the President of the Republic of Poland, Aleksander KWASNIEWSKI, the Chief of the National Security Bureau (also Secretary of National Security Committee), Marek SIWIEC, the Minister of National Defence (Ministerial oversight of Military Intelligence), Jerzy SZMAJDZINSKI, and the Head of Military Intelligence, Marek DUKACZEWSKI.

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175. In my analysis the hierarchy for control of the Polish Military Information Services, or *WSI*, was chronically lacking in formal oversight and independent monitoring. As a result the structure described here from 2002 to 2005 depended to a great extent on close relationships of trust and professional familiarity, both among the Polish principals and between the Poles and their American counterparts. Several of our sources characterised the bonds between these four individuals as being a combination of loyal personal allegiance ("we all serve one another") and strong common notions of national duty ("... but first we serve the Republic of Poland").

176. There was complete consensus on the part of our key senior sources that President Kwasniewski was the foremost national authority on the HVD programme. One military intelligence source told us: "Listen, Poland agreed from the top down... From the President – yes... to provide the CIA all it needed." Asked whether the Prime Minister and his Cabinet were briefed on the HVD programme, our source said: "Even the *ABW* [Internal Security Agency] and *AW* [Foreign Intelligence Agency] do not have access to all of our classified materials. Forget the Prime Minister; it operated directly under the President."

177. Our investigations have revealed that the state office from which much of the strength of this Polish accountability structure derived was the **National Security Bureau** (*Biuro Bezpieczenstwa Narodowego, or BBN*), located in the Chancellery of President Kwasniewski. Our sources confirmed to us that the bilateral operational arrangements for the HVD programme in Poland were "negotiated on the part of the President's office by the National Security Bureau [BBN]."

178. Marek Dukaczewski, an outstanding military intelligence officer ultimately promoted to the rank of General, served the BBN in the Chancellery of his close friend Aleksander Kwasniewski for the first five years of the latter's Presidency, from 1996 to 2001. Mr Dukaczewski worked directly alongside Marek Siwiec during this period, whilst Mr Siwiec was a Secretary of State in the Presidential Chancellery and then became Chief of the BBN. Jerzy Szmajdzinski was appointed Minister of National Defence for Mr Kwasniewski's second term, in October 2001. Shortly afterwards, Mr Dukaczewski was nominated Head of the Military Information Services, the *WSI*, starting in December 2001.

[150] In addition to the statements in court, trade unionists wrote an open letter stating that Mr Kos' posting to Iraq may also have entailed some intelligence functions. See letter on behalf of *Jedynka Wroclawska SA* to Wroclaw Prosecutor Leszek Karpiuk, dated 26.04.2006, copy on file with the Rapporteur.

179. Besides this accountability structure, which remained in place from the immediate aftermath of the 11 September 2001 attacks throughout Poland's involvement in the CIA's covert HVD programme, probably no other Polish official had knowledge of it. Indeed, the "highest level of classification" at national and intergovernmental levels, understood to match NATO's "Cosmic Top Secret" category,[151] still attaches to the information pertaining to operations in Poland. Our unravelling of such secrecy to expose Polish participation in unlawful detention and transfer operations is perhaps the greatest testament to the "dynamics of truth" in motion. However an alternative interpretation, which provided my inquiry with motivation in the face of systematic cover-up, came in one of our most memorable moments of testimony from a top-level Polish source. He stated simply:

> *"Listen, there are no secrets in war. There is no intelligence in war. You cannot keep something secret in a time of conflict."*

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iii. The anatomy of CIA secret transfers and detentions in Poland

180. Notwithstanding the approach of the Polish authorities towards this inquiry,[152] our team was able to uncover new documentary evidence from two separate Polish sources showing actual landings in Poland by aircraft associated with the CIA.

181. These sources corroborate one another and provide the first verifiable records of a number of landings of "rendition planes" significant enough to prove that CIA detainees were being transferred into Poland. I can now confirm that at least ten flights by at least four different aircraft serviced the CIA's secret detention programme in Poland between 2002 and 2005. At least six of them arrived directly from Kabul, Afghanistan during precisely the period in which our sources have told us that High-Value Detainees (HVDs) were being transferred to Poland. Each of these flights landed at the same airport I named in my 2006 report as a detainee drop-off point: Szymany.

182. The most significant of these flights, including the aircraft identifier number, the airport of departure (ADEP), as well as the time and date of arrival into Szymany, are the following:

i. N63MU from DUBAI, arrived in SZYMANY at 14h56 on 5 December 2002
ii. N379P from RABAT, arrived in SZYMANY at 02h23 on 8 February 2003
iii. N379P from KABUL, arrived in SZYMANY at 16h00 on 7 March 2003
iv. N379P from KABUL, arrived in SZYMANY at 16h03 on 25 March 2003
v. N379P from KABUL, arrived in SZYMANY at 01h00 on 5 June 2003
vi. N379P from KABUL, arrived in SZYMANY at 02h58 on 30 July 2003
vii. N313P from KABUL, arrived in SZYMANY at 21h00 on 22 September 2003
viii. N63MU from KABUL, arrived in SZYMANY at an unrecorded time on 28 July 2005

[151] See NATO, Security within the North Atlantic Treaty Organisation, 17.09.2002, *supra* note 73; in Enclosure "B" – Basic Principles and Minimum Standards of Security, at p. 5, § 18(e) In NATO terms, the category of security classification attached to the bilateral operations of the HVD Programme is known as "COSMIC TOP SECRET (CTS)", a category for which "unauthorised disclosure would result in exceptionally grave damage" to NATO and / or to participating member States.

[152] The approach of the Polish authorities towards my inquiry is dealt with in further detail below. The official position of the Polish Government remains unchanged since it was announced on 10 December 2005: "The Polish Government strongly denies the speculation occasionally appearing in the media as to the existence of secret prisons on the territory of the Republic of Poland, especially such as the detention-of-foreigners' suspects of terrorism. There are no such prisons in Poland and there are no prisoners detained in contravention of the laws and international conventions to which Poland is a party." Most recently it was reproduced in submissions before the United Nations Committee Against Torture (CAT) in Geneva; see *Written replies by the Government of Poland to the list of issues (CAT/C/POL/Q/4/Rev.1) to be taken up in connection with the consideration of the fourth periodic report of Poland (CAT/C/81/Add.6)*, UN Document CAT/C/POL/Q/4/Rev.1/Add.1, 30 March 2007, available at http://www.ohchr.org/english/bodies/cat/cats38.htm; response to Question 12, at page 23, § 72.

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183. My first observation regarding the dates of these flights is that several of them conform closely to the dates on which particular "High-Value Detainees" (HVDs) were transferred to CIA "black sites," particularly in outward movements from Kabul, Afghanistan. The most conspicuous example pertains to the so-called "mastermind" of the 9/11 attacks, Khalid Sheikh Mohamed (KSM), who was captured in Rawalpindi, Pakistan on 1 March 2003[153]. Our insider sources have told that KSM was transferred to a secret CIA facility "within days" of his arrest; and from analysis of materials supporting the 9/11 Commission Report[154], we know that the process of interrogating him commenced shortly afterwards[155], and continued throughout 2003. It is noteworthy that the well-known rendition plane N379P undertook a clandestine flight from Kabul to Szymany on 7 March 2003, less than one week after KSM's arrest. Whilst it is not possible at this stage to state the fact definitively, it is likely that the transfer of KSM and several other HVDs into Poland throughout 2003 took place on the flights uncovered in this report.

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184. The full extent of my proof, however, goes beyond merely the number of confirmed flights into Szymany and their concordance with suspected dates of HVD transfers. Through our careful analysis of hundreds of pages of raw aeronautical "data strings,"[156] we can now demonstrate that in the majority of cases these CIA flights were **deliberately disguised so that their actual movements** would not be tracked or recorded – either "live" or after the fact – by the supranational air safety agency Eurocontrol. The system of cover-up entailed several different steps involving both American and Polish collaborators.

185. The aviation services provider customarily used by the CIA,[157] **Jeppesen International Trip Planning**,[158] filed multiple "dummy" flight plans for many of these flights. The "dummy" plans filed by Jeppesen – specifically, for the N379P aircraft – often featured an airport of departure (ADEP) and / or an airport of destination (ADES) that the aircraft never actually intended to visit. If Poland was mentioned at all in these plans, it was usually only by mention of Warsaw as an alternate, or back-up airport, on a route involving Prague or Budapest, for example. Thus the eventual flight paths for N379P registered in Eurocontrol's records were inaccurate and often incoherent, bearing little relation to the actual routes flown and almost never mentioning the name of the Polish airport where the aircraft actually landed – Szymany.

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[153] On the capture of KSM, see *inter alia* B. Raman, "How significant is Khalid Sheikh's arrest?" on Rediff.com, 3.03.2003, available at http://in.rediff.com/news/2003/mar/03raman.htm; and BBC News Online, "Bush hails 'Al-Qaeda killer' arrest," 4.03.2003, available at http://news.bbc.co.uk/2/hi/south_asia/2817441.stm.

[154] The full report and records of the National Commission on Terrorist Attacks upon the United States (the "9/11 Commission") are available online at http://www.9-11commission.gov/. In particular, Chapters 5 and 7 of the Commission Report are said to "rely heavily on information obtained from captured Al-Qaeda members," specifically ten detainees, including Khalid Sheikh Mohamed, "whose custody has been confirmed officially by the US Government." See the inset on "Detainee Interrogation Reports," in Chapter 5, at page 148. For specific dates on which KSM and other "high-value detainees" were interrogated, see, in particular, "Notes to Chapter 5", in Notes to the 9/11 Commission Report, at pages 483 to 499.

[155] Interrogations of KSM are dated as early as 12.04.2003, just over a month after his capture, see "Notes to Chapter 5", 9/11 Commission Report, *ibidem*. Further interrogations are dated at frequent intervals throughout 2003 and 2004.

[156] "Data strings" are exchanges of messages of digital data (mostly in the form of coded text and numbers) between different entities around the world on a network known as the AFTN (Aeronautical Fixed Telecommunication Network). "Data strings" record all communications filed in relation to each particular aircraft as its flights are planned in advance, and as it flies between different international locations. The flings come from diverse entities, including aviation service providers, ANS (Air Navigation Services) authorities, airport authorities and government agencies. I have obtained complete sets of "data strings" for about twenty flight circuits, which I selectively requested from the AFTN system. The selected circuits include each of the circuits featuring undeclared flights of CIA aircraft into Szymany, as well as circuits featuring landings in Romania and a large number of rendition operations pertaining to individual detainees whose cases I dealt with in my report of 2006. Our team has conducted an in-depth analysis of all these "data strings," together with information in the Marty database and in consultation with aviation experts.

[157] Jeppesen International Trip Planning is the travel service of Jeppesen Dataplan, an aviation services provider based in San Jose, California and a subsidiary of Boeing, the world's largest aerospace company. On 30 May 2007, the ACLU announced a lawsuit against Jeppesen Dataplan for its involvement in the renditions of three individuals: Ahmed Agiza, Binyam Mohamed and El-Kassim Britel. See American Civil Liberties Union, "ACLU Sues Boeing Subsidiary for Participation in CIA Torture and Kidnapping," 30 May 2007, available at http://www.aclu.org/safefree/torture/29920prs20070530.html. For the first revelations about Jeppesen's involvement in CIA detainee transfers, including the rendition of Khaled El-Masri, see Jane Mayer, "Outsourcing: The CIA's Travel Agent", in *The New Yorker*, 30.10.2006, available at http://www.newyorker.com/archive/2006/10/30/061030fa_talk_mayer. The Managing Director of Jeppesen is quoted in the article as having said: *'We do all the extraordinary rendition flights – you know, the torture flights. Let's face it, some of these flights do end up that way.'*

[158] Communications, notably flight plans, filed by Jeppesen International Trip Planning are identified in the AFTN system by the use of the company's "originator address," which is KSFOXLDI

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186. **The Polish Air Navigation Services Agency** (*Polska Agencja Zeglugi Powietrznej*), commonly known as PANSA, also played a crucial role in this systematic cover-up. PANSA's Air Traffic Control in Warsaw[159] navigated all of these flights through Polish airspace, exercising control over the aircraft through each of its flight phases[160] right up to the last phase, when control was handed over to the authority supervising the airfield at Szymany,[161] immediately before the aircraft's landing. PANSA navigated the aircraft in the majority of these cases without a legitimate and complete flight plan having been filed for the route flown.

187. Moreover, in certain instances PANSA took on the **responsibility of filing the onward flight plan for the next leg of the circuit after Szymany**. We know that PANSA filed such flight plans in instances where Szymany had been omitted completely from the original Jeppesen flight plans, and where the aircraft was required to fly onwards from Szymany to a destination outside Poland. Similarly in at least one instance where the aircraft flew onwards from Szymany to Warsaw – and thus did not require initially to leave Polish airspace – PANSA simply navigated the onward flight without a flight plan.

188. It is also noteworthy that Jeppesen appears to have followed PANSA's contributions to these operations very closely, acting upon responses from the flight management system to PANSA's communications within minutes of their being received. Furthermore, both Jeppesen and PANSA have co-ordinated their actions with the in-flight communications from the aircraft's Pilot-In-Command.[162]

189. Accordingly, several circuits we have analysed show the following "sequencing" of flight navigation responsibilities for a typical circuit of N379P involving a landing at Szymany, which demonstrate a calculated cover-up of the aircraft's movements:

- Jeppesen files flight plans for every element of the circuit up to and including N379P's return to Europe from Kabul; typically Jeppesen's flight plan(s) from Kabul onwards reflect fictitious routes, featuring false airports of destination and departure that are registered in the Eurocontrol flight management system;
- N379P's Pilot-in-Command then files from Kabul into Polish airspace, at which point the Polish authorities (PANSA) take over to navigate the aircraft to a landing at Szymany Airport without a corresponding flight plan, but in conjunction with Polish military authorities in Warsaw and on the ground;
- PANSA also handles onward flight planning for N379P's departure from Szymany, either by navigating the aircraft to a stopover in Warsaw or by filing a flight plan for its next international destination, such as Prague or Larnaca;
- Jeppesen resumes its planning role once N379P has left Szymany, filing flight plans for the remaining elements of the circuit, starting from either Warsaw or the first international airport after Szymany, continuing until the aircraft's return to its base in the United States.

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[159] The entire national airspace of Poland comprises one single Flight Information Region (FIR), denoted by the four-letter code EPWW. Poland therefore has only one Area Control Centre (ACC). All air traffic into Poland is controlled by the Polish Air Navigation Services Agency, PANSA, from its Air Traffic Management Centre at Warsaw Airport. For an excellent overview of Polish Air Traffic Control, see PANSA, "Air Traffic Control", available at http://www.polatca.pansa.pl/kontrola_eng.htm.

[160] We have identified the relevant "data strings" communications about these flights being sent from the AFTN address "EPWAZPDX", which denotes the "Approach Control Centre – Air Traffic Service Reporting Office at Warsaw Airport", in addition to the phase of general "Region Control" for all of Poland, the phase of "Approach control" for Szymany Airport, during which the movements of all civil or military aircraft are controlled within a specified range of the airport, is dealt with from Warsaw. Szymany Airport does not meet the criteria (i.e. passenger airports that maintain fixed flight connections) to have its own Approach Control unit so it relies on the unit at Warsaw Airport.

[161] We have identified the relevant "data strings" communications about these flights being sent to the AFTN address "EPSYYDYX", which denotes the "Authority Supervising the Aerodrome at Szymany Airport". Several airport officials who were present at Szymany Airport when these flights arrived in 2003 have told us that their notification came from military sources in Warsaw and that all arrangements for the landings were handled using special military units on the ground. Polish Air Traffic Control explains these procedures in the following terms: "Military operations carried out in the military aerodrome zones are controlled by a military unit that directly co-operates with the Approach Control." From our Polish insider sources, we know that the Director of Military Operations, working with PANSA Approach Control in Warsaw, as well as key officials in the Border Guards who notified Szymany of the landings, and military officers who took over from civilian officials at Szymany to deal with them on the ground, were working on behalf of Polish military intelligence in collaboration with the CIA.

[162] We have been able to establish through our investigations that the men registered as Pilot-in-Command (PIC) for the undeclared flights into Szymany are established CIA pilots. We have records of many full names and have been able similarly to obtain for their employment as pilots in multiple detainee transfer operations involving other countries. We have also confirmed their appearances on flight manifests with known CIA "rendition teams" by referring to documents provided to us confidentially from an ongoing judicial inquiry in a Council of Europe member State.

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190. The analysis of "data strings" has also enabled me to confirm further intricate details of the "anatomy" of these CIA clandestine operations. For example, each of these flights was operated under a "special status" or STS designation.[183] The aircraft were thereby exempted from adhering to the normal rules of air traffic flow management (ATFM), and did not, for example, have to wait at airports for approved departure slots. Since such exemptions are only granted when "specifically authorised by the relevant national authority,"[184] they provide further evidence of Polish complicity in the operations. The clearest proof of Poland's knowledge and authorisation of such landings is demonstrated by the following two-line message, contained in several "data strings" for flights of N379P in 2003:

> **"STS/ATFM EXEMPT APPROVED**
> *POLAND LANDING APPROVED"*

191. "Data strings" have also enabled us to trace the official overflight and landing permits obtained from various other countries for these flights; the times and "waypoints" at which the aircraft entered or departed the national airspace of each country; and the actual routes flown between Szymany and other points on the "global spider's web". I have used all of this information to create the graphic representations of "Disguised CIA flights into Szymany Airport, Poland,"[185] which accompany this report as an appendix.

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192. In concluding this section it is only fitting that I should note here, with considerable regret, that the cover-up of CIA flights into Szymany seems to have carried over into the approach adopted by the Polish authorities towards my inquiry on the specific question of national aviation records. In over eighteen months of correspondence, Poland has failed to furnish my inquiry with any data from its own records confirming CIA-connected flights into its airspace or airports. The excuses from the Polish authorities for having failed to do so unfortunately do not seem to be credible.

193. In my report of 2006, I commented that the absence of flight records from Poland was "unusual,"[186] to say the least. Mr Karol Karski, Chairperson of the Polish Delegation to PACE, suggested that I "did not use the information received from Poland honestly"[187] and stated, in his subsequent correspondence, that he hoped to "answer [my] request exhaustively" having "addressed one more time the relevant Polish authorities and asked for proper information". He then repeated a familiar undertaking:

> "I would like to assure you that I will transmit to you the complete data as soon as I will be provided with it."[188]

[183] The status of the flight goes to the all-important question as to whether the function it is performing is considered to be "state," "civilian" or "military." These undeclared flights into Szymany, which we understand to have been operated as "military flights", eased their passage into Poland by securing exemptions as "special status", or STS, flights. STS designators are very strictly limited, because once granted they allow deviations from planned routes and other important exemptions. See Eurocontrol, User Relations and Development Bureau, *IFPS Users Manual*, Edition No. 11.2, 30.03.2007 (hereinafter "Eurocontrol IFPS Users Manual"), available at http://www.cfmu.eurocontrol.int; at Section 50, "Special Status Flights (STS)", p. 50-1

[184] The particular STS indicator used by flights into Szymany was "AFTMEXEMPTAPPROVED". According to Eurocontrol: "*This exemption designator shall only be used with the proper authority. Any wrongful use of this designator to avoid flow restriction shall be regarded by the relevant states as a serious breach of procedure and shall be dealt with accordingly.*" See Eurocontrol IFPS Users Manual, *ibidem*, at Section 54, "STS/AFTMEXEMPTAPPROVED Indicator", p. 54-1.

[185] See Appendix No 1 to the present report, entitled "Disguised CIA flights into Szymany Airport, Poland."

[186] See Marty Report 2006, Council of Europe Doc. 10957, *supra* note 8, at section 2.6.2, "The case of Poland", §§ 63 to 75, pages 20 to 21.

[187] Contribution of Mr Karol Karski, Chairperson of the Delegation of Poland to PACE, at the 17th Sitting of the Plenary of the Parliamentary Assembly during its 2006 Session, Strasbourg, 27.06.2006.

[188] Letter to me from Mr Karol Karski, Chairperson of the Polish Delegation to PACE, 28.12.2006.

194. After several further months passed,[189] Mr Karski ultimately responded with the following three items of information:[190]

- "the Polish Government has definitively closed the investigation into alleged secret CIA prisons and in this connection, once again explicitly denies all speculations appearing in the media";
- "the European Parliament's Temporary [TDIP] Committee... has all the information available to the Polish side, concerning the aircraft listed in [your] letter"; and
- "the registers of flight movements over the territory of Poland in 2001 to 2005 are in Eurocontrol databases."

195. This response of the Polish authorities is patently unsatisfactory. The third item of information is belied by the findings I have presented above, along with the accompanying graphic and data in the annex. Meanwhile the second statement suggests that the Polish Government is attempting to deceive both the CoE and the European Parliament by playing the institutions off against one another.[191]

196. On the whole, Mr Karski's response casts the Polish authorities in a negative light, whichever one of two possible conclusions I might choose to draw: is the Polish Government unable to lay its hands on official data from Polish sources, which our team successfully uncovered and which at least one airport official is publicly known[192] to possess? Or have the Polish authorities willfully withheld valuable information from my inquiry? I strongly hope that the Polish authorities now take the situation in hand and retrace fully the unfolding of this situation and establish respective responsibilities.

a. Transfer of HVDs into CIA detention in Poland

197. Our enquiry regarding Poland included talks with Polish airport employees, civil servants, security guards, Border Guards and military intelligence officials who hold first-hand knowledge of one or more of the undeclared flights into Szymany. Their testimonies are crucial in establishing what happened in the time after these CIA-associated aircraft landed at Szymany. The following account is a compilation of testimonies from our confidential sources about these events.

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b. Arrivals and "drop-offs" at Szymany Airport

- Each of these landings was preceded, usually less than 12 hours in advance, by a telephone call to Szymany Airport from the Warsaw HQ of the Border Guards (*Strazy Granicznej*), or a military intelligence official, informing the Director Mr Jerzy Kos of an arriving "American aircraft"
- The airport manager, who assumed the flights were coming from the United States, was instructed to adhere to "strict protocols" to prepare for the flights, including: clearing the runways of all other aircraft and vehicles; and making sure that all Polish staff were brought in to the terminal building from the vicinity of the runway, including local security officials and airport employees
- The perimeter and grounds of the airport were secured by military officers and Border Guards, the latter of whom were registered on a roll-call document that lists names of those present on more than five dates between 2002 and 2005
- American officials from the nearby Stare Kiejkuty intelligence training base assumed "control" on the dates in question, arriving in several passenger vans in advance of the landing; "everything Americans," said one Polish source present for several landings, "even the drivers [of the vans] were Americans."
- A "landing team" comprising American officials waited at the edge of the runway, in two or three vans with their engines often running; the aircraft touched down in Szymany and taxied to a halt at

[189] On 14.03.2007, I sent a reminder letter to Mr Karski on this issue, concluding: "*I respectfully urge you to re-emphasise to the Polish authorities the importance of sending me a swift and comprehensive reply to my letter, along with the requested data.*"

[190] Letter to me from Mr Karol Karski, Chairperson of the Polish Delegation to PACE, 28.03.2007.

[191] When I read that "*all the information on the Polish side*" had been given to the EP's TDIP Committee, I recalled the resolution adopted on 12.02.2007 by the very same Committee, in which it regrets that "*contradictory statements were made about the flight plans for those CIA flights, which were first said not to have been retained, then said probably to have been archived at the airport, and finally claimed to have been sent by the Polish Government to the Council of Europe.*" See European Parliament Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (AS-0020/2007 – Rapporteur: Giovanni Claudio Fava), 12.02.2007, at § 172. It is scarcely credible for the Polish Government to practice such evasion towards me and my fellow Parliamentarians.

[192] See Tom Hundley, "Remote Polish airstrip holds clues to secret CIA flights," *Chicago Tribune*, 6.02.2007, available at http://www.chicagotribune.com/news/nationworld/ch-0702060167feb06,1,1958708.story The article says: "Jaroslaw Jurczenko, the airport's director, denied that flight records had ever been lost for the mysterious landings and provided the *Tribune* with documentation for seven of the flights in question."

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the far end of the runway, several hundred metres (and out of visible range) from the four-storey terminal control tower

- The vans drove out to the far end of the runway and parked at close proximity to the aircraft; officials from within the vans were said to have boarded the aircraft "every time", although it is not clear whether any then stayed on board
- All the officers charged with "processing" the passengers on these aircraft were Americans; no Polish eye-witness has yet come forward to state whether or not any detainees disembarked the aircraft upon any of these landings – indeed, it may be that no Polish eye-witness to such an event exists
- However, asked where the HVDs actually entered Poland, one of our sources in Polish military intelligence confirmed that "it was on the runway of Szczytno-Szymany"; another said "they come on planes and they entered at this airport"
- Documentation, in Polish, attests to persons having been "picked up" [verbal translation] at Szczytno-Szymany in conjunction with at least two aircraft landings in 2003; the documentation also refers to the dispatch of vehicles to the airport from the military unit stationed at the Stare Kiejkuty facility
- Having spent only a short time next to the aircraft after each landing, the vans then drove back past the side of the terminal building, without stopping, before leaving airport premises through the front security gate; the vans put their "headlights up to full level" and airport officials say they "turned our eyes away"
- The vans then drove less than two kilometres along a simple tarmac road, lined by thick pine forest on both sides, through an area which was entirely out of bounds to private or commercial vehicles during these procedures, having been cordoned off for "military operations"; at the end of the tarmac road, the vans travelled north-east beyond Szczytno for approximately 15 to 20 minutes before joining an unpaved access road next to a lake;[173]
- at the end of this access road they reached an entrance of the Stare Kiejkuty intelligence training base, where multiple sources have confirmed to me that the CIA held High-Value Detainees (HVDs) in Poland.

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c. Secret detention operations at Stare Kiejkuty

198. The stringent limitations on information about what happened to detainees "dropped-off" at Szymany are perhaps the best example of the "need-to-know" principle of secrecy in practice. Polish officials were not involved in the interrogations or transfers of HVDs, nor did they have personal contact. In explaining his understanding of HVD treatment or conditions in detention, one Polish source said:

> "I have no understanding of detainee treatment. We were not "treating" the detainees. Those were the responsibilities of the Americans."

199. We were told that senior Polish military intelligence officials who visited Stare Kiejkuty were ordered to "limit rotation and operational demands on Polish officers to make the HVD programme work." Beyond this fleeting insight, however, neither Polish nor American sources who discussed the HVD programme with us would agree to speak about the exact "operational details" of secret detentions at Stare Kiejkuty, nor would they confirm how long it was operated for, which other facilities were used as part of the same programme in Poland, nor how and when exactly the detainees left the country.

[173] A member of our team re-traced the route from Szymany Airport to the Stare Kiejkuty intelligence training base.

200. The legacy of the HVD programme in Poland is palpable in the self-perceptions of those Polish officials who participated in its operations. The members of military intelligence with whom we spoke seemed, on one level, to be in denial as to whether secret detentions in violation of Poland's human rights obligations had taken place in their country; yet, on another level, they showed signs of resentment mainly that their American allies had betrayed their bond of trust by leaking details of the programme. These contradictory sentiments, often difficult to gauge accurately, are aptly captured by the following statement:

> *"The [Stare Kiejkuty] base was America's choice; our job was their security. If any American is here, it is America's responsibility, but he also becomes Poland's responsibility too. So it is my responsibility."*

IV. Secret detention operations in Romania

i. Partnering with military intelligence in Romania

201. In Romania, after the December 1989 Revolution and the dismantling of the repressive *Securitate* in 1990, the reforms of the intelligence services were focussed, understandably, on preventing the politicisation and abuse of internal state security structures. Similarly, much of the subsequent discussion around democratic oversight in the country has looked at ways of controlling "institutional actors and leading political figures with authority over the security and intelligence domain who disregard the legal stipulations regarding political neutrality."[174]

202. As I have analysed Romania's complex array of different agencies and sub-structures that collect intelligence for the state,[175] I have realised that preserving political neutrality is merely one of a variety of competing considerations that affect the objectivity and effectiveness of their accountability structures.[176] In the context of my inquiry, it seems to me that while Romania has made at least superficial efforts to rid its civilian intelligence services of the scourges of their *Securitate* past, its oversight mechanisms do not go far enough to prevent the exercise of what could be called "unitary executive authority" – on the part of the President – over military intelligence services and the wider defence community.

203. This analysis conforms to the testimony of our Romanian sources, who said that the Americans chose to work with the military intelligence services because the military "cover" afforded the CIA flexible deployment options and guarantees of secrecy under the NATO framework. As the following comparison shows, there are substantial disparities between the respective monitoring mechanisms in the civilian and military spheres.

[174] See Larry Watts, Office of the National Security Advisor of the Romanian President, "Control and Oversight of Security Intelligence in Romania", Working Paper No. 111, published by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, February 2003, copy on file with the Rapporteur (hereinafter "Watts, Oversight of Security Intelligence in Romania"), at p. 27. The author recommends that "real sanctions should be introduced and enforced" in such instances where rule of law is subverted by political considerations.

[175] There are at least six different secret services in Romania, several of them housed under individual Government Ministries. The agencies that I have not discussed specifically in this section include the General Directorate of Intelligence and Internal Protection (*Direcția Generală de Informații și de Protecție Internă*, or DGIPI) in the Ministry of the Interior, and the Independent Protection and Anti-Corruption Agency (*Serviciul Independent de Protecție și Anticorupție*, or SIPA) in the Ministry of Justice.

[176] For a much more developed discussion of the relevant considerations, see: European Commission for Democracy through Law (Venice Commission), "Report on the Democratic Oversight of the Security Services", Study No. 388/2006, CDL-DEM(2007)001, 24.05.2007. In its concluding remarks, the Commission highlights "recurring issues in the design of oversight procedures", as follows: "First is the need to establish mechanisms to prevent political abuse while providing for effective governance of the agencies. Overall, the objective is that security and intelligence agencies should be insulated from political abuse without being isolated from executive governance;" and "the challenge for oversight and accountability is to adapt or devise processes that simultaneously command democratic respect while protecting national security;" at pp. 49-50, § 215 to 228. (Soon to be issued as CDL-AD(2007)016 – to be made available on http://venice.coe.int.

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204. First, in the civilian sphere, Romania's two main agencies of the post-Communist era, the Romanian [Domestic] Intelligence Service (*Serviciul roman de informatii, or SRI*) and the Foreign Intelligence Service (*Serviciul de informatii externe, or SIE*) were created under specific laws[177] and a multi-layered oversight structure, which purport to immunise them from manipulation along party-political lines. The SRI and the SIE operate independently of Government and are not subordinated to the incumbent executive. They are each subjected to parliamentary scrutiny through dedicated Special Parliamentary Committees.[178] The **Supreme Council of National Defence** (*Consiliul Suprem de Aparare a Tarii, or CSAT*), an autonomous administrative body chaired by the non-partisan Office of the President,[179] organises and continually monitors the activities of the SRI and the SIE, in line with its mandate to co-ordinate the overall national security and defence of the country. As such, the possibilities for a handful of people at the heart of Government to use the SRI or the SIE to pursue their own personal, political or strategic agenda are exceedingly narrow.

205. In contrast, intelligence gathering in the military sphere is a competence formally overseen by the Ministry of National Defence,[180] through its **General Directorate for Defence Intelligence** (*Directia Generala de Informatii a Apararii, or DGIA*). What little parliamentary scrutiny of defence intelligence is supposed to exist[181] certainly does not apply to its organisational, planning or operational aspects. On the contrary, strict compatibility with NATO structures, insisted upon as a criteria for NATO accession, means that the majority of Romanian military intelligence activities are kept secret from all but those who "need to know".

206. According to our sources, the relevant sub-unit of the DGIA that worked with the CIA on its clandestine operations was the **Directorate for Military Intelligence and Representation** (*Directia Informatii si Reprezentare Militare, or DIRM*), also known as the **"J2" Unit**. This unit was not involved in transporting, holding or interrogating any detainees – since these were tasks performed solely by the Americans – but, according to one Romanian officer, the "J2" officers "co-operated and adjusted" to accommodate the CIA personnel's needs.

207. As part of a wider restructuring of the DGIA in 2003,[182] the "J2" unit increased in scope and importance at a very strategic moment in Romania's co-operation with the United States, just as American forces were deploying into the country in large numbers to launch their aerial missions into Iraq for Operation Iraqi Freedom.[183] The place at which these US forces were stationed, the **86th Air Force Base at Mihail Kogalniceanu Airfield,**[184] became the most significant point in the country for a whole range of collaborative activities in a "partnership" between Romanian and American personnel.

[177] For the SRI, see the *Law on the Organisation and Functioning of the Romanian Intelligence Service (SRI)*, Law No. 14/1992; for the SIE, see the *Law on the Organisation and Functioning of the Foreign Intelligence Service (SIE)*, Law No. 1/1998.

[178] For the SRI, see the *Decision of the Romanian Parliament on the Organisation and Functioning of the Joint Committee of the Senate and the Chamber of Deputies for Parliamentary Oversight of the Romanian Intelligence Service (SRI)*, Decision No. 30/1993; for the SIE, see the *Decision of the Romanian Parliament on the Organisation and Functioning of the Special Committee for Parliamentary Oversight of the Foreign Intelligence Service (SIE)*, Decision No. 44/1998. Indeed, some commentators say that the increased transparency and growing public trust in the SRI and the SIE owe largely to the strength of these parliamentary accountability mechanisms. See, for example, Watts, Oversight of Security Intelligence in Romania, *ibidem*: "Romania's semi-presidential system has proven itself capable of blocking the over-accumulation and over-centralisation of power by government executives."

[179] In addition to the President (Chair), the membership of the CSAT includes: the Prime Minister (Vice-Chair); the Ministers of Defence, Economy and Commerce, Finance, Justice, Interior and Administrative Reform, and Foreign Affairs; the Directors of the SRI and SIE; the Presidential Advisor on National Security; and the Chief of General Staff; see the CSAT website at: http://csat.presidency.ro/. The CSAT is regulated under a 2002 statute – Law No. 415/2002 – and its activities are themselves reported regularly to the Parliamentary Committee for Defence, Public Order and Security. For further discussion on related matters, see also Karoly Szabo, "Parliamentary Overview of Intelligence Services in Romania," workshop paper published by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), delivered at the workshop on "Democratic and Parliamentary Oversight of Intelligence Services", Geneva, 3-5.10.2002, copy on file with the Rapporteur.

[180] The Ministry of National Defence (*Ministerul Apararii Nationale*) was renamed as the Ministry of Defence (*Ministerul Apararii*) in April 2007. I have used its old name, which applied in the period in question.

[181] Formally speaking, military intelligence activities are supposed to be subject to the same parliamentary scrutiny as all the activities of the Ministry of National Defence, namely through the Committees on Defence, Public Order and National Security in both the Senate and the Chamber of Deputies of the Romanian Parliament. In reality, these Committees are far removed from the actual work of the *DGIA* services.

[182] See, for example, Ocru Dragomir, "Hurricane in the Army's Secret Services", Bucharest Zxs, 9.04.2003, at p. 9; available online at http://www.zxs.ro/.

[183] Between February and June 2003, United States Armed Forces (both airforce and ground troops) deployed an expeditionary group for operations in Iraq at the 86th Air Force Base – Mihail Kogalniceanu Airfield ("MK Airfield"), near Constanta, Romania. According to Romanian military personnel at the airfield, the deployment reached up to "5,000 bodies" at its peak, albeit that most of the troops were only there temporarily, or in transit. MK Airfield was used for the purpose of "regrouping and resupplying air deployments before entering action in theatre in Iraq."

[184] At the time of Operation Iraqi Freedom, and up until 27.04.2004, MK stood on its own as the 57th Air Force Base of the Romanian Air Force. From 1.05.2004, the self-standing air force base at MK was "disbanded" and Romanian military air traffic

208. A noteworthy aspect of this partnership was that everything was carried out under the NATO framework. The deployment at MK Airfield in February 2003 was authorised in a Memorandum of Understanding signed by President Ion Iliescu in late 2002, in which the terms of NATO-SOFA and the bilateral SOFA-Supplemental were expressly referenced. "NATO concepts" were applied to the deployment, including MK's designation as an APOD / APOE,[185] and the phase being referred to as "regrouping." Most important of all, a **Joint Operations Centre** was established in which American and Romanian personnel "from each and every branch" of their respective armed forces and services worked together side-by-side throughout the Operation, sharing operational knowledge in strict accordance with the **NATO Security Policy**.

209. Members of the Directorate for Military Intelligence, the "J2" Unit, participated in the Joint Operations Centre,[186] which – as our American sources confirmed – also received "visits"[187] from operatives of the CIA's Counterterrorist Centre (CTC) between February and June 2003. While the whole four-month period of Operation Iraqi Freedom at MK Airfield was characterised as "a military activity in support of a military operation," the relationships formed and strengthened between members of the respective intelligence services – both individually and collectively – were just as indispensable in the broader context of the "war on terror."[188] The Operation was construed as a welcome "dry-run" for Romania in NATO and for potential future bilateral actions between the partners.

210. Continuity in the evolving relationship between American and Romanian services can perhaps best be illustrated by highlighting the role of the then Head of the Directorate of Military Intelligence and Representation (*Sef al Directiei de Informatii si Reprezentare Militara*), **Sergiu Tudor Medar**. General-Lieutenant Medar served in the United States for seven years in the 1990s, heading the Office of the Romanian Defense Attache in Washington, DC until 1999. Between 2000 and 2003 he headed the original incarnation of the Directorate of Military Intelligence in the DGIA; then from 2003 until the end of 2005 he was Head of the restructured "J2" Unit. General-Lieutenant Medar was a prescient choice for the CIA as a liaison for secret detention operations in Romania: not only was he trusted beyond doubt in both US and NATO military circles; he was also, as the following quote attests, aware of the potential perils of partnering with military intelligence to achieve an essentially political goal:

> "The civilian leadership's tendency in using its control over intelligence for political purposes is likely to be even bigger than its desire to keep the military component under its firm control. Some equilibrium must be established between the professional experience of the Military Intelligence Service and the authority of the civilian political leadership."[189]

reduced significantly, as part of wider restructuring in the Ministry of National Defence. The MK Airfield is therefore now administered from Fetesti as an extension of the 86th Air Force Base; the only active unit located at MK is the 863 Helicopter Squadron.

[185] APOD stands for Aerial Port of Debarkation; APOE stands for Aerial Port of Embarkation. Under NATO concepts these references mean that MK Airfield was hosting primarily transport aircraft that were bringing in and shipping out personnel and equipment.

[186] Confirmed in interviews by the Rapporteur's representative with Romanian military personnel stationed at MK Airfield. Military intelligence was the second of nine categories of military staff that participated in the Joint Operations Centre. The other categories were: personnel, operations, logistics, planning, communications, training, finance and budget, and "civmil" – or civil-military co-operation.

[187] Visits by US officials to Romanian facilities in the context of their classified bilateral arrangements are regulated under the NATO framework and the *Agreement on the protection of military classified information* of 21 June 1995 (entered into force in 2003). See "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20 January 2006; at page 1, Article 5(1) of the 1995 Agreement states as follows: "The authorization for "visits" by one party to units or installations of the other party where access to state classified military information is necessary, will be limited to official purposes... [and] to government officials both parties have agreed upon."

[188] One example of how Romanian military intelligence continued to collaborate with the United States in the "war on terror" was Parliament's endorsement in March 2004 of President Iliescu's proposals to send a special military intelligence detachment of 30 officers to serve in the International Security Assistance Force (ISAF) in Afghanistan. See Rompres News Agency, Bucharest, "Parliament approves Romanian military intelligence unit for Afghanistan," reproduced on BBC Monitoring, 2.03.2004, available at http://www.roembus.org/english/news/international_media/2004/march/02/BBC_Monitoring_2d_03_2004_Parliament%2dapproves%20Romanian%20military%20intelligence%20unit%20for%20Afghanistan.htm.

[189] See Sergiu Medar, "The role of military intelligence in the process of military and political-military decision-making" (original in Romanian), internal document of the Directorate for Military Intelligence, Bucharest, 2000; cited in Florin Ureche, "Civilian Control over Military Intelligence Services", in *Romanian Military Thinking*, April 2000, pp. 69-74, copy on file with the Rapporteur; at p. 68.

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223. Nonetheless we were able to confirm the approximate borderlines of the CIA's "outer perimeter" for its secure area in Romania. We were assisted by a source in military intelligence, a detailed map and an annex to the Access Agreement of 2005, in which reference is made to "facilities"[190] generally and to one relevant "manoeuvre area" in particular.[191] Our source used his right index finger to draw an invisible elliptical perimeter on the map, which encompassed a vertical column between the towns of Tulcea (to the north) and Constanta (to the south), as well as an area extending approximately 50 kilometers inland (to the west) and in the opposite direction to the Black Sea coast (to the east).[192] Referring to the role of the Romanian "J2" Unit in supporting bilateral arrangements with the CIA, our source said: *"We have to seal [this] entire area and limit access there."*

224. The secure area in question includes several current and former military installations, including all of those facilities named in the Access Agreement of 2005, which have been used by the United States under a "special regime of access" since late 2001.[193] Nonetheless, the main reason that led one of our CIA sources to say that his "guys were familiar with the area" was its inclusion of the landing point at which scores of civil and military flights carrying American service personnel have landed throughout the "war on terror": Mihail Kogalniceanu Airfield.

225. In the light of all that I have said above about MK Airfield, I only wish to draw attention to one further factor that has made it a venue so conducive to "partnership" with the CIA: its "dual" military-civilian character.[194] Military personnel worked routinely with civilian Air Traffic Controllers in processing both civil and military flights at the Airfield – each according to the applicable aviation rules. The system used at MK Airfield bears great similarities, albeit on a much smaller scale, to the system used at Kabul Airport (OAKB),[195] which became such a hub in the context of coalition military activities in Afghanistan and simultaneously a destination or departure point for multiple known renditions of CIA detainees on board civilian aircraft since the start of the "war on terror".

226. During the period of interest to my inquiry – from 2002 until 2005 – the civilian section of the MK Airfield had a Director General with a formidable "dual" civil-military character of his own. **Rtd. Colonel Mircea Dionisie** was a former controlling **Commander of the military Air Force Base** at MK Airfield in the communist pre-1989 era. He returned to the Airfield in 2002 and became the **Director General of the civilian airport**, now known as *Aeroportul International Mihail Kogalniceanu Constanta* (AIMKC).[196] Rtd. Colonel Dionisie stayed in this position until 12 July 2005 and therefore oversaw the bulk of the flights into and out of the MK Airfield, the exact movements of which – as well as their connections to CIA detainee transfers – my inquiry has attempted to trace.

[190] The four named facilities are as follows: Smardan Training Range; Babadag Training Area and Rat Head; Mihail Kogalniceanu Air Base, co-located with 34th Mechanised Brigade Base; and Cincu Training Range.

[191] See "Annex A – Facilities", the first of two annexes to the Access Agreement between Romania and the United States, 6.12.2005, at p. 9. Under the last of the four named facilities, Cincu Training Range, the "manoeuvre area" is described as follows: "comprised of areas in Tulcea and Constanta counties ("Judetul" in Romanian), bounded generally by the towns of Babadag in the north, Babadag Training Area in the east, Tariverde in the south and Harlau in the west."

[192] In total, the perimeter line encompasses an area of about 1,500 square kilometers of territory in south-eastern Romania. See Appendix No. 2 to the present report, entitled "The 'secure zone' for CIA transfers and detentions in Romania."

[193] See the discussion on bilateral NATO SOFA arrangements between Romania and the United States earlier in this report, at section II.iii.b, entitled "Application of the NATO framework in Romania."

[194] The "dual use" character of MK Airfield dates back to 1961, when the Romanian Ministry of National Defence handed over the following elements of the airfield to the civilian authorities of Constanta International Airport: the runway / landing strip; the "parking aprons" for both light and heavy aircraft; the terminal buildings, including the Air Traffic Control Tower; and the main entrance / exit points from the adjacent highway. This restructuring created two "sections" on the MK Airfield: a civilian section and a military section. According to our discussions with Romanian military personnel stationed at the MK Airfield, the civilian and military sections keep one another informed only "for operational reasons [e.g. use of the runway] and on a need-to-know basis." These personnel told us that *"everybody plays by the rules, and that is one of the main reasons for the military side's close co-operation with the civilian side."*

[195] It is a little known fact that Romanian personnel managed and operated Kabul Airport as one of their tasks in the context of their NATO deployment, 2004 to 2006. Our team spoke with a senior military officer who was seconded directly from MK Airfield to serve for several months at OAKB.

[196] Denoted by the ICAO code "LRCK". *Aeroportul International Mihail Kogalniceanu Constanta* (AIMKC) is the new name of the airport. It was previously called simply *Aeroportul International Constanta* (AIC), but – according to its current Director General – took on the additional MK in its name in order to benefit from the "free publicity" generated by the media scandal over CIA flights allegedly having landed at MK Airfield. Mihail Kogalniceanu was the first President of Romania and – in addition to the MK Airfield – also gave his name to a town about 50 kilometres north of Constanta. Romanians tell me it was the first town in the country to have an entirely literate population.

b. Transfer of detainees into Romania: the cover-up persists

227. Our efforts to obtain accurate actual flight records pertaining to the movements of aircraft associated with the CIA in Romania were characterised by obfuscation, inconsistency and genuine confusion. I must begin this assessment, however, by commending my colleagues and their assistant in the Romanian Delegation to PACE and, in particular, its Chairperson Gyorgy Frunda, for demonstrating exceptional good faith and professionalism, and for extending the very best of co-operation and assistance to my inquiry. It is unfortunate that the Romanian authorities more generally did not match the levels of thoroughness and transparency shown by this Delegation.

228. Specifically I hold three principal concerns with the approach of the Romanian authorities towards the repeated allegations of secret detentions in Romania, and towards my inquiry in particular. In summary, my concerns are: far-reaching and unexplained inconsistencies in Romanian flight and airport data; the responsive and defensive posturing of the national parliamentary inquiry, which stopped short of genuine inquisitiveness; and the insistence of Romania on a position of sweeping, categorical denial of all the allegations, in the process overlooking extensive evidence to the contrary from valuable and credible sources.

229. First I was confounded by the clear inconsistencies in the flight data provided to my inquiry from multiple different Romanian sources. In my analysis I have considered data submitted directly from the Romanian Civil Aeronautical Authority (RCAA),[197] data provided by the Romanian Senate Committee,[198] and data gathered independently by our team in the course of its investigations. I have compared the data from these Romanian sources with the records maintained by Eurocontrol, comprehensive aeronautical "data strings" generated by the international flight planning system, and my complete Marty Database. The disagreement between these sources is too fundamental and widespread[199] to be explained away by simple administrative glitches, or even by in-flight changes of destination by Pilots-in-Command, which were communicated to one authority but not to another. There presently exists no truthful account of **detainee transfer flights into Romania**, and the reason for this situation is that the Romanian authorities probably do not want the truth to come out.

[197] See, for example, *information from its records of the Romanian Civil Aeronautic Authority (RCAA) and the Romanian Ministry of National Defence*, contained as Appendices to the letters sent to me by Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, dated 24.02.2006 and 7.04.2006.

[198] The committee to which I refer is the "Senate Committee of Inquiry to investigate the allegations regarding the use of Romanian territory for CIA detention facilities or flights by CIA-chartered aircraft", established under Article 1 of Decision No. 29 of the Senate, Parliament of Romania, 21.12.2005 (hereinafter referred to as the "Senate Inquiry Committee"). The Chairperson of the Committee was Senator Norica Nicolai, supported by Vice-Chair George Cristian Maior and Secretary Ilie Petrescu. The Committee released its final report on 5.03.2007 (hereinafter "Senate Inquiry Committee Final Report, 5.03.2007" – page numbers refer to the original, Romanian version), a copy of which was submitted as an attachment to Senator Nicolai's letter to me dated 20.03.2007. My inquiry was also provided with copies of most of the annexes to the final report, including substantial information from airport authorities, handling service providers and the national Air Traffic Services Administration (ROMATSA). I am grateful to Senator Nicolai for facilitating access for my inquiry to important information in Romania.

[199] In my letters to the Romanian authorities, I highlighted crucial inconsistencies in flight data relating to the movements of a host of CIA-linked aircraft in Romania, including N313P, N379P and N85VM. The documentation I received back from the Senate Inquiry Committee helps to establish certain findings, but is not authoritative enough to state categorically the exact paths flown by these aircraft, nor the full list of locations in Romania at which they did or did not land. I cannot, for example, content myself with "evidence" that aircraft changed their routes or destinations based on hand-written annotations on flight plans. In several cases I have "data strings" attesting to communications relating to these aircraft that do not correspond with the Senate Inquiry Committee's version of events.

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230. I found it especially disappointing that the Senate Inquiry Committee chose to interpret its mandate in the rather restrictive terms of defending Romania against what it called "serious accusations against our country, based solely on 'indications', 'opinions', 'probabilities', 'extrapolations' [and] 'logical deductions'."[200] In particular, the Committee's conclusions are not framed as coherent findings based on objective fact-finding, but rather as "clear responses to the specific questions raised by Mr Dick Marty,"[201] referring to both my 2006 report and subsequent correspondence. Accordingly the categorical nature of the Committee's "General Conclusions,"[202] "Conclusions based on field investigations and site visits"[203] and "Final Conclusions"[204] cannot be sustained. The Committee's work can thus be seen as an exercise in denial and rebuttal, without impartial consideration of the evidence. Particularly in the light of the material and testimony I have received from sources in Romania, the Committee does not appear to have engaged in a credible and comprehensive inquiry.

231. The Romanian national delegation to PACE, in their carefully worded reply, ruled out the existence of unlawful CIA activity,[205] and appeared to offer prospects of constructive and transparent co-operation in the search for the truth. However the Romanian Government and Parliament have preferred to keep control of information by directing everything through the Senate Committee,[206] and ultimately reverted to their initial position of complete denial.[207]

[200] See Senate Inquiry Committee Final Report, 5.03.2007, *supra* note 200, at Chapter 2, "References to Romania", page 5.
[201] See Senate Inquiry Committee Final Report, 5.03.2007, *supra* note 200; generally at Chapter 5, "Conclusions reached by the Committee based on its documentation and monitoring activities"; and specifically at pages 10, 11, 12 and 13.
[202] By way of example, the first general conclusion states categorically: "Neither the Romanian Civil Aeronautic Authority nor any other institutions or structures of state with relevant competences in the field investigated by the Committee has any knowledge about civilian aircraft operated or chartered by the CIA or by any other company on behalf of the CIA, landing or flying over national territory," *Ibidem*, at page 10.
[203] The Committee rules out embarkation or disembarkation of any passengers on the key flights listed in the Marty Report of 2006, and states that aircraft associated with the CIA landed only in Bucharest. With regard to MK Airfield, the Committee "concludes that there is no facility that could have been used for the purpose of detention, not even on an ad-hoc basis. Moreover, none of the flights considered suspicious by the Marty inquiry, by NGOs or by the media has ever landed at this airport;" *Ibidem*, at page 11. Among other evidence, our team obtained records of actual flights into MK Airfield by aircraft associated with the CIA, which directly contradicts the Committee's claim.
[204] Final Conclusion No. 5 states as follows: "On the question of whether certain Romanian institutions could have participated knowingly or participated through omission or negligence in unlawful detainee transfer operations in Romanian airspace or at Romanian airports, the Committee's response is negative;" *Ibidem*, at page 14. It should be noted that other final conclusions are not so categorical, however, particularly with regard to whether secret detention facilities could have existed in locations other than the grounds or immediate vicinity of the named airports.
[205] See *inter alia* "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, to Dick Marty, 20.01.2006; pp. 5 to 6. The language of such submissions was carefully worded so as not to exclude the types of CIA operations I have described in this report: *"No Romanian authority has any knowledge or information about any aircraft illegally transporting prisoners. No Romanian authority has been, legally or illegally, involved in secret transportation of prisoners. The Romanian Government has never issued any authorisation for any transport of prisoners via Romania."*
[206] In two written decisions, on 14 and 21.11.2006, the Romanian Senate rejected the requests of the Romanian Delegation to PACE to respond to my correspondence directly, and instead assigned to the Senate Committee the sole authority for preparing Romania's official responses. These decisions were followed by a four-month period during which we received no communications, ended only by Senator Nicolaï's submission of the Final Report by letter dated 20.05.2007.
[207] At the end of my inquiry, the official position of Romania has developed no further than the original denials it adopted at the beginning. See "Response of the Romanian Government on the investigation initiated by the Secretary General of the Council of Europe, in accordance with Article 52 ECHR", appended to the letter from Mihai-Razvan Ungureanu, Romanian Minister of Foreign Affairs, to Terry Davis, 15.02.2006; at page 4: *" no public official or other person acting in an official capacity has been involved in any manner in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty. Official investigations have been conducted by several Government authorities [whose] results confirmed that no such activities took place on Romanian territory."*

V. Human rights abuses involved in the CIA secret detention programme

i. Re-humanising the people held in secret detention

232. The policy of secret detentions and renditions pursued by the current US administration has created a dangerous precedent of dehumanisation. Many of the people caught up in the CIA's global spider's web[208] are rightly described as "ghost prisoners"[209] because they have been made invisible for many years.[210]

233. Meanwhile the US Government's descriptions of its captives in the "war on terror" can only serve to exacerbate this dehumanising effect. The Administration routinely speaks of "aliens", "deadly enemies" and "faceless terrorists," with the clear intention of dehumanising its detainees in the eyes of the American population. The NGO community, for its part, calls them "ghost prisoners".

234. By characterising the people held in secret detention as "different" from us – not as humans, but as ghosts, aliens or terrorists – the US Government tries to lead us into the trap of thinking they are not like us, they are not subjects of the law, therefore their human rights do not deserve protection.

235. President Bush has laid this trap on multiple occasions as a means of diverting attention from the abusive conditions in which certain detainees in US custody are being held.[211] Our team heard first-hand how distinctions are drawn in the mind of guards and interrogators: in an interview with one of our CIA sources who has extensive knowledge of detainee treatment, we asked whether a known form of detainee treatment should be considered as abusive. *"Here's my question,"* replied our source. *"Was the guy a terrorist? 'Cause if he's a terrorist then I figure he got what was coming to him. I've met a lot of them and one thing I know for sure is that they ain't human – they ain't like you and me."*

236. Yet what has struck me most often as I have examined the cases of scores of people held in secret detention – some of whom I have met – is precisely the opposite: these detainees' ordeals have affected me profoundly as I have always thought of them as fellow human beings. The worst criminals, even those who deserve the harshest punishment, must be given humane treatment and a fair trial. This, moreover, is what makes us a civilised society.

237. It is for these reasons that we must combat their being seen as "ghost prisoners" by repeatedly pointing out that persons detained in the course of counter-terrorist operations are and remain human beings whose human rights must be protected and who are entitled to humane treatment as laid down in the ECHR. In this section of my report I have set out expressly to place the emphasis on the human aspects of these people held in secret detention.

[208] For the most comprehensive and authoritative known list of persons detained at one point by the United States, and whose fate and whereabouts remain unacknowledged, see the following report produced jointly by six leading human rights organisations: Amnesty International, Cageprisoners, Center for Constitutional Rights, Center for Human Rights and Global Justice at NYU School of Law, Human Rights Watch and REPRIEVE, "Off the Record – US Responsibility for Enforced Disappearances in the 'War on Terror'," 7 June 2007, available at http://www.chrgj.org/docs/OffTheRecord/OFF_THE_RECORD_FINAL.pdf.
[209] See, for example, various reports by Human Rights Watch: most recently "Ghost Prisoner – Two Years in Secret CIA Detention", HRW Volume 19, No. 1(G), February 2007, available at: http://hrw.org/reports/2007/us0207/us0207webcover.pdf; and earlier "List of 'Ghost Prisoners' possibly in CIA custody", 30 November 2005, available at http://hrw.org/english/docs/2005/11/30/usdom12109.htm.
[210] In its report entitled "USA / Yemen: Secret Detention in CIA 'Black Sites'", Amnesty International described how one detainee had been transformed from a person his father described as a "very gentle man, who is always laughing", to someone who sat through an encounter with "never even the ghost of a smile on his face". See AI Index: AMR 51/177/2005, 8 November 2005, available at http://web.amnesty.org/library/index/engamr511772005; at page 2.
[211] The speech delivered by President Bush on 06.09.2006 is a prime example of the type of rhetoric used to convince the audience that the people in US custody are inhuman and undeserving of empathy. The speech is strewn with references to "dangerous men", "terrorist enemies" and "those who kill Americans". Talking about Guantánamo Bay, President Bush states: "It's important for Americans and others across the world to understand the kind of people held". In his conclusion, President Bush states: "The adversaries are different... We're fighting for the cause of humanity, against those who seek to impose the darkness of tyranny and terror upon the entire world."

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instructed to walk along an isolated path without looking over his shoulder. He said he feared that he was "about to be shot in the back and left to die," with nobody having any idea of how he had got there.

278. In the ensuing three years, Mr El-Masri's case has been investigated and reported extensively, including by the *Untersuchungsausschuss* of the German Bundestag and by German prosecutors, both of which I shall address below. Yet a key piece of the jigsaw, namely the means by which Mr El-Masri was returned from Afghanistan to an unknown point in Europe[221], has eluded investigators until now.

279. Today I think I am in a position to reconstruct the circumstances of Mr El-Masri's return from Afghanistan: he was flown out of Kabul on 28 May 2004 on board a CIA-chartered Gulfstream aircraft with the tail number N982RK to a military airbase in Albania called Bezat-Kuçova Aerodrome.[222] We have obtained primary data on this extraordinary homeward rendition from three separate sources and we are able to publish the relevant flight logs from the Marty Database as an appendix to this report.[223]

280. Our team was first alerted to an unusual "flight circuit" through European airspace on the date in question by a submission from the national aviation authorities of Bosnia and Herzegovina (BiH).[224] The submission cited three "diplomatic permissions for state aircraft," which it said had been issued in relation to "flight movements for the needs of CIA, USA." The most relevant of these permissions, of which I subsequently obtained a copy,[225] was described as follows:

> "On the 26 May 2006 permission [was] issued to the company "RICHMON AVIATION" [sic] for traveller charter flight on the day of 28 May 2004. Line: Auki/Gwaunaru'u – Sarajevo – Prag. Aircraft type: Gulfstrim III, Registration N982RK, which is also its call sign."

281. Three elements of this permission caught our attention: the role of the charter company Richmor Aviation;[226] the outlandish notion that a Gulfstream III would fly to Sarajevo from the Solomon Islands airport of Auki/Gwaunaru'u;[227] and the mention of 28 May 2004, which we knew as the date on which Khaled El-Masri was released. The first of these elements was the key to our locating the flight logs for the N982RK aircraft; the second was evidence of a smokescreen on the part of the CIA to cover up the aircraft's actual arrival from Bezat-Kuçova Aerodrome; and the third was the match we had been looking for to solve the mystery of the circumstances of Mr El-Masri's return to Europe.

[221] See El-Masri statement to US Court in Alexandria, 06.04.2006, at p. 21. "Sam", a German-speaking official who accompanied Mr El-Masri on this flight, told him that he "would eventually land in a European country but that it would not be Germany itself."

[222] The military airbase in question appears to have two variations on its name: the first is Bezat-Kuçova; the other is Berat-Kuçovë. The airbase is denoted by the ICAO code LAKV. It is situated in the south of Albania, between the towns of Vlorë and Korcë, about 40 miles (64 km) south of the capital Tirana. The airbase underwent a comprehensive renovation and upgrade between 2002 and 2004 in order to bring it into line with NATO standards, as part of Albania's NATO accession process.

[223] See Appendix No. 3 to the present report, entitled "Flight logs related to the secret 'homeward rendition' of Khaled El-Masri in May 2004."

[224] Submission No 02-292.7-525-6/06, "Report on flight movements", prepared by Mr Đorđe Ratković, Director General, Directorate for Civil Aviation in the BiH Ministry of Transport and Communications, Sarajevo, 17.05.2006; attached to the letter to me from Mr Elmir Jahić, Chairperson of the BiH Delegation to PACE, Sarajevo, 14.06.2006.

[225] Permission No. 292.7-361/04 issued by Hasan Hadzepagic, Senior Advisor for Flight Authorisation, Directorate for Civil Aviation in the BiH Ministry of Transport and Communications, Sarajevo, 26.05.2004, sent as a fax to "Richmon [sic] Aviation", USA; attached to the letter to me from Aljosa Campara, Secretary General of the BiH Delegation to PACE, "Report on flight movements – copies of permissions issued", Sarajevo, 6.01.2007.

[226] We were familiar with Richmor Aviation as the operator of the aircraft with the tail number N85VM, which was used in the CIA's rendition of the Egyptian cleric Abu Omar on 17.02.2003. See Appendix No. 4 to the Marty Report 2006, "Flight logs related to the rendition of Abu Omar."

[227] Quite apart from the fantastical route, the N982RK aircraft's maximum flight capacity of 6 hours 52 minutes, as listed in the "data strings" I have obtained, would make it impossible to complete this journey.

282. We have since received confirmation from CIA insiders that Albania was indeed the country to which the Agency opted to send Mr El-Masri from Afghanistan. We were told by these American sources that originally the CIA had asked "the former Yugoslav Republic of Macedonia" whether it would accept a "reversal" of the January 2004 rendition, but that this approach was instantly rejected: *"You can imagine that was the last thing the Macedonians wanted! They had no reason to take the problem back."*

283. The CIA's second choice of Albania was favourable from a geographical point of view since it opened the option to drive Mr El-Masri to the Macedonian border immediately upon arrival and thus set him free in a state of disorientation that might diminish his credibility if he went public with his story. From a policy point of view, Albania has also proven to be a willing bilateral partner in providing the United States with a "dumping ground"[228] for its unwanted detainees in the "war on terror." At least eight former inmates of Guantanamo Bay remain stranded in Albania[229] because their refugee status does not allow them to go home to their families.

284. At the end of his own ordeal, Mr El-Masri was not shot in the back but instead confronted by police guards at a checkpoint on what appeared to be the border between "the former Yugoslav Republic of Macedonia" and Albania. From there he was driven for about six hours to Tirana, Albania's capital city, and sent home to Germany on a commercial flight from Mother Theresa Airport to Frankfurt. He received a boarding card for this final flight and an Albanian exit stamp in his passport for 29 May 2004.

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285. There have been other new developments concerning in particular the activities of the prosecutor's office in Munich, the proceedings in the German Bundestag's parliamentary committee of inquiry (*Untersuchungsausschuss/UA*), Mr El-Masri's civil lawsuit against the CIA before US courts, and, last but not least, his personal situation.

286. The case against Mr El-Masri's kidnappers before the Munich prosecutor's office is still pending. Upon the initiative of the prosecutor, international arrest warrants were launched against 13 suspected CIA agents in January 2007.[230] The Bavarian judicial authorities did not in any way interfere with the launch of these arrest warrants, but no progress has as yet been made in apprehending the persons concerned or even identifying them by their actual names.

287. In Germany – in contrast to Italy – it is not possible to try suspects *in absentia*. In reply to a formal request for judicial cooperation addressed to the Macedonian authorities in early 2006, the prosecutors were given only the "official version" of the events as already publicly stated by the authorities.[231]

288. Nor has any progress been made in identifying "Sam", the German-speaking agent who, it is claimed, accompanied Mr El-Masri home from Afghanistan[232]. It was revealed recently[233] that then Interior Minister Schily was personally present in Kabul at the time when "Sam" announced to Mr El-Masri that he would soon be repatriated. But the prosecutor sees no link between Mr Schily's presence and the allegations made by Mr El-Masri himself that "Sam" was in fact a German federal agent.

[228] The phrase "dumping ground" is used by the US lawyer of five Uighur Muslims from western China who were sent to Albania in May 2006 upon their release from Guantanamo Bay; see BBC News Online, "Albania takes Guantanamo Uighurs", available at http://news.bbc.co.uk/2/hi/americas/4973468.stm.

[229] See, for example, BBC News, "Guantanamo refugee rues asylum deal," 18.05.2007, available at http://news.bbc.co.uk/2/hi/africa/6665187.stm. The nationalities of the eight men in Albania are listed as: an Algerian, an Egyptian, an Uzbek and the five Uighurs.

[230] In its press release of 31.01.2007, the Prosecutor's Office acknowledged having received additional information from the Milan Prosecutor's Office and from the Council of Europe's Rapporteur, Dick Marty.

[231] See Marty report 2006, *supra* note 8, p. 27, §§ 106-111.

[232] See Marty report 2006, *supra* note 8, p. 26, §§ 99-100, p. 27, § 103, p. 32, § 130.

[233] See n-tv, 23.11.2006.

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289. It has been revealed that the telephones of Mr El-Masri's lawyer, Mr Gnjidic, were tapped from January until May 2006 on the instructions of the prosecutor's office. At the time, there were also long conversations between Mr Gnjidic and my collaborator as part of the mandate given to me by the Parliamentary Assembly. The prosecutor in charge[234] informed me that the reason for the wire-tap, which was court-approved as provided for by law[235], was to document any possible attempts made by the suspected kidnappers to contact Mr Gnjidic with a view to offering Mr El-Masri a settlement. As no such contacts were made, however, the wire-tap was terminated. Mr Gnjidic, who had not been informed of this wire-tap in advance, appealed against the decision authorising the surveillance. Its extension beyond March was found unlawful on appeal, but the legality of the initial wire-tap was upheld. Mr Gnjidic then lodged a constitutional complaint (*Verfassungsbeschwerde*) against the authorisation of the initial wire-tap before the Federal Constitutional Court (*Bundesverfassungsgericht*). In submissions to this court,[236] the Federal Ministry of the Interior commented that if it found the wire-tap justified. On 17 May 2007, the Federal Constitutional Court held that the wire-tap had violated Mr Gnjidic's constitutionally protected right to privacy.

290. Whilst the Bundestag's parliamentary committee of inquiry (UA) has not yet completed its work, it is now undisputed in this body that Mr El-Masri's account of his ordeal is true[237]. This means that there is no longer any doubt that the Macedonian authorities' official version is inaccurate[238]. This confirms our belief that the latter consciously concealed the truth.

291. Disagreement between the representatives of the German Government and opposition parties in the Bundestag committee of inquiry continues to exist as to the extent to which different German authorities were involved or at least informed of Mr El-Masri's case, and when. The testimonies of a Telecom employee and a junior member of the German intelligence services – claiming that Macedonian officials informed the German embassy in Skopje of Mr El-Masri's detention before he was transported to Afghanistan - were not considered by the majority of the committee to be sufficiently conclusive to be able to hold the political leadership accountable[239].

292. More generally, opposition members on the committee have voiced their frustration that the executive is limiting the possibility for the committee to elucidate the truth by invoking official secrecy, refusing access to key files or testimony on this ground. Information relating to the "core field of executive privilege" and information which must be kept secret in the higher interests of the state (*Staatswohl*) is not available to the UA even when meeting in camera. It is the executive itself which decides what information falls into this category, apparently without any parliamentary control; the current trend is to extend this concept of knowledge restricted to the executive, a move which has come in for much criticism from the members of the UA. The latter have recently decided to refer this matter to the Federal Constitutional Court[240]. Even classified information which does not fall into this category has to be dealt with in camera by the committee, which means that it cannot be publicised by the members of the UA; this too has been criticised by some members of the Bundestag[241].

293. Prosecutor Hofmann, who also testified before the UA, had transmitted the entire case file to the committee, including elements that were classified as secret. But during his public testimony, he was obliged to withhold his answers to certain questions relating to classified documents. His offer to discuss the classified material in a closed session was not taken up, although this procedure had been followed for other witnesses.

[234] Mr Martin Hofmann, whom I met in December 2006 in Geneva. I should like to thank Mr Hofmann for his kind cooperation.
[235] A prolongation of the wire-tap was subsequently refused by the competent judge.
[236] On file with the inquiry.
[237] According to Max Stadler, Liberal member of the Bundestag's committee of inquiry and the *Parlamentarisches Kontollgremium (PKG)* who spoke with a member of our team on 26.05.2007, this is the opinion of all members, including those from the party currently in power.
[238] Mr Stadler, *supra* note 239, indicates that this is also the view of the committee of inquiry, which does not however believe that its terms of reference allows it to record this officially.
[239] The political leadership could only be held responsible for "organisational error" for failing to report back with the relevant information in good time.
[240] Tagesthemen.de of 21.05.2007, citing Dr. Max Stadler (Liberal).
[241] Mr Stadler has alluded to "organised leaks" by members of government parties designed or at least objectively likely to mislead the public on the substance of the in camera discussions – one case in point was the private hearing of officers who had interrogated Mr Kurnaz in Guantanamo Bay and the matter of the American "offer", apparently refused by the German authorities, to allow Mr Kurnaz to be repatriated.

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294. As a result of the UA's work, the German government and government departments have been made more aware of human rights aspects and the rule of law[242]. The UA recently agreed to avail itself, for the first time, of the possibility provided for in the law governing committees of inquiry to appoint a "special investigator" with effect from the summer 2007 parliamentary recess, tasked on behalf of the UA with looking into the CIA rendition flights[243].

295. Meanwhile Mr El-Masri's civil lawsuit in the United States against the CIA is entering its final phase: an appeal to the US Supreme Court, after the rejection of his case on grounds of state secrecy in the first instance, upheld by the court of appeal[244], was announced by Mr Gnjidic on 30 May 2007.

296. Against this background, Mr El-Masri himself is still suffering severely from the psychological consequences of the ordeal he has gone through. He has been repeatedly victimised by personal attacks in the local media and has been unable to find employment in the last three years. In January 2007, he lashed out physically at a vocational training officer, who he felt had treated him unfairly. On 17 May 2007, he was arrested in Neu-Ulm as a suspect in a case of arson and placed in a psychiatric hospital[245]. This dramatic development in Mr El-Masri's personal situation merely confirms the repeated claims by his lawyer, Mr Gnjidic, that Mr El-Masri is in desperate need of immediate professional psycho-social post-traumatic care[246]. According to his current therapist[247], the conflict between his post-traumatic care and the pressure arising from the various ongoing procedures to establish the truth simply adds to Mr El-Masri's problems.

297. It is therefore all the more regrettable that Mr El-Masri has not yet been given an official apology for the abuses he has suffered, despite the fact that Mr Schily has stated before the *Untersuchungsausschuss* that Mr El-Masri is innocent and that the Americans have long since offered their own apology to the German Government.

298. I have the following comments regarding these developments in the El-Masri case.

b. The "legal vacuum": denial of accountability to El-Masri in Germany and in the United States

299. In the present state of affairs, Mr El-Masri is unable to hold accountable those responsible for his ordeal both in Germany and in the United States. The core of the problem is the doctrine of state secrecy, which at present constitutes an absolute obstacle to the effective prosecution of Mr El-Masri's kidnappers in Germany, the full clarification of responsibilities in the *Untersuchungsausschuss* and Mr El-Masri's civil lawsuit against the CIA in the United States.

300. As Mr Gnjidic has said so aptly in his complaint against the wire-tap of his law office: whilst the domain of professional secrecy - the traditionally protected relationship between lawyers and doctors and their clients, journalists and their sources - is gradually shrinking, the realm of state secrecy is increasingly expanding. "Equality of arms" - part of the "fair trial" requirements under Article 6 ECHR - becomes a hollow phrase under these conditions[248].

[242] Mr Stadler gave as an example an apparently similar case of a long-term German resident arrested in Pakistan who was able to return to Germany without the government raising the objections it did in the case of Mr Kurnaz; a second example is the approach adopted by the Bundestag's Legal Affairs Committee to a bill to facilitate information exchange between executive services in the fight against terrorism. The Committee insisted on including measures to prevent this being misused for rendition purposes.
[243] Mr Stadler insisted that this "special investigator" would not be replacing the Committee but would be preparing the way by carrying out preliminary investigations which would facilitate the UA's subsequent work.
[244] No 06-1667 of 02.03.2007 (4th circuit).
[245] He is suspected of having laid fire to a wholesale market in Neu-Ulm (cf. Spiegel online 17.05.2007).
[246] Letter from Mr Gnjidic to Chancellor Merkel of 26.04.2007, passed on to the Bavarian Prime Minister's Office by letter from the Chancellor's office of 11.05.2007 with a request to take this issue up as a matter of urgency (copy of both letters on file); since February 2006, Mr El-Masri has received limited therapy (70 hours) from the treatment centre for torture victims in Neu-Ulm, but this therapy was considered as insufficient both by Mr Gnjidic and by the therapist herself (cf. SPIEGEL-online 18.05.2007). Although Mr El-Masri had asked for treatment at the centre shortly after his return to Germany in 2004, it took until 2006 for Mr Gnjidic to obtain the required health insurance funding agreement to start this limited treatment.
[247] Cf. Spiegel-online, 18.05.2007 (interview with Ms Gertrude Dölsch).
[248] Mr Gnjidic's graphic comparison : the lawyer gets to fight with a pocket knife, the executive with a sword.

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301. The US Supreme Court, if it chooses to hear Mr El-Masri's case, and the German Federal Constitutional Court, following the appeal lodged by the minority representatives of the Bundestag's committee of inquiry, will have to take a position on the extent to which the executive is allowed to act in complete secrecy, without the possibility for either judicial or parliamentary scrutiny of its actions. Here, we have on the one hand lawyers and judges – in favour of judicial and/or parliamentary control, and on the other the executive, and in particular the intelligence agencies and other special services, claiming the freedom to act in secrecy on the pretext of the supposed higher interests of the state. Mr Gnjidic's constitutional complaint, in contrast, has led to a clearer definition of the realm of professional secrecy.

302. These are undeniably key issues for the defence of human rights and for the fight against terrorism. Short-circuiting the different mechanisms of judicial and parliamentary control does not make the fight against terrorism more effective. Rather, this vacuum can lead to arbitrary action and all sorts of dysfunctioning. While certain operational means must of course remain confidential, there is nothing to prevent making provision for transparent procedures for subsequent review. Continuing to invoke state secrecy years after the events is unacceptable in a democratic society.

303. Moreover, state secrecy cannot in any circumstances justify or conceal criminal acts and serious human rights violations. From the point of view of the rule of law, the ruling of the US Court of Appeal (4th circuit) in Mr El-Masri's case[248] is disappointing and regrettable: whilst the Court of Appeal acknowledges that it is for the courts to decide on the extent of state secrecy[249], it takes a very restrictive stance as to the scope of judicial review, insisting on the court being obliged to accord the "utmost deference" to the responsibilities of the executive branch[250]. This "deference" goes so far that "in certain circumstances a court may conclude that an explanation by the Executive of why a question cannot be answered would itself create an unacceptable danger of injurious disclosure. [...] In such a situation, a court is obliged to accept the executive branch's claim of privilege without further demand"[251].

304. One may legitimately ask how such reasoning can be reconciled with the fundamental principles of the rule of law. The case law of the US Supreme Court cited in support of this wide interpretation of the state secrecy doctrine[252] dates back to the 19th century and the worst periods of the Cold War, when there was an almost blind trust in the infallibility and incorruptibility of its secret services. It is therefore to be hoped that the United States Supreme Court will use the opportunity of the El-Masri case to take a fresh approach to and modernise the "state secrets doctrine", to bring it into line with the principle of the separation of powers and the requirement for transparency in a genuinely democratic society.

305. In *Fitzgerald*[253], another United States Court of Appeal rightly points out that *"[w]hen the state secrets privilege is validly asserted, the result is unfairness to individual litigants – through the loss of important evidence or dismissal of a case – in order to protect a greater public value."* How can it be seriously argued that information establishing the responsibility of State officials in serious violations of human rights is of "a greater public value" deserving protection in a democratic society?

[248] No 06-1667 of 02.03.2007
[249] Quoting the US Supreme Court in *Reynolds* (345 US at 9-10) "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers"
[250] Again quoting the US Supreme Court (*Nixon*, 418 US at 710)
[251] Court of Appeal (*supra* note 246) p. 12, with references to the US Supreme Court's *Reynolds* judgment (345 US at 9).
[252] The *Reynolds* case dates back to 1953; another leading case (*Totten v. United States, 92 US 105*) to 1875, and the *United States v. Nixon (418 US 683)* to 1974; *Chi & S Air Lines, Inc., v. Waterman S.S.Corp.*, 333 US 103, 111 to 1972
[253] 776 F.2d at 1238 n.3 (cited by the Court of Appeal in the El-Masri case, *supra* note 246, p. 23)

306. The principle of judicial self-restraint is certainly a good thing, but this is truly corrupted when it results in a denial by the judicial system of its own role, leading to impunity for the perpetrators of serious human rights violations.

307. Judges, prosecutors and lawyers cannot *a priori* be considered national security risks, any more than other agents of States themselves. If necessary to safeguard legitimate state secrets that may well be intertwined with illegitimate ones, judicial personnel participating in proceedings involving state secrets can be subjected to a specific clearing or vetting procedure, as is done in a number of jurisdictions, and placed under an obligation to maintain the secrecy of the information they are given access to[255].

308. In order to ensure accountability, information pertaining to serious human rights violations committed by agents of the executive should not, and need not be permitted to be shielded by the notion of state secrecy or national security.

309. What applies to courts must also apply to parliamentary committees of inquiry: the executive must not be allowed to thwart inquiries into its own possible wrongdoings by classifying relevant information.

c. *The German parliamentary committee of inquiry and the work of the prosecutors in Munich*

- *The Bundestag committee of inquiry*

310. The German parliamentary committee of inquiry responsible for establishing the facts in the El-Masri case is emblematic. Of course the *Bundestag*'s decision to conduct a serious inquiry into the case of Mr El-Masri and into possibly reprehensible activities by the German special services is welcome. It is, however, regrettable that most members of the committee have to date been content to receive documentation that has been rendered very incomplete by government censorship. The committee has also frequently been quick to accept the reasons given by witnesses for refusing to give evidence: on each occasion, "state secrecy" or the so-called doctrine of *exekutive Eigenverantwortung* (the domain of the executive's own responsibility, exempt from parliamentary scrutiny) has been accepted. It should also be made clear that the standing committee responsible for supervising the activities of the secret services (*Parlamentarisches Kontrollgremium (PKG)*) has access to secret information[256]; and that the parliamentary committee of inquiry was granted access behind closed doors both to classified documents and to witness testimony on matters classified as secret. What is in dispute between majority and minority representatives is the extent to which parliamentarians can demand access to classified materials, and what use they can make of it in public if they consider that the matter in question requires their constituents to be informed. This matter needs clarification, generally and also for future reference. The parliamentary committee of inquiry is fulfilling its supervisory remit in the interest of parliament as a whole, and its work must not be primarily influenced by considerations of short-term political rivalry[257]. Any majority, in a democratic system, can become the minority at the next election, and should have an interest in protecting parliamentary scrutiny of executive action. I therefore welcome the decision of the opposition representatives on the parliamentary committee of inquiry to apply to the Federal Constitutional Court for a clearer definition of the scope of the doctrine of the executive's own responsibility (*exekutive Eigenverantwortung*)[258].

[255] In the same way as the procedure described by the 4th Circuit Court of Appeals (*supra* note 246, pp. 11-12 and 21-22) for the judicial review of the issue whether the information sought to be protected qualifies as privileged under the state secrets doctrine.
[256] On the other hand, this body has no power to summon witnesses. The government is under an obligation to "report" to the PKG, but there is no statutory obligation (subject to criminal penalty) like that which exists for witnesses summoned by a committee of inquiry, for the executive's representatives on the PKG to tell the truth.
[257] As seems to be the case, according to Mr Stadler, within the German parliamentary committee of inquiry: while the representatives of government parties, especially the Christian Democrats who were in the opposition at the material time, take a very active and open attitude during the examination of witnesses, government discipline comes fully into play when the facts are being assessed, with the representatives of government parties never having voted for a motion to take evidence (*Beweisantrag*) tabled by minority representatives or having tabled such a motion themselves.
[258] cf. tagesthemen.de of 21.06.2007, announcing the appeal to the Federal Constitutional Court.

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its resources and let it die than to kill every insurgent [because] dynamic insurgencies can replace losses quickly. Skilful counterinsurgents must thus cut off the sources of that recuperative power." One such source is said to be the status afforded to an insurgent by his enemy.

[illegible]
56800&admnt=1&oref=login&admnix=1180692658-m6KqJwvrpPYbDzyegwQvGA

[illegible] See Steve Kleinman, "Barriers to Success: Critical Challenges in Developing a New Educing Information Paradigm," excerpts taken from pp. 254, 255 and 265, in *Intelligence Science Board*, "Educing Information", *supra* note 308, at pp. 235-266.

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359. I support unambiguous, transparent and strictly enforced rules on CIA detainee interrogation. The Executive Order that President Bush "shall issue" imminently[310] should be published in full and should expressly outlaw not only the abhorrent practice of "water boarding," but also techniques like slapping, stress positions, sleep deprivation and extremes of temperature. I note that even the Army Field Manual of September 2006 leaves open the possibility that such techniques are not prohibited, so that manual does not strike me as an appropriately robust set of minimum standards. When the long-awaited rules for the CIA are finally issued, they must set higher, clearer thresholds that maintain the integrity of these important interrogations.

iii. Perceptions of the HVD programme and its likely reactivation

360. At the time of his 6 September 2006 speech, President Bush lauded the HVD programme as a policy that "*has been, and remains, one of the most vital tools in our war against the terrorists*". In the experience of our team during this inquiry, the President's view is largely shared among those officers who had knowledge of the programme. With only very few exceptions, the majority of our sources in the CIA and the wider intelligence community have described the HVD programme as a success, or in one case "*about as good as it could have turned out*".

361. The following is an excerpt from our interview with a senior US intelligence source:

> "I think you have to understand that the programme we ran through 2005, into 2006 to handle the HVDs was both needs-oriented and results-oriented. We needed to show that we could capture those responsible for 9/11, break down key Al-Qaeda cells at their source, and keep the threat of terror attacks as far away from the American people as possible. We needed to work with our most trusted allies to avoid leaks that would endanger national security – ours or theirs. The results speak for themselves.
>
> And if you look at our situation now, the needs are different from the immediate post-9/11 period. Bringing those 14 HVDs to Guantánamo – the Zubaydahs and the KSMs – was like drawing a line under that programme in the way it had been operating, as a lot of guys weren't happy going on with it. Sure, there'll be something else to replace it, but we don't know what that looks like yet."

362. Our sources have stated categorically to us that from the perspective of the CIA officials who operated it, the specific aspects of the "High-Value Detainee" programme on which this report concentrates – including the European "black sites" – belong to a chapter of the post-9/11 story that is essentially closed.

363. At first sight, this analysis appears valid. The 14 HVDs whom our sources agreed to discuss with us (at least on a limited basis) have been transferred to and are all now held at Guantanamo Bay. They have received visits from representatives of the International Committee of the Red Cross (ICRC), which indicates that their fundamental rights as detainees have at last been regularised, at least as far as this particular aspect is concerned. They are no longer regarded as having high "live" intelligence value for the CIA or the US Government,[311] and so they were subject to Combatant Status Review Tribunal (CSRT) proceedings in early 2006 to rubber-stamp their status as "unlawful enemy combatants". Ultimately, these HVDs will be among the first detainees to be charged with specific offences in individual military commissions processes.

[310] According to the Military Commissions Act 2006, at §§ 6(a)(3)(A) and (B), the President "shall issue" an Executive Order containing authoritative interpretations of the "meaning and application of the Geneva Conventions" that would then apply to interrogations carried out by the CIA. Recent news reports have stated that a lengthy deliberative process involving lawyers in the State Department, the White House, Directorate of National Intelligence and the Department of Defense would most likely lead to this Executive Order being published before the summer of 2007; see, for example, Mark Mazzetti, "CIA Awaits Rules on Terrorism Interrogations," in *The New York Times*, 25.03.2007, available at: http://www.nytimes.com/2007/03/25/washington/25interrogate.html?ex=1332475200&en=c7c0514347030512&ei=5088&partner=rssnyt&emc=rss

[311] See Remarks by President Bush, 06.09.2006, *supra* note 3: "*We have largely completed our questioning of the men – and to start the process for bringing them to trial, we must bring them into the open". One of our sources also conceded that having held these detainees for several years in incommunicado detention, it would be "disingenuous" to say that they are still "live intelligence assets".*

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364. On the other hand, however, there can be little doubt that the Bush Administration is prepared to resort once again to some form of CIA detention and interrogation regime in the future. If President Bush's claim on 6 September 2006 that "*there are now no terrorists in the CIA program*" represented the closing of one chapter, then his very next sentence heralded the opening of another: "*But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical – and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information*".[312]

365. Indeed, there are clear indications that the HVD programme has been reactivated in recent months. The transfer of Abd Al-Iraqi to Guantanamo Bay in April 2007[313] bore strikingly similar characteristics to the 14 transfers in September 2006: during his several months in CIA detention prior to his transfer to Cuba, he appears to have been kept incommunicado and subjected to interrogation at an unknown site.

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366. Indeed Al-Iraqi's handover to the Department of Defense only *after* his intelligence value to the CIA had been completely exploited would seem to confirm this statement from one of our intelligence sources: "*The CIA has gone from having no interest in interrogation to being the agency of preference in this area. We'll only give them up to the DoD once we've got everything we can out of them.*"

iv. Concluding thoughts

367. It is my sincere hope that my report this year will catalyse a renewed appreciation of the legal and moral quagmire into which we have collectively sunk as a result of the US-led "war on terror." Almost six years in, we seem no closer to pulling ourselves out of this quagmire, partly because of the absence of factual clarity – perpetuated by secrecy, cover-up and dishonesty – about the exact practices in which the US and its allies have engaged, and partly because a lack of urgency and political will on both sides of the Atlantic to unite around consensus solutions.

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368. By clarifying some of the unspoken truths that have previously held us back in this exercise, I hope I have spurred right-minded Americans and Europeans alike into realising that our common values, in tandem with our common security, depend on our uniting to end the abusive practices inherent in US policies like the "High-Value Detainee" programme.

[312] See Remarks by President Bush, 06.09.2006, *supra* note 3. Also, for the President's interpretation of the CIA programme's status under the revised law, see The White House, Office of the Press Secretary, "President Bush Signs Military Commissions Act of 2006", 17.10.2006, available at http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html. The Act, he said, "will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives."

[313] See US Department of Defense, "Defense Department takes custody of al-Qaeda leader," 27 April 2007, available at http://www.defenselink.mil/news/newsarticle.aspx?id=32969.

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THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

RELEASED IN FULL

LA1

October 21, 2005

Ms. Christine Chanet
Chairman
Human Rights Committee
Office of the High Commissioner
for Human Rights
Palais Wilson
CH-1211 Geneva 10

Dear Madame Chairman:

I have the honor to transmit to you the combined second and third periodic report of the United States of America, with annexes, provided under Article 40 of the International Covenant on Civil and Political Rights. As you requested in your letter of July 23, 2005, the report contains a discussion of U.S. implementation of the Patriot Act. The Government of the United States will be pleased to answer further questions from the Committee on the basis of this report, in keeping with the Committee's rules and standard practice.

Please allow me to express once again the longstanding commitment of the United States to the protection and promotion of human rights and to the work of the Committee.

Regards,

Kevin Edward Moley
Ambassador

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

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LA2

October 21, 2005

Ms. Christine Chanet
Chairman
Human Rights Committee
Office of the High Commissioner
for Human Rights
PalaisWilson
CH-1211 Geneva 10

Dear Madame Chairman:

In a letter that I had the honor to send you today, the United States of America transmitted to the Committee on Human Rights the combined second and third periodic report of the United States of America, provided under Article 40 of the International Covenant on Civil and Political Rights. Although not part of the U.S. report, as described more fully in paragraph 130 of the U.S. report, I am enclosing, as a mutter of courtesy, a separate description relating to individuals under the control of the U.S. Armed Forces captured during operations against the Taliban, Al-Qaida, and their affiliates and supporters and to individuals captured during military operations in Iraq. This information updates information provided in May of this year by the United States to the Committee Against Torture.

We hope that this information will be responsive to the concerns you expressed in your July 23, 2005 letter.

Regards,

Kevin Edward Moley
Ambassador

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
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UNITED NATIONS

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HUMAN RIGHTS COUNCIL
First session
Agenda item 4

IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF 15 MARCH 2006 ENTITLED "HUMAN RIGHTS COUNCIL"

Note verbale dated 20 June 2006 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Human Rights Council

The Permanent Mission of the United States of America presents its compliments of the secretariat of the Human Rights Council and has the honour to request that the secretariat distribute the attached paper on the Draft Convention for the Protection of All Persons from Enforced Disappearance to all Council members and observers and to include the document as part of the official record.

* Reproduced in the annex as received, in the language of submission only.

GE.06-12685

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Annex

The United States appreciates the opportunity to address the Human Rights Council on the Draft Convention for the Protection of All Persons from Enforced Disappearance. We thank the Chair of the Working Group and all participants in the Working Group for focusing attention on this serious human rights violation, although we express disappointment that the draft text of the Convention, albeit significantly improved from earlier drafts, does not represent the consensus of all members of the Working Group. The United States has been an active participant in the Working Group in each session, and given our steady participation, we are providing our understanding of the intent of States that participated in the Working Group on a number of core issues. We will provide further, detailed interpretations when this document comes up for consideration at the UN General Assembly. We reaffirm and incorporate herein our Closing Statement at the final session of the Working Group, reproduced at pages 48-49 of the Working Group Report of the Fifth Session (E/CN.4/2006/57) ("Report").

We underscore at the outset our view, shared by other delegations, that the definition of the crime (Article 2) would have been much improved had it been more precise and included an explicit requirement for intentionality, particularly the specific intent to place a person outside the protection of the law. The need for intentionality was recognized by the Chair and recorded in paragraph 96 of the Report, which states that an intentionality requirement is implicit in the definition of enforced disappearance, recognizing that "in no penal system was there an offense of enforced disappearance without intent." We agree and reaffirm our understanding that under the Convention *mens rea* is an essential ingredient of the

crime under Articles 2, 4, 6 (particularly Article 6(2)), 12(4), 22, 25, & other articles.

Second, the United States expresses its intent to interpret the Right to Truth in the preamble and in Article 24(2) consistent with the Commission on Human Rights Resolution on the Right to Truth (2005/66), which states that the right may be recognized in various legal systems (such as our own) as freedom of information, *the right to know*, or the right to be informed, and also consistent with the International Covenant on Civil and Political Rights which speaks to the right to seek, receive and impart information. As noted in our Explanation of Position delivered upon adoption of UNCHR resolution 2005/66, the United States' position on the right to know has not changed since the ICRC Conference on the Missing in February 2003 as well as at the 28th ICRC/Red Cross Conference in December 2003; that is, the United States is committed to advancing the cause of families dealing with the problem of missing persons; however, we do not acknowledge any new international right or obligation in this regard. For the United States, which is not a party to the 1977 Additional Protocol I to the Geneva Conventions and has no obligations vis-à-vis any "right to truth" under Article 32 of that instrument, families are informed of the fate of their missing family members based on the longstanding policy of the United States and not because of Article 32.

Third, the United States wishes to place on record our understanding of Article 43 of the draft Convention. We understand this provision to confirm that the provisions of the law of armed conflict, also called international humanitarian law, remain the *lex specialis* in situations of armed conflict and other situations to which

international humanitarian law applies. The United States understands Article 43 to operate as a "savings clause" in order to ensure that the relevant provisions of international humanitarian law take precedence over any other provisions contained in this Convention.

Fourth, the United States continues to support the use of an existing treaty body to perform *monitoring functions*, that is, the Human Rights Committee, which currently deals with forced disappearances, in view of the Committee's expertise; in the interests of consistency of jurisprudence, efficiency, avoidance of redundancy, and cost; and in light of the ongoing proposals for treaty body reform. We would hope that, per Article 27 of the draft Convention, States Parties adopt in the future use of the Human Rights Committee as the monitoring body.

In addition to the points expressed above, we place on the record our reservations, many of which are noted in the Report and in our Closing Statement, to, *inter alia*, the following articles, which is an illustrative (not exhaustive) list:

- Article 4 on criminalization should not be read to require various domestic legal systems to enact an autonomous offense of enforced disappearance, which is unnecessary and, from a practical standpoint, unworkable in, for example, a federal system such as our own.
- Article 5 requiring criminalization of crimes against humanity is vague, aspirational in nature, and inappropriate as an operative treaty provision. The United States agrees with the statement in paragraph 106 of the Report that Article 5 would "not create any additional obligations on States to accede to particular instruments or amend their domestic legislation."

- Article 6(2) on the unavailability of a defense of obedience to superior orders in a prosecution related to enforced disappearance could under certain circumstances be inconsistent with due process guarantees and could subject unwitting government personnel to the possibility of prosecution for actions that they did not and could not know were prohibited. Therefore, as stated in paragraph 109 of the Report, the United States interprets Article 6(2) to establish no criminal responsibility on the part of an individual unaware of participating in the commission of an enforced disappearance.
- Article 8 on statute of limitations presents problems of implementation in a federal system and contains unclear text in paragraph 2.
- Article 9(2) on "found in" jurisdiction remains unacceptable to the United States, especially in view of the lack of precision in the definition of enforced disappearance.
- Article 16 on *non-refoulement*, which refers to violations of international humanitarian law in the country of return, does not conform to international principles on *non-refoulement*, as articulated in the 1951 Refugee Convention.
- Article 17 on standards for and access to places of detention retains the possibility of conflict with constitutional and other legal provisions in the laws of some States; accordingly we would interpret the term "any persons with a legitimate interest" in Articles 17, 18, and 30 in accordance with the domestic law of a State.

- Article 18 on access to information similarly retains the possibility of conflict with constitutional and other legal provisions of a State and sets unreasonable standards guaranteeing information.
- Article 22 on additional criminalization, among other concerns, should contain an express intentionality requirement, and the United States will interpret it to contain such an intent requirement (as noted above).
- Article 24 on the right to the truth and reparation contains text that is vague and at the same time overly specific, employs an overbroad definition of a "victim," and may not be consistent with a common law system for granting remedies and compensation.
- Article 25 on children must be interpreted consistent with adoption laws and other relevant domestic laws and with international obligations of the State regarding children.

The United States respectfully requests that its views be made a part of the official record of the Human Rights Council.

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General Statement of the United States: Forced Disappearances Text

As the task of the Working Group draws to a close and responsibility is passed to the Human Rights Commission to consider further work, we express sincere appreciation to the Chair and his team, including the Secretariat, for your enormous dedication, skill, and industriousness during negotiations on a binding instrument to combat this heinous crime.

We also commend the State delegations, the independent experts, the ICRC, and non-governmental organizations for their intense commitment, expertise, tireless work, and collegiality throughout, and give special thanks to the families of the disappeared for bearing witness to this terrible scourge.

At the same time, as we have said before, in order to produce a document that will attract the widest possible number of states parties, treaty negotiations should be deliberate, unhurried, and careful, allowing for full expression of views by all representatives, with every effort to achieve a consensus text that can be applied in all legal systems.

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We regret that often the pace of negotiations, among other factors, has resulted in a document that includes provisions the United States does not support, and to which we have registered key reservations. These reservations include, but are not limited to the following:

Preambular paragraph 7 and Article 24(2) on the RIGHT TO THE TRUTH. This is a notion that the United States views only in the context of the freedom of information, which is enshrined in Article 19 of the ICCPR, consistent with our long-standing position under the Geneva Conventions. We are grateful for the good will shown in seeking compromise language in the Preamble, but our reservations remain concerning this issue, including with respect to Article 24 (2), which we read in this same light.

We have serious concerns about Article 2 which we firmly believe needs a more focused DEFINITION that includes the element of intentionality. This is the core of the Convention and we believe it needs a great deal more work.

Article 5 requiring domestic legislation criminalizing CRIMES AGAINST HUMANITY remains insufficiently defined and inappropriate to an operative paragraph in the text.

As we have noted, the lack of a DEFENSE OF SUPERIOR ORDERS in Article 6(2) could unfairly subject unwitting military and law enforcement personnel to the possibility of prosecution for actions that they did not and could not know were prohibited.

Despite some modifications, the specific requirements for a STATUTE OF LIMITATIONS in Article 8 continue to present a problem of implementation within a Federal system like that of the U.S. Likewise, Article 4 should not be read to require our various domestic legal systems to enact an autonomous offense of enforced disappearance, which is unnecessary and, from a practical standpoint, extremely burdensome and unworkable in the United States.

We also note that our continuing objection to Article 9 (2) concerning "FOUND IN" JURISDICTION has not been satisfactorily addressed.

We have clearly stated for the record our continuing reservation to the absence of language in Article 16 explicitly conforming this text to

the principle of NON-REFOULEMENT articulated in the 1951 Refugee Convention.

We find that Article 17 concerning ACCESS TO PLACES OF DETENTION, despite significant improvement, retains the possibility of conflict with constitutional and legal provisions in the laws of some state parties.

Finally, we remain unconvinced that the appropriate vehicle for implementation of this instrument is a NEW TREATY MONITORING BODY.

Despite our continuing reservations, let me reiterate to you, Mr. Chairman, and your magnificent staff, the appreciation of my delegation for your outstanding leadership and the warm, cooperative and collegial spirit which defined these negotiations.

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U.S. Government's Initial Intervention at
Working Group Negotiations on a Draft
Forced Disappearances Convention
(January 6, 2003)

The United States delegation takes great pleasure Mr. Chairman, in warmly congratulating you on your assumption of the chairmanship of this working group, for all of the reasons that have already been mentioned.

The United States deplores forced disappearances and regards them as a serious violation of human rights and fundamental freedoms, which, as others have correctly pointed out, result in several associated violations of human rights guarantees. These include, for instance, deprivation of the right to liberty and security of the person, the right against arbitrary arrest or detention, and the rights to due process and a fair trial, just to mention a few. Moreover, too often, forced disappearances lead to some of the gravest violations, such as torture and deprivation of the right to life.

So there should be no mistake that the U.S. harbors no toleration for the despicable collection of violations associated with the phenomenon of "forced disappearance."

Nonetheless, the U.S. finds itself in agreement with several delegations that have suggested in various ways that the Working Group has much work ahead of it in order to elaborate a document that could attract widespread acceptance within the international community.

First, for example, reaching consensus on a legal definition of "forced disappearance" that would be precise and not prohibit legitimate law enforcement and military activities presents a daunting challenge for the Working Group. While we recognize the effort invested in the 1998 Sub-Commission draft on forced disappearances, we believe that its definitional section is in several respects far too broad to be workable in the practical sense of defining and penalizing a crime. As we will point out along the way, the draft text contains other deficiencies which will require close scrutiny and revision. In this regard, we believe that the Working Group should make a virtue of precision in our negotiations.

Second, whatever draft instrument results from this process should be compatible with internationally accepted standards and guarantees, such as those contained in the ICCPR.

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Third, we believe the proposed convention should be carefully crafted to target forced disappearances without capturing collateral issues and bodies of law. For example, we believe that existing international humanitarian law should continue to govern and resolve issues arising from armed conflict.

A fourth concern is that, in our view, a convention should place its greatest emphasis on strengthening national laws and law enforcement practices, which is where the problem of forced disappearances is typically confronted.

Fifth, we would not support the creation of a new treaty body to oversee compliance with a new convention. We oppose duplication of the work and the capabilities of existing treaty bodies, and would wish to avoid additional costs and efforts associated with such duplication. For instance, several delegations have made the interesting proposal that we frame this instrument as an optional protocol to the ICCPR. An advantage of so doing may be that the Human Rights Committee could serve as the monitoring mechanism.

A sixth concern relates to provisions that would clearly, from the outset, impede consensus, such as a no-reservations provision and certain other provisions contained in the 1998 draft.

These comments represent some of our initial thoughts. Others will likely be raised in the course of the Working Group's deliberations. We look forward to actively participating in the work of this body.

HRC submission on website

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United States/Selected Core Legal Reservations to the Draft Forced Disappearances Instrument

The United States maintains several core legal reservations to the draft forced disappearances treaty text and, for example, proposed the following textual amendments to draft treaty provisions during the course of the five formal negotiating sessions of the Working Group to elaborate a binding normative instrument to prohibit and punish forced disappearances. The following list of textual amendments proposed by the United States during negotiations is illustrative and not exhaustive. Please consult our written statement on the draft convention distributed at the Human Rights Council during its first session (and posted on our website) as well as our Closing Statement at the conclusion of negotiations in October 2005 (reproduced at pages 48-49 of the Report of the Fifth Session of the Working Group) for additional information on the views of the United States.

An illustrative sampling of proposed textual amendments proffered by the United States delegation during negotiations:

DEFINITION - Article 2

"For the purposes of this instrument, enforced disappearance is considered to be the arrest, detention, or abduction of a person by or with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, with the intention of removing that person from the protection of the law for a prolonged period of time."

CRIMINALIZATION - Article 4

"Each State Party shall take the necessary measures to ensure that an enforced disappearance is fully covered under its criminal or penal law."

CRIME AGAINST HUMANITY - Article 5 –

The United States supporting reframing Article 5 as a preambular provision.

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DEFENSE OF SUPERIOR ORDERS - Article 6(2)

"No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance if the accused knew that the order was unlawful or a person of ordinary sense and understanding would have known the order to be unlawful."

STATUTE OF LIMITATIONS – Article 8

"A State Party which applies a statute of limitation in respect of an enforced disappearance shall take the necessary measures to ensure that the term of limitation is proportionate to the extreme seriousness of the offence."

JURISDICTION - Article 9

"1. Each State party shall take the necessary measures to establish its competence to exercise jurisdiction over an enforced disappearance:

(a) When the offence is committed within its territory;

(b) When the alleged offender is one of its nationals; and

(c) When the disappeared person is one of its nationals and the State Party considers it appropriate."

CONSULTATION WITH CONSULAR AUTHORITIES – Article 10(3)

"Any foreign national held in custody pursuant to paragraph one may communicate with an appropriate representative of the state of which he or she is a national in accordance with applicable international legal obligations."

NON-REFOULEMENT - Article 16

"1. No State party shall expel, return ("*refouler*"), or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subject to an enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights"

3. The benefit of the present provision may not, however, be claimed by a person whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. "

RIGHT TO THE TRUTH/FREEDOM OF INFORMATION - Article 24(2)

"Each victim has the freedom to seek, receive, and impart information regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard."

TREATY MONITORY BODY - The United States firmly supported use of an existing treaty body, the Human Rights Committee.

- **The Human Rights Committee already deals with forced disappearances, which violate numerous provisions of the ICCPR.**
- **The Human Rights Committee should continue to perform this monitoring role, including under this instrument, for reasons of:**
  - **expertise,**
  - **consistency of jurisprudence,**
  - **efficiency,**
  - **avoidance of redundancy, and**
  - **cost savings.**
- **In view of the specific proposal of the High Commissioner on Human Rights to create a single, unified, standing treaty body, and the widespread acknowledgement of the need for treaty body reform, the creation of a new body at this juncture is not warranted.**

Doc 26771

Drafted: L/HRR – Gilda Brancato

Cleared: IO/RHS – Thomas Johnson
DRL/MLA – Lynn Sicade
Mission Geneva – Jeffrey Kovar

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NONPAPER To French Chair 2004

The Chair of the Working Group for the Elaboration of a Treaty to Punish and Prohibit Forced Disappearances inquired of the United States delegation as to the red-lines for the United States Government regarding this proposed treaty text. The following list, which is non-exhaustive, highlights areas of critical concern to the United States Government. Articles are treated in numerical sequence and not in order of importance.

Critical Provisions for the United States in the Forced Disappearances Draft Treaty Text include, but are not limited to, the following.

PP4, Articles 16bis, 17 and 22 - Right to Know - It is critical for the United States to have acceptable text on the "RIGHT TO KNOW", which recognizes the need of families to have access to the truth without endorsing unacceptably broad "rights" based language and without requiring provision of information that could impair national security, law enforcement, or privacy interests.

Article 1 - Definition.

We have urged since the first treaty negotiation session in January 2003 that the definition of forced disappearances must be sufficiently precise, narrow and tailored to the problem of forced disappearances so as not to capture lawful military and law enforcement activities. Thus we believe that inclusion of an express intent requirement in the definition is extremely important. Further, inclusion of state action as an element of the definition is also of critical importance to the United States (and many other delegations) for reasons expressed at length during the negotiations.

As we have also urged throughout the treaty negotiations, the definition is critical not only intrinsically but also because an overbroad or otherwise flawed definition renders even more problematic other thorny provisions in the text, including:

-- the jurisdiction provisions (notably "found in" (quasi-universal) jurisdiction),
-- elimination of a defense of superior orders,
-- command responsibility,
-- non-refoulement,
-- required refusal to obey an order relating to a forced disappearance,

and other provisions.

One definition proposed by the United States is the following:

"the arrest, detention or abduction of a person by, or with the authorization, support or acquiescence of, a State, followed by a refusal by the State to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such persons, with the intention of removing that person from the protection of the law for a prolonged period of time."

During the upcoming negotiations commencing January 31, the United States delegation will be pleased to give consideration to alternative definitions submitted by other delegations, for example by the delegation of Japan, with a view to their precision and inclusion of an intent requirement.

Article 2 - Criminalization

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A treaty provision requiring enactment of a new criminal statute (or statutes) containing a dedicated offense of forced disappearance would in and of itself defeat USG support of a treaty text. Under the United States Constitution, the United States has a federal system, and much criminal law authority is retained by the fifty states.

Article 2bis- Crime against Humanity

An operative provision in the treaty on crime against humanity is not acceptable to the United States.

Article 4 - Elimination of a defense of superior orders

The United States has consistently maintained that the overbroad definition of a forced disappearance makes it difficult for the United States to support elimination of a defense of superior orders. The United States was able to support the provision in the Convention Against Torture that eliminates a defense of superior orders because there we took the view that torture was limited to deliberate and calculated acts of an extremely cruel and inhuman nature, which an individual of ordinary sense would know to be criminal. We are unable to reach the same conclusion regarding forced disappearances as defined in the treaty text, and therefore believe that principles of fairness and due process compel maintenance of a defense of superior orders.

Article 5 – Statute of Limitations

While the United States appreciates that the statute of limitations provision has been revised to require that the statute of limitations be commensurate with the seriousness of the offense, which is a substantial improvement over earlier drafts, other provisions in the statute of limitations article remain problematic, in particular article 5(2) which reads as follows:

"The term of limitation for criminal proceedings which is provided for in paragraph 1 shall be suspended for as long as no effective remedy is available in a State Party to any victim of enforced disappearance."

There is precedent in treaty law for tolling (or suspending) a statute of limitations during the period that the defendant is absent from the jurisdiction or has otherwise evaded justice, and there is recognition in law for the concept of a continuous offense. However, the language above raises the question whether the *ex post facto* principle would be implicated. If the intent is to toll or suspend the statute of limitation because a State has not implemented a criminal statute, any subsequent enactment of a criminal statute would not be applicable to offenses occurring prior to enactment. Thus, we find the above provision to be totally unclear as to meaning and as to the obligations it would impose on a State Party.

Moreover, to the extent that the provision intends to link a criminal statute of limitations with the availability of civil remedies, such a provision would be highly questionable.

Statutes of limitations for a forced disappearance are a matter of state law under the federal system in the United States, and it would not be possible to guarantee that all 50 states' statute of limitations would operate in the fashion contemplated in the treaty text.

Articles 9-11 : Jurisdictional provisions

Precise criminal jurisdictional provisions, with mandatory jurisdiction limited to territorial and nationality jurisdiction, are critical for USG support of a treaty text. "Found in" jurisdiction,

when coupled with an overbroad definition of forced disappearance, is unacceptable to the United States.

Article 12: Investigations, access to places of detention

Access to sites of detention is unacceptable unless access is made "subject to domestic law."

Articles 13 and 14: Extradition and Legal Assistance

The USG believes that these provisions should track the extradition and legal assistance provisions in the Optional Protocol on Child Sale, Prostitution and Pornography. We would need to review final provisions before deciding whether provisions are acceptable.

Article 15bis - Non-refoulement

It is critical for the United States that the non-refoulement provision conform to existing international law on non-refoulement. Among other factors, the non-refoulement provision should contain identical or nearly identical text to that contained in the non-refoulement provision in the Convention on the Status of Refugees article 33(2). Article 33(2) reads as follows: "The benefit of the present provision may not, however, be claimed by a [person] whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

Article 22 - Reparation

The reparation provision would be acceptable if it tracked the compensation provision of CAT (CAT Article 14). We would need to review final text to determine if provision on reparation is acceptable.

Part II - Treaty Monitoring Body

It is critical for the United States that if the instrument has a treaty monitoring body, that an existing treaty monitoring body is used, especially as the Human Rights Committee already has competence over forced disappearances, including individual complaints of forced disappearance against States Parties to the First Optional Protocol to the ICCPR. In this regard, any individual complaint mechanism in the disappearances instrument must be optional and should conform with existing treaty individual complaint mechanisms.

The predicate of state consent for a site visit by the treaty body must be maintained.

The United States reservse on other provisions in Part II notably the provision regarding referral to the UN Secretary-General.

Military tribunals.

Should a prohibition on military proceedings be re-introduced into the text of the instrument, the United States would be firmly opposed.

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Schou, Nina E

From: Harris, Robert K (L-HRR)
Sent: Monday, December 13, 2004 3:06 PM
To: Dolan, JoAnn (L-PM); Dorosin, Joshua L (L-PM); Deeks, Ashley S (L-PM)
Cc: Legal-L-HRR (SBU); Witten, Samuel M (L); Thessin, James H (SBU); Andre Surena Final (E-mail)
Subject: Convention Against Torture Period Report
Attachments: Annexes Convention Against Torture Period Report.doc

JoAnn and Josh,

Attached is a draft of the annex to the USG's CAT report on USG detainees in Iraq, Afghanistan and GTMO. I have not read it yet, other than to make a suggested edit in the second paragraph. As we are hoping to get the report fully cleared this year and as we need to get DOD clearance and input, we are on an extremely tight internal clearance schedule. If you could give us your comments by tomorrow at 10, we will try to get them in and circulated to DOD.

Sorry for the short fuse.

Bob

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1/21/2009

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U.S. DEPARTMENT of STATE

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U.S. Government's 1-year Follow-up Report to the Committee's Conclusions & Recommendations

PDF version

United States Response to Specific Recommendations Identified by the Committee Against Torture

In its conclusions and recommendations regarding the Second Period report of the United States of America, the Committee Against Torture requested that the United States provide, within one year, information on its response to specific recommendations identified by the Committee.[1] These specific recommendations and the United States responses to them are provided below.

Paragraph 16

Recommendation:

"The State party should register all persons it detains in any territory under its jurisdiction, as one measure to prevent acts of torture. Registration should contain the identity of the detainee, the date, time and place of the detention, the identity of the authority that detained the person, the ground for the detention, the date and time of admission to the detention facility and the state of health of the detainee upon admission and any changes thereto, the time and place of interrogations, with the names of all interrogators present, as well as the date and time of release or transfer to another detention facility."

Response:

As an initial matter it should be noted that the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "the Convention") has no provision requiring the registration of prisoners.

Although there is no unified national policy governing the registry of persons detained in territory subject to the jurisdiction of the United States, relevant individual federal, state, and local authorities, including military authorities, as a matter of good administrative practice generally maintain appropriate records on persons detained by them.[2] Such records would generally include the information mentioned in the Committee's recommendation.

Paragraph 20

Recommendation:

"The State party should apply the *non-refoulement* guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention. The State party should always ensure that suspects have the possibility to challenge decisions of *refoulement*."

Response:

There are two issues that appear to be raised in this conclusion and recommendation. The first issue is the *evidentiary standard* that would trigger application of CAT Article 3. As the United States described to the Committee,[3] pursuant to a formal understanding the United States filed at the time it became a State Party to the Convention, the United States determines whether it is more likely than not that a person would be tortured, rather than whether a person faces a "real risk" of torture.

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The second issue addresses the *territorial scope* of Article 3. Although the United States and the Committee hold differing views on the applicability of the non-refoulement obligation in Article 3 of the Convention outside the territory of a State Party, as the United States explained to the Committee at length,[4] with respect to persons outside the territory of the United States as a matter of policy, the United States government does not transfer persons to countries where it determines that it is more likely than not that they will be tortured. This policy applies to all components of the government, including the intelligence agencies.[5] Although there is no requirement under the Convention that individuals should have *the possibility to challenge refoulement*, United States practice in the different areas in which this provision comes into play is designed to ensure that any torture concerns, whenever raised by the individual to be transferred, are taken into account. For example, in the context of immigration removals from the United States, as noted in the United States periodic report,[6] there are procedures for alleging torture concerns and procedures by which those claims can be advanced.

Paragraph 21

Recommendation:

"When determining the applicability of its non-refoulement obligations under article 3 of the Convention, the State party should only rely on "diplomatic assurances" in regard to States which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements. The State party should also provide detailed information to the Committee on all cases since 11 September 2001 where assurances have been provided."

Response:

As explained to the Committee,[7] the United States undertakes a thorough, case-by-case analysis of each potential transfer where diplomatic assurances are involved. This analysis takes into account all relevant factors, including all available information about the compliance of the potential receiving state with its international obligations, including those under the Convention, and the merits of each individual case.

The United States would like to emphasize to the Committee, as it did on other occasions,[8] that diplomatic assurances are used sparingly but that assurances may be sought in order to be satisfied that it is not "more likely than not" that the individual in question will be tortured upon return. It is important to note that diplomatic assurances are only a factor that may be considered in appropriate cases and are not used as a substitute for a case-specific assessment as to whether it is not more likely than not that a person will be tortured if returned.

Procedures for obtaining diplomatic assurances vary according to the context (*e.g.*, extradition, immigration removal, or military custody transfer) and have been made available to the Committee.[9] For example, the United States report provides information regarding regulatory procedures for consideration of diplomatic assurances in the immigration removal context, which provide for the opportunity to allege torture and advance such claims.[10] In addition, attached in Annex 1 is a declaration by Clint Williamson, Ambassador-at-Large for War Crimes Issues at the Department of State, dated June 8, 2007, and filed in United States federal court. This declaration explains in detail the process for obtaining and considering diplomatic assurances for detainees to be transferred from Guantanamo. It supersedes the declaration by former Ambassador Pierre Prosper that was provided to the Committee as part of the Second Periodic Report.[11] For the Committee's information, With regard to post-return monitoring arrangements, the United States agrees that follow-up following return is important. Indeed, the United States has requested and obtained information about the situation of individuals who have been transferred to other countries subject to assurances. As explained to the Committee, the United States would pursue any credible report and take appropriate action if it had reason to believe that those assurances would not be, or had not been, honored.

The United States does not unilaterally make public the specific assurances provided to it by foreign governments. Reasons for this policy were articulated in the materials provided to the Committee,[12] including the fact that unilaterally making assurances public might make foreign governments reluctant in the future to communicate frankly with the United States concerning important concerns related to torture or mistreatment.

Paragraph 22

Recommendation:

"The State party should cease to detain any person at Guantánamo Bay and close this detention facility, permit access by the detainees to judicial process or release them as soon as possible, ensuring that they are not returned to any State

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where they could face a real risk of being tortured, in order to comply with its obligations under the Convention."

Response:

Among the actions purported by the Committee to be governed under the Convention – including, for example, (1) closing Guantanamo; (2) permitting judicial access by enemy combatant detainees in that facility; or (3) not returning individuals who face "a real risk" of being tortured – the first two lack an arguable textual basis in the Convention, while the third issue is discussed at length in materials provided to the Committee[13] as well as in the response to the Committee's recommendation in paragraph 20 above.

As the United States explained to the Committee,[14] the United States is in an armed conflict with al-Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the Convention, provides the applicable legal framework governing these detentions.

Without going into further detail about its legal disagreements with the Committee's sweeping legal assertions regarding the scope of the Convention – which are addressed in other responses[15] – the United States has made it clear in many different settings that it does not want to be the world's jailer. Although the Committee calls for the closure of Guantanamo, it does not appear to take into account the consequences of releasing dangerous terrorist combatants detained there or explain where those who cannot be repatriated due to humane treatment concerns might be sent. The United States will continue to look to the international community for assistance with resettlement of those detainees approved for transfer or release.

The United States does permit access by Guantanamo detainees to judicial process. Every detainee in Guantanamo is evaluated by a Combatant Status Review Tribunal (CSRT), which determines whether the detainee was properly classified as an enemy combatant and includes a number of procedural guarantees. A CSRT decision can be directly appealed to a United States domestic civilian court, the Court of Appeals for the District of Columbia Circuit. Providing such an opportunity for judicial review exceeds the requirements of the law of war and is an unprecedented and expanded protection available to all detainees at Guantanamo. These procedural protections are more extensive than those applied by any other nation in any previous armed conflict to determine a combatant's status.

After a CSRT determination, each enemy combatant not charged by a Military Commission receives an annual review to determine whether the United States needs to continue detention. An Administrative Review Board (ARB) conducts this review.

Since the Committee's consideration of the United States report in May 2006, approximately 120 detainees have departed Guantanamo. This process is ongoing. Updates are available at http://www.defenselink.mil/news/nrdgb.html.

These transfers are a demonstration of the United States' desire not to hold detainees any longer than necessary. It also underscores the processes put in place to assess each individual and make a determination about their detention while hostilities are ongoing – an unprecedented step in the history of warfare.

At present, approximately 375 detainees remain at Guantanamo, and approximately 405 have been released or transferred. The Department of Defense has determined – through its comprehensive review processes – that approximately 75 additional detainees are eligible for transfer or release. Departure of these detainees is subject to ongoing discussions between the United States and other nations.

Paragraph 24

Recommendation:

"The State party should rescind any interrogation technique, including methods involving sexual humiliation, "waterboarding", "short shackling" and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention."

Response:

As an initial matter, as the United States has informed the Committee,[16] the United States is in an armed conflict with al-Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy

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combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the Convention, is the applicable legal framework governing these detentions. Moreover, as the Committee is aware,[17] the United States disagrees with the Committee's contention that "de facto effective control" is equivalent to territory subject to a State party's jurisdiction for the purposes of the Convention.

Leaving aside interpretive issues arising under the Convention, as a matter of United States law, there is a ban on torture of anyone under the custody or physical control of the United States Government. Torture, attempt to commit torture, and conspiracy to commit torture outside of the United States by U.S. nationals or persons present in the United States are crimes under the extraterritorial torture statute.[18] Moreover, pursuant to the Detainee Treatment Act of 2005,[19] cruel, inhuman, or degrading treatment or punishment of anyone under the custody or physical control of the United States Government is prohibited. All detainee interrogations must be conducted in a manner consistent with these prohibitions, Common Article 3 of the Geneva Conventions, as well as any greater applicable law of war protections.

In September 2006, the Department of Defense released the updated DoD detainee program directive 2310.01E, and the Army released its revised Field Manual on Interrogation. These documents are attached in Annexes 2 and 3, respectively. They provide guidance to military personnel to ensure compliance with the law, and require that all personnel subject to the directive treat all detainees, regardless of their legal status, consistently with the minimum standards of Common Article 3 until their final release, transfer out of DoD control, or repatriation. Of course, certain categories of detainees, such as enemy prisoners of war, enjoy protections under the law of war in addition to the minimum standards prescribed by Common Article 3.

Furthermore, under the Military Commissions Act of 2006,[20] serious violations of Common Article 3, including torture and cruel or inhuman treatment, are criminal offenses. In defining precisely those violations that are subject to criminal prosecution, greater clarity is provided to officials involved in detention and interrogation operations on what treatment violates United States and international law. A copy of the Military Commissions Act is attached at Annex 4.

Paragraph 33

Recommendation:

"The State party should adopt all appropriate measures to ensure that women in detention are treated in conformity with international standards."

Response:

The United States provided the Committee with information about its efforts to ensure appropriate treatment of women in detention facilities, including action taken against gender-based violence and sexual abuse.[21] As the United States told the Committee,[22] incidents of shackling of female detainees during childbirth are extremely rare and are not a standard procedure. It also provided the information on these issues in response to other questions from members of the Human Rights Committee.[23]

In its written reply to the Committee's List of Issues, the United States provided Bureau of Prisons statistics regarding enforcement actions for sexual abuse against prisoners.[24] These figures were for calendar year 2004, the latest year for which statistics were available at the time. Updated figures are provided below.

During Calendar Year (CY) 2005, the latest figures available, there were 17allegations of *inmate-on-inmate non-consensual sexual acts* (also broadly referred to as "rape"). During CY 2005, there were five guilty findings for *non-consensual sexual acts*. Please note that there is not necessarily acorrespondence between allegations and findings because cases may span more than one calendar year.

During CY 2005, there were 40 allegations of *inmate-on-inmate abusive sexual contacts* (also broadly referred to as "touching offenses"). During CY 2005, there were 30 guilty findings for abusive sexual contacts. Please note that there is not necessarily a correspondence between allegations and findings because cases may span more than one calendar year.

During CY 2005, there were 203 allegations of staff sexual misconduct. During CY 2005, 6 allegations were substantiated. Please note that it is possible for a single case to have multiple subjects; and similarly, the same subject could be charged with multiple allegations in the same case. If a single case involved multiple subjects, an allegation is counted for each subject and for each behavior. Any allegations made during previous years which were closed during CY 2005 are not reflected.

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Allegations of the sexual abuse of inmates by staff are tracked in accordance with the definitions outlined Title 18, United States Code, Chapter 109A.

Additionally, other behaviors such as indecent exposure, staff voyeurism, and inappropriate comments of a sexual nature are also tracked and are included with the sexual abuse allegations. All types of allegations are included in the above figures. These figures are for allegations made against staff working in Bureau of Prisons facilities.

Paragraph 34

Recommendation:

"The State party should ensure that detained children are kept in facilities separate from those for adults in conformity with international standards. The State party should address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment."

Response:

As the United States explained to the Committee,[25] juveniles are not regularly held in federal prison with the adult prison population. Federal law prohibits juvenile offenders held in the custody of federal authorities from being housed in correctional institutions or detention facilities in which they could have regular contact with adults. As a general rule, the state prison populations do not include "juveniles" as that term is defined by the applicable state law.

The Convention does not prohibit the sentencing of juveniles to life imprisonment without parole. The United States, moreover, does not believe that the sentencing of juveniles to life imprisonment constitutes cruel, inhuman or degrading treatment or punishment as defined in United States obligations under the Convention. In this context, it is significant to recall the specific treaty obligations of the United States under Article 16 in light of the formal reservation the United States took with respect to that provision at the time it became a State Party to the Convention. Specifically, that reservation stated "[t]hat the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." United States courts have considered such sentences on numerous occasions and ruled that juvenile life imprisonment does not violate the United States Constitution. Accordingly, such sentences do not violate U.S. obligations under the Convention with respect to cruel, inhuman or degrading treatment or punishment.

A prohibition of juvenile life imprisonment without parole is an important provision in the later-negotiated Convention on the Rights of the Child (CRC). States that wished to assume new treaty obligations with respect to juvenile sentencing were free to become States Parties to the CRC, and a very large number of countries chose to do so. Accordingly, States Parties to the CRC have an obligation under Article 37 of that Convention to ensure that "neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." However, the United States has not become a State Party to the CRC[26] and, accordingly, is under no obligation to prohibit the sentencing of juveniles to life imprisonment without the opportunity for parole.

Paragraph 42

Recommendation #1:

"The Committee requests the State party to provide detailed statistical data, disaggregated by sex, ethnicity and conduct, on complaints related to torture and ill-treatment allegedly committed by law-enforcement officials, investigations, prosecutions, penalties and disciplinary action relating to such complaints. It requests the State party to provide similar statistical data and information on the enforcement of the Civil Rights of Institutionalized Persons Act by the Department of Justice, in particular in respect to the prevention, investigation and prosecution of acts of torture, or cruel, inhuman or degrading treatment or punishment in detention facilities and the measures taken to implement the Prison Rape Elimination Act and their impact. The Committee requests the State party to provide information on any compensation and rehabilitation provided to victims."

Response:

The United States provided substantial statistical information to the Committee[27] and provides the following updated information.

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In July 2006, the Department of Justice's Bureau of Justice Statistics released a report, Sexual Violence Reported by Correctional Authorities, 2005. This report is attached as Annex 5 and is also available at: http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca05.pdf. This report has detailed statistical information, including:

According to this report, in 2005, in substantiated incidents of staff sexual misconduct and harassment, staff were discharged or resigned in approximately 82% of cases, arrested or referred for prosecution in approximately 45% of cases, and disciplined, transferred, or demoted in approximately 17% of cases (these numbers add to more than 100% because more than one action against a staff member could be taken concerning the same incident).

This report also states that in 2005, approximately 15% of allegations of staff sexual misconduct in Federal and state prisons were substantiated, while approximately 6% of allegations of staff sexual harassment in Federal and state prisons were substantiated. The report states that in local jails, approximately 37% of allegations of staff sexual misconduct were substantiated, while approximately 10% of allegations of staff sexual misconduct were substantiated.

Finally, the report states that in 2005, in Federal and state prisons approximately 67% of the victims of staff misconduct were male, while approximately 62% of the perpetrators were female. In local jails, however, approximately 78% of the victims of staff misconduct were female, while approximately 87% of the perpetrators were male. With respect to race, approximately 69% of the staff members involved in staff sexual misconduct and harassment were White, approximately 24% were Black (non-Hispanic), approximately 4% were Hispanic, and approximately 4% were Other (this category includes American Indians, Alaska Natives, Asians, Native Hawaiians, and Other Pacific Islanders).

Recommendation #2:

"The Committee encourages the State party to create a federal database to facilitate the collection of such statistics and information which assist in the assessment of the implementation of the provisions of the Convention and the practical enjoyment of the rights it provides."

Response:

As a result of the decentralized federal structure of the United States, the creation of one unified database would not materially contribute to better implementation of the Convention. Instead, Federal and state authorities compile relevant statistics, including those mentioned by the Committee, and use them for a wide variety of purposes, including assessing the effectiveness of enforcement. Enforcement against torture and cruel, inhuman or degrading treatment or punishment is managed through the laws and procedures described at length in the United States periodic report[28] and its responses to the questions posed by the Committee.[29]

Recommendation #3:

"The Committee also requests the State party to provide information on investigations into the alleged ill-treatment perpetrated by law-enforcement personnel in the aftermath of Hurricane Katrina."

Response:

For the Committee's information, a partial list of the work done by Federal agencies in response to Hurricanes Katrina and Rita, including enhanced law enforcement operations in the Gulf Coast region, is attached at Annex 6 and is available at http://www.dhs.gov/xprepresp/programs/gc_1157649340100.shtm.

Since the Committee has not provided the United States with specific information about the allegations of ill-treatment it mentions, the United States is unable to provide a detailed response to any specific allegations the Committee may have in mind.

That said, U.S. law prohibits brutality and discriminatory actions by law enforcement officers. The Civil Rights Division of the Department of Justice, with the aid of United States Attorney's Offices and the FBI, actively enforces those laws. In addition, states have laws and/or other mechanisms that protect individuals from mistreatment by law enforcement officers.

Following Hurricane Katrina, which devastated the Gulf Coast region of the United States, there have been media reports of alleged ill-treatment perpetrated by law-enforcement personnel. The Federal government and relevant state entities have attempted to determine the validity of the allegations. Given the dual-sovereign system of government in the United States, as well as the manner in which the Federal government keeps statistics of allegations of police misconduct, it is not possible for the United States to accurately determine how many allegations of law enforcement misconduct were reported

or investigated in the aftermath of Hurricane Katrina.

The Department of Justice's Civil Rights Division has opened files in connection with at least ten complaints of law-enforcement misconduct in the affected areas following the storm. Three of those complaints have been closed without prosecution because the allegations did not constitute prosecutable violations of federal criminal civil rights law. The three closed files included unsubstantiated allegations of an assault in a Mississippi jail; a civilian who was struck by a patrol car during the evacuation; and officers stealing cars from a car dealership following the storm.

Two of the nine matters opened by the Civil Rights Division involve incidents that have led to criminal charges being filed by the State of Louisiana. In October 2005, three New Orleans Police Department officers were charged with battery stemming from the assault of an individual in the New Orleans French Quarter a few weeks after Hurricane Katrina. In December 2006, seven New Orleans Police Department officers were indicted for the fatal shooting of two individuals on the Danzinger Bridge in the aftermath of the hurricane. Both cases still are pending, and the Department of Justice will continue to monitor these prosecutions.

The remaining files that were opened by the Civil Rights Division still are open and the investigations into those allegations are pending. Applicable federal law and policy requires that information concerning pending investigations into those allegations remain confidential. Nevertheless, the Committee can be assured that if an investigation indicates that there was a violation of a federal criminal civil rights statute, appropriate action will be taken.

In addition to the cases reviewed by the Civil Rights Division, the Louisiana Attorney General's Office is conducting an exhaustive inquiry into allegations that New Orleans residents were not permitted by law enforcement officials to cross the Greater New Orleans Bridge to Gretna, Louisiana, during the evacuation of the city. The Civil Rights Division intends to review the results of the state's investigation to determine whether the facts implicate a violation of any federal statutes.

The U.S. Department of Homeland Security (DHS) also received complaints alleging ill-treatment by law enforcement personnel in the aftermath of Hurricane Katrina. Specifically, DHS's Immigration and Customs Enforcement Office of Professional Responsibility (ICE OPR) received six complaints and its Office of Inspector General (IG) received three complaints. The allegations raised by these complainants are detailed below:

Complaints received by ICE OPR:

- One complaint regarding an alleged civil rights/false arrest violation.
- Two complaints regarding alleged looting/theft of electronics.
- One complaint regarding an alleged rape.
- One complaint regarding an alleged unauthorized procurement of supplies.
- One complaint regarding alleged rude conduct.

Complaints received by the DHS Inspector General:

- One complaint regarding alleged intimidation/mismanagement.
- Two complaints regarding alleged false claims.

These allegations are being or have been investigated pursuant to standard procedures.

Annexes

1. Declaration of Clint Williamson

2. Department of Defense Directive 2310.01E

3. Army Field Manual 2-22.3, Human Intelligence Collector Operations

4. Military Commissions Act of 2006 (P.L. 109-366)

5. Sexual Violence Reported by Correctional Authorities, 2005 (Department of Justice, Bureau of Justice Statistics)

6. Department of Homeland Security, "Hurricane Katrina: What Government Is Doing"

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[1] See Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture –United States of America, UNDOC CAT/C/USA/CO/2 at ¶43 (July 25, 2006).

[2] For further information on such records, see List of Issues to Be Examined During the Consideration of the Second Periodic Report of the United States of America – Response of the United States of America, *available at* http://www.usmission.ch/Press2006/CAT-May5.pdf at 13 (May 5, 2006) [hereinafter referred to as "Response to List of Issues"].

[3] *See, e.g.*, Second Periodic Report of the United States of America to the Committee Against Torture, *available at* http://www.state.gov/g/drl/rls/45738.htm at ¶30 (May 6, 2005) [hereinafter referred to as "Second Periodic Report"]; Response to List of Issues at 37-38.

[4] *See, e.g.*, Response to List of Issues, *supra* note 2, at 32-37.

[5] *See id.* at 49.

[6] *See* Second Periodic Report, *supra* note 3, at ¶32-38; Response to List of Issues, *supra* note 2, at 27-30.

[7] *See, e.g.*, Second Periodic Report, *supra* note 3, at ¶30; Response to List of Issues, *supra* note 2, at 45-48.

[8] *See, e.g.*, Response to List of Issues, *supra* note 2, at 45.

[9] *See* Second Periodic Report, *supra* note 3, at ¶33 (immigration removal) and ¶40 (extradition); Annex I, Part One, Section II.E (military transfers).

[10] *See* Second Periodic Report, *supra* note 3, at ¶33.

[11] *See id.*, Annex I, Tab 1.

[12] *See id.*

[13] *See, e.g.*, Second Periodic Report, *supra* note 3, at ¶30; Response to List of Issues, *supra* note 2, at 37-38.

[14] *See, e.g.*, Second Periodic Report, *supra* note 2, Annex I, Part One, Section I.

[15] *See supra* at 2-3..

[16] *See, e.g.*, Second Periodic Report, *supra* note 3, Annex I, Part One, Section I.

[17] *See* Response to List of Issues, *supra* note 2, at 87.

[18] 18 U.S.C. § 2340A.

[19] Pub. L. No. 109-148, 119 Stat. 2739.

[20] Pub. L. No. 109-366, 120 Stat. 2600.

[21] *See, e.g.*, Second Periodic Report, *supra* note 3, at ¶¶87-94, 96-101, 120; Response to List of Issues, *supra* note 2, at 101-05.

[22] *See* Response to List of Issues, *supra* note 2, at 100.

[23] *See* List of Issues to be Taken up in Connection with the Second and Third Periodic Reports of the United States of America, available at http://www.usmission.ch/ICCPRAdvanceQ&A.pdf (July 17, 2006).

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[24] See Response to List of Issues, *supra* note 2, at 102-03.

[25] See Second Periodic Report, *supra* note 3, at ¶¶114-17; Response to List of Issues, *supra* note 2, at 97-99.

[26] The United States is a party to the two Optional Protocols to the Convention on the Rights of the Child.

[27] *See, e.g.*, Response to List of Issues, *supra* note 2, at 69-76, Annexes 4-8.

[28] *See, e.g.*, Second Periodic Report, *supra* note 3, at ¶¶8, 11-29, 45-55, 63-84, 87-139.

[29] *See, e.g.*, Response to List of Issues, *supra* note 2, at 8-12, 44, 50-53, 63-69, 85-89.

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Opening Statement for U.S. Hearing at Committee Against Torture

Barry F. Lowenkron
Assistant Secretary for Bureau of Democracy, Human Rights and Labor
Geneva, Switzerland
May 5, 2006

Mr. Chairman, Members of the Committee, ladies and gentlemen: My name is Barry Lowenkron. I am the Assistant Secretary for Democracy, Human Rights and Labor at the U.S. Department of State. Six years ago, in 2000, my government appeared before this Committee to present its initial report on U.S. implementation of the Convention Against Torture. My predecessor emphasized the importance the United States Government attaches to full compliance with all our international human rights treaty obligations. I am here to continue that tradition, and have the honor of introducing the head of our delegation, John Bellinger, the Legal Adviser of the Department of State.

On the topic of this hearing, my government's position is clear: U.S. criminal law and treaty obligations prohibit torture, and the United States will not engage in or condone it anywhere. As the President said in 2004:

> ". . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere"

My country is committed to upholding our national and international obligations to eradicate torture and to prevent cruel, inhuman or degrading treatment or punishment. We also are committed to transparency about our policies and actions, and we hope other countries will be equally forthcoming. This is not just a legal obligation – we are fulfilling a higher moral obligation, which our nation has embraced since its earliest days. Indeed, the United States is proud that it was among the leaders in the international community who established the Convention against Torture.

Our nation was founded on the principle of respect for human dignity. Our Constitution's first ten amendments – the Bill of Rights – are the covenant between our Government and citizens for the protection of their rights. The Bill of Rights spells out several protections that are reflected in the Convention Against Torture. These safeguards include the Eighth Amendment, which prohibits cruel and unusual punishments. These protections have endured for over two centuries and they have continually been strengthened.

Firm U.S. Commitment to Investigate and Prosecute Abuses

The United States has a long tradition of international leadership against torture. As the most senior officials of my government have repeatedly affirmed, and as we will make clear again today, when allegations of torture arise – including allegations against government officials – they are investigated and, if substantiated, prosecuted. Our commitment to protecting individuals from abuses does not stop with torture. My government is similarly committed to investigating and prosecuting credible allegations of other such forms of unlawful treatment against persons in custody of law enforcement – including in the War on Terror.

Abuses, such as those that notoriously occurred at Abu Ghraib, sickened the American people – just as they appalled people around the world. They were inexcusable and indefensible. The United States government and people sincerely regret these incidents and have taken steps to hold people accountable. In fact, my government has carried out more than 600 criminal investigations into allegations of mistreatment, and more than 250 individuals have been held accountable for detainee abuse. Their punishments have included courts-martial, prison terms for as long as ten years, formal reprimands and separation from our military services. And as recent headlines show, the investigations and charges continue.

Transparency and Self-Corrective Mechanisms

As this record reflects, when we make mistakes, we take corrective measures. Our system is designed to do just that.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

Investigations and law enforcement mechanisms operating under law are an important, but not the only, means to address allegations of torture or other mistreatment. We are an open society. I am sure you have read about or seen the vigorous public debate in my country about allegations of abuses and how best to prevent future problems. Our media, our civil society organizations, and our citizens' groups, all have spoken to these issues, and the government has listened and made changes.

For example, more than 1,000 international journalists have now traveled to Guantanamo to learn about detainee operations there. A parliamentary group from the Organization for Security and Cooperation in Europe visited Guantanamo and one of its members later told journalists it was a "model prison." Further, the President of the International Committee of the Red Cross said recently that conditions at the facility had "improved considerably" and that the ICRC was satisfied with its access to detainees there.

Our system of government provides for other means of improving our policies and practices. Our Constitution's system of checks and balances relies on the separation and independence of the three branches of government: executive, legislative and judicial. The push and pull between the branches has led to specific reforms. The Courts have rendered decisions and the Congress has passed legislation such as the Detainee Treatment Act, which John Bellinger will discuss.

Concrete U.S. Actions to Combat Torture Around the World

A vital part of our efforts to combat torture worldwide entails engagement with other nations on their human rights situations. In the annual reports on country situations prepared by my bureau at the State Department, we devote substantial attention to the issue of torture. A number of key non-governmental organizations stated that the U.S. "pulled no punches" in the Human Rights Reports assessments – even of allies and friends. These reports are very useful in our bilateral efforts to persuade nations to improve their own policies, and they are often used by non-governmental groups or the citizens of those countries for the same end.

My government also engages in a multilateral activities designed to reduce and ultimately eliminate torture globally. At the UN Commission on Human Rights, for example, the U.S. played a central role in the adoption of country-specific and thematic resolutions related to torture. We have supported the work of the UN Special Rapporteur on Torture throughout the world. We did invite him and several of his colleagues to visit our military detention facilities in Guantanamo -- an invitation they regrettably declined. Although the U.S. is not seeking a seat in the new UN Human Rights Council this year, we intend to remain actively engaged with that body, supporting resolutions, contributing to its funding, and ensuring that it can play a positive role on key matters such as ending torture.

Conclusion

Ladies and gentlemen, in conclusion, the U.S. commitment to end torture worldwide stems from my country's most cherished values. All branches of my government have advanced this goal through sustained, intensive effort. We have devoted substantial policy attention and financial resources to it. We also welcome the crucial contributions to this effort of others throughout the international community – whether they are national or international activists, non-governmental organizations or civil society organizations, members of the media, faith-based organizations, or concerned citizens. Even when their criticisms are directed against our government, we understand and appreciate that they do so on behalf of an objective we all share: ending torture forever.

In furtherance of this objective, we anticipate a vigorous and constructive dialogue with this Committee. With that, I am happy to turn the microphone over to John Bellinger for his opening remarks and overview of how we will be responding to the questions we received from the Committee. Thank you.

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U.S. Meeting with U.N. Committee Against Torture

Opening Remarks

John B. Bellinger, III
Legal Adviser, U.S. Department of State
Geneva, Switzerland
May 5, 2006

Mr. Chairman, Distinguished Members of the Committee,
Members of Civil Society and Other Observers,

My name is John Bellinger. I am the Legal Adviser of the Department of State, and I serve as head of the United States delegation to the Committee Against Torture.

The United States recognizes the importance of our international legal obligations and the key role this Committee plays in the treaty-monitoring process. The United States greatly appreciates this opportunity to meet with the Committee and to explain the measures we have taken to give effect to the obligations we have undertaken as a State Party to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Secretary of State Rice has emphasized that the United States takes its international obligations seriously. This is reflected in the great lengths to which we have gone to provide you with an extensive report and thorough answers to the many questions you have posed. Our delegation is composed of senior-level officials involved in implementing the Convention. This further demonstrates our commitment not only to fulfilling our obligations under the Convention, but also to engaging in what we expect will be a productive dialogue with you.

At the outset I want to reiterate the United States Government's absolute commitment to upholding our national and international obligations to eradicate torture and to prevent cruel, inhuman, or degrading treatment or punishment worldwide. The President of the United States has made clear that "[t]orture anywhere is an affront to human dignity everywhere" and that "freedom from torture is an inalienable human right." Beyond the protections in our Constitution that Mr. Lowenkron mentioned, United States criminal laws prohibit torture. There are no exceptions to this prohibition. Within the United States, our 50 states and the federal government prohibit conduct that would constitute torture under their civil and criminal laws. Our Congress has also passed laws that provide for severe federal sanctions, both civil and criminal, against those who engage in torture outside the territory of the United States.

And our laws have gone further. Our focus on eradicating torture and punishing its perpetrators would be incomplete without a parallel effort to help its victims recover from abuses. The United States has comprehensive legislation that enables citizens and non-citizens of the United States who are victims of torture to bring claims for damages against foreign government officials in U.S. federal courts. Congress has also established and funded programs that assist victims of torture, domestically and overseas. The United States has contributed far more than any other country in the world to the United Nations Voluntary Fund for Victims of Torture. For the years 2000 through 2005, U.S. contributions to the Fund totaled more than 32 million dollars, which is approximately 70% of the total contributions during that period.

And late last year, our Congress enacted, and the President signed into law, the Detainee Treatment Act of 2005. The Act included a provision that codified in law our already-existing policy against the use of cruel, inhuman or degrading treatment as that term is defined under the obligations the United States assumed under the Convention. The law provides that no person "in the custody or under the physical control of the United States Government, regardless of nationality or physical location" shall be subjected to cruel, unusual, and inhumane treatment or punishment prohibited by certain provisions of the U.S. Constitution. The enactment of the Detainee Treatment Act highlights our nation's commitment to upholding the values of freedom and humanity on which it was founded.

We know that you will have many questions about actions the U.S. Government has taken in response to the terrorist attacks upon our country on September 11. We welcome this dialogue and we are committed to addressing your questions

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as fully as possible. As we attempt to answer your questions, I would like to ask the Committee to bear in mind a few considerations.

First, some of the matters that are addressed by your questions are the subject of ongoing litigation, and I hope you will understand that our ability to comment in detail on such matters is necessarily constrained.

Second, like other governments, we are not in a position to comment publicly on alleged intelligence activities.

Third, our Second Periodic report and the written answers to your questions contain extensive information about U.S. detainee operations in Guantanamo Bay, Cuba, and in Afghanistan and Iraq. It is the view of the United States that these detention operations are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations.

As a general matter, countries negotiating the Convention were principally focused on dealing with rights to be afforded to people through the operation of ordinary domestic legal processes and were not attempting to craft rules that would govern armed conflict.

At the conclusion of the negotiation of the Convention, the United States made clear "that the convention . . . was never intended to apply to armed conflicts. . . ." The United States emphasized that having the Convention apply to armed conflicts "would result in an overlap of the different treaties which would undermine the objective of eradicating torture."[1] No country objected to this understanding.

In any case, regardless of the legal analysis, torture is clearly and categorically prohibited under both human rights treaties and the law of armed conflict. The obligation to prevent cruel, inhuman, or degrading treatment or punishment is in Article 16 of the Convention and in similar provisions in the law of armed conflict.

While the United States maintains its view that the law of armed conflict is the *lex specialis* governing the detainee operations that we will discuss, we are pleased to provide extensive information about these operations in a sincere spirit of cooperation with the Committee.

In closing I would like to make two final comments.

First, while I am acutely aware of the innumerable allegations that have appeared in the press and in other fora about various U.S. actions, I would ask you not to believe every allegation that you have heard. Allegations about various U.S. military or intelligence activities have become so hyperbolic as to be absurd. Critics will now accept virtually any speculation and rumor and circulate them as fact. The U.S. Government has attempted to address as many of these allegations as quickly and as fully as possible. And yet, as much as we would like to deny the numerous inaccurate charges made against our government, because many of the accusations relate to alleged intelligence activities, we have found that we cannot comment upon them except in a general way.

Second, even as we recognize matters of concern to the Committee, we ask that the Committee keep a sense of proportion and perspective. While it is important to deal with problems in a straightforward manner, it does a disservice to the quality of our dialogue, to the treaty monitoring process, to the United States, and, ultimately, to the cause of combating torture around the world to focus exclusively on the allegations and relatively few actual cases of abuse and wrongdoing that have occurred in the context of the U.S. armed conflict with al Qaeda. I do not mean to belittle or shift attention away from these cases in any way. We welcome your questions. But we suggest that this Committee should not lose sight of the fact that these incidents are not systemic. We also suggest that the Committee devote adequate time in these discussions to examining the treatment or conditions that apply domestically with respect to a country of more than 290 million people. The United States is committed to rule of law and has a well-functioning legal system to ensure criminal and civil accountability.

We will now begin to answer the questions you have posed to us. In light of time constraints on this oral presentation, it will be impossible for us to reply in detail to every aspect of your wide-ranging questions. In many cases, we will refer you to the more detailed responses we have provided in writing.

Thank you very much.

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[1] U.N. Doc. E/CN.4/1984, March 9, 1984.

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The United States' Response to the Questions Asked by the Committee Against Torture

Geneva, Switzerland
May 8, 2006

Mr. Chairman, Distinguished Members of the Committee, Ladies and Gentlemen, my delegation is pleased to be here for another day of dialogue with this Committee. We found our Friday meeting very useful, and hope the Committee did as well. We appreciated your important questions, and my delegation worked very hard over the weekend to prepare full responses for you.

On Friday, Chairman Mavrommatis began his questions by noting that more is expected from the United States than from many other countries. We recognize that much of the rest of the world holds the United States to a strict standard when it comes to the rule of law and human rights. This is especially important when it comes to moral imperatives, such as eliminating torture. The United States acknowledges this challenge, knowing that we must always strive to improve our own record.

In this context, this Committee asked important questions about U.S. detainee operations in Guantanamo, Afghanistan and Iraq, and about alleged intelligence activities. The members also asked a number of questions about the scope of U.S. obligations under the Convention Against Torture and a wide array of other matters. We are pleased to answer those questions today. We will also highlight the strong legal protections under U.S. law for those who might be detained.

Let me be very clear about our position: U.S. officials from all government agencies are prohibited from engaging in torture, at all times, and in all places. Every U.S. official, wherever he or she may be, is also prohibited from engaging in cruel, inhuman or degrading treatment or punishment, as defined by our obligations under the Convention Against Torture. This is the case even in situations where the law of armed conflict applies.

We note in this context Mr. Wang's question as to whether the United States would agree with the statement that "some people are simply not entitled to humane treatment." Our answer is a clear and simple no. As the President stated on the UN International Day in Support of Victims of Torture, on June 26, 2004, "[t]he United States reaffirms its commitment to the worldwide elimination of torture. The non-negotiable demands of human dignity must be protected without reference to race, gender, creed, or nationality. Freedom from torture is an inalienable human right and we are committed to building a world where human rights are respected and protected by the rule of law."

We described on Friday our internal mechanisms for meeting our domestic and international obligations to combat torture. Our presence here highlights another, vital instrument in this effort: our dialogue with this Committee and with other interested parties. Mr. Chairman, you asked if my government has an active dialogue with non-governmental organizations on these issues. We do. Secretary Rice meets regularly with NGO officials. Numerous other senior U.S. officials, including members of this delegation, meet regularly with NGOs in Washington and wherever we travel. Indeed, I met with 19 NGO representatives this weekend to discuss these very proceedings. My government takes very seriously concerns expressed by members of the NGO community and has benefited from this dialogue.

Most of the regrettable incidents or allegations of mistreatment of detained enemy combatants occurred several years ago. I say this not to minimize their significance, but to emphasize that, without question, our record has improved. We now have more rigorous laws, more rigorous procedures, more rigorous training and more rigorous monitoring mechanisms.

We look forward to further dialogue with the Committee today. As many of the Committee's questions focused on three main themes, we will address these topics thematically before addressing each member's other questions individually. These themes are: first, legal issues about U.S. implementation of the Convention; second, treatment of detainees in the context of our operations overseas – including accountability for abuses; and third, monitoring and oversight of alleged intelligence activities. We believe that we will address all of the Committee's questions, but if we leave something out, we thank you in advance and look forward to hearing again from the Committee after we make our presentation.

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The first theme we will address deals primarily with questions of treaty law related to the scope of U.S. obligations under the Convention.

Mr. Camara asked about reservations the United States took to the Convention when we ratified it in 1994, and, in particular, whether the United States considers itself subject to the provisions of the Vienna Convention on the Law of Treaties with respect to making reservations. Although the United States is not a party to the Vienna Convention, the reservations made by the United States, including its reservations under the Convention Against Torture, conform to the provisions on reservations of the Vienna Convention.

As Article 19 of the Vienna Convention provides, a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless the reservation is prohibited by the treaty or is incompatible with the object and purpose of the treaty. The Convention Against Torture does not prohibit reservations. In fact, more than 20 countries have made reservations to the Convention. Consistent with customary international law and the Vienna Convention, the United States made two reservations when ratifying the Convention Against Torture.

Mr. Camara also inquired whether the U.S. reservations, particularly our reservation to Article 16 of the Convention, were intended to negate obligations under customary international law. I want to emphatically assure Mr. Camara and the members of this Committee that, to the contrary, the U.S. reservation to Article 16 was intended to state clearly the precise scope of the obligation that the United States was assuming under the Convention Against Torture given that the term "cruel, inhuman or degrading treatment or punishment" was not defined in the Convention.

Finally on the topic of general treaty law, Mr. Camara suggested that if there is a difference of opinion between an interpretation of the Convention advanced by the Committee Against Torture and an interpretation advanced by a State Party such as the United States, the interpretation of the Committee, as a matter of law, would prevail. With respect, we must disagree with that view. Although a party to a treaty can agree to establish a third party to render authoritative interpretations of that treaty, in this case, the United States did not agree to give the Committee such a role. While the Committee's views are entitled to respect, the Convention does not grant the Committee the authority to issue legally binding views on the nature of U.S. obligations thereunder.

I now turn to a question asked by Messrs. Mariño, Camara, and Mavrommatis, regarding why the United States has not created the crime of "torture" within the United States. The United States has taken very seriously its obligation under Article 4 to ensure that all acts of torture are offences under its criminal law. Before ratifying the Convention, the United States undertook an exhaustive review of its existing criminal laws and expressly determined that "existing law is sufficient to implement Article 4 of the Convention, except to reach torture occurring outside the United States."[1] The United States supported this determination by a long and specific list of criminal statutes that – together – prohibit ***all*** conduct that would constitute torture. Thus, acts of torture – as well as other appalling violent or abusive acts – are made criminal in the United States. As Chairman Mavrommatis observed Friday, several other States Parties have also relied on previously-existing criminal laws to satisfy their obligations under Article 4.

Mr. Mariño asked why the United States has limited torture to "extremely severe" pain or suffering. We have not done this. In its criminal statute for the extraterritorial offense of torture, the United States utilized the term "extreme" as a synonym for the term "severe." It did not use the term "extremely severe."

With respect to Mr. Mariño's question about the U.S. understanding defining the term "severe mental pain or suffering" in Article 1, this understanding recited elements implicit in the text to provide the specificity needed to meet the requirements of a criminal statute. There was, and is, no intent to limit the scope of Article 1.

Mr. Mariño also questioned the U.S. understanding of the term "lawful sanctions" in the Convention's first paragraph of Article 1. The U.S. understanding merely clarified the scope of that term; namely, that it included judicially imposed actions as well as other enforcement action authorized by law. The United States considers that this understanding is compatible with the object and purpose of the Convention. We note that no State Party to the Convention has objected to this understanding.

Several members of the Committee asked questions regarding the application of the law of armed conflict to U.S. actions in Afghanistan and Iraq.
First, Mr. Mariño asked whether the United States is engaged in an ongoing armed conflict against terrorism and if that is so, whether the Convention Against Torture applies during the course of that armed conflict. These are very important issues and we are glad to have the opportunity to address them.

The United States is engaged in a real, not rhetorical, armed conflict with al Qaeda and its affiliates and supporters, as reflected by al Qaeda's heinous attack on September 11, 2001, an attack that killed more than 3000 innocent civilians.

It is important to clarify the distinction we draw between the struggle in which all countries are engaged in a "global war on terrorism" and the legal meaning of our nation's armed conflict with al Qaeda, its affiliates and supporters. On a political level, the United States believes that all countries must exercise the utmost resolve in defeating the global threat posed by transnational terrorism. On a legal level, the United States believes that it has been and continues to be engaged in an armed conflict with al Qaeda, its affiliates and supporters. The United States does not consider itself to be in a state of international armed conflict with every terrorist group around the world.

Even while we are engaged in an armed conflict, the Convention Against Torture continues to apply, in accordance with its terms. For example, the Convention obviously applies to the treatment of prisoners in domestic U.S. prisons that are not governed by the law of armed conflict. Our view is simply that U.S. detention operations in Guantanamo, Afghanistan, and Iraq are part of ongoing armed conflicts and, accordingly, are governed by the law of armed conflict, which is the *lex specialis* applicable to those particular operations.

Regardless of the legal analysis, both the law of armed conflict and human rights treaties, such as the Convention Against Torture, have provisions that prohibit torture and other mistreatment. Let me be perfectly clear: applying the law of armed conflict does not permit the United States to engage in such acts. Those who are found to have committed such acts are held accountable.

Mr. Mariño also asked about the United States' statement about its understanding that the Convention "was never intended to apply to armed conflicts," which forms part of the *travaux préparatoires* of the Convention. The United States made this statement over twenty years ago, during the final session of the Working Group negotiations on the draft convention in February 1984[2] and confirmed that statement in its final observations contained in the Secretary-General's October 1984 report to the General Assembly on the draft convention.[3]

As I explained on Friday, the United States was concerned that application of the Convention to situations governed by the law of armed conflict, which also prohibits torture, "would result in having an overlap of the different treaties which would undermine the objective of eradicating torture."[4] It is important to note that we were not alone in expressing this concern. Indeed, the *travaux* contain similar statements by other countries, including Switzerland,[5] Norway,[6] and Israel.[7] We will provide the Committee with citations to all of these documents in writing.

With these legal principles as a foundation, I want to turn now to a second area of concern to the Committee – our laws, policies, and procedures regarding the treatment of detainees in the context of our armed conflicts with al Qaeda and in Iraq. For this discussion I would turn to Mr. Cully Stimson from the Department of Defense.

[STIMSON]

As we stated on Friday, the Detainee Treatment Act of 2005 is a significant development in this area. With regard to persons under Department of Defense control, the Act statutorily prohibits any treatment or interrogation technique not authorized by, and listed in, the United States Army Field Manual on Intelligence Interrogation. The techniques contained in the Army Field Manual are the only techniques currently authorized for use at DoD facilities.

With respect to a question from Dr. Sveaass, the Department of Defense has finalized several key policy documents related to detainees, including the revised Army Field Manual. We are in the midst of final consultations with our Congress about them at this time. We hope that we will be able to publish these documents soon. We will supply the Committee with a copy of new detainee policies and the unclassified Army Field Manual when they are published.

Regarding the Committee's questions about waterboarding, I want to make two points. First, waterboarding is not listed in the current Army Field Manual and therefore is not permitted for detainees under DoD control. Second, waterboarding is specifically prohibited in the revised Army Field Manual. It would not be appropriate for me to discuss further specifics of the revised Army Field Manual at this time.

I can also confirm, in response to Mr. Mariño's and Chairman Mavrommatis' questions, that the Department of Defense has conducted investigations of allegations relating to detainee abuse, including those at Abu Ghraib. These investigations also reviewed the conduct of people in the chain of command. Of the hundreds of thousands of service members who are or have been deployed in Afghanistan and Iraq, there have been approximately 800 investigations into allegations of mistreatment, including approximately 600 criminal investigations. After many of these investigations were completed, no misconduct was found. In many others, however, the Department of Defense did discover misconduct and took action: more than 270 actions against more than 250 service members. In addressing these cases, the full range of administrative, disciplinary, and judicial measures have been available and used as appropriate. Approximately 170 of those investigations also remain open.

Mr. Mariño noted an apparent inconsistency between the numbers provided by Human Rights Watch (among others), and those provided by the Department of Defense. The numbers Human Rights Watch provided to the Committee were: *only* 54 courts martial; *only* 40 service members sentenced to prison; *only* a small percentage of convicted service members given long sentences; and *only* 10 persons sentenced to one year or more. Let me be clear: these numbers are simply wrong. The facts are these: to date, there have been 103 courts-martial; 89 service members were convicted – an 86% conviction rate. Moreover, 19 service members received sentences of one year or more. Furthermore, more than 100 service members have received non-judicial punishment; more than 60 were reprimanded; and to date, 28 service members were involuntarily separated from military service. Accountability is ongoing.

And finally, in answer to Mr. Mariño's question about whether supervisors have been investigated or held accountable, the answer is emphatically yes.

Mr. Camara requested information regarding Martin Mubanga, a British citizen who sought and received extensive terrorist training at camps in Afghanistan and Bosnia. He used this training to fight in Bosnia and against U.S. forces in Afghanistan in 2001. In March of 2002, Mr. Mubanga was arrested by Zambian officials after fleeing from Afghanistan. Based upon those activities, the United States detained Mr. Mubanga as an enemy combatant.

Mr. Mubanga alleged that, while at Guantanamo Bay, he had been subjected to racial insults and was intimidated by a guard on July 31, 2003. The investigation into these allegations found them to be without merit. Mr. Mubanga had engaged in aggressive behavior towards the guards – indeed, on June 22, 2003, he grabbed an interrogator's hand and put it in a pressure hold. Further, the investigation did not discover evidence that he had been subjected to racial insults.

Madame Belmir questioned whether inadequate training or misinterpretation of the rules and policies may have led to abuses. Let me first say that when the shocking events of Abu Ghraib were discovered, the Department of Defense set out to investigate all aspects of detainee operations. To this end, the Department conducted major investigations, inspections, or reviews that examined issues ranging from training, policy and personnel to operations and leadership. The conclusion of these investigations, specifically, those that focused on the cause of detainee mistreatment, was that the abuse was the result of the wholly unauthorized and abhorrent conduct of a relatively small number of servicemembers. We have acknowledged, however, that the abuses at Abu Ghraib were not merely the failure of individuals to follow known standards but also resulted from leadership failures compounded by poor advice from staff officers responsible for overseeing detentions operations in Iraq.

The Department conducts comprehensive training programs on treatment and interrogation of detainees – now improved by the recommendations of the various independent panels. Of course, no training program, however extensive, will be able to prevent all incidents of abuse.

In response to your question on this topic, Mr. Chairman, the United States is carefully monitoring its detention operations to prevent any recurrence of the Abu Ghraib abuses. The Department of Defense takes very seriously its obligations to conduct safe, secure, and humane detention operations. We were shocked, as you were Mr. Chairman, about the events at Abu Ghraib. It should not have happened. Any wrongdoers need to be punished, procedures evaluated, and problems corrected. We feel terrible about what happened to these Iraqi detainees. They were people in U.S. custody and our country had an obligation to treat them properly. We didn't do that. That was wrong.

One of the great strengths of a nation is its ability to recognize problems, to deal with them effectively and transparently, and to strive to make things better. Indeed, a measure of a strong free society is confronting problems in a transparent manner. Of course, we wish that all persons in our government and Armed Forces had conducted themselves in accordance with American values, which reflect the highest standards. But the reality is that some did not, and the misconduct at Abu Ghraib occurred.

With respect to the Chairman's question suggesting the need for more visible and independent Department of Defense investigations, let me assure the Committee that the Department's 12 major investigations have been honest and impartial. These investigations, inspections, and reviews looked exhaustively into all aspects of our detention operations. This included a wholly independent review by a panel chaired by former Secretary of Defense James Schlesinger. No investigators were restricted or influenced by DoD leadership in their inquiries into the facts or in making their findings and recommendations. They had full access to all materials and individuals.

The United States Congress has also extensively reviewed these issues. It has conducted numerous hearings, and more than 150 Members of Congress have visited our detention facilities. The Department has already instituted numerous reforms and improvements in response to these investigations.

Should information come to light that an additional investigation is warranted, DoD will, as it has before, investigate fully.

With respect to Madame Belmir's question about juveniles detained at Guantanamo and the reason for their detention, there are currently no juvenile detainees at Guantanamo.

At one point we detained three juveniles at Guantanamo. They returned to their home country in January 2004. We returned them to an environment where they have an opportunity to reintegrate and we did so with the assistance of non-governmental organizations. We are aware one returned to the fight.

Let me briefly speak about the conditions of detention we provided them while at Guantanamo. After medical tests determined their ages, they were housed in a separate detention facility, separated at a significant distance from the other detainees, and the other detainees were not permitted to have access to them. Indeed, they were housed in a communal facility, rather than cells. They underwent assessments from medical, behavioral, and educational experts to address their needs. Furthermore, we taught them mathematics, English, and reading, and provided daily physical exercise and sports programs.

It is unfortunate that al Qaeda and the Taliban use juveniles as combatants. The United States detains enemy combatants engaged in armed conflict against it and the juveniles were detained to prevent further harm to them and to our forces.

I will now return the floor to Mr. Bellinger.

[BELLINGER]

Before turning our attention to each member's individual questions, I will now address the third general theme of your questions, which involve matters related to U.S. intelligence agencies.

Messrs. Mariño, Wang, and Mavrommatis each asked related questions regarding intelligence activities, which we will answer together, because they overlap to some extent. We appreciate the Committee's recognition and forbearance that we cannot discuss specific alleged intelligence activities, but we are pleased to provide the following information.

First, it is certainly the view of the United States that every agency of the U.S. Government, including its intelligence agencies, must comply with U.S. obligations under the Convention Against Torture, as well as with the requirements of the Detainee Treatment Act. Second, in answer to your questions regarding whether U.S. intelligence activities are subject to monitoring and oversight, all of the activities of our Central Intelligence Agency are subject to inspection and investigation by the CIA's independent Inspector General and to oversight by the intelligence committees of the United States Congress.

The CIA continues to review and, where appropriate, revise its procedures, including training and legal guidance, to ensure that they comply with U.S. Government policies and all applicable legal obligations, including the Convention Against Torture and the Detainee Treatment Act. To this end, the CIA has put new guidelines and procedures in place during the last several years.

We will now turn our attention to answering your questions that did not fit within those three broad themes. We will try to address them in the order we received them.

I first want to address a common question asked by several members of the Committee: whether specific practices might constitute torture or other cruel, inhuman or degrading treatment or punishment. As we have explained before, both categories are prohibited by United States law, whether they occur within the United States or outside the country. We provided many examples of crimes that could potentially be charged in our oral responses and written materials.

That said, as the example Mr. Kovalev gave shows, it is difficult to look at broad categories of practices -- totally divorced from the specific facts of any given case -- and label them in the abstract as being in all cases either torture or cruel, inhuman or degrading treatment or punishment. Moreover, as Mr. Mariño noted, even when the facts are known, drawing the line can be a difficult exercise.

Mr. Mariño raised two hypotheticals -- forced disappearances and incommunicado secret detention -- and asked if they constitute torture. From a legal perspective, it depends on the facts of the case and whether the facts meet the relevant legal standards. We are therefore reluctant to speculate about these difficult questions in the abstract.

The issue of incommunicado detention, however, is one that has been raised frequently and I would just note that the Fourth Geneva Convention, while not directly applicable here, specifically recognizes that in certain circumstances, individuals, such as spies and saboteurs, or other individuals suspected of activity hostile to the security of the detaining power, shall be regarded as having forfeited their rights of communication.

Mr. Mariño asked a question about the Detainee Treatment Act, which, as I have said, is an important development in the treatment of those in United States Government custody. First, I'd like to address Mr. Mariño's question regarding habeas corpus access to U.S. courts and the judicial remedy provisions in the Detainee Treatment Act of 2005. The Act provides unprecedented procedural protections -- in our nation's domestic courts of law -- to enemy combatants captured during an ongoing armed conflict and held by the Department of Defense at Guantanamo Bay, Cuba. Historically, captured enemy combatants have not been able to challenge their detention before domestic courts of the nation holding them, a worldwide tradition that had been reflected in decisions of the United States Supreme Court.

Under the Detainee Treatment Act, a U.S. court of appeals may evaluate whether the already extensive procedures by which the United States determines that a detainee is an enemy combatant are consistent with the Constitution and laws of the United States. This review also extends to the final decisions of military commissions. In imposing this uniform review procedure, the Act forecloses whatever limited statutory habeas corpus jurisdiction may have applied because of the location of their detention at Guantanamo. Instead, the Act provides Guantanamo detainees with a standardized definite form of judicial review in a United States domestic court -- a protection that is extraordinary in the history of armed conflict.

Mr. Mariño also asked whether the statement issued by the President at the time the President signed the Detainee Treatment Act indicated an intention to take actions that would violate the Act. The question reflects a common misunderstanding, both within the United States and internationally, about the President's signing statement. Mr. Mariño, I can assure you and the Committee that the answer to this question is a clear and emphatic "no". As the President stated on the day he signed the Detainee Treatment Act, the policy of the United States has "been not to use cruel, inhuman or degrading treatment, at home or abroad." That remains our policy and is also now a matter of U.S. statute. Under our legal tradition Presidents regularly issue such signing statements; the President has no intention of taking actions that would contravene the Detainee Treatment Act.

Mr. Mariño additionally asked about the U.S. legal position on the territorial application of Article 3 in light of the Convention's goal to prevent torture. We agree that Article 3's *non-refoulement* provision is an essential safeguard to prevent torture. However, as a legal matter, we note that the affirmative obligation in Article 2 is limited to "any territory under [a State Party's] jurisdiction." As we noted previously, Article 3 of the Convention in our view does not apply as a matter of law to individuals located outside of U.S. territory. This view is supported by the text of the Convention, its negotiating history, and the U.S. record of ratification. Let me be clear: torture is abhorrent and, as the President has repeatedly said, we are committed to its elimination worldwide. As we have emphasized again before the Committee -- notwithstanding our legal position on the territorial reach of Article 3 -- the U.S. worldwide policy is not to transfer persons to countries where it determines that it is "more likely than not" that they would be tortured. This is the same standard we apply in implementing our Article 3 obligations under the CAT. This policy applies to all components of the U.S. Government and to all individuals in U.S. custody or control, regardless of where they may be detained.

Mr. Mariño also inquired, in light of the U.S. legal interpretation of Article 3's territorial application, how the U.S. ensures that the non-refoulement protection is afforded to those who need such protection. Our legal views on the territorial scope of Article 3 do not prevent the United States from providing this important protection as a matter of policy. Rather, as just noted, the U.S. policy to provide this protection applies to all components of the U.S. government and to individuals in U.S. custody or control regardless of where they may be detained. For example, it is longstanding U.S. policy to afford migrants interdicted at sea with a meaningful opportunity to seek and receive protection against persecution or torture. In addition, with respect to transfers and returns of individuals from Guantanamo Bay, the United States has gone to great lengths to give effect to its policy not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured. This policy is described in great detail in declarations that were annexed to the U.S. *Second Periodic Report*. U.S. Government departments and agencies have strengthened their internal procedures to ensure compliance with this policy.

Mr. Mariño further inquired about the meaning of the standard "more likely than not", which the United States adopted for implementation of Article 3. In applying this standard in the context of implementing Article 3, United States officials determine whether it is probable that the foreign national would be tortured if returned or extradited to a particular country. It is a standard that is familiar in U.S. law and has long been applied by immigration tribunals in the United States (at least since the enactment of the Refugee Act of 1980). In fact, immigration judges apply the standard in approximately 20,000 adjudications per year under regulations implementing Article 3.

Regarding Mr. Mariño's and Chairman Mavrommatis' question about whether diplomatic assurances are a substitute for

case-by-case determinations, the answer, as we have explained before, is "no." Diplomatic assurances are simply a tool that may be used in appropriate cases and are not a substitute for a case-specific assessment as to whether it is more likely than not that a person would be tortured if returned. In such cases, they are one factor in the analysis. That said, if, taking into account all relevant information including any assurances received, the United States believed that a person more likely than not would be tortured if returned to a foreign country, the United States would not approve the return of the person to that country.

Mr. Mariño also asked whether it would be prudent to rely on "international bodies" to determine whether torture is systematically practiced in certain countries, suggesting that the assessment by the international bodies would be dispositive about whether any individuals could properly be transferred to such countries. As we stated in our opening presentation last Friday, Article 3 requires the United States to make an individualized determination as to whether a **particular individual** would "more likely than not" face torture in a **particular country**. Although a systematic practice of torture in a country would be highly relevant, it does not obviate the need to conduct an individual review to determine whether the standard is met in a particular case. Moreover, Article 3 does not accord a role to third-party "international bodies" to make the individual determination on behalf of the State Party. Rather, it is the State Party's obligation to ensure that the Convention's standard is met.

In response to Mr. Mariño's question on who is the decision-maker for the application of Article 3 in extradition cases, he was correct. It is in fact the Secretary of State, or the Deputy Secretary of State by delegation, who is the decision-maker. The State Department regulations governing the extradition process provide fugitives with the opportunity to submit whatever documentation they consider relevant for consideration of their claims. The Department will examine materials submitted by the fugitive, persons acting on his behalf, or other interested parties, and will examine other relevant materials that may come to its attention. Whenever allegations relating to torture are raised by the fugitive or other interested parties, appropriate policy and legal offices within the State Department with regional or substantive expertise review and analyze the information. The Department's Bureau of Democracy, Human Rights and Labor, which drafts the annual human rights reports, is a key participant in this process. All relevant bureaus will then participate in the process to make a recommendation to the Secretary of State. Mr. Mariño is correct: consistent with U.S. law and practice governing extraditions, we do not believe that the decision of the Secretary of State regarding claims for protection under regulations implementing Article 3 of the Convention is subject to judicial review. U.S. courts are currently reviewing the issue in a number of cases.

Mr. Kovalev, in response to your question regarding the International Criminal Court, which I will refer to by its acronym the "ICC," the United States strongly supports accountability for war crimes and crimes against humanity, and is steadfast in its promotion of international justice worldwide. The U.S. position on the ICC is well-known, and is not relevant here; however, the United States does respect the right of other nations to be party to the ICC. The United States played a key role in drafting the substantive elements of the crimes in the Rome Statute. Furthermore, the United States continues to lead the way in promoting accountability for these atrocities by being the largest financial contributor to both international and domestic war crimes tribunals, by finding that genocide has occurred in Darfur, and by supporting countries in their apprehension of fugitives such as Mladic, Karadic, and Taylor. We do agree that international and domestic mechanisms for accountability are an important method of eradicating torture, among other crimes, and in promoting accountability and the rule of law.

At this point, I am pleased to turn the floor over to Mr. Monheim.

[MONHEIM]

Thank you. I will first turn to several of Dr. Sveaass's questions related to implementation of the Prison Rape Elimination Act. As an initial matter, we can all agree that the elimination of prison rape is an important objective for all countries. In this context, I can reassure you that, there has not been a delay in the implementation of the Act in the United States. The Act specifically requires the collection of statistical data, a survey on the prevalence of sexual assault, the formation of a Commission, and a final report to the United States Attorney General by June 2007. We are making steady progress, and to date we have:

- Initiated a massive survey of federal, state and local prisons and other detention centers;
- Conducted extensive research on the nature of the problem of prison rape;
- Disbursed over 22 million dollars in grant money to the states in an effort to reduce the problem; and
- Convened the Prison Rape Commission for hearings on the matter. The first hearings were held in June of 2005 and the next public hearing is scheduled for this June.

Accordingly, the United States Government is working to implement fully the Act's important requirements to better detect, prevent, and punish prison rape.

As Dr. Sveaass noted, the prevention of sexual violence against individuals in immigration custody is also a serious matter requiring the attention of all governments. With respect to individuals in U.S. immigration detention, the Department of Homeland Security, which I will refer to by its acronym "DHS," has taken significant steps to prevent sexual violence and abuse in immigration detention facilities. These steps include a comprehensive classification and screening system used to segregate nonviolent detainees from those with violent tendencies, and widespread posting of instructions on how to report sexual misconduct by detention officers and other detainees. All immigration detention facilities, including contract facilities, must meet each of DHS's National Detention Standards, including those Standards that specifically serve to protect the health, safety, and well-being of detainees. DHS immigration detention facilities also provide Prison Rape Elimination Act training to detention officers.

We would also like to assure the Committee that the prevention and punishment of sexual abuse against prisoners remains a high priority for law enforcement at both the federal and state level. The federal Bureau of Prisons has repeatedly affirmed the agency's zero tolerance policy for sexual abuse of federal inmates and the federal government conducts thorough investigations of alleged abuses occurring within state prisons pursuant to the Civil Rights of Institutionalized Persons Act. When abuses are found, the federal government has the authority to initiate legal actions against a state institution and then closely monitors the jurisdiction (via on-site inspections, interviews of inmates and staff, and review of investigatory documents) to ensure that reforms are thoroughly and systemically implemented.

Regarding Dr. Sveaass' question about prosecutions of law enforcement officers involved in sexual assaults, the Department of Justice vigorously investigates and, where appropriate, prosecutes cases involving sexual misconduct by law enforcement officers. Furthermore, the Department can, and does, prosecute state and federal law enforcement officers and prison officials for deprivations of constitutional rights. Sexual assaults are among the cases prosecuted under federal law. Since October 1999, the Criminal Section of the Civil Rights Division, working in conjunction with United States Attorneys Offices around the country, has charged 44 defendants with acts of sexual misconduct ranging from inappropriate sexual contact to forcible rape. Of these defendants, 16 were prison officials and most of the rest were police officers.

The Department of Justice has obtained lengthy sentences against law enforcement officers and prison officials convicted of sexual assault.

- For example, in 2005 a former Jackson, Mississippi police officer was sentenced to 20 years in prison for raping a 19-year old woman in his custody.
- In addition, a sheriff in Latimer County, Oklahoma, was sentenced to 25 years in prison for sexually assaulting several female inmates and employees.

We believe that aggressive prosecution protects all persons, including prisoners, from such egregious and unlawful behavior by removing the individual offender and sending a strong message of deterrence to other officials.

The United States firmly believes that all detainees should be safe and free from sexual assaults, and it does not tolerate such behavior by its employees or contractors.

Dr. Sveaass also inquired about the training provided to U.S. law enforcement personnel to emphasize the need to respect human dignity, especially with regard to gender issues. While any question about law enforcement training in the United States necessarily involves a wide variety of law enforcement agencies and training regimes, I would highlight some prominent examples that demonstrate our commitment to training and our emphasis on respecting human integrity:

- The federal Bureau of Prisons provides extensive training for staff that is focused on issues specific to the treatment of female inmates.
- At DHS, detention officers receive extensive training in the proper use of force and best practices in arresting and searching female subjects. Similarly, DHS immigration inspectors are specifically trained to "treat all minors with dignity and sensitivity to their age and vulnerability," and to generally keep males and females, as well as adults and minors, segregated at all times during the immigration inspections process.

More generally, law enforcement personnel are trained to comply with a wide variety of Constitutional provisions, statutes, regulations, and policies, including civil rights protections that safeguard the rights of individuals. Training law enforcement personnel to comply with this robust set of individual rights effectively promotes respect for human integrity.

Regarding Dr. Sveaass' question about "especially vulnerable individuals in detention," we share her concern about the need to protect such people. Indeed, in the United States there are numerous safeguards in place for their protection. While practice varies within the many prisons in the United States, prisoners are generally classified and housed within a prison to ensure inmate safety, including consideration of real or perceived vulnerabilities. Relevant classification factors may include gender, age, medical condition, affiliations, seriousness and nature of the charge, criminal history, and history of violence. In addition, any prisoner who is subject to threats or acts of violence can be separated from the general prisoner population and, if necessary, transferred to another facility.

As a general rule, the state prison populations do not include "juveniles." However, this issue is complicated by the fact that state laws and policies vary regarding the age by which an individual may be charged with a crime as an adult, and thus incarcerated with other adult offenders. Federal law prohibits juvenile offenders held in Bureau of Prisons custody from being housed in correctional institutions or detention facilities in which they could have regular contact with adult offenders. When a juvenile must be temporarily detained in an adult facility, as, for example, immediately following arrest, it is only for a minimal period of time and the juvenile remains separated from the adult offenders within the institution.

The United States recognizes that training for staff is essential to protect individuals in custody and to prevent abuse. The federal Bureau of Prisons has a zero tolerance policy for any type of inmate abuse, and these strict standards are also imposed on the private providers of detention services. With respect to private facilities, the Bureau has taken a very active role in explaining its expectations to the contractors. The Bureau has, for example, sponsored national training meetings with private contract providers and has conducted a substantial amount of formal and informal training of contractors.

DHS also undertakes a number of measures to protect potentially vulnerable aliens held under its authority. For example, Special Management Units are available to allow for the administrative segregation of vulnerable detainees upon request, such as when the detainee is a victim of assault by another detainee. Importantly, while in DHS custody, children may be housed with their adult family members, and unaccompanied juveniles are kept completely segregated from adults.

Dr. Sveaass also asked about measures taken to monitor the treatment and conditions in U.S. prisons, jails, and detention facilities. For example, the United States continues to vigorously enforce the Civil Rights of Institutionalized Persons Act, which deals with these matters. Since 2001, DOJ has concluded formal investigations of 42 jails, prisons, and juvenile facilities. It is currently monitoring agreements involving 97 jails, prisons and juvenile facilities. Furthermore, DHS annually reviews every immigration detention facility's compliance with the DHS National Detention Standards.

In response to Dr. Sveaass' question regarding redress and compensation measures, prisoners in federal and state facilities have recourse through private civil actions. Remedies for these actions may involve monetary damages or equitable or declaratory relief. In addition, any inmate subject to any abuse or violence is generally provided an extensive medical exam and psychological assessment, as well as counseling. Aliens in DHS' custody who are victims of sexual assault are referred immediately to an Emergency Department in the community for medical treatment, to include collection of forensic evidence, and for mental health evaluation and crisis intervention, if necessary. Similarly, aliens who experience violence while in DHS custody or who are suspected to be victims of abuse receive medical treatment – including off-site medical care at DHS expense, if necessary – and are referred to a mental health professional, such as a psychiatrist, psychologist, or licensed clinical social worker for evaluation and treatment.

Regarding Dr. Sveaass' question about women giving birth in custody, we reiterate that it is not the general practice of the United States Government to shackle female prisoners during childbirth. While the use of restraints is not constitutionally prohibited, the federal Bureau of Prisons does not, as a matter of policy, employ shackles on pregnant women or those in labor. Depending on the facility, an inmate could be restrained in the unlikely event that she posed a threat to herself, her baby, or others around her.

Allegations of the misuse of shackles or other restraints in both federal and state prisons are investigated by the Department of Justice, and may be the subject of civil litigation in U.S. courts. For example, there is pending private litigation in Arkansas in the case of Shawanna Nelson. While the federal government is not involved in that case, following reports of this incident, the Department of Justice conducted an inquiry at the facility and asked the inmates about any other occurrences, and none were reported. We currently have a private Memorandum of Agreement to monitor the facility where Ms. Nelson had been held in Arkansas to make certain that no unconstitutional conditions exist for the inmates.

Dr. Sveaass asked whether the United States believes the Committee's questions about domestic violence are beyond its mandate. To clarify our position, the United States does not believe that all acts of domestic violence are necessarily beyond the scope of the Convention. Nor do we believe that all acts of domestic violence are *per se* within that scope. An issue may arise, for example, whether the acts at issue would constitute torture and whether there is the requisite involvement of public officials or persons acting in an official capacity. In order to determine whether a specific act of

domestic violence might fall within U.S. obligations under the Convention, one would have to look closely at the particular facts in a given case.

In any event, in our written response to the Committee's Question 59, the United States referred the Committee to the lengthy discussion on violence against women, including domestic violence, contained in its latest periodic report to the Human Rights Committee. Additionally, the United States' written response did not purport to address possible application of Article 3 of the Convention to any particular claim of domestic violence. Whether an individual could establish eligibility for such protection based on a likelihood of severe pain or suffering endured in the context of domestic violence is an unsettled question in U.S. immigration law. Also, victims of domestic violence may be eligible for asylum under current U.S. law. As with any applicant for asylum, those individuals must satisfy the full range of requirements established by Congress before asylum may be granted.

I would also note that, under U.S. law perpetrators of acts of domestic violence are subject to a wide array of criminal sanctions and civil remedies.

Moving to additional questions of Chairman Mavrommatis, the United States appreciates the opportunity to discuss prior incidents of alleged physical abuse in Chicago, Illinois. It is our understanding that an Illinois state judge has appointed a special prosecutor to investigate allegations against Chicago Police Department Lt. Jon Burge. To date, several convictions based on allegedly coerced confessions have been overturned. This confirms a fundamental tenet of U.S. law that no one is above the law, and while the vast majority of police officers display courage in a difficult and often dangerous job, anyone who violates the rights of a citizen whom they are charged with protecting will be prosecuted to the full extent of the law. We can assure the Committee, however, that U.S. law enforcement authorities will continue to follow the state special prosecutor's progress.

We also appreciate the Chairman's question regarding what some refer to as the "death row phenomenon." As the Chairman recognized, the Convention does not prohibit the imposition of the death penalty. To this effect, the United States included an understanding with its instrument of ratification that the Convention does not "restrict or prohibit the United States from applying the death penalty consistent [with the Constitution], *including any constitutional period of confinement prior to the imposition of the death penalty.*" The Supreme Court has considered and upheld as constitutional delays between an initial death sentence and the eventual imposition of that penalty.

Despite the inapplicability of the Convention to this issue, the United States is aware of the possible psychological toll exacted by a period of incarceration before the execution of a sentence. There is a balance of interests here, as the delay is most commonly produced by the very procedural safeguards that ensure that the sentence is justly imposed. We also recognize that some believe that the segregation of inmates sentenced to death from the rest of the prison population may exacerbate this effect. There are interests to be balanced here as well -- some correctional facilities regard inmates sentenced to death as more dangerous to fellow prisoners, both because of their violent backgrounds and because of the inability of the prison to deter misconduct by increasing the sanction. As you know, the prevention of inmate-on-inmate violence is a priority for the United States and an issue that is of concern to this Committee.

I now return the floor to Mr. Bellinger.

[BELLINGER]

Mr. Chairman, ladies and gentlemen of the Committee, this concludes our responses to the questions you posed to us at our hearing on Friday. We have made every effort to respond to these questions as comprehensively as possible within the time period allowed. If we misunderstood any of your questions, or if you wish for further clarifications on any of these points, we will be happy to receive your follow-up questions.

In closing, let me reiterate the U.S. Government's absolute commitment to complying with its obligations under the Convention Against Torture and to the implementation of policies that provide protections that extend beyond those obligations. I hope that our delegation's appearance before the Committee today and on Friday, together with the extensive written materials we have provided to the Committee, are a manifestation of that commitment and the importance we place on these issues. We hope the Committee will be able to take this information into account when you prepare your final conclusions and recommendations.

Thank you.

[1] President's Transmittal of the CAT at 9; Senate Report on the CAT, Exec. Rep. 101-30 at 19.

[2] *See* Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/1984/72 at para. 5 (Mar. 9, 1984).

[3] *See* Report of the Secretary-General, A/39/499 at p. 20 (Oct. 2, 1984).

[4] *See* E/CN.4/1984/72, *supra* note 1, at para. 5.

[5] *See* Summary Prepared by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV), E/CN.4/1314 at para. 55 (noting that "human rights regulations and the law of armed conflicts" are "two complementary but distinct legal systems...the characteristics of which vary according to the specific situation in which they are applied).

[6] *See* A/39/499, *supra* note 2, at p. 15 (referring to United States statement).

[7] *See* J. Herman Burgers and Hans Danelius, The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 106 (1988) (noting statement of the Israeli delegation after adoption of General Assembly resolution 39/46).

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United States' Response to the Questions Asked by the Committee Against Torture

U. S. DELEGATION ORAL RESPONSES TO CAT COMMITTEE QUESTIONS
Geneva, Switzerland
May 5, 2006

[LEGAL ADVISER BELLINGER]

I will now provide summaries of our answers to the many questions posed by the Committee. In all cases, I would encourage you to consult those written responses as they provide more detail than I and my colleagues will be able to provide today.

Questions 1 and 2 concern the memoranda drafted by the Department of Justice's Office of Legal Counsel in August 2002 and December 2004 that provided legal advice on the meaning of the term "torture" under the extraterritorial criminal torture statute that implements portions of the Convention. Nothing in these memos changes the definition of torture governing U.S. obligations under the Convention from what the United States accepted upon ratification of the Convention.

The Department of Justice's Office of Legal Counsel, which provides opinions on questions of law to the Executive Branch of the United States Government, produced the August 2002 and December 2004 memoranda. The August 2002 memorandum provided legal advice on the meaning of the term "torture" under the extraterritorial criminal torture statute and addressed issues concerning the separation of powers under the United States Constitution. That opinion was requested to provide operational guidance with respect to the implementation of the criminal statute at the level of detail needed to guide U.S. government officials

The Office of Legal Counsel later withdrew that opinion and issued another opinion dated December 30, 2004, which is confined to an interpretation of the extraterritorial criminal torture statute. The December 2004 opinion supersedes the August 2002 opinion in its entirety and thus provides the Executive Branch's authoritative interpretation of the extraterritorial criminal torture statute.

The August 2002 opinion was withdrawn not because it purported to change the definition of torture but rather because it addressed questions that were not necessary to address. In this regard, the December 2004 Memorandum clarified that "[b]ecause the discussion in that [August 2002] memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."

The purpose of both opinions was to provide legal advice related to a domestic criminal statute. Neither opinion purported to change the definition of torture set out in Article 1 as understood by the United States. The question that the OLC addressed was simply what the terms of that definition, as now reflected in the United States Code, mean.

Question 3 asks whether the references to "torture" as involving "extreme" acts in the December 2004 memorandum are compatible with the Convention. The fact that the Convention defines torture in Article 1 and then subsequently refers in Article 16 to "other acts of cruel, inhuman or degrading treatment or punishment" reflects the recognition of the negotiators that torture applied to more severe acts of cruelty and abuse than did cruel, inhuman or degrading treatment or punishment. This basic distinction between the severity of the conduct constituting torture, on the one hand, and cruel, inhuman and degrading treatment or punishment, on the other, is reflected in the underlying regime set forth in the treaty text to combat and prevent each form of conduct. Specifically because of the aggravated nature of torture, States Parties agreed to comprehensive measures to prohibit it under their criminal law, to prosecute perpetrators found in territory under their jurisdiction, and not to return individuals to other States where there are substantial grounds for believing that such persons would be in danger of being subjected to torture. In contrast, the obligations regarding cruel, inhuman or degrading treatment or punishment are far more limited.

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The December 2004 memorandum, recognizing what is clear from the text and structure of the Convention, distinguishes "torture" from "other acts of cruel, inhuman or degrading treatment or punishment" as expressed in Article 16, by explaining that torture is a more severe, or extreme, form of mistreatment than that described by Article 16. The use of the word "extreme" in these contexts clarifies the meaning of the word "severe" contained in the definition of torture set forth in Article 1.

The fact that the term "torture" is reserved for those acts involving more severe pain and suffering, as distinguished from cruel, inhuman or degrading treatment or punishment, is also confirmed by the Convention's negotiating history and is consistent with other international law sources, cited in our written submission.

Question 4 suggests that both OLC memoranda on the extraterritorial criminal torture statute are more restrictive than previous U.N. standards, including the 1975 Declaration. We respectfully disagree. The interpretation of the term "severe" in the December 2004 memorandum reflects the understanding that torture constitutes a more aggravated form of abuse than that covered by the "cruel, inhuman or degrading treatment or punishment" described in Article 16. As I have just explained, this distinction is not only express in the text of the Convention, but also is apparent from the negotiating history, the U.S. ratification record, and other international law sources. This distinction is also consistent with, and is not more restrictive than, the 1975 Declaration, which distinguishes torture from other lesser forms of abuse in part on the basis of the severity of the underlying acts.

Regarding **Question 5** and how the United States ensures implementation of its Convention obligations, I would note that, before ratifying the Convention, the United States carefully reviewed U.S. federal and state laws for compliance with the treaty's terms. The United States concluded that, with the sole exception of prohibiting certain acts of torture committed outside the territory of the United States, U.S. state and federal law covered all of the offenses stated in the Convention. The United States filled this lone shortcoming by enacting the afore-mentioned extraterritorial criminal torture statute.

In other words, the United States ensures compliance with its Convention obligations through operation and enforcement of its existing laws. As a result, there is no specific federal crime styled as "torture" for acts occurring within U.S. territory. The reason is simply that any act of torture falling within the Convention definition, as ratified by the United States, is already criminalized under U.S. federal and state laws. These laws, which meet the requirements of the Convention, are binding on government officials and are enforced through a variety of administrative procedures, criminal prosecutions. Additionally, civil suits provide available remedies in many cases. Our written response to this question provides a comprehensive list of such mechanisms.

There are various mechanisms that allow the United States to ensure its Convention obligations. Of these, the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA"), is particularly relevant to the Committee's question about monitoring of prisons as it enables the Department of Justice to eliminate a pattern or practice of abuse in any state prison, jail or detention facility. It is perhaps the most direct source of the federal government's authority to enforce the federal constitutional rights of persons in jails and prisons, including juvenile justice facilities, at the state and local level. Our written response provides more detailed information on the activities of the Department of Justice under this statute.

Question 6 requests extensive information, including statistics relating to detained persons both within and outside United States territory. In the interests of conserving time for our presentation this morning, I would direct you to our written answer, which includes detailed statistical data.

Question 7 concerns alleged "secret detention facilities" under the "*de facto* effective control" of the United States. While it is the policy of the United States not to comment on allegations of intelligence activities, it is important to underscore that all components of the United States Government are obligated to act in compliance with the law, including all U.S. constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. Government does not permit, tolerate, or condone unlawful practices by its personnel or employees (including contractors) under any circumstances. The extraterritorial criminal torture statute makes it a crime for a person acting under the color of law to commit, attempt to commit, or conspire to commit torture outside the United States. In addition, pursuant to the Detainee Treatment Act of 2005, which I mentioned in my opening remarks, the United States voluntarily has undertaken a prohibition on cruel, inhuman, and degrading treatment or punishment that applies as a matter of statute to protect any persons "in the custody or under the physical control of the United States Government, regardless of nationality or physical location."

I will now turn to Mr. Cully Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs at the Department of Defense to address Question 8.

[STIMSON]

Question 8 concerns the Committee's interest in measures to remedy command and operational issues at DoD detention

facilities in light of what the Committee describes as "numerous allegations of torture and ill-treatment of persons in detention under the jurisdiction of the State party and the case of the Abu Ghraib prison." The United States would like first of all to address an underlying misconception that is the basis for the Committee's question. While the United States is aware of allegations of torture and ill-treatment, and takes them very seriously, it disagrees strongly with the assertion that such are widespread or systemic. As Mr. Bellinger stated in his opening remarks, these allegations must be placed in context: they relate to a minute percentage of the overall number of persons who have been detained. Moreover, not everything that is alleged is in fact truth. For example, it is well-known that al Qaida are trained to lie. The "Manchester Manual" instructs *all al Qaeda members, when captured, to allege torture, even if they are not subjected to abuse.* The Department of Defense investigates all allegations of abuse or maltreatment, and if found credible, takes appropriate actions to hold accountable those who violate the law or our policies. The United States provided numerous examples of specific measures taken in response to incidents of maltreatment or misconduct at Department of Defense ("DoD") detention facilities at Guantanamo Bay, Cuba and in Afghanistan and Iraq in our written response to the Committee's questions and in the Annex to the *Second Periodic Report.*

With respect to access and information provided to the International Committee of the Red Cross (ICRC), the ICRC has access to DoD theatre internment detention facilities, including Guantanamo, Iraq, and Afghanistan, and meets privately with detainees. DoD accounts for detainees under its control fully and provides notice of detention to the ICRC as soon as possible, normally within 14 days of capture.

The ICRC transmits its confidential communications to senior officials in the U.S. Government, including those in DoD, and military commanders in Afghanistan, Iraq, and Guantanamo. DoD has established procedures to ensure that ICRC communications are appropriately routed to senior leadership and acted upon in a timely manner. While our dialogue with the ICRC is confidential, we take seriously the matters the ICRC raises and greatly value the historic and ongoing relationship between the U.S. Government and the ICRC.

I will now return the floor to Mr. Bellinger.

[LEGAL ADVISER BELLINGER]

Thank you, Cully. **Question 9** asks about derogations. I would like to state unequivocally that under U.S. law, there is no derogation from the express prohibition on torture. The legal and administrative measures undertaken by the United States to implement this prohibition are described in detail in both our *Initial Report* and *Second Periodic Report.*

In response to **Questions 10 and 11**, which ask whether there are exceptions to the prohibition on torture, I would like to reiterate that the United States stands by its obligations under Article 2, that "[a]*n order from a superior officer* or a public authority may not be invoked as a justification of torture" and that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." These are longstanding commitments of the United States, repeatedly reaffirmed at the highest levels of the U.S. Government.

With regard to the Committee's concern about investigations, the United States described in great detail in the Annex to the *Second Periodic Report* that the Department of Defense has conducted 12 major investigations into all aspects of its detention operations following the events of Abu Ghraib.

As these major investigations reflect, the U.S. government is committed to investigating and holding accountable those who engage in acts of torture or other unlawful treatment of detainees. If it appears that criminal laws have been violated, then those violations are investigated and prosecuted as appropriate by the relevant authorities.

Let me now turn to the Committee's questions about interrogation rules in **Question 12**. The Detainee Treatment Act of 2005, as I mentioned, prohibits cruel, inhuman, and degrading treatment or punishment, as that term is defined by U.S. obligations under Article 16, and applies as a matter of statute to protect any persons "in the custody or under the physical control of the United States Government, regardless of nationality or physical location." The Act also provides for uniform interrogation standards that "[n]o person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation." These standards apply to military, DoD civilians, and contract interrogators.

The question also asks about any interrogation rules, instructions, and methods that may have been adopted by the CIA. As already noted, the United States does not comment publicly on alleged intelligence activities. But, like any other U.S. government agency, any activities of the CIA would be subject to the extraterritorial criminal torture statute and the Detainee Treatment Act's prohibition on cruel, inhuman, or degrading treatment or punishment.

The United States provided a detailed answer to the Committee's questions in **Question 13** about the process under which Article 3 is implemented in its written answers to the Committee. Rather than oversimplifying the various intricacies of procedure that may apply, I refer you to that discussion as well as the relevant discussion contained in the *Second Periodic Report*. To summarize briefly, however, let me make several points. Regulations in the immigration removal and extradition contexts permit aliens to assert Article 3 claims as a defense to either removal or extradition. Consistent with its obligations under Article 3, the United States does not transfer persons to countries where it determines that it is "more likely than not" that they would be tortured. Additionally, the United States' implementing laws and regulations do not exclude categories of persons from protection from refoulement under Article 3. The United States may not revoke or terminate an individual's protection under Article 3 from involuntary removal to a particular country so long as it continues to be shown that the protected individual would "more likely than not" be tortured in that country.

Our policy is clear. The United States does not transfer persons to countries where it believes it is more likely than not that they will be tortured. This policy applies to all components of the U.S. Government and to individuals in U.S. custody or control, regardless of where they may be detained. Nevertheless, on this point, I would like to refer you to our detailed analysis in our written response to this question. It explains that, despite this firm policy, as a legal matter, the view of the United States is that Article 3 does not impose obligations on the United States with respect to an individual who is outside the territory of the United States. Neither the text of the Convention, its negotiating history, nor the U.S. record of ratification supports a view that Article 3 applies to persons outside of U.S. territory.

In **Question 14** the Committee asks whether the United States' understanding to Article 3 interpreting "substantial grounds for believing" is in fact a reservation that restricts or changes the scope of the provision. At the time the United States became a State Party to the Convention, it considered that the standard enunciated in its understanding was merely a clarification of the definitional scope of Article 3, rather than a statement that would exclude or modify the legal effect of Article 3 as it applied to the United States. This view has not changed. With respect to the question of who is the competent authority to make Article 3 determinations, this turns on the context in which the determination is made. For example, as I mentioned in the previous question, the decisionmaker will differ in immigration removal and extradition proceedings. To provide a thorough answer to this complex question, I would refer you to our more detailed description of the procedures governing these various contexts that is contained in our written submissions.

On **Question 15**, let me briefly describe the appeal rights of individuals asserting Article 3 claims in the immigration removal context. Generally speaking, in immigration removal proceedings (with the narrow exception of certain expedited proceedings described in our written response), an individual seeking protection from removal from the United States under Article 3 may appeal an adverse decision of the immigration judge to the Board of Immigration Appeals (BIA). If the BIA dismisses the individual's administrative appeal or denies his or her motion to reopen, the individual may file a petition for review of the BIA's decision with the appropriate federal court of appeals. I refer you to our written submissions for a more detailed description of these appeal procedures.

With respect to **Question 16**, as an initial matter, I would like to reiterate that the United States does not comment on information or reports relating to alleged intelligence operations. That being said, Secretary Rice recently explained that the United States and other countries have long used renditions to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice. Rendition is a vital tool in combating international terrorism, which takes terrorists out of action and saves lives. I would like to emphasize that the United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture. The United States has not transported anyone, and will not transport anyone, to a country if the United States believes he or she will be tortured. Where appropriate, the United States seeks assurances it considers to be credible that transferred persons will not be tortured.

Concerning **Question 17**, U.S. federal and state law prohibits unlawful acts that would constitute an enforced or involuntary disappearance, for example, by prohibiting assault, abduction, kidnapping, false imprisonment, and by regulating the release or detention of defendants.

With respect to transfers or removals of persons to another country, I would like to reiterate that the United States does not transfer persons to countries when it determines that it is more likely than not that they would be tortured.

Regarding the Committee's questions about diplomatic assurances in **Question 18**, I would like to emphasize, as the United States did in paragraph 33 of the *Second Periodic Report*, that diplomatic assurances are used sparingly. As an example, I would refer you to the over 2500 cases where Article 3 protection was granted to individuals in removal proceedings between 2000 and 2004. Procedures are in place that permit the United States, as appropriate, to seek assurances in order to be satisfied that it is not "more likely than not" that the individual in question would be tortured upon return. These procedures are described at length in our written submissions. Diplomatic assurances are not a substitute for a case-by-case determination of whether that standard is met.

If, taking into account all relevant information, including any assurances received, the United States believes that it is

- "more likely than not" that a person would be tortured if returned to a foreign country, the United States would not approve the return of the person to that country. There have been cases where the United States has considered the use of *diplomatic assurances*, but declined to return individuals because the United States was not satisfied such an assurance would satisfy its obligations under Article 3.

In response to the Committee's question about the "rule of non-inquiry," this is a judicial doctrine under which courts of the United States refrain from examining the penal systems of nations requesting extradition of fugitives when considering whether to permit extradition. Instead, such issues are considered by the Secretary of State in making the final extradition decision. The rule of non-inquiry recognizes that, in the U.S. constitutional system, the Executive branch is best equipped to evaluate and deal with such issues. The rule of non-inquiry is regularly cited and relied upon in U.S. judicial opinions involving extradition.

In **Question 19**, the Committee refers to cases in which the United States has allegedly returned individuals to countries that the United States considers "not to respect human rights." In response, I would like to emphasize that Article 3 does not prohibit the return or transfer of individuals to countries with a poor human rights record *per se*, nor does it apply with respect to returns that might involve "ill treatment" that does not amount to torture. Rather, the United States implements its obligations under Article 3 through making an individualized determination as to whether a **particular individual** would "more likely than not" face torture in a **particular country**.

To the extent that the Committee's question is directed to returns or transfers of individuals that are effected outside of U.S. territory, the U.S. reiterates its view that Article 3, by its terms, does not apply to individuals outside of U.S. territory. That said, as we have noted previously, the United States does not transfer persons to countries where it believes it is "more likely than not" that they will be tortured.

Finally, a note on what the Committee and others have called "extraordinary renditions." If that term is meant to refer to moving persons across borders outside normal extradition procedures, the United States has acknowledged, as I just stated, that it, like other countries, has long used procedures in addition to extraditions or other judicial mechanisms to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice. If, however, the term is meant to refer to a practice of rendering a person to a place where he or she will be tortured, I cannot be more emphatic: we do not engage in that practice. This applies to all components of the United States government and with respect to individuals in U.S. custody, regardless of whether they are inside or outside of U.S. territory.

In **Question 20**, the Committee asks whether torture constitutes a specific federal offense if it is committed within the United States. As I explained previously, while there is no specific federal crime styled as "torture" for acts occurring within U.S. territory, any act of torture falling within the Convention's definition, as ratified by the United States, is criminally prosecutable. There is a long list of criminal violations that could be charged depending on the facts of the case: for example, aggravated assault or battery or mayhem in cases of physical injury; homicide, murder or manslaughter, when a killing results; kidnapping, false imprisonment or abduction where an unlawful detention is concerned; rape, sodomy, or molestation if those acts occur; an attempt or a conspiracy to commit any of the above acts; or a criminal violation of an individual's civil rights. Thus, there is no "lacuna" in U.S. law, as all acts that would constitute torture under the Convention are crimes in the United States.

Additionally, in our written response to Question 5, we described a range of mechanisms by which U.S. compliance with its Convention obligations is implemented. The availability of these mechanisms ensure that individuals are protected from torture and other serious forms of abuse, and that when violations arise, prosecution at the federal and state level, and appropriate remedies are available.

To give one example that I think highlights just how broad the available tools for criminal prosecution under our system are: many acts which would qualify as "torture" could, provided the offender was acting under color of law, be prosecuted under Section 242 of Title 18 of the United States Code as criminal deprivations of Constitutional rights. As the examples in paragraphs 20 and 21 of the *Second Periodic Report* make clear, Section 242 also reaches, and the Department of Justice prosecutes as criminal deprivations of Constitutional rights, many violations that would constitute torture but also many that do not rise to that level.

The same is true of the military justice system, which is the focus of **Question 21**. As described in the Annex to the *Second Periodic Report*, it is a violation of our Uniform Code of Military Justice or "UCMJ," which applies world-wide, to engage in cruelty and maltreatment. Further, under the UCMJ, acts of assault, maiming, rape and carnal knowledge, manslaughter, murder, and unlawful detention, among other violations, can be prosecuted.

Under the UCMJ, individuals may also be charged for violations of U.S. federal criminal statutes, including the extraterritorial criminal torture statute and the other federal crimes I listed in response to Question 20.

Concerning **Question 22**, there is no "penal immunity" for any person for the crime of torture under U.S. law. Additionally, although there have been no criminal prosecutions initiated under the extraterritorial criminal torture statute to date, there have been prosecutions for offenses occurring outside the United States under other statutory provisions, including the Uniform Code of Military Justice.

I will now turn to Cully Stimson to respond to Questions 23 through 27 as they concern detention operations by the Department of Defense, including relating to training of military personnel and applicable interrogation rules.

[STIMSON]

Regarding **Questions 23 and 24**, which concern education and training of military and DoD civilian personnel, including contractor employees, I would like to reiterate that DoD conducts comprehensive training programs on treatment and interrogation of detainees. Of course, the United States recognizes that no training program, however extensive, will be able to prevent every case of abuse. Education programs and information for personnel, including contractors, involved in the custody, interrogation, or treatment of individuals in detention include training on the law of war. Law of War training is provided at least annually (and more frequently as appropriate) for all DoD personnel involved in conducting or supporting detention operations, including contractors. This extensive training on the law of war also includes instruction on the prohibition against acts of torture and the requirement of humane treatment. DoD has provided the Committee a more comprehensive and detailed answer in Annex 3 to our written response to the Committee's questions. Our written answer includes information on law of war training in the military academies.

Rules and instructions regarding the custody, interrogation, and treatment of detainees are described in the Annex to the *Second Periodic Report* and will also be addressed in response to Question 26. Mechanisms for systematic review of military, DoD civilians, and contractor employees involved in detention operations include inspector general visits, command visits and inspections, Congressional and intelligence oversight committees and visits, as well as reviews conducted pursuant to unit procedures and by the chain of command. They also include case-specific investigations and overall reviews, including the 12 major Department of Defense reviews of detainee policy described in detail in the Annex to the *Second Periodic Report.*

The U.S. written response to **Question 25** concerns the recruitment, use, and training of contractors involved in detention facilities by the Department of Justice or Department of Homeland Security. Please consult our written response for that information. Please also refer to our written response for more detailed information on the use of contractors in Department of Defense detainee operations; however, let me provide a brief overview here. The Department of Defense requires all contractors to comply fully with its rules, regulations, and standards regarding the humane treatment of detainees and has explicitly required contractors to agree to adhere to these requirements. On April 11, 2005, the Secretary of Defense established a policy that all federal employees and civilian contractors engaged in the custody or interrogation of individuals detained by the Department of Defense shall complete annual training on the law of war, including the obligations of the United States under domestic and international law. In addition, all personnel deploying to the Iraq and Afghanistan theaters receive Geneva Conventions training before they leave for their deployment. Personnel also receive periodic training with their units while deployed. This is applicable to all the military services.

Regarding **Question 26**, which asks about whether the December 2004 memorandum created unnecessary confusion for trainers and personnel, the answer is no. As the United States explained in the Annex to the *Second Periodic Report*, the main finding of the investigation conducted by General Kern, Lieutenant General Jones, and Major General Fay (commonly referred to as the Jones-Fay report) was that a small group of individuals, acting in contravention of U.S. law and DoD policy, were responsible for perpetrating the acts of abuse at Abu Ghraib. Specifically, in an interview after the report's release, General Kern told reporters, "We found that the pictures you have seen, as revolting as they are, were not the result of any doctrine, training or policy failures, but violations of the law and misconduct." This finding has been supported in 12 other major reviews conducted by the Department of Defense.

The issues arising in **Question 27** concern interrogation rules and has largely been addressed by John Bellinger in his reply to Question 12. As he stated, the Detainee Treatment Act of 2005 prohibits cruel, inhuman, or degrading treatment or punishment, as that term is defined by U.S. obligations under Article 16 of the Convention, and provides for uniform interrogation rules for persons in the custody of DoD or under its effective control or under detention in a DoD facility. Only the interrogation techniques listed in the Army Field Manual on Intelligence Interrogation may be used.

Other U.S. government agencies may also have their own interrogation policies. As already noted, any activities of such other agencies would be subject to the federal anti-torture statute and the prohibition on cruel, inhuman, or degrading treatment or punishment in the Detainee Treatment Act of 2005.

I would now like to return the floor to John Bellinger.

[LEGAL ADVISER BELLINGER]

Let me now introduce Mr. Tom Monheim, an Associate Deputy Attorney General at the Department of Justice, to respond to **Questions 28 and 29** concerning the programs of the Department of Justice's Civil Rights Division.

[MONHEIM]

In the limited time we have for oral reply, it is difficult to both succinctly describe the functions of the Civil Rights Division and adequately pay tribute to its many accomplishments. For that reason, please refer to the more detailed information contained in our written responses to the Committee's questions and our *Initial* and *Second Periodic Reports.* In the limited time available, however, I will briefly explain the Division's role.

The Division was established in 1957 and is responsible for enforcing federal statutes prohibiting discrimination on the basis of race, sex, handicap, religion, and national origin, and numerous other federal civil rights statutes and additional civil rights provisions contained in other laws and regulations. These laws prohibit discrimination in education, employment, credit, housing, public accommodations and facilities, voting, and certain federally funded and conducted programs. The Division also enforces the Civil Rights of Institutional Persons Act of 1980, which I will refer to by its acronym "CRIPA," which Mr. Bellinger mentioned previously in response to Question 5 and which is also the subject of the next question.

In addition, the Division prosecutes actions under several federal criminal civil rights statutes, mentioned previously, including those prohibiting conspiracy to interfere with Constitutional rights and deprivation of rights under color of law – both of which are key mechanisms to ensure U.S. compliance with its Convention obligations.

Finally, the Civil Rights Division is responsible for coordinating civil rights enforcement efforts of other federal agencies in certain areas. Since October 1999, the Division has achieved an impressive record protecting and enforcing the civil rights of all persons and enforcing U.S. civil rights laws, filing 537 criminal civil rights cases against 971 defendants and obtaining 766 convictions to date. This includes 254 cases filed charging 436 law enforcement officers with official misconduct, which have resulted in 359 convictions to date. While I should note that not all of these cases involve matters within the scope of the Convention, this is a noteworthy record.

Regarding **Question 29**, the Department of Justice has continued its vigorous enforcement of CRIPA.

- Since October 1999, the Department of Justice has opened 65 investigations covering 79 facilities.
- The Department of Justice has also entered into 39 settlement agreements, including seven consent decrees.
- Over the past 5 years, the Department of Justice has initiated 25 percent more new investigations than in the preceding 5-year period.
- In fiscal year 2005 alone, the Department of Justice opened 11 CRIPA investigations; sent 9 findings letters; obtained 9 agreements involving 12 facilities; entered 4 consent decrees involving 6 facilities; and conducted approximately 120 investigatory and compliance tours of facilities.
- In addition, the Department of Justice is monitoring compliance with court orders that cover persons who previously resided in institutions but who currently reside in community-based residential settings in the District of Columbia, Hawaii, Pennsylvania, Indiana, Puerto Rico, Wisconsin, and Tennessee.
- As of April 2006, there are currently 41 active investigations covering 44 facilities.

Question 29 also asks about investigations that ended in prosecution for torture or cruel, inhuman, degrading treatment or punishment. As noted in the *Second Periodic Report*, complaints about abuse, including physical injury by individual law enforcement officers, continue to be made and are investigated by the Department of Justice and, if the facts so warrant, prosecuted. The Department remains committed to investigating all incidents of willful use of excessive force by law enforcement officers and to prosecuting federal law violations where action by state or local authorities fails to vindicate the federal interest. Since October 1, 1999, 432 law enforcement officers have been convicted of violating federal civil rights statutes. Most of these officers were charged with using excessive force.

The Civil Rights Division also investigates conditions in state prisons and local jail facilities pursuant to CRIPA, and investigates conditions in state and local juvenile detention facilities pursuant to either CRIPA or the "pattern or practice" provision of the Violent Crime Control and Law Enforcement Act of 1994. These statutes allow the Department to bring legal actions for declaratory or equitable relief for a pattern or practice of unconstitutional conditions of confinement.

The Committee's question also concerned what measures have been taken to improve conditions of detention. In response, when the investigations of the Civil Rights Division uncover unconstitutional conditions at prisons, jails, or juvenile detention facilities, it takes measures – including working with local and state authorities – to remedy these conditions. The remedies, often memorialized in negotiated settlement agreements, represent constitutional solutions and

recognized best national practices. Once the reforms are agreed upon with the facility, DOJ will often work cooperatively with the jurisdiction to jointly select a monitor to ensure implementation. The monitor will then work with the jurisdiction to promptly identify issues of non-compliance and provide status assessments regarding compliance to both the jurisdiction and DOJ.

In addition, in this regard, I would also like to emphasize the importance of the Civil Right's Division's impressive record of prosecuting officers who engaged in unlawful use of force. Prosecution enhances conditions of confinement by providing general and specific deterrence to law enforcement officers, and ensuring persons in custody that laws prohibiting use of excessive force or other constitutional violations will be vigorously enforced.

I will now return the floor to Mr. Bellinger.

[LEGAL ADVISER BELLINGER]

Thank you, Tom. Turning to **Question 30**, which asks for detailed statistical data regarding deaths in custody according to detention, due to the very large amount of data requested by the Committee and provided by the U.S. in response to this question, I would like to refer you to our written response to this question. Please refer to the annexes to those answers, in which we provided statistical information, broken down by various categories as the Committee requested. However, let me just emphasize that any death of an individual in United States Government custody is reported, and if the facts suggest that there may be criminal implications resulting from such deaths, the incident will be investigated. If the facts so warrant, the responsible individuals will be held accountable.

Mr. Chairman, until this point our presentation has addressed the Committee's questions in numerical order. For the next few questions, however, in order to avoid having to pass the floor back and forth among my colleagues excessively, I would like to group some of the questions together. I will first ask Mr. Stimson to respond to Questions 31 through 34, Question 36 and Question 39. I will then ask Mr. Monheim to address Questions 35, 37, and 38. I will then resume the presentation from Question 40.

[STIMSON]

Questions 31 and 32 concern the number of individuals who have died in DoD control and cases involving assaults on detainees in Afghanistan, Iraq and Guantanamo Bay.

There have been a total of 120 deaths of detainees in Department of Defense control in Afghanistan and Iraq. There have been no deaths at Guantanamo. The vast majority of the deaths in Afghanistan and Iraq were caused by factors such as natural causes, injuries sustained on the battlefield, or detainee-on-detainee violence. In only 29 cases was abuse or other violations of law or policy suspected. In these cases, these alleged violations were properly investigated, and appropriate action was taken. Our written answers to the Committee's questions provide extensive information about the investigations and, where appropriate, prosecutions that have been undertaken to date in specific cases of detainee deaths or alleged detainee abuse. These investigations have numbered in the hundreds. I would invite the Committee to review that very detailed information, which includes information about punishment.

I should note that the process of holding violators accountable is ongoing. For example, in the time between our submitting of the answers to the Committee's questions last Friday and today, the Army has charged a senior officer, the former head of the interrogation center at Abu Ghraib prison, for his alleged involvement in the abuse of detainees and for allegedly interfering with the abuse investigation.

Concerning the Committee's question about overall reviews of policy in **Question 33**, as mentioned before, the Department of Defense has conducted 12 major reviews of its detention operations. Let me make a few points about the allegations mentioned by the Committee that these investigations have not been not fully independent. In all 12 of these reviews, panels were allowed access to all materials and individuals they requested. They were provided any resources for which they asked, including the assignment of more senior personnel when investigations required it. In no way did DoD officials direct the conclusions drawn. As the Secretary of Defense, Donald H. Rumsfeld, has said on numerous occasions and in numerous venues with respect to the investigations, DoD policy was "to let the chips fall where they may." The recommendations generated by these investigations have been taken seriously, as described in further detail in the Annex to the *Second Periodic Report*.

As the Department of Defense has conducted an honest, open and impartial set of investigations since the events of Abu Ghraib into all aspects of detention operations, other investigations are not foreseen at this time. They would not add value to the 12 investigations already conducted. Should information come to light that would suggest additional investigation is warranted, the Department of Defense will, as it has before, investigate such allegations fully.

The question also asks about access to detention facilities, a topic that I already addressed under Question 8.

Question 34 asks whether the Combatant Status Review Tribunals and the Administrative Review Boards have any jurisdiction regarding complaints of torture and cruel, inhuman or degrading treatment or punishment. The Annex to the *Second Periodic Report* describes the scope, jurisdiction, and impartiality of these processes. Our answers to the Committee's questions provide an update on the judicial review applicable to the CSRTs under the Detainee Treatment Act of 2005. These are processes with specific purposes, namely to review the initial enemy combatant determination in the case of the CSRTs and to determine on an annual basis whether there is a continued need to detain an enemy combatant in the ARBs. Of course, if credible allegations of torture or cruel, inhuman, or degrading treatment or punishment were raised during such proceedings (or in any other context), they would be investigated and acted upon based upon the information that is uncovered.

Question 36 asks about remedies, including compensation, available to detainees who have alleged abuse while under U.S. control. The Department of Defense has administrative procedures in place under various domestic statutes that enable it to pay compensation in such cases. Thirty-three (33) detainees, including some detainees from Abu Ghraib have filed claims for compensation, and the claims process is ongoing. Our written answer provides more detail on these procedures, as well as a table with a breakdown of the statistical data regarding allegations of torture or ill-treatment according to gender, age, location of the complaint and result of the investigation.

Question 39 requests an update on *habeas corpus* litigation in U.S. courts. Currently, there are approximately 195 *habeas corpus* cases on behalf of more than 350 detainees presently pending before 15 district court judges. Proceedings in almost all of these cases are stayed awaiting either a decision of the U.S. Supreme Court in the case of **Hamdan v. Rumsfeld** or a U.S. Circuit Court of Appeals decision on one of the various decisions appealed to the Circuit Court level.

As discussed in our written answer to Question 39, the Detainee Treatment Act of 2005 eliminates district court jurisdiction in favor of review by the United States Court of Appeals under certain circumstances delineated within the statute.

As Mr. Bellinger requested, I will now pass the floor to Mr. Monheim to answer Questions 35, 37 and 38.

[MONHEIM]

Question 35 asks for further information on the Justice for All Act. This Act provides for a range of rights of victims of federal crimes described in greater detail in our written response. The protections contained in the Act improve the ability of victims of abuse to monitor and assist in efforts to prosecute the perpetrators of such abuse. The Act includes rights to protection from the accused, notice of public court proceedings involving the crime or of any release or escape of the accused, full and timely restitution as provided in law, as well as the rights to appear and be heard at public proceedings, confer with the government in the case, and to be treated with fairness and with respect for dignity and privacy owed to victims of abuse.

If a victim believes that he has been denied these rights by an employee of the Department, he may file a complaint with DOJ's Victims' Rights Ombudsman. As far as the DOJ is aware, no alleged victims of torture by U.S. government personnel have asserted any of these rights, filed for writs of mandamus, or filed complaints with the Ombudsman.

Regarding **Question 37**, while the Prison Litigation Reform Act of 1995 contains several provisions designed to curtail frivolous lawsuits by prison inmates, it does so in a manner consistent with Article 13 of the Convention. By no means does it "increase the possibility of impunity for perpetrators," as the Committee's question suggests. Those who violate the rights of prisoners are subject to both civil and criminal liability for their actions.

The Act does not limit a prisoner's ability to "complain to and to have his case promptly and impartially examined by competent authorities regarding allegations of torture," which is the language used in Article 13 of the Convention. The Act does not prevent a prisoner from bringing a federal civil action to redress allegations of torture. A prisoner alleging actual physical injury may seek compensatory, nominal, and punitive damages, and injunctive and declaratory relief. In addition, courts of appeals have held that this provision permits prisoners alleging a non-physical constitutional injury to seek nominal and punitive damages, and injunctive and declaratory relief.

Moreover, nothing in the Act prevents access to the wide range of other administrative and other avenues by which prisoners may present complaints and grievances, including administrative remedies at the federal and state level as well as judicial remedies before state courts.

Regarding **Question 38**, the United States is not aware of any allegations of torture by U.S. government personnel that have been brought to the attention of the Center for Victims of Torture.

I now return the floor to Mr. Bellinger.

[LEGAL ADVISER BELLINGER]

Question 40 seeks an explanation of the exact legal status of "enemy combatants" and asks whether the United States is considering reviewing its decision not to apply the Geneva Conventions to them. As an initial matter, I note that the applicability of and compliance with the Geneva Conventions is a matter unrelated to the scope of U.S. obligations under the Convention.

While the question seems to conflate the discussion relating to persons detained in Iraq, in Afghanistan, and at Guantanamo, it is important to be precise and recognize the different legal status of each of these categories of detainees.

The United States has not made any "decision not to apply" the Geneva Convention where it would, by its terms, apply. For example, the United States recognized that the Geneva Conventions apply to the war in Iraq and made it clear that our armed forces would treat captured Iraqi armed forces in accordance with the Geneva Conventions.

The United States is aware that questions are often raised about the concept of "unlawful combatants," which certain academics and others have asserted is not a concept found in the Geneva Conventions. The United States strongly disagrees: the concept of "unlawful combatants" is well-recognized in international law by courts, in military manuals, and by international legal scholars, some of whom are cited in our written response.

With regard to Taliban detainees, the President determined that the Third Geneva Convention does apply to the Taliban detainees, but that the Taliban fail to meet the requirements of Article 4 of that Convention and so are not entitled to the status of prisoners of war. With regard to the al-Qaeda detainees, the President determined that the Geneva Convention did not apply because al-Qaeda is not a party to the Convention. Article 2 of the Convention makes it clear that the Convention only applies as between High Contracting Parties. Because these decisions are grounded in the Geneva Conventions themselves, the United States does not consider it necessary to review them.

At the same time, I should note that in making these determinations, President Bush ordered that "the United States Armed Forces shall continue to treat detainees humanely. . . in a manner consistent with the principles of Geneva." Moreover, let me reiterate that the United States Government complies with its Constitution, its laws, and its treaty obligations with respect to all detainees.

Question 41 requests examples of cases where statements have been found inadmissible in court on the grounds that they were obtained coercively. As the United States explained in its *Initial Report*, and in its *Second Periodic Report*, U.S. law provides strict rules regarding the inadmissibility of coerced statements. U.S. courts take these rules seriously, as evidenced by the numerous cases cited in our written response and prior reports. We direct the Committee to those reports for further details.

Question 42 asks how Article 15 of the Convention is implemented in the Combatant Status Review Tribunal and Administrative Review Boards proceedings. Article 15 of the Convention is a treaty obligation of the United States, and the United States is obligated to abide by that obligation in Combatant Status Review Tribunals and Administrative Review Boards.

On Article 15, the United States would like to draw the Committee's attention to an important recent development with regard to the implementation of that article in military commission proceedings. On March 24, 2006, an instruction was adopted that provides that "the commission shall not admit statements established to have been made as a result of torture as evidence against an accused, except as evidence against a person accused of torture as evidence the statement was made."

Regarding the Committee's question about the U.S. reservation to Article 16 in **Question 43**, let me begin first by explaining why the United States felt it necessary to take this reservation. Pursuant to the U.S. reservation, the United States agreed under Article 16 to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture," "insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution." As we have explained, this reservation was adopted because of concern over the uncertain meaning of the phrase "cruel, inhuman or degrading treatment or punishment" and was intended to ensure that existing U.S. constitutional standards would satisfy U.S. obligations under Article 16. Moreover, I would like to emphasize that while the United States recognizes that other courts in other countries, often dealing with different instruments than the Convention, have held that certain types of conduct satisfy standards similar to that in Article 16, the relevant test for the United States is the obligation it assumed as set forth in the U.S. reservation.

Because the meaning of Article 16's "cruel, inhuman or degrading treatment or punishment" standard is uncertain, it is difficult to state with certainty and precision what treatment or punishment (if any) would be prohibited by Article 16 with no reservation, but permitted under Article 16 as reserved by the United States. It is this very uncertainty that prompted the reservation in the first place.

In response to **Question 44**, and the Committee's question about the geographic scope of Article 16, as ratified by the United States, I would like to emphasize that by its terms, Article 16 of the Convention obliges States Parties "to prevent **in any territory under its jurisdiction**other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. . . ." (emphasis added). Clearly this legal obligation does not apply to activities undertaken outside of the "territory under [the] jurisdiction" of the United States. The United States does not accept the concept that "de facto control" equates to territory under its jurisdiction. There is nothing in the text or the travaux of the Convention indicating that the two are equivalent.

Notwithstanding debates over the territorial scope of Article 16, it is important to bear in mind that, as a matter of U.S. law, the Detainee Treatment Act of 2005 now provides that "[n]o individual in the custody or under the physical control of the U.S. government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment," as that term is defined by U.S. obligations under Article 16. Cruel, inhuman and degrading treatment or punishment is also prohibited under the Uniform Code of Military Justice, which governs U.S. military personnel wherever they may be located and prohibits abusive conduct.

Regarding the special maritime and territorial jurisdiction of the United States, I would direct you to our more detailed explanation contained in our written response to this question.

However, let me briefly make a few points. The territorial restriction in Article 16 of the Convention, which also appears in other provisions of the Convention, uses different terms to describe its coverage and serves a purpose entirely different from the technical term "special maritime and territorial jurisdiction," which Congress used to define the jurisdiction of certain U.S. criminal statutes. Article 16 is limited, by its own terms, to "territory under [the State Party's] jurisdiction." Moreover, "special maritime and territorial jurisdiction" includes concepts obviously inapposite to Article 16's reach, such as offenses committed on certain spacecraft and in "places outside the jurisdiction of any nation."

I now turn to Mr. Monheim to address Questions 45 through 50.

[MONHEIM]

Question 45 asks for information about the Department of Homeland Security's National Detention Standards, which serve as a framework for selection of contract detention facilities. The American Bar Association has applauded the standards as a "significant achievement" and "good first step towards providing uniform treatment and access to counsel for immigrants and asylum seekers."

One practical example of these standards at work can be seen in the recently opened South Texas Detention Complex, a facility comprised of several secure "pods" that allow for separation of detainees based on gender and degree of risk posed. Other examples are discussed in our written responses, which also address under Question 49 measures to prevent sexual violence.

Question 46 concerns the use of Tasers. The U.S. government and others are conducting extensive research into the safety and effectiveness of electro-muscular disruption devices, including Tasers. In addition, the Department of Justice works with local police agencies to assist them in their development of policies regarding the use of these devices. This policy guidance includes consideration of community acceptance, use-of-force protocols, continuous monitoring of all uses of these devices, medical response, and training.

The use of Tasers to control arrestees and inmates is consistent with the law. Courts have reviewed the application of such devices for consistency with the Eighth Amendment's "prohibition of cruel and unusual punishment," and have upheld their legality.

Furthermore, use of Tasers often obviates the need to use other forms of more severe, or even deadly, force. Nevertheless, the Department of Justice remains committed to investigating and, where appropriate, prosecuting use of Tasers where the circumstances indicate a willful use of excessive force in violation of Constitutional standards. In addition, the Departments of Justice and Defense continue to develop less-lethal options, including novel electro-muscular devices that may provide improved safety and effectiveness to law enforcement and military personnel.

Question 47 concerns the detention of juveniles with adults. As an initial matter, it should be noted that that the detention

of juveniles with adults would not *per se* constitute cruel, inhuman or degrading treatment or punishment.

That being said, Federal law prohibits juvenile offenders held in custody of federal authorities from being housed in correctional institutions or detention facilities in which they could have regular contact with adult offenders. When a juvenile must be temporarily detained in an adult facility, as, for example, immediately following arrest, it is for a minimal period of time and "sight and sound" separation from the adult offenders is ensured within the institution. Similarly, under the Juvenile Justice and Delinquency Act, **accused juvenile delinquents in custody of state authorities may be detained in adult jails for only 6 hours after arrest and only for the purposes of identification, processing, and awaiting pickup by a parent or guardian. Juvenile delinquents also may be detained in adult jails 6 hours before and 6 hours after a court appearance. In both instances, juveniles must be "sight and sound" separated from adult inmates.**

Regarding the Committee's request for statistics, please see our written response to this question.

Additionally, with respect to juveniles in Department of Homeland Security custody, as discussed in greater detail in our written response, generally speaking, juveniles are not detained with adults in DHS adult or juvenile detention facilities. One limited exception allows for the detention of a juvenile with an unrelated adult for a temporary period of time (not to exceed 24 hours) only to the extent necessary for processing or for transport from a remote area.

Question 48 concerns a range of restraints used on detainees, and also concerns supermaximum prisons. First, let me emphasize that it is not the general policy or practice of the United States government to shackle female prisoners during childbirth. Although the use of restraints is not prohibited, the Bureau of Prisons does not generally restrain inmates in any manner during labor and delivery because they are not considered a flight risk. An inmate would be restrained only in the unlikely case that she posed a threat to herself, her baby, or others around her.

Allegations of the misuse of shackles or other restraints in both federal and state prisons are investigated by the Department of Justice. However, it should be noted that the use of shackles on prisoners is not per se unconstitutional, and there are circumstances in which the use of shackles is permissible.

The Department of Justice has been vigilant in its monitoring of unconstitutional practices by prisons, including use of chain gangs and the hitching post. While the use of chain gangs is not *per se* unconstitutional, the Department's investigations examine whether the practice is conducted in conformity with the Constitution (such as, providing inmates on chain gangs with adequate water, access to toilets, medical care, etc.). If the practice were conducted in violation of constitutional principles, the Department would seek immediate prohibition of such practices.

Regarding the Committee's question about supermaximum prisons, the Department of Justice has reviewed allegations involving several supermaximum facilities in the last several years, applying the same constitutional standards as in other penal facility investigations. For example, the Department investigated a supermaximum facility in Baltimore, Maryland, and worked with the State of Maryland to address the identified deficiencies. The Department intends to continue to fully investigate all credible allegations pertaining to super maximum facilities.

Question 49 concerns measures to prevent sexual violence against detainees. First, I should note that the Prison Rape Elimination Act of 2000 mandates that all correctional facilities have standards that identify and report sexual assaults and rapes. Our written materials provide detailed information regarding Department of Justice and Department of Homeland Security policies and practices design to prevent sexual violence, including information on allegations of sexual abuse and misconduct by staff and on inmate-on-inmate sexual abuse, as well as the availability of compensation for victims.

While the Department of Justice and Department of Homeland Security have their own policies, in general terms, I can say that staff and inmates alike are encouraged to report incidents of misconduct or otherwise inappropriate behavior. When allegations of serious abuse are accompanied by credible evidence, appropriate administrative measures are taken. For example, in the Bureau of Prisons, the staff member is removed from contact with inmates or placed on administrative leave. Cases are also referred for criminal prosecution when warranted. Finally, staff working with female inmates receive appropriate training, including training on policies prohibiting sexual abuse, assault, and intimidation.

Question 50 concerns the use of solitary confinement and monitoring of the mental health of detainees. The Bureau of Prisons does not use solitary confinement in its facilities. Procedures and safeguards applicable in the limited cases where it is necessary to separate inmates temporarily from the general population, including mental health monitoring, are described in our written answer.

Regarding the question relating to "prolonged isolation and indefinite detention," the United States takes exception to the assumption contained therein that prolonged isolation and indefinite detention *per se* constitutes cruel, inhuman, and

degrading treatment or punishment. Under U.S. criminal law, the United States does not detain individuals convicted of criminal charges indefinitely. Rather, their sentences are imposed for a term of years, or for life, as the case may be, by judges, and if elected by the defendant, by juries of his or her peers.

Finally, inasmuch as this question is meant to relate to the detention of enemy combatants, there is no question that a State is authorized under the law of war to detain combatants – whether lawful or unlawful combatants – for the duration of the armed conflict without charges.

Question 51 concerns executions by lethal injection. The United States included an understanding in its instrument of ratification of the Convention that the treaty does not "restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." The Supreme Court of the United States has found lethal injection to be consistent with the U.S. Constitution.

I now return the floor to Mr. Bellinger.

[LEGAL ADVISER BELLINGER]

Question 52 deals with alleged interrogation techniques. Although we have submitted a lengthy written response, for purposes of our meeting today, our answer to Question 27 provides our views on the topic.

Question 53 concerns implementation of the Convention in light of the federal structure of the United States. Under the U.S. Constitution, the federal government is a government of limited authority and responsibility. The resulting division of authority means that state and local governments retain significant responsibility in many areas, including in areas relevant to certain aspects of the implementation of the Convention. Nonetheless, as a practical matter, this has not detracted from or limited our substantive obligations under the treaty because the U.S. Constitution prohibits such conduct by state and local government officials.

Question 54 concerns the individual complaints procedure under Article 22 of the Convention. The United States is not considering making a declaration under Article 22.

On **Question 55**, while the United States has considered its existing reservations, understandings and declarations in light of the Committee's recommendation to withdraw them, there have been no developments in the interim that have caused the United States to revise its view.

Question 56 concerns the Optional Protocol to the Convention Against Torture. The United States is not considering ratification of this instrument. **Question 57** concerns restrictions on equipment specifically designed to inflict torture. The United States recognizes that trade and export of certain items should be controlled to prevent their misuse. Under the Export Administration Regulations, the export of such items requires a special license. Human rights vetting is a prerequisite for the issuance of such licenses. Items specifically designed for the use of torture would never receive such a license.

Question 58 concerns measures to respond to terrorism and **Question 59** asks for information on measures to prevent domestic violence. Both questions are extremely broad, raising many issues outside the scope of the Convention. In the interest of time, I would refer you to our written answers, our *Second Periodic Report*, as well as the latest U.S. Periodic Report to the Human Rights Committee.

Mr. Chairman, that concludes our oral responses to the Committee's extensive list of questions. As I mentioned before, our written submissions as well as the information submitted in the *Initial Report* and the *Second Periodic Report* are much more detailed, and I would once again refer the Committee to those materials.

Thank you very much. My delegation looks forward to your questions.

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COMMITTEE AGAINST TORTURE BEGINS REVIEW OF REPORT OF THE UNITED STATES

5 May 2006

The Committee against Torture this morning began its consideration of the second periodic report of the United States on the efforts of that country to give effect to the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Barry Lowenkron, Assistant Secretary for Democracy, Human Rights and Labour of the Department of State of the United States, introducing the report, reiterated the Government's absolute commitment to upholding its national and international obligations to eradicate torture and to prevent cruel, inhuman or degrading treatment or punishment worldwide. The President of the United States had made it clear that torture anywhere was an affront to human dignity everywhere, and that freedom from torture was an inalienable right. Beyond the protections in the Constitution, United States criminal law prohibited torture. There were no exceptions to that prohibition.

John Bellinger, Head of the Delegation and Legal Adviser of the Department of State, said that it was the view of the United States that the detention operations in Guantanamo Bay, Cuba, in Afghanistan and in Iraq were governed by the law of armed conflict, which was the *lex specialis* applicable to those operations. At the conclusion of the negotiation of the Convention, the United States had made it clear that the Convention was never intended to apply to armed conflicts and had emphasized that that would result in an overlap of different treaties which would undermine the objective of eradicating torture.

Serving as Rapporteur for the report of the United States was Committee Expert Fernando Mariño Menendez, who said that he was concerned that the United States had not incorporated the full provisions of Article 1 in its laws. He understood the debate that had taken place with regard to "extreme" or "severe" suffering or pain induced by a certain act. He understood that extremely severe was not appropriate, because in his view the Convention did not refer to extremely severe, but just severe. It just needed to be severe. The expression mental suffering was also in the definition and this was the subject of a reservation or a qualification by the United States when it deposited its instrument of ratification, and it was limited to four particular modalities. Article 1, however, did not establish modalities for mental suffering. He wished to know what the delegation thought about that.

Guibril Camara, the Committee Expert serving as Co-Rapporteur for the report of the United States, said that the role of the Committee, while it was not a Court, was to interpret the Convention. In that respect it was the interpretation of the Committee that would hold, and not that of the delegation, in terms of determining whether the United States was or was not acting in conformity with the Convention.

Also representing the delegation of the United States was Barry F. Lowenkron, Assistant Secretary for Democracy, Human Rights and Labour of the Department of State, Cully Stimson, Deputy Assistant Secretary of Defence for Detainee Affairs at the Department of Defense, and Tom Monheim, Associate Deputy Attorney General at the Department of Justice, along with more than 20 advisers.

The delegation will return to the Committee at 3 p.m. on Monday, 8 May, to provide its response to the questions raised this morning.

The United States is among the 141 States parties to the Convention and as such it must present periodic reports to the Committee on how it is implementing the provisions of the Convention.

When the Committee reconvenes at 3 p.m., it will hear the answers of Guatemala to the questions posed by the Experts on Thursday, 4 May.

Report of the United States

The second periodic report of the United States (CAT/C/48/Add.3) says that with the attacks against the United States of 11 September 2001, global terrorism has fundamentally altered the world. In fighting terrorism, the United States remains committed to respecting the rule of law, including the

UNITED STATES DEPARTMENT OF STATE
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United States Constitution, federal statutes, and international treaty obligations, including the Torture Convention. Under the law of armed conflict the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of the hostilities. The detention of each Guantanamo detainee is reviewed annually by an Administrative Review Board and each enemy combatant is provided with an unclassified written summary. As of 26 September 2005, the United States has transferred 246 persons from Guantanamo: 178 for release and 68 transferred to the custody of other governments for further detention. All detainees receive three meals per day; adequate shelter; adequate clothing; opportunity to worship; the means to send and receive mail; reading materials; and excellent medical care.

Allegations of detainee abuse at the Abu Ghraib prison in Iraq became known with incidents documented in photographs and reported in the media throughout the world. These photographs, which depict acts of abuse and mistreatment of detainees by certain members of the United States Armed Forces in Iraq, involved blatant violations of the Uniform Code of Military Justice and the law of war. The Government of the United States has acted swiftly and is investigating allegations of abuse thoroughly and making structural, personnel, and policy changes necessary to reduce the risk of further such incidents.

The definition of torture accepted by the United States upon ratification of the Convention remains unchanged. The definition of torture is codified in United States law in several contexts. On 30 December 2004 the Department of Justice's Office of Legal Counsel published a memorandum that addresses the legal standards applicable under the extraterritorial criminal torture statute, separately considering the meaning of "severe"; "severe physical pain or suffering"; the meaning of "severe mental pain or suffering"; and the meaning of "specifically intended". Torture is also defined in the immigrations and extradition regulations as well as in the Torture Victim Protection Act, which permits victims of torture and extrajudicial killings to claim damages for such abuses. The core legal framework through which the United States gives effect to its Convention undertakings to prevent acts of torture has not changed fundamentally since the initial report.

Presentation of Report

BARRY F. LOWENKRON, Assistant Secretary for Democracy, Human Rights and Labour of the Department of State of the United States, at the outset, reiterated the United States Government's absolute commitment to upholding its national and international obligations to eradicate torture and to prevent cruel, inhuman or degrading treatment or punishment worldwide. The President of the United States had made it clear that torture anywhere was an affront to human dignity everywhere, and that freedom from torture was an inalienable right. Beyond the protections in the Constitution, United States criminal law prohibited torture. There were no exceptions to that prohibition.

The United States was also committed to transparency in its actions. It was fulfilling higher moral obligations that it had embraced since its earliest days, Mr. Lowenkron said. Indeed the United States was among the original signatories to the Convention against Torture and had helped to draft it. The Bill of Rights spelled out several rights that were reflected in the Convention, including the Eighth Amendment, which prohibited cruel or unusual punishment.

Mr. Lowenkron said that the United States had had a long tradition of combating torture. When allegations of torture arose, including allegations against government officials, they were investigated and, if needed, prosecuted. The Government was also committed to investigating other such abuses committed by law enforcement authorities. What had happened at Abu Ghraib was inexcusable and indefensible. The Government had carried out over 600 investigations and over 250 individuals had been held accountable for detainee abuse, and the investigations and charges continued.

The United States was an open society. It could not fail to have been noticed that there had been a wide public debate in United States civil society about the abuses. The Government had listened and made changes. A Parliamentary group from the Organization for Security and Cooperation in Europe had visited Guantanamo, Mr. Lowenkron observed, and one of the visitors had later told journalists that it was a model prison. The International Committee of the Red Cross (ICRC) had also recently visited the prison and said that conditions had improved and that they were satisfied with the conditions there.

An important part of the fight to combat torture worldwide included cooperation with international organizations. The Government also engaged in a number of key multilateral activities designed to eliminate and reduce the practice of torture. For example, the Government supported the work of the United Nations Special Rapporteur on torture throughout the world. It had invited the Special Rapporteur and his colleagues to visit Guantanamo – an invitation that he had unfortunately turned down, Mr. Lowenkron said. Though the United States was not seeking a seat on the new Human Rights Council, it was committed to upholding human rights, including the prevention of torture worldwide, and it would continue to do so.

JOHN B. BELLINGER, Head of the Delegation and Legal Adviser of the Department of State, said the United States recognized the importance of its legal obligations and the key role that the Committee played in the treaty-monitoring process.

At the outset, he reiterated the United States Government's absolute commitment to upholding its national and international obligations to eradicate torture and to prevent cruel, inhuman or degrading treatment or punishment worldwide. The President of the United States had made it clear that torture anywhere was an affront to human dignity everywhere and that freedom from torture was an inalienable right. Beyond the protections in the Constitution, United States criminal law prohibited torture. There were no exceptions to that prohibition. The Congress had also passed laws that provided for severe federal sanctions, both civil and criminal, against those who engaged in torture outside the territory of the United States.

The United States focus on eradicating torture and punishing its perpetrators would be incomplete without a parallel effort to help its victims recover from abuses, Mr. Bellinger said. Congress had established and funded programmes that assisted victims of torture, domestically and overseas, and the United States had contributed far more than any other country in the world to the United Nations Voluntary Fund for Victims of Torture, contributing more than $ 32 million.

Late last year, the President signed into law the Detainee Treatment Act of 2005, which included a provision that codified in law the already existing policy against the use of cruel, inhuman or degrading treatment, as that term was defined under the obligations of the United States assumed under the Convention, Mr. Bellinger said.

In respect of Committee questions concerning United States actions taken in response to the terrorist attacks upon the country on 11 September, Mr. Bellinger said that it was the view of the United States that the detention operations in Guantanamo Bay, Cuba, in Afghanistan and in Iraq were governed by the law of armed conflict, which was the *lex specialis* applicable to those operations. At the conclusion of the negotiation of the Convention, the United States had made it clear that the Convention was never intended to apply to armed conflicts and had emphasized that that would result in an overlap of different treaties which would undermine the objective of eradicating torture. No country had objected to that understanding.

In any case torture was clearly and categorically prohibited under both human rights treaties and the law of armed conflict, Mr. Bellinger noted. While the United States maintained its view that the law of armed conflict was the *lex specialis* governing the detainee operations, they were pleased to provide extensive information about those operations in a sincere spirit of cooperation with the Committee.

While acutely aware of the innumerable allegations that had appeared in the press and in other fora about various United States actions, Mr. Bellinger asked that the Committee not believe every allegation it had ever heard. Allegations about United States military or intelligence activities had become so hyperbolic as to be absurd. The Committee should not lose sight of the fact that those incidents were not systemic.

Response by Delegation to Questions Sent by the Committee in Advance

JOHN B. BELLINGER, Legal Adviser at the Department of State, responding to a series of written questions prepared by the Committee in advance and sent to the State party beforehand, said that, concerning the memoranda drafted by the Department of Justice's Office of Legal Counsel in 2002 and December 2004 that provided legal advice on the meaning of the term "torture" under the extraterritorial criminal torture statute that implements portions of the Convention against Torture, nothing in those memos changed the definition of torture governing United States obligations under the Convention from what the United States accepted upon ratification of the Convention. The opinion was requested to provide operational guidance with respect to the implementation of the criminal statute at the level of detail needed to guide United States government officials.

The Office of Legal Counsel later withdrew the August 2002 opinion and issued another opinion dated 30 December 2004, which was confined to an interpretation of the extraterritorial criminal torture statute. The August 2002 opinion was withdrawn not because it purported to change the definition of torture, but rather because it addressed questions that were not necessary to address. Neither opinion purported to change the definition of torture set out in Article 1 as understood by the United States.

With regard to Committee concerns that references to "torture" as involving "extreme" acts in the December 2004 memorandum were compatible with the Convention, the fact that the Convention defined torture in Article 1 and then subsequently referred in Article 16 to "other acts of cruel, inhuman or degrading treatment or punishment" reflected the recognition of the negotiators that torture applied to more severe acts of cruelty and abuse than did cruel, inhuman or degrading treatment or punishment. Specifically because of the aggravated nature of torture, Mr. Bellinger said, States parties agreed to comprehensive measures to prohibit it under criminal law, to prosecute perpetrators found in territory under their jurisdiction, and not to return individuals to other States where there were substantial grounds for believing that such persons would be in danger of being subject to torture. In contrast, the obligations regarding cruel, inhuman or degrading treatment or punishment were far more limited.

Mr. Bellinger said the United States respectfully disagreed with the Committee's suggestion that both of the Office of Legal Counsel memorandums on the extraterritorial criminal torture statute were more restrictive than previous United Nations standards, including the 1975 Declaration. The interpretation of the term "severe" in the December 2004 memorandum reflected the understanding that torture constituted a more aggravated form of abuse than that covered by "cruel, inhuman or degrading treatment or punishment".

Before ratifying the Convention, the United States concluded that, with the sole exception of prohibiting certain acts of torture committed outside the territory of the United States, state and federal law covered all the offences stated in the Convention. The United States had filled that lone shortcoming, Mr. Bellinger noted, by enacting the extraterritorial criminal torture statute.

There was no specific federal crime styled as "torture" for acts occurring within United States territory, Mr. Bellinger said. The reason was simply that any act of torture falling within the Convention definition, as ratified by the United States, was already criminalized under United States federal and state laws. Those laws, which met the requirements of the Convention, were binding on government officials and were enforced through a variety of administrative procedures as well as criminal prosecutions. Additionally, civil suits provided remedies in many cases.

Concerning alleged secret detention facilities under the de facto effective control of the United States, Mr. Bellinger felt it important to underscore that all the components of the United States Government were obligated to act in compliance with the law. The United States Government did not permit, tolerate or condone unlawful practices by personnel or employees, including contractors, under any circumstances. The extraterritorial criminal torture statute made it a crime for a person acting under cover of law to commit, attempt to commit or conspire to commit torture outside the United States. In addition, pursuant to the Detainee Treatment Act of 2005, the United States prohibited cruel, inhuman or degrading treatment or punishment that applied to any persons in the custody or under the physical control of the United States Government, regardless of nationality or physical location.

Continuing to respond to Committee questions, another member of the delegation said that while the United States was aware of allegations of torture and ill-treatment, it disagreed with the assertion that they were widespread or systemic. Those allegations should be placed in context, as

they related to a minute percentage of the overall number of persons who had been detained. Moreover, it was well-known that al-Qaida were trained to lie and that the "Manchester Manual" instructed all al-Qaida members, when captured, to allege torture, even if they were not subject to abuse. The United States had provided numerous examples of specific measures taken in response to incidents of maltreatment or misconduct at Department of Defense detention facilities at Guantanamo Bay and in Afghanistan and Iraq.

The ICRC had access to Department of Defense theatre interment detention facilities, including Guantanamo, Iraq and Afghanistan, and met privately with detainees. The Department of Defense accounted for detainees under its control fully and provided notice of detention to the ICRC as soon as possible, normally within 14 days of capture. While their dialogue with the ICRC was confidential, the delegation noted, the United States Government took seriously the matters the ICRC raised and greatly valued its historic and ongoing relationship with them.

With regard to the Committee's concerns about investigations, the United States report described those in great detail in the annex to its report. The Department of Defense had conducted 12 major investigations into all aspects of its detention operations following the events of Abu Ghraib.

Turning to the Committee's questions about interrogation rules, the Detainee Treatment Act of 2005, previously mentioned, also provided for uniform interrogation standards that no person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defence facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation. The delegation said that those standards applied to military, Department of Defense civilians, and contract interrogators. Any activities of the CIA would be subject to the extraterritorial criminal torture statute and the Detainee Treatment Act's prohibition on cruel, inhuman or degrading treatment or punishment.

The delegation said that, consistent with its obligations under Article 3, the United States did not transfer persons to countries where it determined that it was "more likely than not" that they would be tortured. That policy applied to all components of the United States Government and to individuals in United States custody or control, regardless of where they might be detained.

Generally speaking, in immigration removal proceedings an individual seeking protection from removal from the United States under Article 3 could appeal an adverse decision of the immigration judge to the Board of Immigration Appeals. If the Board dismissed the individual's administrative appeal or denied his or her motion to reopen, the individual could file a petition for review of the Board's decision with the appropriate federal court of appeals.

The delegation said that Secretary Rice had recently explained that the United States and other countries had long used renditions to transport terrorist suspects from the country where they were captured to their home country or to other countries where they could be questioned, held or brought to justice. Rendition was a vital tool in combating international terrorism, which took terrorists out of action and saved lives. The delegation emphasized that the United States did not transport and had not transported detainees from one country to another for the purpose of interrogation using torture. The United States had not transported anyone, and would not transport anyone, to a country if it believed he or she would be tortured.

Concerning Committee questions about diplomatic assurances, the delegation emphasized that diplomatic assurances were used sparingly and were not a substitute for case-by-case determination. There had been cases where the United States had considered the use of diplomatic assurances, but declined to return individuals because the it was not satisfied such an assurance would satisfy its obligations under Article 3.

Regarding concerns that the United States had returned individuals to countries that the United States considered not to respect human rights, the delegation emphasized that Article 3 did not prohibit the return or transfer of individuals to countries with a poor human rights record per se, not did it apply with respect to returns that might involve "ill-treatment" that did not amount to torture, the delegation noted.

The delegation said that there was no penal immunity for any person for the crime of torture under

United States law. Additionally, although there had been no criminal prosecutions initiated under the extraterritorial criminal torture statute to date, there had been prosecutions for offences occurring outside the United States under other statutory provisions, including the Uniform Code of Military Justice.

Concerning the education and training of military and Department of Defense civilian personnel, including contractor employees, the Department of Defense conducted comprehensive training programmes on treatment and interrogation of detainees, the delegation said. Law of War training was provided at least annually for all Department of Defense personnel involved in conducting or supporting detention operations, including contractors. That extensive training on the law of war also included instruction on the prohibition against acts of torture and the requirement of human treatment. Mechanisms for systematic review of military, Department of Defense civilians and contractor employees involved in detention operations included inspector general visits, command visits and inspections and Congressional and intelligence oversight committees and visits, as well as reviews conducted pursuant to unit procedures and by the chain of command. They also included case-by-case specific investigations and overall reviews.

Regarding whether the December 2004 memorandum created unnecessary confusion for trainers and personnel, the answer was no, the delegation said. The main finding of the investigation was that a small group of individuals, acting in contravention of United States law and Department of Defense policy, had been responsible for perpetrating the acts of abuse at Abu Ghraib. That finding had been supported in the 12 other major reviews conducted by the Department of Defense, the delegation said. There had been a total of 120 deaths of detainees in Department of Defense control in Afghanistan and Iraq. There had been no deaths in Guantanamo. The vast majority of deaths were caused by factors such as natural causes, injuries sustained on the battlefield, or detainee-on-detainee violence. In only 29 cases had abuse or other violations of law or policy been suspected.

The process of holding violators accountable was ongoing, the delegation observed. Between the time they had submitted their answers last Friday and today, the Army had charged a senior officer, the former head of the Abu Ghraib prison, for his alleged involvement in the abuse of detainees and for allegedly interfering with the abuse investigation.

Regarding remedies and compensation available to detainees who had allegedly been abused while under United States control, 33 detainees, including some from Abu Ghraib, had filed claims and the process was still ongoing.

Questions by Experts

FERNANDO MARIÑO MENENDEZ, the Committee Expert serving as Rapporteur for the report of the United States, said that the United States was a leader in the international community and an important guide and touchstone for the application of international law.

Regarding *lex specialis*, he understood the United States delegation to say that the Convention against Torture did not apply in time of armed conflict. In that connection, did the United States still hold that they were still engaged in a *sui generis* armed conflict against terrorism? There were other international human rights instruments that held during the time of armed conflict including the International Covenant on Civil and Political Rights, Mr. Mariño Menendez said. While he understood the delegation's reservations about revealing confidential information, he noted that any act undertaken by an intelligence service was attributable to the State itself, under international law, and that was still a concern of the Committee.

Mr. Mariño Menendez said that he was concerned that the United States had not incorporated the full provisions of Article 1 in its laws. He understood the debate that had taken place with regard to "extreme" or "severe" suffering or pain induced by a certain act. He understood that extremely severe was not appropriate, because in his view the Convention did not refer to extremely severe, but just severe. It just needed to be severe. The expression mental suffering was also in the definition and this was the subject of a reservation or a qualification by the United States when it deposited its instrument of ratification, and it was limited to four particular modalities. Article 1, however, did not establish modalities for mental suffering. He wished to know what the delegation thought about that.

It was true that there was a distinction between torture and cruel and inhuman treatment. Article

15 prohibited a confession extracted under torture, but not one extracted under cruel or inhuman treatment. Maybe they could speak of specific practices that would rise to the level of torture, such as those committed during interrogation. Forced disappearance did constitute a sort of torture, as in that relatives of the disappeared suffered mental or physical anguish that was the equivalent. There were legal instruments, such as the draft convention against forced disappearances, and he felt that there was a sort of consensus by the international community that it did represent a form of torture. Water boarding should be a prohibited practice because it was at the very limits of the practice of torture. The holding of persons incommunicado. The practice of sexual aggression in prisons, was that a form of torture or not?

Speaking of Guantanamo, Mr. Mariño Menendez said he had heard the delegation's statement that the ICRC and other NGOs had visited the facilities there and found the conditions to be good, but given that the United Nations Special Rapporteur had not been able to visit with detainees there, he remained concerned that the practices carried out there might be in contravention of the Convention.

Human Rights Watch had, in many documented cases, found that civil and military personnel in the United States had abused or killed detainees, involving 600 personnel and 450 detainees. Mr. Mariño Menendez said only 54 members of the military had been convicted, 40 sentenced to prison, and only 10 received prison sentences of one year or more, even in cases of serious abuse. Under the doctrine of chain of command, responsibility should be held against a superior in the case. By that logic, the State was ultimately responsible for those acts of torture.

Regarding extraordinary renditions, the European Parliament was organizing investigations concerning the flights of detainees to secret prisons and the Committee would await the outcome of these investigations. Secret or clandestine prisons were contrary to international law and he referred to the crime of forced disappearance, which also had a link to torture.

In that context, he was pleasantly surprised that the delegation reported the United States policy was generally not to rely on diplomatic assurances, but he wondered if the actual practice of the United States was in conformity with the Convention's standards. That was related to the expulsion of foreigners in extradition proceedings. He understood that the Secretary of State made that final determination and that there was no appeal possible. He would appreciate the delegation's confirmation of that understanding.

GUIBRIL CAMARA, the Committee Expert serving as Co-Rapporteur for the report of the United States, said that the role of the Committee, while it was not a Court, was to interpret the Convention. In that respect it was the interpretation of the Committee that would hold, and not that of the delegation, in terms of determining whether the United States was or was not acting in conformity with the Convention.

He felt they needed to go back to Article 1 of the Convention itself to look at the definition of torture. What was the legal foundation of the practice of legal reservations by the United States? Mr. Guibril felt that one or the other would have to give way, and it was the interpretation of the Committee, once again, that would prevail.

He recognized that not all acts constituted torture. A State could penalize various offences, but if they constituted torture and were not prosecuted as torture, there was non-compliance with the provisions of the Convention, Mr. Guibril commented. He recommended that the delegation reread paragraph 2 of Article 16 of the Convention.

He had read in a French newspaper an article about a young British man, originally from Zambia, who had been held in Guantanamo for thirty-three months. He was released, but he stated that he was tortured. He was tortured, with a view, probably, to obtain evidence, Mr. Guibril said, but the man had said that he was also the victim of racist insults by his guards. That man was in London now and, as far as he knew, there had been no inquiry and no compensation. As Mr. Guibril understood the delegation to say, the United States were thus obliged to undertake an inquiry and make reparations. The young man also said that it was because he had converted to Islam that he had been subjected to all that he had undergone.

In the French language there was a distinction between law and right. There was not just a rule of law, there was also a moral aspect. With regard to the United States, it should apply both to citizens

and foreigners, he said.

Other Committee Experts also raised a series of questions. An Expert asked a question on sexual violence against female detainees in United States facilities. In that regard, she wondered why the enactment of the Prison Rape Act had been delayed and whether prison officials received training that included a gender dimension. Other issues raised included the fact that the United States was not a signatory to the Rome Statute of the International Criminal Code; the existence of clandestine or secret prisons; did the United States delegation consider that mock drowning constituted torture, or simply cruel or inhuman treatment; and whether there were measures to monitor CIA operations to ensure that they were not violating the provisions of the Convention.

The Chairman of the Committee, Andreas Mavrommatis, said that although the United States had a long and illustrious human rights record, it also bore a great responsibility. The photos of Abu Ghraib recalled for him the time of Saddam Hussein and brought back many memories. He was really shocked that those abuses were committed by authorities of a country like the United States. The duty of the United States was to take the appropriate monitoring measures to prevent the occurrence of the events at all, and who took responsibility for that? His advice was that they should have more contact with NGOs and really examine the complaints they alleged, rather than dismissing them as false. He reiterated strongly his belief that *habeas corpus* provided one of the strongest protections against impunity, and he strongly suggested the United States reconsider its position in that regard.

Mr. Mavrommatis noted that the Committee had been made aware of at least one case of rendition. He was sure that investigations were being carried out, but suggested that perhaps they could be done in a more independent manner, by being carried out by the courts instead of the Department of Defense, for example.

For use of the information media; not an official record

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Schou, Nina E

From: Schou, Nina E
Sent: Thursday, May 05, 2005 2:15 PM
To: Barrios, Stacy M
Cc: Danies, Joel D; Legal-L-HRR
Subject: Final CAT report

Importance: High

Attachments: LEGAL-#11089-v1-CAT_report_annexes.DOC; Prosper Declaration.pdf; Waxman Declaration.pdf; LEGAL-#10927-v2-CAT_ANNEX__FINAL_SENT_TO_S.DOC; LEGAL-#10992-v1-CAT_Report_--_5-3-05.DOC

Stacy --
You should have the cable instructing you to submit this. Here is the report itself. These are in separate documents because of formatting issues, including the PDF files. Please be sure to remember, though, that this is a unitary document and should be presented as such. It should be organized as follows:

Second Periodic Report of the USA to the CAT (title page)
Annex 1
Waxman Declaration (Tab 1, Annex 1)
Prosper Declaration (Tab 1, Annex 1)
Annex 2-7

Please forward in hard copy, and electronically to the Secretariat of the CAT first thing Friday morning, as we will be releasing it to NGOs at 10 am D.C. time.

Thanks,
Nina
647-4262

LEGAL-#11089-v1-CAT_report_ann...

Prosper Declaration.pdf (278 K

Waxman Declaration.pdf (145 K

LEGAL-#10927-v2-CAT_ANNEX__FIN...

LEGAL-#10992-v1-CAT_Report_--_...

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

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L444

WEEKLY REPORT OF GENEVA MISSION
October 4 - 8, 2004

(U) Russian Bilateral. We participated with L/ACV Marshall Brown and DOD representatives in bilateral talks with the Russians in preparation for the CCW meetings next month. Some progress appeared to be made in identifying areas of possible flexibility in the technical requirements which would satisfy some of Russia's principal objections while maintaining the integrity of the 30-nation proposal.

(U) Waxman Visit. We accompanied Matt Waxman, Deputy Assistant Secretary for Detainee Affairs at DOD, on a series of meetings with various representatives of the ICRC. There was general agreement that the establishment of this office and the communications between Waxman and the ICRC in Washington have proved extremely valuable.

(U) Human Rights: Enforced Disappearances. With L/HRR (Brancato), we actively participated in this week's negotiations on the draft Chairman's text. There was, for the first time, a thoroughgoing review of the articles that would create an international monitoring mechanism, and of related questions, including what the mechanism's mandate would be and whether it would be free-standing or an integral part of an existing body, like the Human Rights Committee created by the ICCPR. On the substantive provisions, limited progress was made on such important issues like definition (still not/not to the US's liking), crimes against humanity (partially bracketed and still under review), criminalization of enforced disappearance and accomplish actions (may be moving in a favorable direction for the U.S.), extra-territorial jurisdiction. The entire week was devoted to day-long negotiating sessions on this, and Gilda's contributions were brilliant. Gilda is highly regarded and respected in the room, from the Chairman on down, and continues to be an essential component of the U.S. delegation to these talks. The next round is set for late January. The U.S. delegation was tremendously aided by excellent negotiating instructions and by timely support from a variety of officers in L and DoD, for which we are mightily grateful.

(SBU) European Community and Disaster Reduction Prepcom. In the margins of the enforced disappearances negotiations, we managed to devote

UNITED STATES DEPARTMENT OF STATE
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DATE/CASE ID: 30 JUL 2009 200706444

substantial time this week also to assisting the Department and Mission officers to prepare for the Prepcom that will begin on Monday (Colombus Day) and carry over until Tuesday. We led a Mission demarche with the Australians and the Canadians this week to solicit their support on this matter and have reported the (reasonably positive) results back to EC watchers at the Department. As an adviser to the U.S. delegation to the Disaster Reduction Prepcom, we will assist in managing the EC participation/status issue, under the rules of procedure, as well as provide legal advice on the draft outcome document. The actual conference will take place in January in Kobe, Japan.

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Confirmation Report – Memory Send

Time : Jan-10-2005 02:31pm
Tel line :
Name :

LA46

Job number	:	631
Date	:	Jan-10 02:30pm
To	:	95140080
Document pages	:	007
Start time	:	Jan-10 02:30pm
End time	:	Jan-10 02:31pm
Pages sent	:	007
Status	:	OK

Job number : 631 *** SEND SUCCESSFUL ***

DEPARTMENT OF STATE
OFFICE OF THE LEGAL ADVISER
HUMAN RIGHTS AND REFUGEES

L/HRR, ROOM 3422
2201 C STREET, N.W.
WASHINGTON, D.C. 20520-6310

Fax

To: Thomas Burrows, DoS
Fax: 514-0050
Phone: 514-1436
Pages: 7

From: Gilda Brancato
Fax: (202)736-7028
Phone: (202) 647-4065 or x 72773
Date: 1/10/05

SUBJECT: Forced DIs appearances Draft Trea
Reporting Cable on October Session
COMMENTS: (received in Wash. late last week)

- Report on October negotiations is attached.
- Upcoming negotiating session runs from Jan 31 - Feb 11 in Geneva
- There will be no new treaty text, although some proposals are being informally discussed in Geneva.

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HUMAN RIGHTS AND REFUGEES

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2201 C STREET, N.W.
WASHINGTON, D.C. 20520-6310

Fax

703 614-9789

To: Jim Burger DOD	From: Gilda Brancato
Fax: Brad Weymann NSC	Fax: (202)736-7028
Phone: 456-9110	Phone: (202) 647-4065 or x 72773
Pages:	Date:

SUBJECT: Reporting Cable on October Session
COMMENTS: of Forced Disappearances

Just received from Geneva.
The upcoming session in Geneva begins Jan 31, 2005.
There is no revised text yet (if at all)

Gilda Brancato

Confirmation Report – Memory Send

Time	:	Jan-07-2005 06:56pm
Tel line	:	
Name	:	

LA46A

Job number	:	622
Date	:	Jan-07 06:55pm
To	:	94569110
Document pages	:	006
Start time	:	Jan-07 06:55pm
End time	:	Jan-07 06:56pm
Pages sent	:	006
Status	:	OK

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DATE/CASE ID: 30 JUL 2009 200706444

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WASHINGTON, D.C. 20520-6310

Fax

To: Thomas Burrows	From: Gilda Brancato
Fax: 514-0080	Fax: (202)736-7028
Phone: 514-1436	Phone: (202) 647-4065 or x 7277
Pages:	Date:

Forced Disappearances Draft Text

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

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LA46D

International Instrument for the Protection of all Persons from Enforced Disappearances

Presidency proposal

11 February 2005

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

Preamble

The States Parties to [this instrument],

Considering **the obligations of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,**

Having regard **to the Universal Declaration of Human Rights,**

Recalling **the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and all other relevant international Human Rights Law, international Humanitarian Law and international Criminal Law instruments,**

Recalling the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992,

Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined **in international law,** a crime against humanity,

Determined to **prevent enforced disappearances and** combat impunity for the crime of enforced disappearance,

Affirming **the right of any person not to be subjected to an enforced disappearance,** ~~and~~ the right of victims **to justice and to reparation, and their right** to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person,

Have agreed as follows:

Article 1 (former Article 1)

For the purposes of [this instrument], enforced disappearance is considered to be the ~~deprivation of a person's liberty, in whatever form,~~ **arrest, detention, abduction or any other form of deprivation of liberty** committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.

Article 2 (former Article 2-2 : non State actors) Chair's text

Article 3 (former Article 1 bis)

1. No one shall be subjected to enforced disappearance.

2. No **exceptional** circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

Article 4 (former Article 2)

Each State Party shall take the necessary measures to ensure that enforced disappearance~~, as defined in article 1,~~ constitutes an offence under its criminal law.

Article 5 (former Article 2 bis)

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity **as defined in applicable international law** and shall attract the consequences provided for under **such applicable** international law.

Article 6 (former Article 3)

1. Each State Party shall take the necessary measures to ~~prosecute and punish~~ **hold criminally responsible at least** ~~those who~~

a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice or participates in ~~commit or assist in the commission of~~ an enforced disappearance.

~~1. The following shall be punished:~~

~~(a) The perpetrators of an enforced disappearance and those who are accessories to it;~~

~~(b) Attempted enforced disappearance;~~

~~(c) Conspiracy to commit an enforced disappearance.~~

~~2. The following shall also be punished:~~

~~(a) Those who order or encourage the commission or attempted commission of such an offence, and those who facilitate its commission or attempted commission by aiding, abetting or otherwise assisting in it, including by providing the means for its commission or attempted commission;~~

b) The superior who:

- (i) knew, or consciously disregarded information which clearly indicated, that subordinates **under his/her effective authority and control** were committing or about to commit an **offence of** enforced disappearance, **and**
- **(ii) exercised effective responsibility and control on activities which were concerned with the crime of enforced disappearance, and who**
- (iii) failed to take all necessary and reasonable measures within his or her power to prevent or ~~halt~~ **repress the commission of the** enforced disappearance or ~~to repress its commission or~~ to submit the matter to the competent authorities for investigation and prosecution.

c) subparagraph b) above is without prejudice to the higher standards of responsibility for military commander or a person effectively acting as a military commander, which apply under international law.

2. No order or instruction from any public authority, civilian, military, or other, may be invoked to justify an offence of enforced disappearance.

Article 7 (former Article 4)

1. Each State party shall make **the offence of** enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish

a) Mitigating circumstances, ~~inter alia~~ **in particular** for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;

b) **Without prejudice to other criminal procedures**, aggravating circumstances, ~~inter alia~~ **in particular** in the event of the death of the **disappeared person** or the commission of an enforced disappearance in respect of pregnant women, minors or other particularly vulnerable persons.

Article 8 (former Article 5)

Without prejudice to article **5**,

1. A State Party which applies a statute of limitation in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

a) Is ~~substantial~~ **of a long duration** and proportionate to the extreme seriousness of this offence;

b) Commences from the moment when the offence of enforced disappearance ceases ~~and the fate of the disappeared person is established~~., **taking into account its continuous nature.**

2. ~~The term of limitation for criminal proceedings which is provided for in paragraph 1 shall be suspended for as long as no effective remedy is available in a State Party to any victim of enforced disappearance~~. **Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation.**

Article 9 (former Article 9)

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over **the offence of** enforced disappearance:

~~a)~~ When the offence is committed in any territory under its jurisdiction or on **board** a ship ~~flying its flag~~ or ~~on an~~ aircraft registered in ~~accordance with its legislation at the time of the events;~~ **that State;**

b) When the alleged offender is one of its nationals ~~or a stateless person usually resident in its territory~~;

c) When the disappeared person is one of its nationals and the State Party considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over **the offence of** enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites, or ~~transfers~~ **surrenders** him or her to another State **in accordance with its international obligations** or ~~transfers~~ **surrenders** him or her to an international criminal tribunal whose jurisdiction it has recognized.

3. [This instrument] does not exclude any **additional** criminal jurisdiction exercised in accordance with ~~internal~~ **national** law.

Article 10 (former Article 10)

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an **offence of** enforced disappearance is present shall take him or her into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be continued only for such time as is necessary **to ensure the person's presence** at ~~enable any~~ criminal, **surrender** ~~transfer~~ or extradition proceedings ~~to be instituted~~.

2. A State Party which has taken the measures referred to in paragraph 1 shall immediately carry out ~~an investigation~~ **a preliminary inquiry** to establish the facts. It shall notify the States Parties ~~which may have jurisdiction in accordance with~~ **referred to in** article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention, and the findings of its ~~investigation~~ **preliminary inquiry**, indicating whether it intends to exercise its jurisdiction.

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or ~~she is a national~~, or, if he or she is a stateless person, with the representative of the State where he or she usually resides

Article 11 (former Article 11)

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an **offence of** enforced disappearance is found shall, if it does not extradite that person, or ~~transfer~~ **surrender** him or her to another State **in accordance with its international obligations** or ~~transfer~~ **surrender** him or her to an international criminal tribunal whose jurisdiction it has recognised, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.

3. **Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried with an offence of enforced disappearance** ~~Any person regarding whom proceedings are brought in connection with an enforced~~

~~disappearance shall be tried~~ **shall benefit from a fair trial before a** ~~by a~~ competent, independent and impartial ~~court which has been duly established by law and which respects the guarantees of a fair trial~~ **court or tribunal established by law.**

~~4. Any person regarding whom proceedings are brought in connection with an enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings~~

Article 12 (former Article 12)

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to a **the** competent authorities, which shall **examine the allegation promptly and impartially and, where appropriate,** ~~immediately~~ undertake **without delay** a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, ~~each State Party shall refer the matter to~~ the authorities referred to in paragraph 1 ~~for~~ **shall undertake** an investigation, even if there has been no formal complaint.

3. Each State Party shall ensure that the authorities referred to in paragraph 1:

a) Have the necessary powers and resources to conduct the investigation effectively, ~~including the power to compel suspects or witnesses to appear before it~~**, including access to documentation and other information relevant for their investigation**;

b) ~~Receives the information it needs for~~ their investigation;

c) ~~Has access to any official place of detention where it is suspected there are reasonable grounds to believe that the disappeared person may be present.~~

d) ~~Has access to any other place, upon judicial authorisation, where there are reasonable grounds to believe that the disappeared person may be present.~~

b) Have access, if necessary with the prior authorisation of a judicial authority, which shall decide as rapidly as possible, to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present.

4. Each State Party shall take the necessary measures to prevent and punish acts **that** ~~likely to~~ hinder the conduct of the investigations. It shall ensure in particular that persons suspected of having committed **an offence of** enforced disappearance are not in a position to influence the progress of the investigations by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the

disappeared person or their defence counsel, or at persons participating in the investigation.

Article 13 (former Article 13)

1. For the purposes of extradition between States Parties, **the offence of** enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds.

2. **The offence of** enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of [this instrument].

3. States Parties undertake to include **the offence of** enforced disappearance as an extraditable offence in every extradition treaty subsequently to be concluded between them.

4. If a State Party, which makes extradition conditional on the existence of a treaty, receives a request for extradition from another State Party with which it has no extradition treaty, it may consider [this instrument] as the necessary legal basis for extradition in respect of **the offence of** enforced disappearance.

5. **States Parties** which do not make extradition conditional on the existence of a treaty shall recognise **the offence of** enforced disappearance as an extraditable offence **between themselves**.

6. Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.

7. Nothing in [this instrument] shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, **membership of a particular social group** or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

Article 14 (former Article 14)

1. States Parties shall afford one another the greatest measure of legal assistance in connection with any criminal investigation or proceedings relating to an **offence of** enforced disappearance, including the supply of all evidence at their disposal necessary for the proceedings.

2. Such legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual judicial assistance, including, inter alia, the conditions in relation to the grounds upon which the requested State Party may refuse to grant judicial assistance or may make it subject to conditions.

Article 15 (former Article 15)

States Parties shall cooperate with each other and shall afford one another the greatest measure of assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their **human** remains.

Article 16 (former Article 15 bis)

1. No State Party shall expel, return ("refouler"), **surrender** or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or **of serious violations of international** humanitarian law.

Article 17 (former Article 16)

1. **Without prejudice to other international obligations of the State Party with regard to deprivations of liberty**, each State Party shall, under its law:

   a) **Establish the conditions under which orders of deprivation of liberty may be given;**

   b) Indicate those ~~officials~~ **authorities** authorised to order deprivation of liberty;

   c) Guarantee that any person deprived of liberty shall be held solely in ~~an~~ officially recognised and supervised places **of deprivation of liberty**;

   d) **Guarantee that any person deprived of liberty shall be authorised to communicate with and be visited by ~~a~~ his/her family ~~member~~, counsel or any other person of his/her choice, subject only to conditions established by law and, if he/she is not a national of the detaining State, have access to his/her consular authorities;**

   e) Guarantee access to the places where persons are deprived of liberty by the ~~judicial~~ **competent** authorities **and institutions entitled by law** ;

   f) Guarantee that any person deprived of liberty **and any person with a legitimate interest** shall, in all circumstances, be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the deprivation of liberty and order **the** ~~his or her~~ release if that deprivation of liberty is not lawful.

2. Each State Party shall ensure ~~compile~~ **the compilation** and ~~maintain~~ **maintenance of** one or more **up-to-date** official registers **and/or records** of persons deprived of liberty, **which shall be made promptly available upon request to any judicial or other competent authority or institution entitled under the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party.** The information contained therein shall include, as a minimum:

a) The identity of the person deprived of liberty;

b) **The date, time and location where the person was deprived of liberty and the identity of the authority who deprived the person of liberty ;**

c) The authority ~~that ordered~~ **having decided** the deprivation of liberty **and the reasons for the deprivation of liberty;**

d) The authority ~~responsible for supervising~~ **controlling** the deprivation of liberty;

e) **The place of deprivation of liberty,** the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of ~~detention~~ **deprivation of liberty;**

f) **Elements regarding the physical integrity of the person deprived of liberty;**

g) **In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains;**

h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

Article 18 (former article 16 bis - para 1 and 2)

1. Subject to Articles 19 and 20, each State Party shall guarantee to ~~the person deprived of liberty and to his or her relatives, their legal representatives, their counsel and any person authorized by them, as well as to any person able to claim~~ **any person with** a legitimate interest **in this information, such as relatives of the person deprived of liberty, their representative or counsel,** access to at least the following information:

(a) ~~The authority to which the person has been handed over;~~

(a) The authority ~~that ordered~~ **having decided** the deprivation of liberty ;

(b) The date, time and location where the person was deprived of liberty and admitted to the place of deprivation of liberty ;

(c) The authority ~~responsible for supervising the person deprived~~ **controlling the deprivation** of liberty ;

(d) The whereabouts of the person deprived of liberty, including, in the event of a transfer **to another place of deprivation of liberty, the destination and the authority responsible for the transfer** ;

(e) The date, **time** and place of release ;

(f) ~~**The state of health**~~ **; Elements regarding the physical integrity of the person deprived of liberty ;**

(g) In the event of death **during the deprivation of liberty,** the circumstances and cause of death **and the destination of the human remains.**

2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1, as well as persons participating in the investigation, from

any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

Article 19 (former Article 16 bis - § 3-4)

1. Personal ~~data~~ information, including medical and genetic data, which are **collected and/or** transmitted within the framework of the search of a disappeared person shall not be used **or made available** for purposes other than the search for the disappeared person. **This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or to the exercise of the right to obtain reparation.**

2. **The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing human rights, fundamental freedoms or human dignity of an individual.**

Article 20 (former article 17)

1. **States Parties may refuse requests for information referred to in article 18 where necessary in a State respecting the rule of law and in accordance with law if the transmission of information undermines the privacy or safety of a person or hinders a criminal investigation or seriously impairs public security. In no case shall States Parties refuse information on whether the person is deprived of liberty and on his or her death in the course of a deprivation of liberty.**

2. Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the ~~relatives of the person deprived of liberty or of the disappeared person, their legal representatives, their counsel and any person authorized by the person deprived of liberty or by the disappeared person or by his or her relatives, as well as to any other person able to claim a legitimate interest~~ **persons referred to in Article 18.1,** the right to a prompt and effective remedy as a means of obtaining without delay information referred to in **article 18.1**. This right to a remedy may not be suspended or restricted in any circumstances.

Article 21 (former Article 18)

Each State Party shall take the necessary measures to ensure that persons are released in a manner permitting reliable verification that they have actually been released. Each State Party shall also take the necessary measures to assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release, without prejudice to any obligations to which such persons may be subjected by ~~the~~ **national** law.

Article 22 (former Article 19)

1. **Without prejudice to Article 6,** each State Party shall take the necessary measures to prevent and ~~punish~~ **impose sanctions on** the following conduct:

a) Delaying or obstructing the remedies referred to in articles **17.1.f and 20.2 ;**

b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official registers **and/or records** ~~knows~~ **knew** or ~~ought to know~~ **should have known** to be inaccurate;

c) Refusal ~~by an official~~ to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.

Article 23 (former Article 20)

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the **relevant** provisions of [this instrument], in order to:

   a) Prevent the involvement of such officials in enforced disappearances;

   b) Emphasize the importance of prevention and investigations in relation to enforced disappearances;

   c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized.

2. Each State shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State shall guarantee that a person who refuses to obey such an order will not be punished.

3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reason to believe that an enforced disappearance has occurred or is planned shall report the matter to their superiors and, where necessary, to the appropriate authorities or organs vested with reviewing or remedial powers.

Article 24 (former Article 22)

1. For the purposes of [this instrument], "victim" means the disappeared person and any individual who has suffered ~~direct~~ harm as a **direct** result of ~~that person's~~ **an enforced** disappearance.

2. **Each victim has the right to know** the truth regarding the circumstances of the enforced disappearance, **the progress and results of the investigation** and the fate of the disappeared person. **Each State Party shall take appropriate measures in this regard.**

3. ~~Each State Party shall take the necessary measures to ensure that every victim knows the truth regarding the circumstances of the enforced disappearance and the fate of the disappeared person. In particular, it~~ **Each State Party** shall take the necessary measures to search for, locate and release disappeared persons and, in the event of death, **locate, respect** and return their **human** remains.

4. Each State Party **shall ensure in its legal system that** ~~guarantee the right of~~ the victims of **an** enforced disappearance ~~to~~ obtains **reparation and has an**

enforceable right to prompt, fair and adequate **compensation** ~~for the harm caused to them~~.

5. The right to obtain reparation referred to in paragraph **4** ~~includes full compensation for~~ **covers** material and psychological harm **and** ~~. It may shall also include~~, **where appropriate, other modalities of reparation such as** :

a) Restitution;

b) Rehabilitation;

c) Satisfaction; **including** restoration of honour and reputation;

d) **Guarantee of non repetition.**

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the **appropriate steps with regard** to the legal situation of the disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, **family law** and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with contributing to the establishment of the circumstances of enforced disappearances and of the fate of disappeared persons, and with assistance to victims of enforced disappearance.

Article 25 (former articles 23, 24, 25)

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law :

a) **The wrongful removal** of children who are subjected to enforced disappearance, of children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

b) The falsification, **concealment** or destruction **of documents attesting to** the true identity of the children referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) ~~and (b)~~ **and to return them to their families of origin, in accordance with relevant legal procedures and international agreements.**

3. States Parties shall assist one another in searching for, identifying and locating the children referred to in ~~article 23~~ **paragraph 1 (a).**

4. Considering the need to protect the best interests of the children referred to in paragraph 1 (a), and the right of the child to preserve and re-establish his or her identity, including nationality, name and family relations as recognized by law, there shall be legal procedures in States Parties which recognize a system of adoption or other form of placement of children to review the adoption or placement, and, as appropriate, annul the adoption or placement of children which originated in enforced disappearance.

5. In all cases, **and in particular in all matters relating to this article,** the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 26 (former Part II)

Article 26-1 (new)

A Committee shall ensure the follow up of the [present instrument].

Article 26-2 (former Article O bis)

1. The Committee shall co-operate with all the relevant Organs, Offices and Specialized Agencies and Funds of the United Nations, with all relevant treaty bodies instituted by relevant international instruments and Special procedures of the Commission on Human Rights of the United Nations, with all relevant regional intergovernmental organizations or bodies, as well as with all relevant state institutions, agencies or offices working towards the protection of all persons against enforced disappearances

2. As it discharges its mandate under Article II B, the Committee shall ensure full coordination with the Working Group on Enforced or Involuntary Disappearances, created by resolution 1980/45.

3. As it discharges its mandate in particular under Article II C bis, the Committee shall take dully into account the observations and recommendations of other treaty bodies instituted by relevant international human rights instruments on matters of enforced disappearances.

Article 26-3 (former Article II-A)

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its obligations under [this instrument], within two years after the entry into force of [this instrument] for the State Party concerned.

2. The Secretary-General of the United Nations shall make this report available to all States Parties.

3. Each report shall be considered by the Committee which shall issue such comments, observations or recommendations as it may deem appropriate. The comments, observations or recommendations shall be communicated to the State Party concerned, which may respond to them, on its own initiative or at the request of the Committee.

4. The Committee may also request at any time information from States relevant to the implementation of the [present instrument].

Article 26-4 (former Article II-B)

1. A request that a disappeared person should be sought and found may be submitted to the Committee by relatives of the disappeared person or their legal representatives, their counsels or any person authorized by them, as well as by any person **having** a legitimate interest.

2. If the Committee considers that the request submitted in pursuance of paragraph 1

   a) is not manifestly unfounded,

   b) does not constitute an abuse of the right of submission of such ~~communications~~ **requests**,

   c) has already been presented to the competent **bodies** of the State Party concerned, **when this possibility exists**

   d) is not incompatible with the provisions of [the present instrument],

it shall request the State Party concerned to provide it with information on the situation of the person concerned, within a time limit set by the Committee.

3. In the light of the response provided by the State Party concerned in accordance with paragraph 2, the Committee shall transmit a recommendation to the State Party and shall inform the person presenting the request. **The Committee may also request the State Party to take appropriate measures,** including interim measures, **and to report to it on them, within a time limit set by the Committee, taking into account the urgency of the situation.**

4. The Committee shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved. The person presenting the request shall be kept informed.

Article 26-5 (former Article II-C)

1. If the Committee considers that a visit to the territory of a State Party is necessary to discharge its mandate, it may request one or more of its members to undertake a visit and report back to it without delay. The member or members of the Committee who undertake the visit may be accompanied if necessary by interpreters, secretaries and experts. No member of the delegation, with the exception of the interpreters, may be a national of the State to which the visit is made.

2. The Committee shall seek the co-operation of the State Party concerned. It shall notify the State Party concerned in writing of its intention to organize a visit, indicating the composition of the delegation and the purpose of the visit. The State Party shall inform the Committee as soon as possible of its agreement or opposition to the visit in a territory over which it has jurisdiction.

3. **If the State Party agrees to the visit, the Committee and the State Party concerned shall work together to arrange the modalities for the visit and the State Party shall provide the Committee with all the facilities needed for an effective visit.**

Article 26-6 (former Article II-C bis)

1. A State Party may at the time of ratification or at any time afterwards declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation of the provisions of [the present instrument]. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee may not consider a communication where:

a) The communication is anonymous,

b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of [the present instrument],

~~c) The communication is insufficiently substantiated or is manifestly unfounded;~~

c) The same matter is being examined under another procedure of international investigation or settlement;

d) The complainant has not exhausted all effective available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. If the Committee considers that the communication meets the requirements set out in paragraph 2, it shall transmit the communication to the State Party concerned, requesting it to provide observations and comments within a time limit set by the Committee. In need be, it shall ~~recommend~~ **request** interim measures.

4. The Committee shall hold closed meetings when examining communications under the present article. **It shall inform the person who presented the communication of the responses provided by the State Party concerned.** It shall terminate the procedure set out in this article by communicating its views to the State Party and to the author of the communication.

Article 26-7 (former Article II-C ter)

If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory of a State Party, it may, after seeking from the State Party concerned all relevant information on the situation, ~~refer~~ **bring** the matter to the **attention to the** Secretary-General of the United Nations, who will act **in accordance** with the powers granted to him/her by the Charter of the United Nations.

Article 26-8 (former Article II-E)

1. The Committee shall have competence solely in respect of deprivations of liberty which commenced after the entry into force of [this instrument].

2. If a State becomes a party to [this instrument] after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to deprivations of liberty which commenced after the entry into force of [this instrument] for the State concerned.

Article 26-9 (former Article II-F)

1. The Committee shall submit an annual report on its activities under [this instrument] to the States Parties and to the General Assembly of the United Nations.

2. Before publishing in the annual report of an observation on a State Party, the State Party concerned shall be informed in advance and shall be given reasonable time to answer. This State Party may request the publication of its comments or observations in the report.

Article 27 (former Article III-O)

[This instrument] is without prejudice to any other international instrument or national legislation which does or may contain provisions of wider application.

Article 28 (former Article III-A)

1. [This instrument] is open for signature by [...].

2. [This instrument] is subject to ratification by [...]. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. [This instrument] is open to accession by [...]. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 29 (former Article III-B)

1. [This instrument] shall enter into force on the thirtieth day after the date of deposit of the **20 th** instrument of ratification or accession.

3. For each State ratifying [this instrument] or acceding to it after the deposit of the **20 th** instrument of ratification or accession, [this instrument] shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 30 (former Article III-C)

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed [this instrument] or acceded to it of the following:

(a) Signatures, ratifications and accessions under article 28;

(b) The date of entry into force of [this instrument] under article ~~30~~ **29**.

Article 31 (former Article III-D)

The provisions of [this instrument] shall extend to all parts of federal States without any limitations or exceptions.

Article 32 (former Article III-D bis)

1. Any State, at the time of signature, ratification or accession, may declare that [this instrument] will be extended to all territory for whose international relations it is responsible. Such a declaration shall take effect when [this instrument] enters into force for the State concerned.

2. Notification of such an extension may be addressed at any time to the Secretary-General of the United Nations, and the extension will take effect [...] days after notification has been received by the Secretary-General of the United Nations.

Article 33 (former Article III-F)

[This instrument] is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, or to the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 34 (former article III-G)

1. Any State Party to [this instrument] may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to [this instrument] with a request that they notify him or her whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to [this instrument] have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of [this instrument] and any earlier amendment which they have accepted.

Article 35 (former article III-H)

1. [This instrument], of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of [this instrument] to all States.

RELEASED IN FULL

Opening Statement

L448A

Matthew Waxman

Head of U.S. Delegation, U.N. Human Rights Committee

Distinguished Chair, Members of the Committee, my name is Matthew Waxman. I am the Principal Deputy Director of Policy Planning at the Department of State, and I serve as head of the United States delegation appearing today and tomorrow morning before the Human Rights Committee. My delegation is honored to appear before the Human Rights Committee to present the Second and Third Periodic report of the United States concerning its implementation of the International Covenant on Civil and Political Rights. We look forward to an informative and productive exchange of views and perspectives.

As my colleague John Bellinger did when he appeared before the Committee Against Torture just two months ago, I would like to take this opportunity to reiterate the United States Government's commitment to upholding our national and international human rights obligations. One such obligation is that of reporting to this Committee on measures we have taken to give effect to our Covenant obligations. Our report documents a wealth of information updating our Initial Report and reflecting how the rights

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protected by the Covenant continue to be implemented and protected under U.S. laws, policies and programs. Our commitment is also demonstrated by the prodigious efforts we have gone to in preparing our report, answering your questions and preparing for this hearing.

We have assembled a strong, senior-level expert delegation to appear before you. Representing the United States are members of many of those agencies that are most actively involved in implementing U.S. laws and programs that give life and effect to U.S. obligations under the Covenant. Following my opening remarks, Assistant Attorney General for Civil Rights Wan Kim will make a short introductory statement on behalf of the Department of Justice. In addition to the Departments of State and Justice, our delegation includes representatives from the Department of Homeland Security, the Department of Interior, and the Department of Defense. Other agencies were also actively involved in drafting the U.S. report and in responding to the Committee's questions.

We take pride in the numerous protections available under U.S. laws and policies where the Covenant rights find expression. Indeed we have found this process of review and reflection about the rights embodied int eh Covenant extremely helpful as we consider how to redouble our efforts to advance and protect human rights within the United States.

L0448

The seriousness with which we have approached our reporting obligations reflects our view that the Covenant is the most important human rights instrument adopted since the U.N. Charter and the Universal Declaration of Human Rights as it sets forth a comprehensive body of human rights protections. The United States played a significant role in drafting those foundational instruments.

The United States is equally proud to have actively participated in the process to transform the human rights and fundamental freedoms referred to in those founding instruments into the legally binding treaty obligations elaborated in the Covenant. This is particularly true in light of the parallels between the rights and freedoms protected under the U.S. Constitution, including its Bill of Rights and subsequent amendments, and the human rights and fundamental freedoms protected under the Covenant. Many of the most cherished rights protected by the U.S. Constitution, such as freedom of religion, speech, press, and assembly, the right to trial by jury, the prohibition on unreasonable searches and seizures, and the prohibition on cruel and unusual punishments, also find expression and protection in the Covenant.

As a general matter, the legal framework within the United States to implement the Covenant that was described in the U.S. Initial Report

L0449

remains essentially unchanged. This is particularly the case in those areas where U.S. laws or practice that so unequivocally prohibit conduct addressed by the Covenant are so firmly settled that there are no noteworthy developments to report.

The U.S. report extensively updates our Initial Report on the major developments related to the human rights and fundamental freedoms protected by the Covenant, including new laws, jurisprudence, policies and programs that expand protections in various areas and provide remedies for violations of the protected rights. Our report also describes a large number of important judicial decisions by U.S. courts -- including a significant number of decisions by the U.S. Supreme Court -- which may be of interest to the Committee.

Of course, the United States has also confronted new challenges as we have sought to respect individual rights in accordance with the Constitution and U.S. law, including our international treaty obligations while also fulfilling our duty to protect the public welfare and national security. In this context, I would like to say a word about the attacks of September 11, 2001, which posed unprecedented challenges for my country. The United States was forced to confront a new threat – that of large-scale armed attacks by an international terrorist group directed against U.S. territory. The U.S.

L0450

overhauled its law enforcement efforts and took critical measures to secure its territory against further attacks. Congress revised many U.S. laws to ensure that they effectively addressed this new threat. These measures were accomplished in a manner consistent with the Constitution and U.S. law, including our international treaty obligations.

In appearing before the Committee this week, my delegation is well aware of the intense international interest about a wide range of issues relating to the actions of the United States outside of its territory.

As we have explained before, the United States believes that the law of armed conflict – international humanitarian law – provides the proper legal framework regarding some of the questions raised by the Committee.

* * *

In addition, it is the long-standing view of the United States that the Covenant by its very terms does not apply outside of the territory of a State Party. We are aware of the views of members of this Committee regarding the extraterritorial application of the Covenant, including the Committee's General Comment No. 31. While we have great respect for the Committee's views, as the Committee is aware, the United States has a principled and long-held view that the Covenant applies only to a State Party's territory. It is the long-standing view of my government that applying the basic rules for

the interpretation of treaties described in the Vienna Convention on the Law of Treaties leads to the conclusion that the language in Article 2(1) establishes that States Parties are required to respect and ensure the rights in the Covenant only to individuals who are BOTH *within* the territory of a State Party *and* subject to its jurisdiction. First, this interpretation is confirmed by the ordinary meaning of the treaty text. Article 2(1) of the Covenant states explicitly that State Parties are required to respect and ensure the rights in the Covenant to all individuals, and I quote, "within its territory and subject to its jurisdiction."

Additionally, this plain meaning of the treaty language is also confirmed by the Covenant's negotiating record. The negotiating record of the Covenant makes clear that the inclusion of the reference to "within its territory" in Article 2(1) was adopted as a result of a proposal made over fifty years ago by U.S. delegate Eleanor Roosevelt -- specifically to ensure that States Parties would not be obligated to implement the Covenant outside their territories. Mrs. Roosevelt emphasized that the United States was "particularly anxious" that it not assume "an obligation to ensure the rights recognized in it to the citizens of countries under United States occupation" or in what she characterized as "leased territory" outside the territorial boundaries of a State Party. She further explained: "An illustration would be

the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying States in certain respects, but were outside the scope of legislation of those States." Several delegations spoke out against the proposed U.S. amendment at the time, arguing that a nation should guarantee fundamental rights to its citizens outside of its territorial boundaries as well as within them. They suggested that the "and" in the U.S. amendment should be replaced with the word "or." However, the U.S. amendment to change the text to the current formulation of Article 2 was adopted at the 1950 session by a vote of 8 in favor and 2 opposed, with 5 abstentions. Subsequent efforts to delete the phrase "within its territory" were also defeated. Accordingly, as State Department Legal Adviser Conrad Harper explained to this Committee in 1995, the words "within its territory" had been debated and were added by vote. The clear understanding emerged that such wording limited the State Party's obligations to within its territory. Thus the territorial limitation in Article 2, far from being inconsistent with the object and purpose of the treaty, reflects the clear and expressed intention of those countries that negotiated the instrument.

Accordingly, to those who suggest that the U.S. interpretation regarding the scope of the treaty is new or novel, I must say that this is

simply not fair or correct. This has been the U.S. position for more than 55 years.

Although we explained the U.S. interpretation of the territorial scope of the Covenant in great detail in Annex 1 of the report, I have reiterated and expanded upon it here for two reasons. First, because the United States is committed to upholding its Covenant obligations, it is important for the United States to be clear on when those obligations apply. Let me be clear: while the U.S. obligations under the Covenant do not apply outside of U.S. territory, it is important to recall that there is a body of both domestic and international law that protects individuals outside U.S. territory. Furthermore, as a matter of domestic U.S. constitutional law, U.S. citizens enjoy a wide range of constitutional protections outside of U.S. territory.

Second, clarifying our position on the scope of the Covenant, we hope, is useful in explaining our responses to this Committee's questions relating to military operations outside the territory of the United States. In keeping with the approach we took in drafting the U.S. report, and in light of our principled and longstanding view on the scope and application of U.S. obligations under the Covenant, the United States has not included in its formal response to the Committee's written questions information regarding activities outside of its territory or governed by the law of armed conflict.

L0454

As a courtesy, we provided this Committee with information we provided this May to the Committee Against Torture on these issues. While preserving the legal position of the United States, we seek to be responsive to the Committee's questions. We hope that the Committee will respect our efforts to focus this hearing on the issues falling squarely within the scope of the Covenant.

* * *

In returning to matters involving our implementation of the Covenant within the United States, we hope that our Initial Report and our Second and Third Periodic Report have explained in detail the way in which the United States robustly implements its obligations under the Covenant. We cherish our vigorous democratic processes – which benefit from comprehensive freedoms of speech, assembly and the press -- our strong and independent judicial system, and our well established body of constitutional, statutes and common law designed to protect civil and political rights. Perhaps to a greater extent than in any other country, people in the United States share a culture and history of challenging their government through judicial processes. It is, thus, not a coincidence that many of the authorities referred to in our report stem from litigation and from decisions of the United States Supreme Court and other courts. Indeed, in many cases, the

protections afforded by the U.S. Constitution extend beyond the protections afforded by the Covenant. For example, as the United States noted in its Initial Report to the Committee in 1994, "Under the First Amendment, opinions and speech are protected, categorically, without regard to content. Thus, the right to engage in propaganda of war is as protected as the right to advocate pacifism, and the advocacy of hatred as protected as the advocacy of fellowship." Similarly, people in the United States enjoy freedom to exercise their religion that extends beyond the requirements of the Article 18 of the Covenant. In his opening remarks, Assistant Attorney General Wan Kim will briefly address the active measures taken by the Department of Justice to zealously protect constitutional rights within the United States and ensure equal protection for all.

While we work to implement the Covenant at home, the United States has continued its steadfast efforts to promote respect for human rights around the world. In keeping with its own history and a long-standing commitment to promote human rights around the world, the United States devotes considerable resources to assistance to other nations in pursuit of these objectives. In 2006, for example, my government is spending 1.4 billion dollars on programs and activities to advance democracy internationally. A considerable portion of those resources is focused

specifically on the promotion of human rights. That is also a record of which we are proud, and a tradition we intend to continue.

* * *

As citizens of the United States, we have much to be proud of in our civil rights achievements at home and our efforts in promoting human rights abroad. But as citizens of the United States we also hold ourselves to a very high standard and recognize that there is always more work to be done to safeguard human rights. We also recognize that along with the role the United States plays in the international system come continuing – indeed, never-ending – responsibilities. We look forward to continuing our dialogue with the Committee on these important issues.

* * *

At this time, I would like to introduce my colleague from the U.S. Department of Justice, Assistant Attorney General for Civil Rights, Wan Kim, who overseas the important work of the Department of Justice in enforcing federal civil rights laws.

RELEASED IN PART L A 3
B6

Harris, Robert K

From: Harris, Robert K
Sent: Thursday, October 27, 2005 8:46 AM
To: Legal-L-HRR; Andre Surena Final [redacted] Sandra L. Hodgkinson [redacted] 'Sandyhodgkinson [redacted]
Cc: Wilner, Samuel M; Kelliher, Brian; Kelliher, Brian; Kelliher, Brian; [redacted]
Subject: FW: ICCPR
Attachments: Corrected 16161 - Core document.pdf; Corrected - 16159 - Periodic Report - 21 October 2005.pdf; Letters from Ambassador Moley.pdf; Update to Annex One of the Second Periodic Report of the US to CAT1.pdf; Letter to Menendez.pdf

B6
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B6

Here is the final of the ICCPR report. I would delete any others you have your system to avoid confusion.

Thanks again.

Bob

From: Gale, T Hanny(Geneva)
Sent: Wednesday, October 26, 2005 8:08 AM
To: Harris, Robert K; Harris, Robert K
Cc: Kovar, Jeffrey D
Subject: ICCPR

Bob,
As promised attached are the "new" files in adobe format.

Jeff,
Bob went to NY and won't be reachable until tomorrow.

Corrected 16161 - Core documen...
Corrected - 16159 - Periodic R...
Letters from Ambassador Moley...
Update to Annex One of the Sec...
Letter to Menendez.pdf (30 KB)

Hanny Gale

Office of Legal Affairs
U.S. Mission Geneva
Tel: [41](0)22-749-4460
Fax: [41](0)22-749-4343
E-mail: GaleTH@state.gov

"A friend is someone who knows the song in your heart and can sing it back to you when you have forgotten the words..."

"C'est bien agréable d'être important, mais c'est plus important d'être agréable"

This e-mail in unclassified per E.O. 12958
UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 13 AUG 2009 200706444

 B1 Hunger meeting w/ LIPM, LIT, LHRR

RELEASED IN PART
B5 LA18

Enforced Disappearances Convention

[redacted] B5

- The Convention is the product of 5 formal negotiating sessions at the Commission on Human Rights beginning in 2003 and chaired by the French.
    - It was developed at the initiative of Latin American countries to respond to governmentally sanctioned disappearances and murders of political opposition in the 1970s and 80s.
    - NGOs and families of the disappeared were very engaged in the negotiations.

[redacted] B5

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[redacted] B5

- The United States delegation participated in the negotiations to oppose proposals that would have made the treaty more unacceptable. We involved DOD and DOJ in this process.

- The US has expressed its views on this Convention in various documents made publicly available, including at the Human Rights Council in June, during the course of negotiations, and in our Closing Statement delivered at the conclusion of the negotiations in October 2005. [redacted] B5

RELEASED IN PART
B5

"*The General Assembly,*

"*Taking note* of Human Rights Council resolution 2006/1 dated 29 June 2006, by which the Council adopted the International Convention for the Protection of All Persons from Enforced Disappearance,

"1. *Hails* the Council's adoption of the International Convention for the Protection of All Persons from Enforced Disappearance;

"2. *Adopts* and opens for signature, ratification and accession the International Convention for the Protection of All Persons from Enforced Disappearance, the text of which is annexed to this resolution;

"3. *Recommends* that the Convention be opened for signature at a signing ceremony in Paris."

21st meeting
29 June 2006
[Adopted without a vote.]

Annex

INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

Preamble

The States Parties to this Convention,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to the Universal Declaration of Human Rights,

Recalling the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and all other relevant

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international instruments in the fields of human rights, humanitarian law and international criminal law,

Recalling the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992,

Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity,

Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance,

Considering the right of any person not to be subjected to enforced disappearance, the right of victims to justice and to reparation,

Affirming the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end,

B5

Have agreed as follows:

PART I

Article 1

1. No one shall be subjected to enforced disappearance.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

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Article 2

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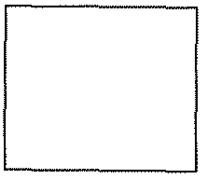
For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to

acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article 3



B5

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

Article 4

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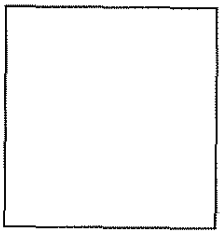
Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

Article 5



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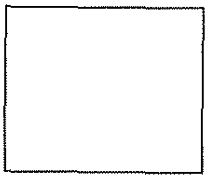
The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

Article 6

1. Each State Party shall take the necessary measures to hold criminally responsible at least:



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(*a*) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;

(*b*) A superior who:

(i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;

(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and

(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(*c*) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

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Article 7

1. Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish:

(*a*) Mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;

(*b*) Without prejudice to other criminal procedures, aggravating circumstances, in particular in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons.

Article 8

Without prejudice to article 5,

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1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

(*a*) Is of long duration and is proportionate to the extreme seriousness of this offence;

(*b*) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.

2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation.

Article 9

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1. Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance:

(*a*) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(*b*) When the alleged offender is one of its nationals;

(*c*) When the disappeared person is one of its nationals and the State Party considers it appropriate.

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2. Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.

Article 10

1. Upon being satisfied, after an examination of the information available to it, that the circumstances so warrant, any State Party in whose territory a person suspected of having committed an offence of enforced disappearance is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be maintained only for such time as is necessary to ensure the person's presence at criminal, surrender or extradition proceedings.

2. A State Party which has taken the measures referred to in paragraph 1 shall immediately carry out a preliminary inquiry or investigations to establish the facts. It shall notify the States Parties referred to in article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention, and of the findings of its preliminary inquiry or its investigations, indicating whether it intends to exercise its jurisdiction.

3. Any person in custody pursuant to paragraph 1 may communicate immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

Article 11

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution

and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.

3. Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.

Article 12

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 shall undertake an investigation, even if there has been no formal complaint.

3. Each State Party shall ensure that the authorities referred to in paragraph 1:

(*a*) Have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation;

(*b*) Have access, if necessary with the prior authorization of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present.

4. Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation. It shall ensure in particular that persons

suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.

Article 13

1. For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

2. The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of this convention.

3. States Parties undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance.

5. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between themselves.

6. Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, in particular, conditions relating to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.

7. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons.

Article 14

1. States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.

2. Such mutual legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, in particular, the conditions in relation to the grounds upon which the requested State Party may refuse to grant mutual legal assistance or may make it subject to conditions.

Article 15

States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.

Article 16

1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross,

flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Article 17

1. No one shall be held in secret detention.

2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:

(*a*) Establish the conditions under which orders of deprivation of liberty may be given;

(*b*) Indicate those authorities authorized to order the deprivation of liberty;

(*c*) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;

(*d*) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;

(*e*) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority;

(*f*) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.

3. Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall

be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:

(*a*) The identity of the person deprived of liberty;

(*b*) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;

(*c*) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;

(*d*) The authority responsible for supervising the deprivation of liberty;

(*e*) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;

(*f*) Elements relating to the state of health of the person deprived of liberty;

(*g*) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;

(*h*) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

Article 18

1. Subject to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:

(*a*) The authority that ordered the deprivation of liberty;

(*b*) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;

(*c*) The authority responsible for supervising the deprivation of liberty;

(*d*) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;

(*e*) The date, time and place of release;

(*f*) Elements relating to the state of health of the person deprived of liberty;

(*g*) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.

2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

Article 19

1. Personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.

2. The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.

Article 20

1. Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the

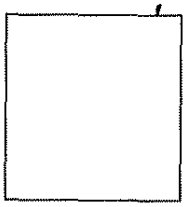
privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.

2. Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.

Article 21

Each State Party shall take the necessary measures to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released. Each State Party shall also take the necessary measures to assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release, without prejudice to any obligations to which such persons may be subject under national law.

Article 22



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Without prejudice to article 6, each State Party shall take the necessary measures to prevent and impose sanctions for the following conduct:

(*a*) Delaying or obstructing the remedies referred to in article 17, paragraph 2 (f), and article 20, paragraph 2;

(*b*) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate;

(*c*) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.

Article 23

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to:

(*a*) Prevent the involvement of such officials in enforced disappearances;

(*b*) Emphasize the importance of prevention and investigations in relation to enforced disappearances;

(*c*) Ensure that the urgent need to resolve cases of enforced disappearance is recognized.

2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished.

3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy.

Article 24

1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

5. The right to obtain reparation referred to in paragraph 4 covers material and moral damages and, where appropriate, other forms of reparation such as:

(*a*) Restitution;

(*b*) Rehabilitation;

(*c*) Satisfaction, including restoration of dignity and reputation;

(*d*) Guarantees of non-repetition.

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

Article 25

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

(*a*) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to

enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

(*b*) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.

3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (a).

4. Given the need to protect the best interests of the children referred to in paragraph 1 (a) and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance.

5. In all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

PART II

Article 26

1. A Committee on Enforced Disappearances (hereafter referred to as "the Committee") shall be established to carry out the functions provided for under this Convention. The Committee shall consist of 10 experts of high moral character and recognized competence in the field of human rights, who shall serve in their personal capacity and be independent and impartial. The members of the Committee shall be elected by the States Parties according to equitable geographical distribution. Due

account shall be taken of the usefulness of participation in the work of the Committee by persons having relevant legal experience and to balanced gender representation.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals, at biennial meetings of States Parties convened by the Secretary-General of the United Nations for this purpose. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of votes of the representatives of States Parties present and voting.

3. The initial election shall be held no later than six months after the date of entry into force of this Convention. Four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the State Party which nominated each candidate, and shall submit this list to all States Parties.

4. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 2 of this article.

5. If a member of the Committee dies or resigns or for any other reason can no longer perform his or her committee duties, the State Party which nominated him or her shall, in accordance with the criteria set out in paragraph 1 of this article, appoint another candidate from among its nationals to serve out his or her term, subject to the approval of the majority of the States Parties. Such approval shall be considered to have been obtained unless half or more of the States Parties respond negatively within six weeks of having been informed by the Secretary-General of the United Nations of the proposed appointment.

6. The Committee shall establish its own rules of procedure.

7. The Secretary-General of the United Nations shall provide the Committee with the necessary means, staff and facilities for the effective performance of its functions. The Secretary-General of the United Nations shall convene the initial meeting of the Committee.

8. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations, as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

9. Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate, to the extent of the Committee's functions that the State Party has accepted.

Article 27

A Conference of States Parties will take place at the earliest four years and at the latest six years following the entry into force of this Convention to evaluate the functioning of the Committee and to decide, in accordance with the procedure described in article 44, paragraph 2, whether it is appropriate to transfer to another body - without excluding any possibility - the monitoring of this Convention, in accordance with the functions defined in articles 28 to 36.

Article 28

1. In the framework of the competencies granted by this Convention, the Committee shall cooperate with all relevant organs, offices and specialized agencies and funds of the United Nations, with the treaty bodies instituted by international instruments, with the special procedures of the United Nations and with the relevant regional intergovernmental organizations or bodies, as well as with all relevant State institutions, agencies or offices working toward the protection of all persons against enforced disappearances.

2. As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political

Rights, with a view to ensuring the consistency of their respective observations and recommendations.

Article 29

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its obligations under this Convention, within two years after the entry into force of this Convention for the State Party concerned.

2. The Secretary-General of the United Nations shall make this report available to all States Parties.

3. Each report shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate. The comments, observations or recommendations shall be communicated to the State Party concerned, which may respond to them, on its own initiative or at the request of the Committee.

4. The Committee may also request States Parties to provide additional information on the implementation of this Convention.

Article 30

1. A request that a disappeared person should be sought and found may be submitted to the Committee, as a matter of urgency, by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any other person having a legitimate interest.

2. If the Committee considers that a request for urgent action submitted in pursuance of paragraph 1:

(*a*) Is not manifestly unfounded;

(*b*) Does not constitute an abuse of the right of submission of such requests;

(*c*) Has already been duly presented to the competent bodies of the State Party concerned, such as those authorized to undertake investigations, where such a possibility exists;

(*d*) Is not incompatible with the provisions of this Convention; and

(*e*) The same matter is not being examined under another procedure of international investigation or settlement of the same nature;

it shall request the State Party concerned to provide it with information on the situation of the persons sought, within a time limit set by the Committee.

3. In the light of the information provided by the State Party concerned in accordance with paragraph 2, the Committee may transmit recommendations to the State Party, including a request that the State Party should take all the necessary measures, including interim measures, to locate and protect the person concerned in accordance with this Convention and to inform the Committee, within a specified period of time, of measures taken, taking into account the urgency of the situation. The Committee shall inform the person submitting the urgent action request of its recommendations and of the information provided to it by the State as it becomes available.

4. The Committee shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved. The person presenting the request shall be kept informed.

Article 31

1. A State Party may at the time of ratification of this Convention or at any time afterwards declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of provisions of this Convention. The Committee shall not admit any communication concerning a State Party which has not made such a declaration.

2. The Committee shall consider a communication inadmissible where:

(*a*) The communication is anonymous;

(*b*) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;

(*c*) The same matter is being examined under another procedure of international investigation or settlement of the same nature; or where

(*d*) All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged.

3. If the Committee considers that the communication meets the requirements set out in paragraph 2, it shall transmit the communication to the State Party concerned, requesting it to provide observations and comments within a time limit set by the Committee.

4. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party will take such interim measures as may be necessary to avoid possible irreparable damage to the victims of the alleged violation. Where the Committee exercises its discretion, this does not imply a determination on admissibility or on the merits of the communication.

5. The Committee shall hold closed meetings when examining communications under the present article. It shall inform the author of a communication of the responses provided by the State Party concerned. When the Committee decides to terminate the procedure, it shall communicate its views to the State Party and to the author of the communication.

Article 32

A State Party to this Convention may at any time declare that it recognizes the competence of the Committee to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under this Convention. The Committee shall not receive communications concerning a State

Party which has not made such a declaration, nor communications from a State Party which has not made such a declaration.

Article 33

1. If the Committee receives liable information indicating that a State Party is seriously violating the provisions of this Convention, it may, after consultation with the State Party concerned, request one or more of its members to undertake a visit and report back to it without delay.

2. The Committee shall notify the State Party concerned, in writing, of its intention to organize a visit, indicating the composition of the delegation and the purpose of the visit. The State Party shall answer the Committee within a reasonable time.

3. Upon a substantiated request by the State Party, the Committee may decide to postpone or cancel its visit.

4. If the State Party agrees to the visit, the Committee and the State Party concerned shall work together to define the modalities of the visit and the State Party shall provide the Committee with all the facilities needed for the successful completion of the visit.

5. Following its visit, the Committee shall communicate to the State Party concerned its observations and recommendations.

Article 34

If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State Party, it may, after seeking from the State Party concerned all relevant information on the situation, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations.

Article 35

1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.

2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.

Article 36

1. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

2. Before an observation on a State Party is published in the annual report, the State Party concerned shall be informed in advance and shall be given reasonable time to answer. This State Party may request the publication of its comments or observations in the report.

PART III

Article 37

Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in:

(*a*) The law of a State Party;

(*b*) International law in force for that State.

Article 38

1. This Convention is open for signature by all Member States of the United Nations.

2. This Convention is subject to ratification by all Member States of the United Nations. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention is open to accession by all Member States of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 39

1. This Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the twentieth instrument of ratification or accession, this Convention shall enter into force on the thirtieth day after the date of the deposit of that State's instrument of ratification or accession.

Article 40

The Secretary-General of the United Nations shall notify all States Members of the United Nations and all States which have signed or acceded to this Convention of the following:

(*a*) Signatures, ratifications and accessions under article 38;

(*b*) The date of entry into force of this Convention under article 39.

Article 41

The provisions of this Convention shall apply to all parts of federal States without any limitations or exceptions.

Article 42

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation or by the procedures expressly provided for in this Convention shall, at the request of one of

them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. A State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a declaration.

3. Any State Party having made a declaration in accordance with the provisions of paragraph 2 of this article may at any time withdraw this declaration by notification to the Secretary-General of the United Nations.

Article 43

This Convention is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the two Additional Protocols thereto of 1977, or to the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

B5

Article 44

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all the States Parties for acceptance.

3. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have accepted it in accordance with their respective constitutional procedures.

4. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted.

Article 45

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States referred to in article 38.

Additional points for JBB on the Plenary

RELEASED IN PART
B5

LA21

- The draft International Convention on the Protection of all Persons against Enforced Disappearances would prohibit secret detention and establish a non-derogable right not to be subject to an enforced disappearance.
- It is likely to be adopted by consensus by the 47 members of the Human Rights Council this Thursday.
- The Council will transfer the instrument to the United Nations General Assembly for final adoption at its upcoming 61st session this Fall.
- Following adoption, the instrument will be open for signature by States at a signing ceremony to be held in Paris.
- A binding instrument on disappearances, if it enters into force, would follow on related provisions in the International Covenant on Civil and Political Rights (to which the United States is a party) and on the non-binding Declaration on the Protection of all Persons against Enforced Disappearances, which was adopted by the UNGA in 1992.
- The proposed convention is the product of five formal negotiating sessions at the Commission on Human Rights beginning January 2003 which chaired by the French Ambassador in Geneva Amb. Kessadjian.
- The Chair of the treaty negotiations exhibited enormous dedication, skill and industriousness throughout the negotiations, which were conducted in an atmosphere of collegiality and respect.
- The Latin and EU countries provided strong support for the initiative.
- The United States and many other States were active throughout the negotiations including Japan, Russia, China, Angola, Algeria, India, Pakistan, Canada and New Zealand.
- Non-governmental organizations and families of the disappeared were extremely engaged throughout the negotiations, bearing witness to the crime and strongly shaping the instrument.
- At the same time the United States regrets that the negotiations did not result in a consensus instrument.
- The United States has expressed its views on the draft instrument in various documents made publicly available including its Written Statement at the HRC (on the Mission Geneva website), a compendium of textual changes proposed to the instrument during the course of the negotiations (on the mission Geneva

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REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

website) and in the Closing Statement of the United States delivered at the conclusion of negotiations in October 2005 (reproduced at pages 48-49 of the official UN Report on the Fifth Negotiating Session). [John, you have been provided will all these documents.]

- The United States is not a member of the HRC, and we take no position on adoption of the instrument by the Council.
- We will take a position on adoption when the draft convention is considered by the UNGA this fall.
- I do not know what our position will be at the UNGA, as it will be subject to an inter-agency review process.
- Our legal concerns include an imprecise definition and the inclusion of several criminal law provisions that would be difficult to implement in a federal system such as our own.
- Our legal concerns include the following:
  - The absence of an express requirement for intentionality in the definition. (States interpret the definition to include an implicit intent requirement, as do we.)
  - The failure to use an existing treaty body for monitoring functions.
  - An apparent requirement to enact an autonomous crime of enforced disappearance (which would be difficult in a State like the United States with 51 criminal jurisdictions).
  - A statute of limitations provision that is not workable in a federal system.
  - A *non-refoulement* provision that is at odds with principles of *non-refoulement* found in the Refugee Convention and Convention against Torture.

B5

The draft convention will enter into force upon ratification by twenty States.

Were the United States to become a party, the Convention would not provide the rules governing United States policies in the war against Al Qaida, as Article 43 of the Convention contains an express international humanitarian law savings clause. Under Article 43, IHL would provide the rules governing the war against Al Qaida and would remain the lex specialis in situations of armed conflict and other situations where IHL applies.

RELEASED IN PART
B6

The United States appreciates the opportunity to address the Human Rights Council on the Draft Convention for the Protection of all Persons from Enforced Disappearance. We thank the Chair of the Working Group and all participants in the Working Group for focusing attention on this serious human rights violation, although we express disappointment that the draft text of the Convention, albeit significantly improved from earlier drafts, does not represent the consensus of all members of the Working Group. The United States has been an active participant in the Working Group in each session, and given our steady participation, we are providing our understanding of the intent of States that participated in the Working Group on a number of core issues. We will provide further, detailed interpretations when this document comes up for consideration at the UN General Assembly. We reaffirm and incorporate herein our Closing Statement at the final session of the Working Group, reproduced at pages 48-49 of the Working Group Report of the Fifth Session (E/CN.4/2006/57) ("Report").

We underscore at the outset our view, shared by other delegations, that the definition of the crime (Article 2) would have been much improved had it been more precise and included an explicit requirement for intentionality, particularly the specific intent to place a person outside the protection of the law. The need for intentionality was recognized by the Chair and recorded in paragraph 96 of the Report, which states that an intentionality requirement is implicit in the definition of enforced disappearance, recognizing that "in no penal system was there an offense of enforced disappearance without intent." We agree and reaffirm our understanding that under the Convention *mens rea* is an essential ingredient of the

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CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 18 AUG 2009 200706444

crime under Articles 2, 4, 6 (particularly Article 6(2)), 12(4), 22, 25, & other articles.

Second the United States expresses its intent to interpret the Right to Truth in the preamble and in Article 24(2) consistent with the Commission on Human Rights Resolution on the Right to Truth (2005/66), which states that the right may be recognized in various legal systems (such as our own) as freedom of information, the right to know, or the right to be informed, and also consistent with the International Covenant on Civil and Political Rights which speaks to the right to seek, receive and impart information. As noted in our Explanation of Position delivered upon adoption of UNCHR resolution 2005/66, the United States' position on the right to know has not changed since the ICRC Conference on the Missing in February 2003 as well as at the 28th ICRC/Red Cross Conference in December 2003; that is, the United States is committed to advancing the cause of families dealing with the problem of missing persons; however, we do not acknowledge any new international right or obligation in this regard. For the United States, which is not a party to the 1977 Additional Protocol I to the Geneva Conventions and has no obligations vis-à-vis any "right to truth" under Article 32 of that instrument, families are informed of the fate of their missing family members based on the longstanding policy of the United States and not because of Article 32.

Third, the United States wishes to place on record our understanding of Article 43 of the draft Convention. We understand this provision to confirm that the provisions of the law of armed conflict, also called international humanitarian law, remain the *lex specialis* in situations of armed conflict and other situations to which

international humanitarian law applies. The United States understands Article 43 to operate as a "savings clause" in order to ensure that the relevant provisions of international humanitarian law take precedence over any other provisions contained in this Convention.

Fourth, the United States continues to support the use of an existing treaty body to perform monitoring functions, that is, the Human Rights Committee, which currently deals with forced disappearances, in view of the Committee's expertise; in the interests of consistency of jurisprudence, efficiency, avoidance of redundancy, and cost; and in light of the ongoing proposals for treaty body reform. We would hope that, per Article 27 of the draft Convention, States Parties adopt in the future use of the Human Rights Committee as the monitoring body.

In addition to the points expressed above, we place on the record our reservations, many of which are noted in the Report and in our Closing Statement, to, *inter alia,* the following articles, which is an illustrative (not exhaustive) list:

- Article 4 on criminalization should not be read to require various domestic legal systems to enact an autonomous offense of enforced disappearance, which is unnecessary and, from a practical standpoint, unworkable in, for example, a federal system such as our own.
- Article 5 requiring criminalization of crimes against humanity is vague, aspirational in nature, and inappropriate as an operative treaty provision. The United States agrees with the statement in paragraph 106 of the Report that Article 5 would "not create any additional obligations on States to accede to particular instruments or amend their domestic legislation."

- **Article 6(2) on the unavailability of a defense of obedience to superior orders in a prosecution related to enforced disappearance could under certain circumstances be inconsistent with due process guarantees and could subject unwitting government personnel to the possibility of prosecution for actions that they did not and could not know were prohibited. Therefore, as stated in paragraph 109 of the Report, the United States interprets Article 6(2) to establish no criminal responsibility on the part of an individual unaware of participating in the commission of an enforced disappearance.**
- **Article 8 on statute of limitations presents problems of implementation in a federal system and contains unclear text in paragraph 2.**
- **Article 9(2) on "found in" jurisdiction remains unacceptable to the United States, especially in view of the lack of precision in the definition of enforced disappearance.**
- **Article 16 on *non-refoulement*, which refers to violations of international humanitarian law in the country of return, does not conform to international principles on *non-refoulement,* as articulated in the 1951 Refugee Convention.**
- **Article 17 on standards for and access to places of detention retains the possibility of conflict with constitutional and other legal provisions in the laws of some States; accordingly we would interpret the term "any persons with a legitimate interest" in Articles 17, 18, and 30 in accordance with the domestic law of a State.**

- **Article 18 on access to information similarly retains the possibility of conflict with constitutional and other legal provisions of a State and sets unreasonable standards guaranteeing information.**
- **Article 22 on additional criminalization, among other concerns, should contain an express intentionality requirement, and the United States will interpret it to contain such an intent requirement (as noted above).**
- **Article 24 on the right to the truth and reparation contains text that is vague and at the same time overly specific, employs an overbroad definition of a "victim," and may not be consistent with a common law system for granting remedies and compensation.**
- **Article 25 on children must be interpreted consistent with adoption laws and other relevant domestic laws and with international obligations of the State regarding children.**

The United States respectfully requests that its views be made a part of the official record of the Human Rights Council.

Drafted: L/HRR – Gilda Brancato 6/8/06 x 72773 doc 26432

Cleared: Mission Geneva/L – Jeff Kovar
Mission Geneva/PSC – Jan Levin
L/HRR – Bob Harris (subs) – ok
L/PM – Vijay Padmanabhan – ok
L/LEI – Denise Manning - ok
IO – Mark Lagon - ok
IO/RHS – Tom Johnson - ok
DRL/MLA – Lynn Sicade - ok
S/WCI – Sam Witten (subs) - ok
DOJ/OLP – Larry Rothenberg – ok
[redacted] - ok B6
NSC/Legal – Him Das - ok

RELEASED IN PART
B6

L433

Schou, Nina E

From: Harris, Robert K
Sent: Friday, April 28, 2006 6:18 PM
To: Harris, Robert K; Brian D Kelliher (Brian.Kelliher@dhs.gov); Bryan Del Monte [redacted] Camponovo, Christopher N. [redacted] Laurence.Rothenberg@usdoj.gov; OSD-POLICY [redacted] B6
Cc: [redacted] Julianna Bentes; Julieta Noyes; Baroukh, Nader; [redacted] Thomas.Monheim@usdoj.gov; Schou, Nina E; Hill, Steven R; DOJ:Brent.McIntosh@usdoj.gov B6
Subject: RE: Need quick clearance on documents tomorrow.

Attachments: LEGAL-#24782-v1-Lowenkron_Opening_Statement__-_4_26_draft.doc; LEGAL-#24607-v1-revised_CAT_press_guidance_4_20.doc; LEGAL-#24887-v1-CAT_Qs_and_As_to_send_to_Geneva.pdf

LEGAL-#24782-v1-Lowenkron_Open... LEGAL-#24607-v1-revised_CAT_pr...

Dear Interagency Group,

This morning a sleepy State Department team sent to Geneva the U.S. answers to the Qs and As from the Committee Against Torture.

LEGAL-#24887-v1-CAT_Qs_and_As_...

Many thanks to the interagency team for giving us your final edits and continuing to improve the document. When we leave for Geneva early Tuesday afternoon, we will need to have completed the Lowenkron statement and the press guidance I sent on Wednesday (attached again at the top of this message) and also John Bellinger's opening statement and the speaking text of our Qs and As (which are much shorter that the longer package and will be drawn from previously cleared language.) With respect to the speaking answers, we obviously couldn't complete work on them until our longer Q and A package went out today. I hope to get both of those documents to agencies over the weekend.

Thanks again, and see you on Monday here at State (room 6417).

Bob

From: Harris, Robert K
Sent: Wednesday, April 26, 2006 11:45 AM
To: Brian D Kelliher (Brian.Kelliher@dhs.gov); [redacted] Camponovo, Christopher N.; [redacted] Laurence.Rothenberg@usdoj.gov; [redacted] B6
Cc: [redacted] Julianna Bentes; Julieta Noyes; Baroukh, Nader; [redacted] Thomas.Monheim@usdoj.gov; Schou, Nina E; Hill, Steven R; DOJ:Brent.McIntosh@usdoj.gov B6
Subject: Need quick clearance on documents tomorrow.

<< File: LEGAL-#24782-v1-Lowenkron_Opening_Statement__-_4_26_draft.doc >>

<< File: LEGAL-#24607-v1-revised_CAT_press_guidance_4_20.doc >>

Larry, Bryan Chris and Brian,

Attached for DHS, DOD, NSC, and DOJ clearance is Barry Lowenkron's opening statement and State Department press guidance. The latter is closely modeled on previously cleared language when we rolled out the CAT report last May.

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Forgive the quick turn around, but we would appreciate your clearance by COB Friday.

Still to come are John Bellinger's opening statement and the speaking version of our Qs and As. As I noted, we won't be in a position to circulate that until we finish the Qs and As, (for which we still await DOD and DOJ final clearance).

Thanks

Bob Harris

RELEASED IN PART
B5, B6 LA39

Schou, Nina E

From: Harris, Robert K
Sent: Friday, May 12, 2006 4:44 AM
To: Kovar, Jeffrey D; Noyes, Julieta V (DRL)
Cc: Legal-L-HRR; Legal-L-PM; Hodgkinson, Sandra L; Bettauer, Ronald J; Bellinger, John B(Legal); Johnson, Thomas A; Lagon, Mark P; [redacted] B6
Subject: Re: Question 1:

Thanks. If you could ask Hanny to send us a PDF and a Word version of the package, that would be great.

Bob

-----Original Message-----
From: Kovar, Jeffrey D(Geneva) <KovarJD@state.gov>
To: Harris, Robert K <HarrisRK2@state.gov>; Kelliher, Brian <Brian.Kelliher1@dhs.gov>; ron.rosenberg@dhs.gov <ron.rosenberg@dhs.gov>; Laurence.Rothenberg@usdoj.gov <Laurence.Rothenberg@usdoj.gov>; Noyes, Julieta V (DRL) <NoyesJV@state.gov>
[redacted] B6
Brent.McIntosh@usdoj.gov <Brent.McIntosh@usdoj.gov>; Thomas.Monheim@usdoj.gov <Thomas.Monheim@usdoj.gov>; Timofeyev, Igor <Igor.Timofeyev@dhs.gov>; Legal-L-HRR <Legal-L-HRR@state.gov>; Legal-L-PM <Legal-L-PMSBU@state.gov>; Hodgkinson, Sandra L <HodgkinsonSL@state.gov>; Bettauer, Ronald J <BettauerRJ@state.gov>; Bellinger, John B(Legal) <BellingerJB@state.gov>; Johnson, Thomas A <JohnsonTA2@state.gov>; Lagon, Mark P <LagonMP@state.gov>; [redacted] B6
Sent: Fri May 12 04:04:33 2006
Subject: RE: Question 1:

We will deliver this attachment with a Mission cover letter today. If you have more later, let us know.

-----Original Message-----
From: Harris, Robert K
Sent: Thursday, May 11, 2006 11:30 PM
To: Kelliher, Brian; 'ron.rosenberg@dhs.gov'; Laurence.Rothenberg@usdoj.gov; Kovar, Jeffrey D; Noyes, Julieta V (DRL)
[redacted] B6
DOJ:Brent.McIntosh@usdoj.gov; Thomas.Monheim@usdoj.gov; B6
Timofeyev, Igor; Legal-L-HRR; Legal-L-PM; Hodgkinson, Sandra L; Bettauer, Ronald J; Bellinger, John B(Legal); Johnson, Thomas A; Lagon, Mark P; L/HRR:NinaSchou/home
[redacted] Harris, Robert K B6
Subject: Question 1:

Jeff,

As UN Secretariat Staff made clear in an e-mail message to me today, the Committee will need to receive the U.S. follow-up answers tomorrow if our responses are to have any effect on the final conclusions and recommendations. [redacted] B5

It is time to

Thanks to all, particularly DOJ's Larry Rothenberg.

Bob

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RELEASED IN PART
B6

LA41

Schou, Nina E

From: Bentes, Julianna W
Sent: Saturday, May 06, 2006 8:02 AM
To: Bentes, Julianna W; [redacted] michael.edney@usdoj.gov'; 'Tobi.Longwitz@usdoj.gov'; 'Brent.McIntosh@usdoj.gov'; Lowenkron, Barry F (DRL); Bellinger, John B(Legal); Waxman, Matthew; Harris, Robert K; Haines, Avril D; 'Mike.Davis@dhs.gov'; 'Thomas.Monheim@usdoj.gov'; 'ron.rosenberg@dhs.gov'; 'Brian.Kelliher1@dhs.gov'; [redacted] Lagon, Mark P; Hill, Steven R; Schou, Nina E; Noyes, Julieta V (DRL); [redacted] 'john.torres@dhs.gov'; 'brian.dixon@dhs.gov'; 'michael.davis2@dhs.gov' B6 B6 B6 B6
Cc: TDY-Surena, Andre
Subject: Committee report

Attachments: committee report.doc

The Committee has uploaded its report of Friday's session to the OHCHR website (under press releases in the CAT section). An electronic copy is provided below.

committee report.doc (63 KB)

From: Bentes, Julianna W
Sent: Saturday, May 06, 2006 12:56 PM
To: Bentes, Julianna W; [redacted] 'michael.edney@usdoj.gov'; 'Tobi.Longwitz@usdoj.gov'; 'Brent.McIntosh@usdoj.gov'; Lowenkron, Barry F (DRL); Bellinger, John B(Legal); Waxman, Matthew; Harris, Robert K; Haines, Avril D; 'Mike.Davis@dhs.gov'; 'Thomas.Monheim@usdoj.gov'; 'ron.rosenberg@dhs.gov'; 'Brian.Kelliher1@dhs.gov'; [redacted] Lagon, Mark P; Hill, Steven R; Schou, Nina E; Noyes, Julieta V (DRL); Hodgkinson, Sandra L; [redacted] 'john.torres@dhs.gov'; 'brian.dixon@dhs.gov'; 'michael.davis2@dhs.gov' B6 B6 B6 B6
Cc: TDY-Surena, Andre
Subject: Pizza's here!

1st floor conference room.

From: Bentes, Julianna W
Sent: Saturday, May 06, 2006 12:33 PM
To: Bentes, Julianna W; [redacted] michael.edney@usdoj.gov'; 'Tobi.Longwitz@usdoj.gov'; 'Brent.McIntosh@usdoj.gov'; Lowenkron, Barry F (DRL); Bellinger, John B(Legal); Waxman, Matthew; Harris, Robert K; Haines, Avril D; 'Mike.Davis@dhs.gov'; 'Thomas.Monheim@usdoj.gov'; 'ron.rosenberg@dhs.gov'; 'Brian.Kelliher1@dhs.gov'; [redacted] Lagon, Mark P; Hill, Steven R; Schou, Nina E; Noyes, Julieta V (DRL); Hodgkinson, Sandra L; [redacted] 'john.torres@dhs.gov'; 'brian.dixon@dhs.gov'; 'michael.davis2@dhs.gov' B6 B6 B6 B6
Cc: TDY-Surena, Andre
Subject: Pizza info

Hello everybody - Pizza will cost 15 sfr per person -- please have your money ready for Jana by 1 pm. Thanks!

Also, just in case, this is the address you should send your paragraphs to, with cc's to the other DoS folks.

From: Bentes, Julianna W
Sent: Friday, May 05, 2006 8:31 PM
To: Bentes, Julianna W; [redacted] michael.edney@usdoj.gov'; 'Tobi.Longwitz@usdoj.gov'; 'Brent.McIntosh@usdoj.gov'; Lowenkron, Barry F (DRL); Bellinger, John B(Legal); Waxman, Matthew; Harris, Robert K; Haines, Avril D; 'Mike.Davis@dhs.gov'; 'Thomas.Monheim@usdoj.gov'; 'ron.rosenberg@dhs.gov'; 'Brian.Kelliher1@dhs.gov'; [redacted] Lagon, Mark P; Hill, Steven R; Schou, Nina E; Noyes, Julieta V (DRL); Hodgkinson, Sandra L; B6 B6 B6 B6

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[redacted]'john.torres@dhs.gov'; 'brian.dixon@dhs.gov'; 'michael.davis2@dhs.gov' B6

Cc: TDY-Surena, Andre
Subject: The questions as of evening 5/5/06

<< File: May 5 list of CAT Committee Questions3.doc >>
See you in the morning!

From: Bentes, Julianna W
Sent: Friday, May 05, 2006 5:31 PM
To: Bentes, Julianna W; [redacted] 'michael.edney@usdoj.gov'; 'Tobi.Longwitz@usdoj.gov'; 'Brent.McIntosh@usdoj.gov'; Lowenkron, Barry F (DRL); Bellinger, John B(Legal); Waxman, Matthew; Harris, Robert K; Haines, Avril D; 'Mike.Davis@dhs.gov'; 'Thomas.Monheim@usdoj.gov'; 'ron.rosenberg@dhs.gov'; 'Brian.Kelliher1@dhs.gov'; [redacted] Lagon, Mark P; Hill, Steven R; Schou, Nina E; Noyes, Julieta V (DRL); Hodgkinson, Sandra L; [redacted] 'john.torres@dhs.gov'; 'brian.dixon@dhs.gov'; 'michael.davis2@dhs.gov' B6 B6 B6 B6 B6
Subject: Meeting time tomorrow

Hello everybody,
Just a reminder that the meeting time tomorrow is 9:30 AM in the first floor conference.room. And if you haven't told me of your menu selection for Monday yet, please email me immediately.
Thanks!
-julianna

RELEASED IN PART
B6

L443

Schou, Nina E

From: Bentes, Julianna W
Sent: Thursday, July 06, 2006 10:50 AM
To: Bentes, Julianna W; [redacted] michael.edney@usdoj.gov'; 'Tobi.Longwitz@usdoj.gov'; 'Brent.McIntosh@usdoj.gov'; Lowenkron, Barry F (DRL); Bellinger, John B(Legal); Waxman, Matthew; Harris, Robert K; Haines, Avril D; 'Mike.Davis@dhs.gov'; 'Thomas.Monheim@usdoj.gov'; 'ron.rosenberg@dhs.gov'; 'Brian.Kelliher1@dhs.gov'; [redacted] Lagon, Mark P; Hill, Steven R; Schou, Nina E; Noyes, Julieta V (DRL); Hodgkinson, Sandra L; [redacted] 'john.torres@dhs.gov'; 'brian.dixon@dhs.gov'; 'michael.davis2@dhs.gov' [redacted] 'Bradley.Saull@usdoj.gov'; ''; 'Brasure, Ian D, Maj, JCS SJS'; 'quintana.carlos@dol.gov'; 'rob.wexler@ed.gov'; 'Abdoo, Mark A (HHS/OGHA)'; [redacted] 'Whitney, Ronald W'; 'Landau, David A'; 'Ellis, Kathryn' B6 B6 B6 B6 B6 B6 B6
Cc: 'Laurence.Rothenberg@usdoj.gov' [redacted] igor.timofeyev@dhs.gov'; [redacted] Smith, Robin L (DRL); Staten, Vernell; Hata, Marianne J B6 B6
Subject: RE: Qs and As for clearance
Attachments: Qs_and_As_-_July_7.doc

Hello ICCPR Delegation and Washington POCs-

Attached for final interagency clearance are the Qs and As. Your clearance is, as Bob Harris mentions below, due Friday at 5 PM. As Bob also mentions, please remember that this is the hardest of our deadlines, as we will be working very hard this weekend to create a final text to send to the Committee on Monday morning. Thanks!
-julianna

From: Harris, Robert K
Sent: Tuesday, July 04, 2006 8:03 AM
To: 'Camponovo, Christopher N.'; Schou, Nina E; ; ; ; ; ; ; ; ; [redacted] Johnson, Thomas A; Lagon, Mark P; ; ; ; ; ; Noyes, Julieta V (DRL); ; ; ; ; ; ; 'Tobi.Longwitz@usdoj.gov'; Kovar, Jeffrey D; Gale, T Hanny; Bellinger, John B(Legal) B6
[redacted] B6
DOJ:Brent.McIntosh@usdoj.gov; 'michael.edney@usdoj.gov'; Thomas.Monheim@usdoj.gov; Kozak, Michael G.; Hodgkinson, Sandra L; Bellinger, John B(Legal); Bettauer, Ronald J; Witten, Samuel M; Thessin, James H; Legal-L-HRR; Legal-L-PM; L/HRR:NinaSchou/home [redacted] L/HRR:SteveHill/home [redacted] B6 B6
Subject: RE: July 17-18 ICCPR hearing: The road ahead

Dear ICCPR team,

I am sending you this message to provide you the revised schedule for getting all agency clearances and inputs for materials related to our July 17-18 hearing before the Human Rights Committee on U.S. implementation of the International Covenant on Civil and Political Rights. Although our original schedule from May is attached to this document for your reference, agencies should work from the revised schedule contained in this message.

To summarize, there are five major work products:

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- **Answers to the Human Rights Committee's 25 questions:** These must be submitted in advance to the Committee and will serve as the opening U.S. oral presentation to the Committee on both days of the hearing.
- **Hard Qs and As:** As the Committee members can ask us about almost any issue arguably related to this very broad human rights treaty, we have tried to anticipate as many of these questions in advance. The answers the interagency team has been preparing are for use by delegation spokespersons if those questions arise. These are not provided to the Committee in advance, but are very important to ensure the delegation is properly prepared to answer oral questions from Committee members.
- **State Department Press Guidance:** This will be used by the Department and Mission Geneva to respond to questions from the press. Once made final, other agencies are welcome to use it as they deem appropriate.
- **Opening Statement(s):** John Bellinger will make a 10-15 minute opening statement, and Wan Kim is welcome to also make a short (5-10 minute) introduction about the role of the Civil Rights Division and the Department of Justice generally in implementing U.S. obligations under the Covenant and protecting human rights/civil rights within the United States.
- **Delegation Briefing Books:** The briefing books produced for the Convention Against Torture hearing proved to be so useful that we are repeating that exercise for the ICCPR hearing. In addition to containing the work products described above, the books will contain additional useful material (e.g., text of the instrument, text of U.S. reservations, understandings and declarations, schedules, information about the members of the Committee, information from the first U.S. session before the Committee in HRC in 1995, etc.) We will provide a hard copy of the book to principals before they leave and will otherwise circulate it electronically. Books will be available to all delegation members when they arrive at our Mission in Geneva.

The Schedule:

With the exception of the Department of Justice (which is steady and industrious as always), agencies have not come close to meeting the deadlines for submissions and clearances set out in late May. State will absorb that as best we can, but must now be firm in enforcing the remaining and revised deadlines. Here they are:

- **Wednesday, July 5, a.m.: Agencies provide State with all overdue material for the Qs and As and hard Qs and As.** I can't overstress the importance of meeting this deadline, as State cannot circulate professionally acceptable products for interagency review without first receiving the necessary agency inputs. If agencies need to set priorities, please send any comments or inputs for the Committee's 25 questions first. If hard Q and A inputs arrive on Thursday, we can survive.
- **Wednesday, July 5, COB: Agencies provide State with clearance to State press guidance (circulated previously).**
- **Thursday, July 6, a.m: State sends final Q and A text for final interagency clearance and, in some cases, inputs**. (Note: the text will contain specific and urgent final requests to DOJ, DHS and Interior and perhaps other agencies for additional inputs/written supplements to our answers, where our current text does not fully answer the question posed or where there appears to be an internal contradiction or ambiguity in

the draft USG answer. We have been selective in asking for this material, but where we ask for it we will have judged that it is of critical importance for agencies to provide this information.)

- **Friday, July 7, COB: State circulates for interagency comments and inputs proposed final text of hard Qs and As.**
- **Friday, July 7, COB: Agencies provide State with final edits and clearance on Qs and As.** *Note: This is a hard deadline, as the final text must be sent to the Committee one week before the hearing, July 10.*
- **Monday, July 10, a.m.: State sends to Geneva and the HRC the US answers to the 25 questions.**
- **Monday, July 10, State circulates for interagency clearance the Bellinger opening statement. (If Justice has opening remarks, they would also be circulated on that date.)**
- **Tuesday, July 11 (time and place to be determined): Final Washington meeting of US delegation and Washington DC points of contact.** (Note: As assistance from Washington will be needed on Monday-Wednesday, July 17-19, each agency is asked to assign a formal point of contact and people to be on call to help provide answers and inputs to the delegation. Delegation members and the Washington point of contact should attend this meeting.
- **Tuesday, July 11, 10 a.m. : Agencies provide State with final edits, inputs and clearance on hard Qs and As.**
  July 7, COB: Agencies provide State with final edits and clearance on Qs and As.
- **Wednesday, July 12: State circulates electronic versions of briefing books.**
- **Sunday, July 16 p.m. - Wednesday, July 19:** Delegation members should treat Sunday afternoon as a work day and should ensure strong coverage on Wednesday the 19th to provide written answers to follow-up questions. Washington action and assistance will be required throughout that period.
- **Tuesday, July 18, 9:00 p.m.: Delegation dinner and celebration.**

State looks forward to working with many of you again and meeting new members of the delegation next Tuesday. I realize that we have a lot of work ahead of us, but our preparation and hard work will make a huge difference in effective advocacy on behalf of our government.

Thanks in advance for your continuing efforts.

Bob Harris

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PRELIMINARY COMPILATION OF PROPOSALS – 02/12/04 LA46C

Preamble

The States Parties to [this instrument],

Considering **the obligations of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,**

Having regard **to the Universal Declaration of Human Rights,**

Recalling the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992,

Recalling **all other relevant instruments,**

Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances, a crime against humanity,

Determined to **prevent enforced disappearances and** combat impunity for the crime of enforced disappearance,

Affirming **the right of any person not to be subjected to an enforced disappearance** and the right of victims to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person,

Have agreed as follows:

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UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: FRANK H PEREZ
DATE/CASE ID: 12 AUG 2009 200706444

Article 1

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For the purposes of [this instrument], enforced disappearance is considered to be the ~~deprivation of a person's liberty, in whatever form,~~ **arrest, detention, abduction or any other deprivation of liberty** committed by agents of ~~the~~ a State or by persons or groups of persons acting with the authorization, support or acquiescence of ~~the~~ a State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, ~~which places such a person~~ **and where such person is placed** outside the protection of the law.

OR

For the purpose of [this instrument], enforced disappearance is considered to be the placement of a person outside the protection of the law as a consequence of both his/her deprivation of liberty, including arrest, detention or abduction, committed by agents of a State or by persons or groups of persons acting with the authorization, support or acquiescence of a State, and the refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person.

Article 1 bis

1. No one shall be subjected to enforced disappearance.

2. [from former art. III-E] No **exceptional** circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

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Article 3

1. Each State Party shall take the necessary measures to ~~prosecute and punish~~ **hold criminally responsible** ~~those who~~ B5

a) those who attempt to commit and are accomplices or participate in ~~commit or assist in the commission of~~ an enforced disappearance.

~~1. The following shall be punished:~~

~~(a) The perpetrators of an enforced disappearance and those who are accessories to it;~~

~~(b) Attempted enforced disappearance;~~

~~(c) Conspiracy to commit an enforced disappearance.~~

~~2. The following shall also be punished:~~

~~(a) Those who order or encourage the commission or attempted commission of such an offence, and those who facilitate its commission or attempted commission by aiding, abetting or otherwise assisting in it, including by providing the means for its commission or attempted commission;~~

(b) The superior **officer** who:

- (i) Knew, or consciously disregarded information which clearly indicated, that subordinates **under his/her effective authority and control** were committing or about to commit an enforced disappearance **and** ;
- (ii) Failed to take all necessary and reasonable measures within his or her power to prevent or ~~halt~~ **repress** the enforced disappearance or ~~to repress its commission~~ ~~or~~ to submit the matter to the competent authorities for investigation and prosecution.

2. An order from a superior **officer** or a public authority may not be invoked as a justification for enforced disappearance.

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Article 4

1. Each State party shall make **the offence of** enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish:

(a) Mitigating circumstances, inter alia for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;

(b) Aggravating circumstances, inter alia in the event of the death of the victim or the commission of an enforced disappearance in respect of pregnant women, minors or other particularly vulnerable persons.

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Article 5

Without prejudice to article 2 bis,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

(a) Is ~~substantial~~ **of a long duration** and proportionate to the extreme seriousness of this offence;

(b) Commences from the moment when the offence of enforced disappearance ceases and the fate of the disappeared person is established.

2. The term of limitation for criminal proceedings which is provided for in paragraph 1 shall be suspended for as long as no effective remedy is available in ~~a~~ **the** State Party ~~to any victim~~ **in case of an** enforced disappearance.

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Article 9

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over **the offence of** enforced disappearance:

a) When the offence is committed in any territory under its jurisdiction or on a ship flying its flag or on an aircraft registered in accordance with its legislation at the time of the events;

b) When the alleged offender is one of its nationals or a stateless person usually resident in its territory;

c) When the alleged offender is a stateless person usually resident in its territory and the State Party considers it appropriate;

d) When the disappeared person is one of its nationals ~~and the State Party considers it appropriate~~.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over **the offence of** enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or transfers him or her **in accordance with its international obligations** to another State or transfers him or her to an international criminal tribunal whose jurisdiction it has recognized.

3. [This instrument] does not exclude any **additional** criminal jurisdiction exercised in accordance with ~~internal~~ **national** law.

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Article 10

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an **offence** of enforced disappearance is present shall take him or her into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State ~~Party~~ but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. A State Party which has taken the measures referred to in paragraph 1 shall immediately carry out an investigation to establish the facts. It shall notify the States Parties ~~which may have jurisdiction in accordance with~~ **referred to in** article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention, and the findings of its investigation, indicating whether it intends to exercise its jurisdiction.

3. Any ~~person~~ in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides

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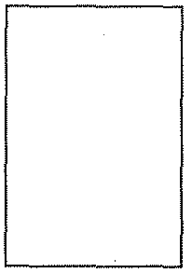
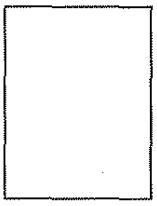


Article 11

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an enforced disappearance is found shall, if it does not extradite that person or transfer him or her **in accordance with its international obligations** to another State or transfer him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.

B5



3. Any person regarding whom proceedings are brought in connection with an enforced disappearance shall be ~~tried~~ **entitled to a fair and public hearing** by a competent, independent and impartial ~~court which has been duly established by law and which respects the guarantees of a fair trial~~ **tribunal established by law.**

4. Any person regarding whom proceedings are brought in connection with an enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings

Article 12

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to a competent authority, which shall immediately undertake a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defense counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, ~~each State Party shall refer the matter to~~ the authority referred to in paragraph 1 ~~for~~ **launches** an investigation, even if there has been no formal complaint.

3. Each State Party shall ensure that the authority referred to in paragraph 1:

(a) Has the necessary powers and resources to conduct the investigation effectively, including the power to compel suspects or witnesses to appear before it;

(b) ~~Receives the~~ **Has access to all documents and other** information **relevant for** ~~it needs for~~ its investigation;

(c) Has access to any place **under its jurisdiction** where it is suspected that a disappeared person may be present.

4. Each State Party shall take the necessary measures to prevent and punish acts likely to hinder the conduct of the investigations. It shall ensure in particular that persons suspected of having committed an enforced disappearance are not in a position to influence the progress of the investigations by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defense counsel, or at persons participating in the investigation.

5. The investigation provided for in this article ~~shall~~ **should** be conducted in accordance with ~~the~~ **relevant** international **standards**, principles and **guidelines** ~~relating~~ **applicable** to investigations into human rights violations, **including those on** torture, **and to the prevention of extra-legal, summary or arbitrary executions, as well as** to the search for disappeared persons~~,~~ **and** forensic examinations and identification.

Article 13

1. For the purposes of extradition between States Parties, **the offence of** enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds.

2. **The offence of** enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of [this instrument].

3. States Parties undertake to include **the offence of** enforced disappearance as an extraditable offence in every extradition treaty subsequently to be concluded between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider [this instrument] as the necessary legal basis for extradition in respect of **the offence of** enforced disappearance.

5. A State Party which does not make extradition conditional on the existence of a treaty shall recognize **the offence of** enforced disappearance as an extraditable offence **between States Parties themselves**.

6. Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.

7. Nothing in [this instrument] shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

Article 15 bis

1. No State Party shall expel, return ("*refouler*") , **transfer** or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of humanitarian law.

Article 16

1. Each State Party shall, under its law:

   a) Indicate those ~~officials~~ **authorities** authorized to order deprivation of liberty;

   b) Establish the conditions under which such orders may be given;

   c) Guarantee that any person deprived of liberty shall be held solely in an officially recognized and supervised place;

   d) Guarantee that any person deprived of liberty shall be authorized to communicate with a person of his/her choice, when such a communication is not incompatible with the purpose of the detention ;

   e) Guarantee access by the judicial authorities to the places where persons are deprived of liberty;

   f) Guarantee that any person deprived of liberty shall, in all circumstances, be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the deprivation of liberty, and order his or her release if that deprivation of liberty is not lawful.

2. Each State Party shall compile and maintain one or more official registers of persons deprived of liberty. The information contained therein shall include, as a minimum:

   a) The identity of the person deprived of liberty;

   b) The authority ~~that ordered~~ **having decided** the deprivation of liberty;

   c) The authority ~~responsible for supervising~~ **controlling** the deprivation of liberty;

   d) The date and time of admission to the place of detention and the authority responsible for the place of detention;

   e) The State of health and, in the event of death, the circumstances and cause of death

   f) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

Article 16 bis

1. Each State Party shall guarantee ~~to the person deprived of liberty and to his or her relatives, their legal representatives, their counsel and any person authorized by them, as well~~ as to any person ~~able to claim~~ **with** a legitimate interest **under this article** , access to at least the following information:

(a) ~~The authority to which the person has been handed over;~~

(b) The authority ~~that ordered~~ **having decided** the deprivation of liberty;

(c) The authority ~~responsible for supervising the person deprived~~ **controlling the deprivation** of liberty ;

(d) The whereabouts of the person deprived of liberty, including in the event of a transfer;

(e) The date and place of release;

(f) **The** state of health and, in the event of death, the circumstances and causes of death.

2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

3. In order not to jeopardize the privacy of the persons concerned, the information provided pursuant to paragraph 1 of this article must be appropriate and relevant for the intended purpose ~~and must not be used for purposes other than~~ **of** the search for the person deprived of liberty.

Article 17

Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the ~~relatives of the person deprived of liberty or of the disappeared person, their legal representatives, their counsel and any person authorized by the person deprived of liberty or by the disappeared person or by his or her relatives, as well as to any other person able to claim a legitimate interest~~ **the persons referred to in Article 16bis 1**, the right to a prompt and effective remedy as a means of obtaining without delay the information referred to in article 16 bis. This right to a remedy may not be suspended or restricted in any circumstances.

Article 19

1. Each State Party shall take the necessary measures to prevent and punish the following conduct:

a) Delaying or obstructing the remedy referred to in **article 16.1 e)** and 17;

b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knows or ought to know to be inaccurate;

2. Refusal by an official to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.

Article 22

1. For the purposes of [this instrument], "victim" means the disappeared person and any ~~individual~~ **natural person** who has suffered ~~direct~~ harm as a **direct** result of ~~that person's~~ **an enforced** disappearance.

2. Each State Party shall take the necessary measures to ensure that every victim knows the truth regarding the circumstances of the enforced disappearance and the fate of the disappeared person. In particular, it shall take the necessary measures to search for, locate and release disappeared persons and, in the event of death, return their remains.

3. Each State Party shall guarantee the right of victims of enforced disappearance to obtain prompt, fair and adequate reparation for the harm caused to them.

4. The right to obtain reparation referred to in paragraph 3 includes full compensation for material and psychological harm. It may also include **other modalities of reparation such as**:

a) Restitution;

b) Rehabilitation;

c) Satisfaction;

d) **Guarantee of non repetition, including** restoration of honour and reputation

5. *Without prejudice to the obligation to continue the investigation until the fate of the* disappeared person has been clarified, each State Party shall take the necessary measures with regard to the legal situation of the disappeared persons whose fate has not been clarified and that of their relatives, *in fields such as social welfare, financial matters,* custody of children and property rights.

Article 23

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

a) The abduction or appropriation of children who are ~~victims of enforced disappearance~~ **disappeared** , children whose father or mother is a victim of enforced disappearance or children born during the captivity of a mother who is a victim of enforced disappearance;

b) The falsification or destruction of documents attesting to the true identity of the children referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) and (b)

Article 25

1. When a child who has been abducted or appropriated in the circumstances described in article 23, paragraph 1 (a), is found in the territory of a State Party, the question of the child's possible return to his or her family of origin shall be resolved either under the national legislation of that State Party or under a bilateral or multilateral agreement entered into by that State and by the State in which the family of origin resides.

2. In all cases, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

3. **Considering the need to protect the best interests of the children referred to in paragraph 1, there shall be an opportunity, in States Parties which recognize a system of adoption, for a review of the adoption of such children and, in particular, for annulment of any adoption which originated in enforced disappearance. Such adoption should, however, continue to be in force if consent is given, at the time of review, by the child's closest relatives.**

RELEASED IN PART
B6
LA4B

Schou, Nina E

From: Hill, Steven R
Sent: Sunday, July 16, 2006 12:48 PM
To: Waxman, Matthew
Cc: 'Harris, Robert K'; Schou, Nina E; Bentes, Julianna W; 'TDY-Surena, Andre';

B6

Subject: Opening Statement

Attachments: opening sun 1900.DOC

Matt,

This draft incorporates the comments we've received, including your own and Bob's.

Steve

opening sun 1900.DOC (56 KB)

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

RELEASED IN PART
B6, B5
LA49.

Schou, Nina E

From: Hill, Steven R
Sent: Thursday, July 13, 2006 10:57 AM
To: Harris, Robert K
Cc: Andre Surena; Nina Schou; Schou, Nina E; Bentes, Julianna W; Legal-L-HRR; Padmanabhan, Vijay M
Subject: RE: ICCPR "Script"

Attachments: script.doc

script.doc (321 KB)

Not sure if people had trouble opening this so I'm re-sending.

-----Original Message-----
From: Steven Hill [redacted] B6
Sent: Thursday, July 13, 2006 3:22 AM
To: Bob Harris
Cc: Andre Surena; Nina Schou; Nina Schou; Julianna W Bentes; L/HRR
Subject: ICCPR "Script"

Bob,

Here is the result of my efforts today to trim the written Q&A's down into a script. (Pardon the delay -- I needed a break midway through doing this.) Based on a reading speed of 1 minute 30 seconds per double-spaced, 14 point Times New Roman page (which was John's pace at the CAT hearing), Monday's material should take about 40 minutes, Tuesday's 50 minutes.

I split question 11 (on material witness warrants) between Wan and Igor so that Igor would have something to say on Monday. Igor's Katrina stuff comes up on Tuesday. I gave Wan the indigenous materials in question 1.

Let me know how you want to proceed.

Steve

Andre: I know you won't be able to open this attachment and will attempt to forward it to you from my Blackberry.

[redacted] B5

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: FRANK H PEREZ
DATE/CASE ID: 12 AUG 2009 200706444

RELEASED IN FULL

Baumert, Kevin A
From: Knight, Marie C
Sent: Wednesday, September 19, 2007 1:11 PM
To: Baumert, Kevin A
Subject: ICCPR transmittal letter

Attachments: ICCPR Follow-Up transmittal letter.doc

Hey there,

Here's a draft of the transmittal letter for the ICCPR follow-up. As I mentioned before, it is nearly identical to the CAT transmittal. Let me know if you'd like anything changed.

Chantal ,

ICCPR Follow-Up transmittal le...

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 31 JUL 2009 200706444

RELEASED IN FULL

[date]

LB6A

Mr. _____
Chairman
Human Rights Committee
c/o Office of the High Commissioner for Human Rights
Palais des Nations
CH-1211 Geneva 10

Dear Mr. Chairman:

I have the honor to transmit my government's response to specific recommendations identified by the Human Rights Committee in its conclusions and recommendations in relation to the Second and Third Periodic Reports of the United States of America. The Committee requested this information within one year in document CCPR/C/USA/CO/3, dated Sept. 15, 2006.

Please allow me to express the longstanding commitment of the United States to the protection and promotion of human rights and its appreciation both for the work of the Committee and for your personal leadership on these important issues.

Sincerely,

Warren W. Tichenor
Ambassador

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 31 JUL 2009 200706444

RELEASED IN FULL
LB37

octobre 2006

NON-PAPIER

Projet de Convention internationale pour la protection de toutes les personnes contre les disparitions forcées

Lors de sa session inaugurale en juin dernier le Conseil des droits de l'homme a adopté, par consensus, le projet de "Convention internationale pour la protection de toutes les personnes contre les disparitions forcées" (résolution 1/1). L'adoption de ce texte a été applaudie et a soulevé une profonde émotion. 59 Etats de tous les continents ont apporté leur co-parrainage à ce texte. Il revient désormais à l'Assemblée Générale d'adopter ce texte afin qu'il soit ouvert à la signature des Etats.

La pratique des disparitions forcées est aujourd'hui encore largement répandue sur tous les continents. Elle constitue une des principales menaces qui pèse sur les défenseurs des droits de l'homme. Les Nations unies ont recensé 51000 cas dans plus de 90 pays depuis 1980, dont 41 000 sont toujours en attente d'élucidation. En 2005, ont été enregistrés 535 nouveaux cas dans 22 pays.

Le nouveau projet de traité représente une avancée considérable pour la promotion et la protection des droits de l'homme :

1) il comble un vide juridique

En vertu du nouvel instrument, les Etats parties s'engagent à :

- incriminer au plan pénal les disparitions forcées et poursuivre leurs auteurs, leurs complices et leurs commanditaires ;
- appliquer aux disparitions forcées un régime de prescription particulièrement favorable aux victimes ;
- renforcer leur coopération internationale pour lutter contre ces crimes ;
- garantir le droit des proches à la vérité : droit des proches à connaître la vérité sur le sort de la personne disparue et les circonstances de sa disparition et, à titre préventif, droit de toute personne ayant un intérêt légitime à recevoir des informations concernant une privation de liberté et à contester la légalité de celle-ci ;
- prendre des mesures préventives : interdiction des détentions secrètes et des lieux de détention non officiels, garanties procédurales entourant la privation de liberté, tenue de registres d'écrou précis, formation des forces de l'ordre ;
- garantir le droit des victimes à réparation (sous toutes ses formes : indemnisation ou autres) ;
- permettre l'annulation de toute adoption qui trouve son origine dans une disparition forcée.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 31 JUL 2009 200706444

2) il fait progresser le droit international des droits de l'homme

Le nouvel instrument :

- reconnaît de nouveaux droits : droit de toute personne à ne pas être soumise à une disparition forcée, droit des victimes de savoir la vérité ;
- renforce les garanties entourant la détention ;
- consacre le droit des victimes de disparitions forcées à réparation, donnant ainsi suite aux principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international relatif aux droits de l'homme et de violations graves du droit international humanitaire (E/CN.4/RES/2005/35) ;
- crée un organe de suivi original : le Comité des disparitions forcées, composé de 10 membres, remplira, outre les fonctions classiques d'un organe de traité (examen des rapports des Etats, des communications individuelles et inter-étatiques, soumission de rapports à l'AGNU), une fonction préventive, en lançant des appels urgents et en effectuant des visites sur place en cas de situation grave. Il pourra en outre en cas de violations massives et systématiques porter la situation à l'attention du Secrétaire général des Nations Unies. A la croisée entre procédures spéciales et organes des traités, il se coordonnera étroitement avec eux. Il est créé pour une période expérimentale de 4 ans, dans l'attente d'une réforme générale des organes conventionnels.

RELEASED IN FULL
October 2006

LB37A

NON-PAPER

Draft International Convention for the Protection of All Persons from Enforced Disappearances

In its inaugural session in June 2006 the Human Rights Council adopted by consensus the draft "International Convention for the protection of all persons from enforced disappearances" (resolution HRC/2006/1). The adoption of the text triggered a standing ovation and was a moving event. 59 States representing all continents co-sponsored the text which is now to be adopted by the General Assembly at its sixty-first session.

The practice of enforced disappearances is still widespread nowadays throughout the world. It does constitute one of the main threats for the human rights defenders. According to the United Nations 51.000 enforced disappearances occurred since 1980 in more than 90 countries, 41.000 of which have not be elucidated yet. 535 new cases in 22 countries were registered in 2005.

The draft Convention represents a remarkable step forward in the promotion and protection of human rights :

1) **It addresses a legal loophole**

In accordance with the new instrument, State Parties commit themselves to :

- ensure that enforced disappearance constitutes an offence under their criminal law and bring to justice its perpetrators, their accomplices and the people who ordered, solicited or induced it ;
- Apply to enforced disappearances "victim-friendly" statutes of limitation ;
- Strengthen their international cooperation to fight against enforced disappearance ;
- guarantee the right of victims' relatives to know the truth : the right of relatives to know the truth on the circumstances of an enforced disappearance and the fate of the disappeared person, and, in order to prevent enforced disappearance, the right of any person with a legitimate interest to be given minimum information regarding the deprivation of liberty of a person and to take legal action to challenge its lawfulness ;
- take preventive measures : to prohibit secret detention and unofficial places of detention, to provide for legal guarantees in case of deprivation of liberty, to maintain up-to-date official registers of persons deprived of liberty, to provide training for enforcement officials ;
- guarantee the right of victims to obtain reparation (under all possible forms : compensation or others) ;
- allow review of any adoption originated from an enforced disappearance.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 31 JUL 2009 200706444

2) It makes international human rights law accomplish new progress

This new instrument :

- recognizes new rights : the right of any person not to be subjected to enforced disappearance, the right of victims to know the truth ;
- reinforces legal guarantees regarding detention ;
- confirms the right of victims of enforced disappearance to obtain reparation, as a follow-up to the Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (E/CN.4/RES/2005/35) ;
- establishes an original follow-up mechanism : besides implementing the traditional activities of treaty bodies (review of States reports, of individual and inter-States communications, reports to UNGA), the Committee on enforced disappearances, which shall consist of 10 members, will fulfil a preventive role by launching urgent appeals and making country visits in case of serious violations. It will also bring the matter to the attention of the Secretary General of the United Nations in case of gross and systematic violations. Standing at the crossroad of special procedures and treaty bodies, it will closely coordinate with them. The Committee is established for a trial period of 4 years, pending a global treaty body reform

RELEASED IN PART
B5, B6 LB13

Baumert, Kevin A

From: Baumert, Kevin A
Sent: Friday, September 07, 2007 4:49 PM
To: Harris, Robert K; Hill, Steven R
Subject: RE: ICCPR One year follow-up
Attachments: LEGAL-_54371-v1-ICCPR_follow_up_2007.DOC

Bob,
Attached is the ICCPR follow up submission, revised to take into account your comments (including new additions from DoJ, DoD. I left your original comments in tracked changes so that you can see what's changed...

Two things:

- [redacted] B5
-

Thanks,
Kevin

-----Original Message-----
From: Robert Harris [redacted] B6
Sent: Monday, August 20, 2007 2:50 PM
To: Baumert, Kevin A; [redacted] B6
Cc: Hill, Stephen A (Baghdad); Harris, Robert K; [redacted] B6
[redacted] Padmanabhan, Vijay M; Nixon, Gina M B6
Subject: ICCPR One year follow-up

Kevin,

[redacted] B5

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1/22/2008

[redacted] B5

Thanks to all.

Bob

UNCLASSIFIED

RELEASED IN PART
B6, B5 LB35

Baumert, Kevin A

From: MaryBeth West [redacted] B6
Sent: Tuesday, January 16, 2007 9:09 AM
To: Andre M. Surena; Harris, Robert K; Baumert, Kevin A; Hill, Steven R; Kovar, Jeffrey D
Subject: Fwd: ICCPR prelim short responses
Attachments: ICCPR - USG Resp to HRC Conclusions & Recommendations [JAN 07].doc

Dear All --

I have reviewed Andre's copy. The info on state laws regarding sexual orientation is fine. I can probably provide more examples if you wish. Also, I have some examples of state programs to address racial profiling (if these would be helpful).

[redacted] B5

Let me know if more specifics on states re sexual orientation or racial profiling would be helpful.

Mary Beth

---------- Forwarded message ----------
From: **Andre M. Surena** [redacted] B6
Date: Jan 15, 2007 11:16 PM
Subject: Re: ICCPR prelim short responses
To: Robert Harris [redacted] baumertka@state.gov , HarrisRK2@state.gov
Cc: HillSR@state.gov, [redacted] kovarjd@state.gov, [redacted] B6 B6 B6

Comments attached.

----- Original Message -----
From: "Robert Harris" [redacted] B6
To: <baumertka@state.gov>; <HarrisRK2@state.gov>; [redacted] B6
Cc: <HillSR@state.gov> [redacted] B6
<kovarjd@state.gov>; <
Sent: Sunday, January 14, 2007 4:55 PM
Subject: RE: ICCPR prelim short responses

> Kevin,
>
> Here are my comments. [redacted] B5
> I wonder if Andre might take a quick look at this, particularly our
> answers
> on sexual orientation, juvenile death penalty, and DC voting rights. I
> also
> wonder if Steve could look this over. I would like to get this around to
> Department people on Tuesday, with a request that they give us any
> comments

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> Wednesday morning. We can then circulate something to DOJ and DHS on
> Wednesday.
>
> Steve,
>
> To keep things as simple as possible, please write your CAT paper using
> this
> format, if it isn't too much additional work.
>
> Mary Beth,
>
> [redacted] B5
>
> Thanks to all. This process will really give us a jump start in
> responding
> to the issues the committees' identified for interim USG responses.
>
> Bob
>
>
>
>
>>From: "Baumert, Kevin A" <baumertka@state.gov>
>>To: "Robert Harris" <[redacted]"Harris, Robert K" B6
>><HarrisRK2@state.gov>
>>CC: "Hill, Steven R" <HillSR@state.gov>,"Baumert, Kevin A"
>><baumertka@state.gov>,[redacted] B6
>>Subject: ICCPR prelim short responses
>>Date: Fri, 12 Jan 2007 17:53:13 -0500
>>
>>Bob,
>>Attached is the latest draft, as well as most of the docs (or links) I
>>used to compile the short answers. We can discuss further on Tues (or
>>over the weekend, if you want).
>>
>>A few notes:
>>- Larry at DoJ said that he would write up short responses to #s 19 and
>>32 over the weekend
>>- the Detainee TPs are taken from a cable on the class side, so that is
>>not attached here
>>- The link to our ICCPR report and the July 2006 USG responses to ICCPR
>>Qs: http://www.state.gov/g/drl/rls/c16069.htm (4th and 5th link). These
>>pages are very easy to keyword search
>>
>>Thanks.
>>Kevin
>>
>>Docs attached:

>>- Draft prelim responses
>>- Bellinger LSE speech
>>- USG reply to 5 SR report on GTMO
>>- Military Commissions Act
>>- IACHR brief, DC voting case
>> <<Ctte_Concerns_and_Recs.doc>>
>> <<military commissions act HR 6166.txt.pdf>>
>><<LEGAL-#21648-v3-USG_Reply_to_SR_GTMO_Report_2006.DOC>> <<Bellinger
>>LSE Speech - Oct 2006.pdf>> <<IACHR brief DC voting at p5.pdf>>
>
>
>><< Ctte_Concerns_and_Recs.doc >>
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>
>><< militarycommissionsactHR6166.txt.pdf >>
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>
>><< LEGAL-_21648-v3-USG_Reply_to_SR_GTMO_Report_2006.DOC >>
>
>
>><< BellingerLSESpeech-Oct2006.pdf >>
>
>
>><< IACHRbriefDCvotingatp5.pdf >>
>
>

No virus found in this incoming message.
Checked by AVG Free Edition.
Version: 7.5.432 / Virus Database: 268.16.8/621 - Release Date: 1/9/2007
1:37 PM

Text proposed by United States delegation

LC7

Article 1.

RELEASED IN FULL

"For purposes of this instrument, an enforced disappearance is considered to be an arrest, detention, or abduction of a person by, or with the authorization, support or acquiescence of, a State, followed by its refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person, with the intention of removing that person from the protection of the law for a prolonged period of time."

Article 2. At end of paragraph one, add a new sentence as follows:

"The same shall apply to an attempt to commit an enforced disappearance and to an act by a person which constitutes complicity or participation in, or a conspiracy to commit, an enforced disappearance."

Article 2bis.

"States Parties shall take all feasible measures to prohibit and criminalize the acts described in Article 1 when committed by private organizations, groups or individuals."

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COMMISSION ON HUMAN RIGHTS

E/CN.4/2004/WG.22/Misc.20

Working Group on a draft legally binding normative instrument for the protection of all persons from enforced disappearance
Geneva, 12-23 January 2004

16 January 2004

LC8

RELEASED IN FULL

PROPOSAL OF

THE UNITED STATES

E/CN.4/2004/WG.22/Misc.20

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 13 AUG 2009 200706444

E/CN.4/2004/WG.22/Misc.20

16 January 2004

US Proposed Text

Article 4. **Add new Article 4(3):**

"Mitigating and aggravating circumstances shall also be permitted as provided under the domestic law of a State Party unless inconsistent with the object and purposes of this instrument."

Article 9. **Replace Article 9(1)© and Article 9(1)(d) with the following.**

"In addition, each State party may take the necessary measures to establish jurisdiction in respect of an enforced disappearance in the following instances:

(a) when the disappeared person is one of its nationals;

(b) when the alleged perpetrator of the offense is present in a territory under its jurisdiction, unless the State extradites the alleged perpetrator, or transfers him or her to an international tribunal.

Article 10(3). **Preference is to *delete* Article 10(3).**

Otherwise reword as follows:

" Any foreign national held in custody pursuant to paragraph one may communicate with an appropriate representative of the State of which he or she is a national in accordance with applicable international legal obligations."

Article 11.

Article 11(3): Substitute "duly constituted under law" for "of general jurisdiction," so that the provision reads as follows.

"Any person alleged to have committed an enforced disappearance shall be tried in a court duly constituted under law which offers guarantees of competence, independence and impartiality and respect for a fair trial."

Article 12.

Article 12 *passim*. Change competent "authority" to "domestic authorities."

Article 12(3): Add at end of chapeau:

", in accordance its domestic law":

Article 12(6): Reword as follows: "Each party shall endeavor to take the necessary measures to prevent or punish acts intended to hinder an investigation."

Article 13(6) and 14(2): **Add after "refuse": "or condition".**

Article 15.

Add to Article 15(1) and 15(2) after "assistance":

"in appropriate cases."

Chapter 6 should read "Prevention" not "Presentation."

Article 16.
Article 16(1)(d): Add at end of chapeau: "in accordance with the Constitution of the State Party":

Article 19.

Article 19(a): Add "knowing" before "delay."

Article 19(b): Add "knowing" before "Failure."

Article 20.

The United States delegation proposes either the current text or a text that incorporates beneficiaries of training, other than law enforcement personnel, who are referred to in CAT Article 10 (i.e., civil or military, medical personnel, public officials and other persons who may become involved in a situation of enforced disappearance.

Article 21.

Reword text to track CAT Article 3, as follows:

"1. No State Party shall expel, return *("refouler")* or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subject to an enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

E/CN.4/2005/WG.22/USA.2
09/02/2005

US Proposal

RELEASED IN FULL

LC10

Article 4 (former article 2)

Each State Party shall ensure that an enforced disappearance is fully covered under its criminal or penal law.

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COMMISSION ON HUMAN RIGHTS

E/CN.4/2004/WG.22/Misc.47

Working Group on a draft legally binding normative instrument for the protection of all persons from enforced disappearance
Geneva, 12-23 January 2004

23 January 2004

LC12A

PROPOSAL OF THE UNITED STATES

ACCES TO INFORMATION

States Parties shall take the necessary measures within their domestic legal systems to ensure respect for the freedom of family members, and other persons with a legitimate interest within the meaning of Article 12 (4), to seek and receive information regarding the whereabouts and fate of a disappeared person, or a person who, it is reasonably believed could become a victim of an enforced disappearance.

ACCÈS À L'INFORMATION

Les Etats parties prennent les mesures nécessaires, dans le cadre de leur ordre juridique interne, pour assurer le respect de la liberté des membres de la famille, et des autres personnes ayant un intérêt légitime telles que décrites à l'article 12 (4), de rechercher et recevoir des informations relatives au sort et au lieu où se trouve la personne disparue, ou une personne qui, croit-on raisonnablement, pourrait devenir victime d'une disparition forcée.

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chron L

RELEASED IN FULL

LC/2C

Text proposed by United States delegation

Article 1.

"For purposes of this instrument, an enforced disappearance is considered to be an arrest, detention or abduction of a person by, or with the authorization, support or acquiescence of, a State, followed by its refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person, with the inttion of removing that person from the protection of the law for a prolonged period of time."

Article 2. At end of paragraph one add a new sentence as follows:

"The same shall apply to an attempt to commit an enforced disappearance and to an act by a person which constitutes complicity or participation in, or a conspiracy to commit, an enforced disappearance."

Article 2bis.

"States Parties shall take all feasible measures to prohibit and criminalize the acts described in Article 1 when committed by private organizations, groups or individuals."

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COMMISSION ON HUMAN RIGHTS

Working Group on a draft legally binding normative instrument for the protection of all persons from enforced disappearance
Geneva, 12-23 January 2004

E/CN.4/2004/WG.22/Misc.21

16 January 2004

LC14

PROPOSAL OF

THE UNITED STATES

E/CN.4/2004/WG.22/Misc.21

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COMMISSION ON HUMAN RIGHTS

Working Group on a draft legally binding normative instrument for the protection of all persons from enforced disappearance
Geneva, 12-23 January 2004

E/CN.4/2004/WG.22/Misc.46

23 January 2004

LC16

PROPOSAL OF THE UNITED STATES

ART. 3 - F

The present instrument is without prejudice to the provisions of international humanitarian law, including the obligations of the High **Contracting Parties** to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, **or to** the opportunity available to any State Party to authorize the International Committee on the Red Cross to visit places of detention in situations not covered by international humanitarian law.

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LC21

Enforced or Involuntary Disappearances (L.59)
Explanation of Position

Mr. Chairman, the United States has long been and remains among the strongest champions of the right of everyone to be free from enforced or involuntary disappearances. Toward this end, the United States has actively participated in the on-going negotiations of the open-ended working group to elaborate a legally binding instrument to protect all persons from enforced disappearances. The text of L.59 – quite appropriately – attaches considerable importance to the on-going negotiations on that instrument and welcomes the substantial progress made thus far by the negotiators. For this, Mr. Chairman, we must commend Ambassador Bernard Kessedjian, the Permanent Representative of France, for his steadfast and very capable chairmanship of the working group.

The United States, however, wishes to underscore its strongly held view that the negotiation of this new instrument should not be unduly rushed. On the other hand, the negotiation of such an important instrument need not require an extended period of years to complete. What is most important is that the final instrument be carefully-crafted, comprehensively-analyzed, consensus-based, and by no means subject to arbitrary timeframes for its completion. It is our hope and expectation that these guiding principles will continue to shape this negotiating process. For it is only within that framework that the final instrument can expect to win adoption by consensus and universal acceptance within the international community.

Within these considerations in mind, the U.S. is pleased to join consensus in the adoption of this resolution. Thank you, Mr. Chairman.

Delivered by T. Michael Peay , April 19, 2004

Drafted: TMPeay

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- The United States underscores that forced disappearances are a serious human rights violation that deserves universal attention, especially by governments, to prevent, prohibit, and punish forced disappearances.

- We would like to recognize the leadership, organization, and hard work that allowed the first negotiating session you chaired last January to be highly substantive and collegial.

- In the spirit of the constructive candor that has thus far shaped these negotiations, we find it necessary to voice serious objection to "informal inter-sessional meetings" or "informal drafting group meetings" in negotiations of multilateral instruments such as the one under consideration.

- In the view of my Government, such "informal" inter-sessional treaty meetings -- coming on top of intense substantive and formal two-week negotiating sessions each year - strain personnel and other government resources. In substantive terms, such informal sessions can also result in hastily formulated positions and incomplete analysis of draft instruments before their formal adoption. This inevitably leads to the publication of inherently flawed instruments, which is a result that serves no one's interests.
- The devotion of finite governmental resources to these negotiations must be viewed in the fuller context of each State's other human rights negotiations commitments, as well as human rights reporting commitments, and of course annual resource commitments related to participation in the Commision on Human Rights and the UNGA Third Committee, which themselves demand significant resources and staffing each spring and fall.
- Additionally, "informal" inter-sessional negotiations tend to undermine the principle of universal participation, as not every State is always able to engage fully in such negotiations.
- In short, my Government believes that the multilateral treaty-making process is best served when negotiating procedures allow all States a full and effective opportunity to elaborate the text of an agreement. Experience has shown that single, official sessions, held

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annually, allow States to have the opportunity they need before the next session to review a text and working group report in capitals and to carry out requisite inter-agency and other internal consultations in preparation for the next session.

- Following that past practice, we believe that this negotiation can be well-paced without being hurried. We therefore call upon all parties to these negotiations to refrain from making the mistake of putting them on a "hurried" track.

- For these reasons, despite the fact that my delegation is present today, in the future, the United States will be unable to support "informal" inter-sessionals that seek to advance unhelpfully the pace of these negotiations.

- Turning to the Chairman's paper prepared for this session and the Chairman's report of the first session, those reports do not adequately address the genuine and on-going concerns that some delegations (the U.S. included) have about certain concepts and provisions discussed in these negotiations to date.
- Working group documents should adequately reflect divergent views on issues, particularly where such views are strongly-held by State delegations, as is the case here.
- To this end, we propose that working documents of these negotiations should contain "brackets" around controversial or unagreed concepts, provisions and words to fairly reflect that there are divergent views expressed by delegations and to memorialize different options delegations may wish to consider.

- Turning to substance, we wish to reiterate points raised last January and to highlight major concerns about the following themes and provisions, while reserving until a later date other substantive concerns we wish to raise.

- A legal instrument on "forced disappearance" can, and should, be flexible enough to accommodate States whose criminal statutes already comprehensively cover and punish the offense, without the need to enact additional legislation.

- Bearing this in mind, criminalization of forced disappearances would be better framed in terms of "acts" of forced disappearance, which is similar to the approach taken in penalizing "acts of torture" in the Convention Against Torture (CAT Article 2(1)). Taking this adaptive approach would be both effective and eliminate the need for radical reform of criminal codes (at least for some States) who would otherwise be required to create a newly designated crime of "forced disappearance."

- The proposed definition of "forced disappearance" to include a "deprivation of liberty in whatever form" suffers from being overbroad, vague, and unworkable in the context of defining a criminal offense.
  - The extraordinary breadth of this phrase seems to extend far beyond the deplorable practice of a forced disappearance which is the target of the proposed instrument.
  - The vagueness of the term could cause constitutional problems in certain criminal justice systems and be invalidated by national courts under a "void for vagueness" doctrine.
  - The breadth and vagueness combined would invariably and inappropriately capture within its scope legitimate law enforcement and security activities.
- The definition of forced disappearances should also be limited to State actors, as inclusion of activities by private groups fundamentally alters the scope and nature of the instrument. Although any proposed instrument would contain elements of international criminal law, it is at its core a human rights instrument primarily governing the conduct of States.

- A statute of limitations provision should require that the prescription period "be commensurate with the seriousness of the offense." This formula was also supported by some other delegations last January but was omitted from the Chairman's most recent Report.
- We strongly oppose a provision that would bar special jurisdiction tribunals, including military tribunals or commissions . Among other reasons, such an approach erroneously implies that military proceedings are inferior or are inherently incapable of ensuring minimum standards of due process by comparison to regular civilian courts. Should the instrument contain a prohibition relating to tribunals, it should bar "sham"

proceedings, regardless of their nature, and not target lawful military tribunals in which due process guarantees are provided.

- We would strongly oppose a death penalty provision or any other restrictions on sentencing.
  - We note, in this regard, that other human rights treaties, including the Convention against Torture, do not limit punishments for perpetrators.
  - The focus should be on the human rights of the disappearance victims and their families, not on the perpetrators. In these negotiations, we need to bear in mind that we are not trying to elaborate a criminal law enforcement instrument but rather one that principally addresses human rights.
- We would strongly oppose jurisdictional provisions that reach beyond those contained in, for example, the Optional Protocol to the CRC on Child Sale, Prostitution and Pornography.
  - Article 4 of the Optional Protocol *requires* that a State Party establish jurisdiction over covered offenses committed in its territory (or on board a ship or aircraft) and *permits* jurisdiction for offenses committed by or against nationals.
  - The Optional Protocol also requires States Parties to prosecute alleged offenders "present in" its territory when the State refuses extradition on the ground that the offense has been committed by one of its nationals.
- We would strongly urge excluding from the scope of the instrument any activities governed by international humanitarian law. In addition, a significant overall concern is that the proposed treaty not cover or otherwise prejudice legitimate law enforcement and national security activities.
- Mandatory site visits would be problematic and subject to abuse.
- Any provisions addressing a superior orders defense would have to be closely studied with a view to: a) governing national law and practice on the subject; b) the lawfulness of the orders; c) applicable international law; and d) the need to avoid unfairly accusing innocent subordinate actors by ensuring that each accused had in fact the requisite intent (*mens rea*) to warrant prosecution.
- A provision prohibiting reservations would be unacceptable.

- Such a prohibition is not necessary as reservations that would defeat the object and purpose of the treaty would not be permitted.
- Properly tailored reservations are essential to enable many countries to become party to treaties. Creating a prohibition would thus be counterproductive to the goal of achieving broad international participation in a treaty regime.

- We would oppose the creation of a new treaty monitoring body and believe that existing treaty bodies (e.g., the HRCommittee) should be considered as the appropriate mechanisms for monitoring implementation by States parties.

- These are only the most serious concerns of our Government. Other issues of notable concern are raised by provisions relating to a centralized registers of names, pardons and amnesties, reparations, standing to raise complaints, funding, and entry into force provisions, among others.

- In sum, the Working Group has a formidable task ahead of it to elaborate a document that truly seeks to enjoy widespread acceptance within the international community.

Drafted: L/HRR - Gilda Brancato x 72773 8/26/03 113465

Cleared: L/HRR - Robert Harris - ok
IO/SHA - Tom Johnson - ok
DRL/MLA - Chris Camponovo - ok
US Mission/L - Mike Peay - ok (8/29/03)

Cc: L - Sam Witten
L/LEI - Linda Jacobson
L/PM - Chip Brooks
IO - Jackie Sanders, Mark Lagon
IO/SHA - June Carter Perry
DRL/MLA - Lynn Sicade

Article 2

For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article 3

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

Article 4

Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

Article 5

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

Article 6

1. Each State Party shall take the necessary measures to hold criminally responsible at least:

(a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;

(b) A superior who:

(i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;

(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and

(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

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LC57L

Restatement (Third)

aliens may not be denied education provided for other children). See also Serrano v. Priest, 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241 (1971), *appeal after remand*, 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 (1976), *certiorari denied*, 432 U.S. 907, 97 S.Ct. 2951, 53 L.Ed. 2d 1079 (1977) (education is fundamental right under California Constitution). Except for those few rights that require no affirmative governmental action, but only abstention from interference, *e.g.*, the right to join a trade union, Art. 8(1)(a), the provisions of this Covenant are inherently non-self-executing. See § 111(3), (4). By adhering to this Covenant, the United States would be obligated to take legislative, executive, and other measures, federal or State, generally of the kind that are already common in the United States, "to the maximum of its available resources," "with a view to achieving progressively the full realization" of those rights. Since there is no definition or standard in the Covenant, the United States would largely determine for itself the meaning of "full realization" and the speed of realization, and whether it is using "the maximum of its available resources" for this purpose. The United States would, however, be required to submit reports for consideration by the United Nations Economic and Social Council "on the measures which they have adopted and the progress made in achieving the observance of the rights recognized" in the Covenant. Art. 16.

9. *Previous Restatement.* The previous Restatement referred to human rights in relation to the international standard of justice protecting aliens. See § 165, Comment *b*. Section 118, Reporters' Note, refers to the propriety of dealing with human rights by treaty.

§ 702. Customary International Law of Human Rights

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

(a) genocide,

(b) slavery or slave trade,

(c) the murder or causing the disappearance of individuals,

(d) torture or other cruel, inhuman, or degrading treatment or punishment,

(e) prolonged arbitrary detention,

(f) systematic racial discrimination, or

(g) a consistent pattern of gross violations of internationally recognized human rights.

Comment:

a. Scope of customary law of human rights. This section includes as customary law only those human rights whose status as customary law is generally accepted (as of 1987) and whose scope

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selves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.

Article 5

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Article 6

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

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10. *Requests* the Office of the High Commissioner to provide for the Commission at its sixty-third session an updated version of the report requested in resolution 2003/33;

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11. *Decides* to consider this question at its sixty-third session under the same agenda item.

56th meeting
19 April 2005

[Resolution adopted without a vote.

See chap. XI, paras. 282 to 284.]

2005/27. Enforced or involuntary disappearances

The Commission on Human Rights,

Recalling its resolution 20 (XXXVI) of 29 February 1980, in which it decided to establish a working group,

Recalling also General Assembly resolution 47/133 of 18 December 1992, by which the Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance as a body of principles for all States,

Deeply concerned in particular by the increase in enforced or involuntary disappearances in various regions of the world, including arrest, detention and abduction, when these are part of or amount to enforced disappearances, and by the growing number of reports concerning harassment, ill-treatment and intimidation of witnesses of disappearances or relatives of persons who have disappeared,

Acknowledging the fact that acts of enforced disappearance are crimes against humanity, as defined in the Rome Statute of the International Criminal Court (A/CONF.183/9),

1. *Takes note* of the report submitted by the Working Group on Enforced or Involuntary Disappearances (E/CN.4/2005/65 and Add.1);

2. *Stresses* the importance of the work of the Working Group, and encourages it to pursue the execution of its mandate:

(*a*) To continue to promote communication between families of disappeared persons and the Governments concerned, particularly when ordinary channels have failed, with a view to ensuring that sufficiently documented and clearly identified individual cases are investigated and to ascertain whether such information falls under its mandate and contains the required elements;

(*b*) To continue to observe, in its humanitarian task, United Nations standards and practices regarding the handling of communications and the consideration of government replies;

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
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(*c*) To continue to consider the question of impunity in the light of the relevant provisions of the Declaration on the Protection of All Persons from Enforced Disappearance and of the final reports submitted by the Special Rapporteur appointed by the Sub-Commission on the Promotion and Protection of Human Rights;

(*d*) To continue to pay particular attention to cases of children subjected to enforced disappearance and children of disappeared persons and to cooperate closely with the Governments concerned in searching for and identifying these children;

(*e*) To pay particular attention to cases transmitted to it that are most urgent from a humanitarian perspective and that refer to ill-treatment, serious threatening or intimidation of witnesses of enforced or involuntary disappearances or relatives of disappeared persons;

(*f*) To pay particular attention to cases of disappearance of persons working for the promotion and protection of human rights and fundamental freedoms, wherever they occur, and to make appropriate recommendations for preventing such disappearances and improving the protection of such persons;

(*g*) To continue to apply a gender perspective in its reporting process, including in information collection and the formulation of recommendations;

(*h*) To provide appropriate assistance in the implementation by States of the Declaration and of the existing international rules;

(*i*) To continue its deliberations on its working methods and to include these aspects in its report to the Commission at its sixty-second session;

3. *Deplores* the fact that some Governments have not provided for a long period of time substantive replies concerning claims of enforced disappearances in their countries and have not given due consideration to relevant recommendations concerning this subject made in the reports of the Working Group;

4. *Urges* States:

(*a*) To promote and give full effect to the Declaration on the Protection of All Persons against Enforced Disappearance;

(*b*) To cooperate with the Working Group and help it to carry out its mandate effectively and, in that framework, give serious consideration to requests for visits to their countries;

(*c*) To prevent the occurrence of enforced disappearances, including by guaranteeing that any person deprived of liberty is held solely in officially recognized and supervised places of detention, guaranteeing access to all places of detention by authorities and institutions whose competence in this regard has been recognized by the concerned State, maintaining official, accessible, up-to-date registers and/or records of detainees and ensuring that detainees are brought before a judicial authority promptly after detention;

(*d*) To work to eradicate the culture of impunity for the perpetrators of enforced disappearances and to elucidate cases of enforced disappearances as crucial steps in effective prevention;

(*e*) To prevent and investigate with special attention enforced disappearances of persons belonging to vulnerable groups, especially children, and to bring the perpetrators of these enforced disappearances to justice;

(*f*) To take steps to provide adequate protection to witnesses of enforced or involuntary disappearances, human rights defenders acting against enforced disappearances, and the lawyers and families of disappeared persons against any intimidation or ill-treatment to which they might be subjected;

5. *Urges* the Governments concerned:

(*a*) To intensify their cooperation with the Working Group on any action taken pursuant to recommendations addressed to them by the Working Group;

(*b*) To continue their efforts to elucidate the fate of disappeared persons and to ensure that competent authorities in charge of investigation and prosecution are provided with adequate means and resources to resolve cases and bring perpetrators to justice;

(*c*) To make provision in their legal systems for victims of enforced or involuntary disappearances or their families to seek fair, prompt and adequate reparation and in addition, where appropriate, to consider symbolic measures recognizing the suffering of victims and restoring their dignity and reputation;

(*d*) To address the specific needs of the families of disappeared persons;

6. *Reminds* States:

(*a*) That, as proclaimed in article 2 of the Declaration on the Protection of All Persons from Enforced Disappearance, no State shall practise, permit or tolerate enforced disappearances;

(*b*) That all acts of enforced or involuntary disappearance are crimes punishable by appropriate penalties which should take due account of their extreme seriousness under penal law;

(*c*) That they should ensure that their competent authorities proceed immediately to conduct impartial inquiries in all circumstances where there is reason to believe that an enforced disappearance has occurred in territory under their jurisdiction;

(*d*) That, if such belief is borne out, all the perpetrators of enforced or involuntary disappearances must be brought to justice;

(*e*) That impunity is simultaneously one of the underlying causes of enforced disappearance and one of the major obstacles to the elucidation of cases thereof;

(*f*) That, as proclaimed in article 11 of the Declaration, all persons deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured;

7. *Expresses*:

(*a*) Its thanks to the many Governments that have cooperated with the Working Group and replied to its requests for information and to the Governments that have accepted visits of the Working Group to their countries, asks them to give all necessary attention to the Working Group's recommendations and invites them to inform the Working Group of any action they take on those recommendations;

(*b*) Its appreciation to the Governments that are investigating, are cooperating at the international and the bilateral levels, have developed or are developing appropriate mechanisms to investigate any claims of enforced disappearance that are brought to their attention, and encourages all the Governments concerned to expand their efforts in this area;

8. *Invites* States to take legislative, administrative, legal and other steps, including when a state of emergency has been declared, to take action at the national and regional levels and in cooperation with the United Nations, if appropriate through technical assistance, and to provide the Working Group with concrete information on the measures taken and the obstacles encountered in preventing enforced or involuntary disappearances and in giving effect to the principles set forth in the Declaration;

9. *Takes note* of the assistance provided to the Working Group by non-governmental organizations and their activities in support of the implementation of the Declaration and invites those organizations to continue their cooperation;

10. *Acknowledges* the improvement in the staffing granted to the Working Group and requests the Secretary-General:

(*a*) To ensure that the Working Group receives all the assistance and resources it requires to perform its function, including supporting the principles of the Declaration, carrying out and following up on missions and holding sessions in countries that are prepared to receive it;

(*b*) To provide the resources needed to update the database on cases of enforced disappearance;

(*c*) To keep the Working Group and the Commission regularly informed of the steps taken for the wide dissemination and promotion of the Declaration;

11. *Requests* the Working Group to report on its activities to the Commission at its sixty-second session;

12. *Takes note* of the report of the Intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2005/66) and welcomes the additional substantial progress made during the third and fourth sessions of the intersessional working group and, in that context, welcomes the participation of non-governmental organizations;

13. *Requests* the intersessional Working Group to meet for a period of 10 working days in one formal session before the end of 2005 with a view to the completion of its work, and to report to the Commission at its sixty-second session;

14. *Requests* the Chairperson-Rapporteur of the intersessional Working Group to undertake informal consultations with all interested parties in order to prepare the next session of the intersessional working group;

15. *Requests* the United Nations High Commissioner for Human Rights to invite the former independent expert to examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, the former Chairman-Rapporteur of the sessional working group on the administration of justice of the Sub-Commission on the Promotion and Protection of Human Rights, who submitted to the sessional working group in 1998 a draft international convention on the protection of all persons from enforced disappearance (E/CN.4/Sub.2/1998/19, annex), and also a representative of the Working Group on Enforced or Involuntary Disappearances to participate in the activities of the intersessional working group;

16. *Decides* to consider this matter at its sixty-second session under the same agenda item;

17. *Also decides* to recommend to the Economic and Social Council the following draft decision for adoption:

[For the text, see chap. I, sect. B, draft decision 8.]

56th meeting
19 April 2005

[Resolution adopted without a vote.

See chap. XI, paras. 285 to 289.]

2005/28. Arbitrary detention

The Commission on Human Rights,

Reaffirming articles 3, 5, 9, 10 and 29, as well as other relevant provisions of the Universal Declaration of Human Rights,

Recalling articles 9 to 11 and 14 to 22 of the International Covenant on Civil and Political Rights,

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DEPARTMENT OF STATE
OFFICE OF THE LEGAL ADVISER
HUMAN RIGHTS AND REFUGEES

L/HRR, ROOM 3422
2201 C STREET, N.W.
WASHINGTON, D.C. 20520-6310

Fax

To: Jim Burger	From: Gilda Brancato
Fax: DOC/CGC	Fax: (202)736-7028
Phone: 703 697-7771	Phone: (202) 647-4065 or x 72773
Pages: 703 614-1759	Date:

SUBJECT: Proposed forced disappearances Convention

COMMENTS:

Attached is reporting cable from US Mission on final negotiating round. the final UN Report has not yet been published. Just sent you 2 emails with materials related to the treaty as drafted. Happy Holidays! Gilda

UNITED STATES DEPARTMENT OF STATE
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DATE/CASE ID: 13 AUG 2009 200706444

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Confirmation Report – Memory Send

Time : Dec-09-2005 03:44pm
Tel line :
Name :

Job number	:	963
Date	:	Dec-09 03:43pm
To	:	95140080
Document pages	:	004
Start time	:	Dec-09 03:43pm
End time	:	Dec-09 03:44pm
Pages sent	:	004
Status	:	OK

Job number : 963 *** SEND SUCCESSFUL ***

Fax

To: Tom Bottows
Fax: 514-0080
Phone: 514-1436
Pages:

From: Gilda Brancato
Fax: (202)736-7028
Phone: (202) 647-4065 or x 72773
Date:

SUBJECT:

COMMENTS: Disappearances Treaty drop Text

FYI Reporting cable from US mission. The final UN Report has not yet been published on website. You should have received 2 emails from me, one confirming the draft treaty text and the other an update on negotiations and a copy of Informal Guidance taking points for final session. Sincerely Gilda Brancato

DEPARTMENT OF STATE
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DATE/CASE ID: 13 AUG 2009 200706444

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HUMAN RIGHTS AND REFUGEES

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WASHINGTON, D.C. 20520-6310

Fax

To:	Tom Bomons DOJ	From:	Gilda Brancato
Fax:	514-6080	Fax:	(202)736-7028
Phone:	514-1436	Phone:	(202) 647-4065 or x 72773
Pages:		Date:	

SUBJECT: **UNITED STATES DEPARTMENT OF STATE**
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 13 AUG 2009 200706444

COMMENTS: Disappearances Treaty draft Text

FYI Reporting cable from US mission. The final UN Report has not yet been published on website

You should have received 2 emails from me, one containing the draft treaty text and the other an update on negotiations and a copy of Fate map guidance talking points for final session. Sincerely Gilda Brancato

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THE MISSING
the right to know

The Missing:
Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence and to assist their families

International Conference of Governmental and Non-Governmental Experts
Geneva, 19 - 21 February 2003

OUTCOME

Working Group on the *Observations and Recommendations*

Report by the Chairman to the Plenary
Mr Nicolas Michel, Director, Directorate of Public International Law, Federal Department of Foreign Affairs, Switzerland

Observations and Recommendations
Adopted by Consensus on 21 February 2003

Geneva, February 2003

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 13 AUG 2009 200706444

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The Missing:
Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence and to assist their families

International Conference of Governmental and Non-Governmental Experts
Geneva, 19 - 21 February 2003

Working Group on the *Observations and Recommendations*

Report by the Chairman to the Plenary
Mr Nicolas Michel, Director, Directorate of Public International Law, Federal Department of Foreign Affairs, Switzerland

The objective of the Working Group was to have an overview of the *Observations and Recommendations*[1], to share considerations on this document's relationship to the process launched by the ICRC on *The Missing*, and to comment upon and clarify its text. The Working Group was not intended to be a forum for negotiations, nor the *Observations and Recommendations* to be a legally binding document. There was a common understanding that the *Observations and Recommendations* should not be interpreted in anyway as undermining existing legal standards. The *Observations and Recommendations* should be seen as an operational tool containing practical measures.

As it was understood that the *Observations and Recommendations* were to be adopted by consensus, additional comments and proposals on this text had to be presented in a separate but related document. These comments and proposals are presented in this Report, which is part of the official Acts of the Conference. The *Observations and Recommendations* are to be read together with this Report.

The Working Group was open to all Conference participants and was well attended. As the Chairman of the Working Group, my role was enormously facilitated by the positive and constructive atmosphere prevailing during our work.

The substantive work of the Working Group began with a presentation demonstrating the links between the contents of the *Observations and Recommendations* and the *ICRC Report: The Missing and Their Families – Summary of the Conclusions arising from Events held prior to the International Conference of Governmental and Non-governmental Experts (19-21 February 2003)*[2]. The Working Group then proceeded to discuss each section of the text in order to obtain clarifications and exchange views. I will do my best to reflect the main points.

Many participants expressed their gratitude for the work done by the governmental and non-governmental experts as well as by the ICRC in the preparation of the text and for the text's added value, which will stimulate all actors in better understanding and implementing the full spectrum of operational best practices related to the problem of persons unaccounted for. It was repeated that the *Observations and Recommendations* should be seen as a focal point for future practical action.

During the discussion, it was recalled that the term "missing persons" should be understood in its broadest sense. Missing persons or persons unaccounted for are those whose families are without news of them and/or are reported missing on the basis of reliable information. People become unaccounted for due to a wide variety of circumstances, such as displacement, whether as an internally displaced person or a refugee, being killed in action during an armed conflict, or forcibly or involuntarily disappearing. Particular attention was drawn to the vulnerability of children, and it was said that, in addition to the term "unaccompanied children" used in the text, reference to the term "separated children" should also be made. Regardless of the circumstances for which a person becomes unaccounted for, the families need to know the fate of their relative. However, different approaches are needed to handle the varied circumstances.

Because of the reference to armed conflict and internal violence in the text, several participants raised the question whether all persons unaccounted for are covered by the *Observations and Recommendations*. Armed conflict and internal violence take place in a large number of contexts in the world today, and most circumstances in which persons become unaccounted for occur in these situations. Nevertheless, it was emphasized that the work of the experts in this process on *The Missing* may, in fact, be used in efforts concerning persons missing in all situations, if appropriate.

The need to recognize the universal right to know was strongly advocated. Numerous participants affirmed its existence and customary character; others specifically referred to regional and domestic jurisprudence on the right to know. It was also affirmed that the right to know can, in addition to the specific reference in Art. 32 of the

[1] TheMissing/Conf/02.2003/EN/1
[2] ICRC/TheMissing/01.2003/EN/10

First Additional Protocol of 1977 applicable in international armed conflicts, be deduced from the Geneva Conventions' general obligations to provide information on detainees and internees, thus, demonstrating the existence of the families' right to know. In addition, the right to know was compared with other rights, such as the right to health, as not being obligations of result. This means that in the face of proven impossibility to provide information, there could be no violation of the right to know. These delegations were in favour of introducing stronger language on the right to know. However, other participants made the reminder that the Working Group was discussing a consensus-orientated text in a forum with inherent limitations, as there are representatives of States, inter-governmental organisations and non-governmental organisations as well as independent experts involved. These participants expressed the view that not all agree that there is a universal right to know; they mentioned that not all States adhere to the First Additional Protocol of 1977 and some debate the customary character of this right.

Some participants spoke of the essential role played by National Societies of the Red Cross and Red Crescent in the clarification of the fate of missing persons by the reestablishment of family links (RFL) and through tracing programs. Addressing the problem of *The Missing* at the International Conference of the Red Cross and Red Crescent to be held in Geneva in December, 2003, will further stress this issue's importance and facilitate coordinated action.

When referring to preventive measures, the need for *effective* protection was emphasized. When discussing internationally recognized standards on the deprivation of liberty, it was recalled that the right to access to justice, including *habeas corpus*, must be respected in all circumstances. In addition, as the text makes specific mention of international humanitarian and human rights law, it was suggested to also refer to refugee law.

It was further said that preventive measures must and can indeed be taken by armed groups. Unless armed groups are included in the solutions, the problem of missing persons will be far from adequately addressed. Obligations foreseen by international humanitarian law applicable in non-international armed conflicts are equally addressed to States and armed groups taking part in the conflict. Practical means, taking into account the specificities of armed groups, should be explored and developed, including in cooperation with these groups.

Regarding the clarification of the fate of persons unaccounted for, it was repeated that clarification entails fully elucidating the fate, including the whereabouts and, if dead, the cause of death. In order to maximize the effectiveness in clarifying the fate of persons unaccounted for, the proper handling of personal information is essential. It was highlighted that the information collected be used only for the humanitarian purpose for which it was collected, so as not to once again sacrifice the dignity of the persons concerned. The need for special safeguards on personal data and the need to respect the relevant standards and principles on the protection of personal data were stressed. It was also stated that information must be properly preserved for historical and research purposes.

While recognizing that information on the fate of a missing relative is essential for the family, several participants made the reminder that the other needs of the families must not be ignored. For example, if the missing family member is dead, the swift return of the human remains is fundamental to many families in order for them to complete the mourning process. The needs of the families for acknowledgement and accountability were referred to. With respect to accountability, it was clarified that in the text "government authorities" includes the judiciary.

Despite the fact that many participants would have preferred the use of stronger language, the *Observations and Recommendations* will nourish this process on resolving the problem of people unaccounted for as a result of armed conflict and internal violence and to assist their families. This process is complementary to others. As an example, specific reference was made to the *UN inter-sessional open-ended working group on a draft legally binding normative instrument for the protection of all persons from enforced disappearances*.

Certain participants referred to the lack of resources as a main reason for not correctly dealing with the issue of missing persons. For instance, without adequate resources the often very expensive methods necessary to identify the dead are not used, nor are means of personal identification easily available.

Finally, it has been reaffirmed that the issue of missing persons and their families must be appropriately addressed. Further social stigmatisation of families of missing persons will thus be avoided. Those responsible can no longer ignore missing persons or their families.

The Missing:
Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence and to assist their families

International Conference of Governmental and Non-Governmental Experts
Geneva, 19 - 21 February 2003

Observations and Recommendations Adopted by Consensus on 21 February 2003

The participants in this Conference

(I.) *Appreciating and drawing upon* the process launched by the International Committee of the Red Cross (ICRC) on the "Missing and their Families" and recognising the importance of exploring, and heightening *international awareness of, the problem of people unaccounted for as a result of armed conflict or internal violence*[3],

(II.) *Recognising* that uncertainty about the fate of their family members is a harsh reality for countless families, including relatives and close friends, which are thus themselves victims of the situation,

(III.) *Recognising* that until they know whether their family members are alive or dead, families are unable to gain closure on the violent events that disrupted their lives and to move on to personal or community rehabilitation and reconciliation,

(IV.) *Alarmed* that the resentment caused by the humiliation and suffering of families and neighbours often undermines relations between communities for future generations,

(V.) *Aware* that preventing persons from becoming unaccounted for and addressing the consequences when they occur are complex tasks that involve numerous actors and require coordination,

(VI.) *Having regard* to the relevant international instruments and standards of international humanitarian and human rights law and aware that the United Nations and the International Conferences of the Red Cross and Red Crescent have addressed this topic and continue to do so,

(VII.) *Convinced* of the need to take action to prevent persons from becoming unaccounted for, to ascertain their fate, to assist their families and to hold accountable those responsible for events leading to persons becoming unaccounted for,

Make the following observations and recommendations and encourage their dissemination and application:

1. It is essential to protect all persons from becoming unaccounted for, without distinction as to the deliberate or incidental character of the events leading to the persons becoming unaccounted for.

2. It is essential that families are allowed to know the fate, including the whereabouts and, if dead, the cause of death, of their family members who are unaccounted for.

3. The principal responsibility in preventing all persons from becoming unaccounted for and in ascertaining the fate of all those unaccounted for as soon as reported missing lies with government authorities; armed groups also have a responsibility in this regard.

4. Inter-governmental organisations and the ICRC, acting in conformity with their respective mandates, should be available to support government authorities and armed groups in fulfilling their responsibilities, and, when they cannot or will not meet their responsibilities, inter-governmental organisations and the ICRC should act accordingly.

5. Non-governmental organisations, acting in accordance with their own mandates, should maximize efforts to prevent persons from becoming unaccounted for and to clarify the fate of those who have become unaccounted for.

6. It is essential that all those involved respect each individual's inherent human dignity in all circumstances.

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[3] For the purpose of these Observations and Recommendations, **internal violence** means internal disturbances (internal strife) and situations requiring a specifically neutral and independent institution and intermediary in conformity with the *Statutes of the International Red Cross and Red Crescent Movement*, article 5(2)(d) and 5(3), adopted by the Twenty-fifth International Conference of the Red Cross at Geneva in October 1986 and amended by the Twenty-sixth International Conference of the Red Cross and Red Crescent at Geneva in December 1995.

7. Every effort should be made to respect the cultural, social and religious or spiritual context specific to each situation.

8. **Prevention**

Respect for international humanitarian and human rights law is fundamental in preventing persons from becoming unaccounted for. It is important that full implementation by States Parties and dissemination of these obligations be ensured. Preventive measures that can be taken include:

8.1 providing means of personal identification to all members of the armed forces and armed groups;

8.2 making means of personal identification easily available to all concerned persons;

8.3 respecting internationally recognised standards regarding the deprivation of liberty, providing immediate notification to families, counsel or other persons having a legitimate interest in the detained persons and preventing extra-judicial executions, torture and detention in secret locations;

8.4 ensuring that family members wherever they may be, including members of armed forces or armed groups and their family members, can communicate with each other at regular intervals;

8.5 accountability, including fighting impunity.

9. **Clarification of the fate of persons unaccounted for**

It is crucial that families receive information on the individual fate of their unaccounted for family members. The families and communities also need both acknowledgment of the events leading to persons becoming unaccounted for and perpetrators held accountable. Measures that can be taken include:

9.1 government authorities and armed groups enabling independent investigations to be carried out to clarify the fate of persons unaccounted for and to provide information;

9.2 avoiding obstruction of, interference with or impediments to the clarification of the fate of persons unaccounted for;

9.3 setting up, whenever necessary, complementary mechanisms, judicial or non-judicial, to respond to the families' needs;

9.4 addressing issues related to reparation;

9.5 providing to the family, in accordance to judicial guarantees and procedures and privacy rights, information collected during criminal investigations that sheds light on the fate of a person unaccounted for.

10. **Information management and the processing of files on persons unaccounted for**

Coordination of the activities of all those involved and sharing information will heighten the effectiveness of the action taken to ascertain the fate of persons unaccounted for. Measures that can be taken include:

10.1 ensuring that the information collected on persons unaccounted for be comprehensive, yet limited to that which is necessary for the purpose identified and is impartially collected and processed;

10.2 sharing information on the methods and objectives of the data collection and processing procedures by those involved;

10.3 exchanging between those involved the information collected in a manner consistent with point 10.5 and without endangering victims, the persons collecting the information or the sources of the information;

10.4 centralising the information collected to increase the possibilities of informing the families about the fate of their members, in particular by:

A. at the latest at the outbreak of an armed conflict, setting up an Information Bureau to collect and transmit information;

B. forwarding to a neutral, impartial and independent humanitarian organisation, such as the ICRC, personal information that may serve to ascertain the fate of persons unaccounted for;

10.5 respecting the relevant standards and principles on the protection of personal information whenever information, including medical and genetic information, is managed and processed.

11. Management of human remains and of information on the dead

The principle responsibility in the proper handling of all the dead without adverse distinction and in providing information to the families with a view to preventing anxiety and uncertainty lies with government authorities and armed groups. Measures that can be taken include:

11.1 ensuring that all feasible measures are taken to identify the human remains of those who died and to record their identity;

11.2 avoiding obstruction of, interference with or impediments to the identification of human remains;

11.3 issuing death certificates;

11.4 ensuring that all those involved respect the legal rules and professional ethics applicable to the management, exhumation and identification of human remains;

11.5 ensuring that forensic specialists, whenever possible, carry out the procedures to exhume and identify human remains;

11.6 ensuring adequate training to all persons collecting information on the dead and handling human remains;

11.7 beginning a process of exhumation and identification only once a framework has been agreed upon by all those concerned and ensuring that the framework includes:

A. the establishment of protocols for exhumation, *ante mortem* data collection, autopsies and identification based on scientifically valid and reliable methods and technologies and/or customary, clinical or circumstantial evidence that are deemed appropriate and which have been previously adopted by the scientific community;

B. appropriate means of associating the communities and the families in the exhumation, autopsy and identification procedures;

C. procedures for handing over the human remains to the family;

11.8 respecting and developing professional ethics and standards of practice for forensic specialists working in international contexts.

12. Support for the families

The material, financial, psychological and legal needs faced by families awaiting clarification of their family members' fate should be addressed by the concerned authorities, when necessary with the support of inter-governmental and non-governmental organisations as well as of the ICRC. Measures that can be taken include:

12.1 providing targeted assistance with the aim, as soon as circumstances allow, of promoting the families' self-sufficiency;

12.2 addressing the legal situation of persons unaccounted for and the consequences for family members, including in terms of property administration, guardianship and parental authority;

12.3 ensuring children special support and protection, and in particular taking measures to reunite unaccompanied children with their families;

12.4 ensuring that the needs of single heads of families be the object of special attention, taking into consideration the specific needs faced by women in such situations;

12.5 ensuring that the families of persons unaccounted for benefit from support programmes in order to adapt to their altered situations and come to terms with the events; psychological support, and whenever necessary and feasible psychiatric treatment, should be provided to those in need; all programmes should be built, as much as possible, on the local health and healing systems;

12.6 encouraging family networks and associations, which can provide a forum for mutual support.

13. Families and mourning

Respect for the dead and for local funeral rites supports peace and social order. The process by which the families are informed that a family member has died and human remains and/or personal effects are returned needs to be well prepared. In addition:

13.1 the dead and the mourning practices of individuals and communities concerned need to be respected in all circumstances;

13.2 commemorations, the planning and organisation of which should be left to the families and communities concerned, need to be supported.

Delivered by Paula Barton

EXPLANATION OF POSITION

LC105

The United States ~~is~~ was pleased to join consensus [redacted] on this resolution addressing the serious problem of forced disappearances. With respect to the instrument being drafted on the disappearances issue, the United States Government supports treaty negotiations that are conducted in one annual two-week formal session, which provides for transparency and inclusiveness of all negotiating partners. The objective must be to produce a well-drafted, well-vetted instrument that reflects consensus, without deadlines for completion of negotiations.

With respect to the resolution itself, The United States does not interpret the disappearances resolution as an attempt to restate or affect provisions of the law with regard to detention.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 13 AUG 2009 200706444

LEGAL SECTION 4 MAY 2005 18:16

UNCLASSIFIED

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* Arbour
Other States - amend

LC147

Distr.
RESTRICTED

E/CN.4/2005/CRP.4
7 March 2005

Original: FRENCH
ENGLISH and FRENCH
ONLY

COMMISSION ON HUMAN RIGHTS
Sixty-first session
14 March – 22 April 2005
Item 11 b) of the provisional agenda

CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF DISAPPEARANCES AND SUMMARY EXECUTIONS

Working paper prepared by the Chairman of the Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, at the end of its 4th session (31 January – 11 February 2005)

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 13 AUG 2009 200706444

UNCLASSIFIED

L0571

RELEASED IN PART
B5, B6

LC48B

PA / L / IO :

BBC correspondent in Geneva Imogen Foulkes asked to interview Amb. Tichenor (on the record) or our legal advisor (on background) for a BBC radio feature of 45 minutes on the draft convention on enforced disappearances. [redacted] B5

Foulkes's question is : What is the U.S. position on the draft convention? She needs this by is Tuesday (6/27). Others to be interviewed include NGO's, as well as other missions - esp. Chile and Argentina given their past experiences.

Foulkes's cellphone number is [redacted] Her email address is [redacted]@bbc.co.uk. B6 B6

Please let PA Geneva know what is decided, and what is done.

- Brooks

****

Brooks Anne Robinson
Counselor for Public Affairs
US Mission, Geneva
tel: 41-22-749-4360
http://geneva.usmission.gov

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 18 AUG 2009 200706444

RELEASED IN PART
B6 LC53

Brancato, Gilda M

From: Imogen Foulkes [redacted@bbc.co.uk] B6
Sent: Wednesday, June 28, 2006 9:35 AM
To: Brancato, Gilda M
Subject: RE: phone call with Legal Adviser Wednesday

Hi Gilda, thank you so much, I'm here and I really appreciate you taking the time. You can call either my cell phone [redacted] B6
[redacted] the latter might give us better quality. As I explained, it's really a background briefing, not recorded and not quoted unless I request that at the time and you agree.
Many thanks and I look forward to talking to you.

Imogen Foulkes
BBC Geneva Correspondent
Office C 205 United Nations, Geneva
tel (+) [redacted] B6
mobile [redacted]

-----Original Message-----
From: Brancato, Gilda M [mailto:BrancatoGM@state.gov]
Sent: Tue 6/27/2006 11:22 PM
To: Imogen Foulkes
Cc: Hata, Marianne J; Robinson, Brooks A; Prosser, Sarah E
Subject: phone call with Legal Adviser Wednesday

Dear Ms. Foulkes - Thank you for being available tomorrow for your requested conversation on background with John Bellinger and me on the draft Convention to Protect All Persons from Forced Disappearances. We are on Mr. Bellinger's schedule to call you at noon Washington time, which would be 6 pm your time. I regret that there was not an earlier time available. We will call you at [redacted] unless you prefer a different number. B6
Look forward to talking with you then.

Thank you, Gilda Brancato, Office of the Legal Adviser, Human Rights and Refugees.

http://www.bbc.co.uk/

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DATE/CASE ID: 18 AUG 2009 200706444

Brancato, Gilda M LC58

RELEASED IN PART
B6

From: Robinson, Brooks A(Geneva)
Sent: Wednesday, June 28, 2006 9:48 AM
To: Brancato, Gilda M; Hata, Marianne J
Cc: Prosser, Sarah E; Kovar, Jeffrey D; DePirro, Velia M; Siekert, Magda S; Cassel, Lynn L; Denig, Paul; Wilbur, Richard M
Subject: About Wed BBC interview with Bellinger Adviser on enforced disappearances convention

Importance: High

Gilda / Marianne:

Thanks for putting this together.

I just called Imogen Foulkes, who confirmed she got Gilda's email (below) and will be ready for the call at noon DC time; she'll send you the land-line number she'd like you to use instead of her cellphone.

FYI: Foulkes said the focus of the program is less on governments / member states, and more on the families affected by enforced disappearances, with examples coming primarily from Latin America and Sri Lanka.

At this point, her characterization of the USG position is along the lines of, "The US has expressed some reservations." The point of interviewing John Bellinger is to get a bit more flesh to that, and to have a USG voice characterize our position - and not have only what human rights NGOs say about the US position.

Also, she said that since the Convention makes mention of secret places of detention, she needs US comment on that.

Foulkes said the first project this will be for is BBC World TV and BBC Asia Today programs, which will probably be broadcast Thursday morning. A version of the story is also likely be broadcast on BBC Radio when the Human Rights Council concludes on the Convention. She thinks we should be able to find the listing (and maybe even video clip and/or transcript) on BBC website tomorrow morning.

- Brooks

****

Brooks Anne Robinson
Counselor for Public Affairs
US Mission, Geneva
tel: 41-22-749-4360
http://geneva.usmission.gov

From: Brancato, Gilda M
Sent: Wednesday, June 28, 2006 12:22 AM
To: [redacted]@bbc.co.uk'
Cc: Hata, Marianne J; Robinson, Brooks A; Prosser, Sarah E
Subject: phone call with Legal Adviser Wednesday

B6

Dear Ms. Foulkes – Thank you for being available tomorrow for your requested conversation on background with John Bellinger and me on the draft Convention to Protect All Persons from Forced Disappearances. We are on Mr. Bellinger's schedule to call you at noon Washington time, which would be 6 pm your time. I regret that there was not an earlier time available. We will call you at [redacted] unless you prefer a different number. Look forward to talking with you then.

Thank you, Gilda Brancato, Office of the Legal Adviser, Human Rights and Refugees.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 19 AUG 2009 200706444

RELEASED IN PART
B6, B5

LC103

From: [redacted]

To: [redacted] LevinJ@state.gov, AswadEM@state.gov, DePirroV@state.gov, KovarJD@state.gov, BartonPJ@state.gov

B6

Cc: BRANCATOGM@state.gov; [redacted]

Subject: Re: Please read/change to disappearances statements

Date: Sun, 18 Jun 2006 16:40:18 +0000

Dear all - Best of luck at the HRC on Monday - it should be a wild ride (though less wild than if we were a member!!) - let us know how we may be of help as the session rolls on. Evelyn and I will aim to be on the morning phone calls, and thank you Evelyn for the Geneva emails above.

Jan and Velia - I sent out to you and a wide group the two HRC forced disappearances convention statements for the USG (oral and written) as well as two background documents by email Friday night. Please be sure to make the following [redacted]

B5

[redacted] and I thank you. Please confirm receipt of this email.

Best of luck! And thanks again, Gilda

---------- Original message ----------

From: [redacted]

B6

Hi, all - I'm just adding Gilda's home e-mail address as she would like to send you guidance on enforced disappearances by Monday morning your time. Best, EA

Check out AOL.com today. Breaking news, video search, pictures, email and IM. All on demand. Always Free.

[Back]

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
DATE/CASE ID: 18 AUG 2009 200706444

RELEASED IN PART
B6

LC137

Brancato, Gilda M (Main State)

From: Brancato, Gilda M (Main State)
Sent: Wednesday, January 19, 2005 5:06 PM
To: Brooks, Waldo W; Johnson, Thomas A; Sicade, Lynn M (DRL); Manning, Denise; Barton, Paula J; Danies, Joel D
Cc: Dorosin, Joshua L; Jacobson, Linda; Harris, Robert K; Barrios, Stacy M; Peay, T Michael; Gale, Hanny; Kovar, Jeffrey D; Witten, Samuel M; Camponovo, Christopher N (DRL); Butler, Michael A (DRL); Lucas, William E; Lagon, Mark P; Kozak, Michael G (DRL); Legal-L-HRR-dl; Deeks, Ashley S
Subject: RE: URGENT/for transmission/USG redlines for forced disappearances treaty

Joel - Attached is a final paper, for Mission Geneva to transmit to the French mission, on critical provisions ("red lines") for the United States Government in negotiation of the forced disappearances treaty text, as requested by the French chair.

Please ensure that the paper is transmitted on Thursday Jan. 20, so that the French ambassador and his staff [redacted] have had the opportunity to review the paper prior to their treaty "pre-negotiation" on January 24, which the USG cannot attend. In this regard, after you submit the English text, it would be immensely helpful to the French ambassador if the mission could provide an informal French translation, if possible. Thank you. B6

Thank you Joel very much, and thank you to those who took the time to review the document on a rush basis.

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-Forced_disapp...

Much appreciated, Gilda

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REVIEW AUTHORITY: JOHN S BLODGETT
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DATE/CASE ID: 18 AUG 2009 200706444

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U.S. Meeting with U.N. Committee Against Torture

LD/A

Opening Remarks
John B. Bellinger, III
Legal Adviser, U.S. Department of State
May 5, 2006

Mr. Chairman, Distinguished Members of the Committee,
Members of Civil Society and Other Observers,

My name is John Bellinger. I am the Legal Adviser of the Department of State, and I serve as head of the United States delegation to the Committee Against Torture.

The United States recognizes the importance of our international legal obligations and the key role this Committee plays in the treaty-monitoring process. The United States greatly appreciates this opportunity to meet with the Committee and to explain the measures we have taken to give effect to the obligations we have undertaken as a State Party to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Secretary of State Rice has emphasized that the United States takes its international obligations seriously. This is reflected in the great lengths to which we have gone to provide you with an extensive report and thorough answers to the many questions you have posed. Our delegation is composed of senior-level officials involved in implementing the Convention. This further demonstrates our commitment not only to fulfilling our obligations under the Convention, but also to engaging in what we expect will be a productive dialogue with you.

At the outset I want to reiterate the United States Government's absolute commitment to upholding our national and international obligations to eradicate torture and to prevent cruel, inhuman, or degrading treatment or punishment worldwide. The President of the United States has made clear that "[t]orture anywhere is an affront to human dignity everywhere" and that "freedom from torture is an inalienable human right." Beyond the protections in our Constitution that Mr. Lowenkron mentioned, United States criminal laws prohibit torture. There are no exceptions to this prohibition. Within the United States, our 50 states and the federal government prohibit conduct that would constitute torture under their civil

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 04 AUG 2009 200706444

and criminal laws. Our Congress has also passed laws that provide for severe federal sanctions, both civil and criminal, against those who engage in torture outside the territory of the United States.

And our laws have gone further. Our focus on eradicating torture and punishing its perpetrators would be incomplete without a parallel effort to help its victims recover from abuses. The United States has comprehensive legislation that enables citizens and non-citizens of the United States who are victims of torture to bring claims for damages against foreign government officials in U.S. federal courts. Congress has also established and funded programs that assist victims of torture, domestically and overseas. The United States has contributed far more than any other country in the world to the United Nations Voluntary Fund for Victims of Torture. For the years 2000 through 2005, U.S. contributions to the Fund totaled more than 32 million dollars, which is approximately 70% of the total contributions during that period.

And late last year, our Congress enacted, and the President signed into law, the Detainee Treatment Act of 2005. The Act included a provision that codified in law our already-existing policy against the use of cruel, inhuman or degrading treatment as that term is defined under the obligations the United States assumed under the Convention. The law provides that no person "in the custody or under the physical control of the United States Government, regardless of nationality or physical location" shall be subjected to cruel, unusual, and inhumane treatment or punishment prohibited by certain provisions of the U.S. Constitution. The enactment of the Detainee Treatment Act highlights our nation's commitment to upholding the values of freedom and humanity on which it was founded.

We know that you will have many questions about actions the U.S. Government has taken in response to the terrorist attacks upon our country on September 11. We welcome this dialogue and we are committed to addressing your questions as fully as possible. As we attempt to answer your questions, I would like to ask the Committee to bear in mind a few considerations.

First, some of the matters that are addressed by your questions are the subject of ongoing litigation, and I hope you will understand that our ability to comment in detail on such matters is necessarily constrained.

Second, like other governments, we are not in a position to comment publicly on alleged intelligence activities.

Third, our Second Periodic report and the written answers to your questions contain extensive information about U.S. detainee operations in Guantanamo Bay, Cuba, and in Afghanistan and Iraq. It is the view of the United States that these detention operations are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations.

As a general matter, countries negotiating the Convention were principally focused on dealing with rights to be afforded to people through the operation of ordinary domestic legal processes and were not attempting to craft rules that would govern armed conflict.

At the conclusion of the negotiation of the Convention, the United States made clear "that the convention . . . was never intended to apply to armed conflicts. . . ." The United States emphasized that having the Convention apply to armed conflicts "would result in an overlap of the different treaties which would undermine the objective of eradicating torture."[1] No country objected to this understanding.

In any case, regardless of the legal analysis, torture is clearly and categorically prohibited under both human rights treaties and the law of armed conflict. The obligation to prevent cruel, inhuman, or degrading treatment or punishment is in Article 16 of the Convention and in similar provisions in the law of armed conflict.

While the United States maintains its view that the law of armed conflict is the *lex specialis* governing the detainee operations that we will discuss, we are pleased to provide extensive information about these operations in a sincere spirit of cooperation with the Committee.

In closing I would like to make two final comments.

First, while I am acutely aware of the innumerable allegations that have appeared in the press and in other fora about various U.S. actions, I would ask you not to believe every allegation that you have heard. Allegations about U.S. military or intelligence activities have become so hyperbolic as to

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[1] U.N. Doc. E/CN.4/1984, March 9, 1984.

be absurd. Critics will now accept virtually any speculation and rumor and circulate them as fact. The U.S. Government has attempted to address as many of these allegations as quickly and as fully as possible: And yet, as much as we would like to deny the numerous inaccurate charges made against our government, because many of the accusations relate to alleged intelligence activities, we have found that we cannot comment upon them except in a general way.

Second, even as we recognize matters of concern to the Committee, we ask that the Committee keep a sense of proportion and perspective. While it is important to deal with problems in a straightforward manner, it does a disservice to the quality of our dialogue, to the treaty monitoring process, to the United States, and, ultimately, to the cause of combating torture around the world to focus exclusively on the allegations and relatively few actual cases of abuse and wrongdoing that have occurred in the context of the U.S. armed conflict with al Qaeda. I do not mean to belittle or shift attention away from these cases in any way. We welcome your questions. But we suggest that this Committee should not lose sight of the fact that these incidents are not systemic. We also suggest that the Committee devote adequate time in these discussions to examining the treatment or conditions that apply domestically with respect to a country of more than 290 million people. The United States is committed to rule of law and has a well-functioning legal system to ensure criminal and civil accountability.

We will now begin to answer the questions you have posed to us. In light of time constraints on this oral presentation, it will be impossible for us to reply in detail to every aspect of your wide-ranging questions. In many cases, we will refer you to the more detailed responses we have provided in writing.

Thank you very much.

FINAL DRAFT
EMBARGOED UNTIL RELEASE

LD14A

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ANNEX 1

PART ONE

INDIVIDUALS UNDER THE CONTROL OF U.S. ARMED FORCES CAPTURED DURING OPERATIONS AGAINST THE TALIBAN, AL-QAIDA, AND THEIR AFFILIATES AND SUPPORTERS

AND

PART TWO

INDIVIDUALS UNDER THE CONTROL OF U.S. ARMED FORCES IN IRAQ CAPTURED DURING MILITARY OPERATIONS

UNITED STATES DEPARTMENT OF STATE
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 20 AUG 2009 200706444

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PART ONE

INDIVIDUALS UNDER THE CONTROL OF U.S. ARMED FORCES CAPTURED DURING OPERATIONS AGAINST AL-QAIDA, THE TALIBAN AND THEIR AFFILIATES AND SUPPORTERS

I. BACKGROUND ON THE WAR AGAINST AL-QAIDA, THE TALIBAN AND THEIR AFFILIATES AND SUPPORTERS

The United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters. There is no question that under the law of armed conflict, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. Like other wars, when they start we do not know when they will end. Still, we may detain combatants until the end of the war.

At the same time, the commitment of the United States to treat detainees humanely is clear and well documented.[1] A discussion of allegations of mistreatment of detainees appears in Part One, III.B and Part Two, III.B.

To understand U.S. actions in continuing to detain members of al-Qaida, the Taliban, and their affiliates and supporters, whether captured committing acts of belligerency themselves or directly supporting hostilities in aid of such enemy forces, the United States submits a brief summary of events in its war against al-Qaida, the Taliban, and their affiliates and supporters.

Summary of Unlawful Belligerent Acts committed by al-Qaida

Although the events of September 11, 2001, indisputably brought conflict to U.S. soil, al-Qaida had engaged in acts of war against the United States long before that date. The reality is that for almost a decade before September 11, 2001, al-Qaida and its affiliates waged a war against the United States, although it did not show the depth of its goals until the morning of September 11, 2001.

In 1996, Osama bin Laden issued a fatwa declaring war on the United States. In February 1998, he repeated the fatwa stating that it was the duty of all Muslims to kill U.S. citizens -- civilian or military -- and their allies everywhere. Six months later, on

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[1] *See* Annex 3. *See also* President's Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003).

August 7, 1998, al-Qaida attacked two U.S. Embassies in Kenya and Tanzania, killing over 200 people and injuring approximately 5,000.

In 1999, an al-Qaida member attempted to carry out a bombing plot at the Los Angeles International Airport during the Millennium Celebrations. U.S. law enforcement foiled this attack, arresting Ahmed Ressam at Port Angeles at the U.S./Canadian border. The United States now knows that in October 2000, al-Qaida directed the attack on a U.S. naval warship, the USS Cole, while docked in the port of Aden, Yemen.[2] This attack killed 17 U.S. sailors and injured 39.

The horrific events of September 11, 2001, are well known. On that day, the United States suffered massive and brutal attacks carried out by nineteen al-Qaida suicide hijackers who crashed three U.S. commercial jets into the World Trade Center and the Pentagon, and were responsible for the downing of one commercial jet in Shanksville, Pennsylvania. These attacks resulted in approximately 3,000 individuals of 78 different nationalities dead or missing.

The United Nations Security Council immediately condemned these terrorist acts as a "threat to international peace and security" and recognized the "inherent right of individual or collective self-defense in accordance with the United Nations Charter." U.N. Sec. Council Res. 1368, U.N. Doc. No. S/RES/1368 (Sept. 12, 2001) (at <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement> (Visited March 1, 2005)); *see* U.N. Sec. Council Res. 1373, U.N. Doc. No. S/RES/1373 (Sept. 28, 2001) (at <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm> (visited March 1, 2005) (deciding that all States shall take certain steps to combat terrorism).

On September 12, 2001, less than 24 hours after the terrorist attacks against the United States, NATO declared the attacks to be an attack against all the 19 NATO member countries. The Allies - for the first time in NATO's history - invoked Article 5 of the Washington Treaty, which states that an armed attack against one or more NATO member countries is an attack against all. NATO followed this landmark decision by implementing practical measures aimed at assisting the United States. (At <http://www.nato.int/terrorism/index.htm#a> (visited February 26, 2005)).

On September 11, 2001, the Organization of American States (OAS) General Assembly immediately "condemned in the strongest terms, the terrorist acts visited upon the cities of New York and Washington, D.C." and expressed "full solidarity" with the government and people of the United States. Immediately thereafter, the foreign ministers of the States Parties to the 1947 Inter-American Treaty of Reciprocal Assistance (the Rio Treaty) declared, "these terrorist attacks against the United States of America are attacks against all American states." The ministers passed a resolution agreeing to "use all legally available measures to pursue, capture, extradite, and punish"

[2] This was the first time that we knew that al-Qaida attacked U.S. military forces directly. There are other instances of violence, however, such as the June 1996 attack on Khobar Towers killing 19 U.S. service members, which bin Laden called a "praiseworthy act of terrorism."

anyone in their territories believed to be involved in terrorist activities. (At <http://www.oas.org/Assembly2001/assembly/gaassembly2000/GAterrorism.htm> (visited February 28, 2005)).

The Prime Minister of Australia also considered the attacks to be an armed attack justifying action in self-defense under Article IV of the ANZUS Treaty. *See* Statement of the Prime Minister, *Application of Anzus Treaty to Terrorist Attacks on the United States*, September 14, 2001, <http://www.pm.gov.au/news/media_releases/2001/media_release1241.htm> (visited February 26, 2005).

The seriousness of the threat al-Qaida and its supporters posed to the security of the United States compelled it to act in self-defense. On October 7, 2001, President Bush invoked the United States' inherent right of self-defense and, as Commander in Chief of the armed forces of the United States, ordered U.S. Armed Forces to initiate action against terrorists and the Taliban regime harboring them in Afghanistan. The U.S. Armed Forces "initiated actions designed to prevent and deter further attacks on the United States . . . [including] measures against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan." Letter from John Negroponte, U.S. Permanent Representative to the U.N., to Richard Ryan, President of the U.N. Security Council, U.N. Doc. No. S/2001/946 (Oct. 7, 2001), 40 I.L.M. 1281 (2001). (At <http://www.un.int/usa/s-2001-946.htm> (visited March 1, 2005)). The attacks commenced when United States and coalition forces launched "strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan . . . designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime." (At <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> (visited March 1, 2005)).

President Bush later stated that "[i]nternational terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces." U.S. Military Order; Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), 66 Fed. Reg. 57,833 (2001), at Section 1(a). (At <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> (visited March 1, 2005)).

Al-Qaida continues to wage armed conflict against the United States and its allies. On December 22, 2001, an al-Qaida associate, Richard Reid, attempted to destroy a U.S. airliner using explosives concealed in his shoe, a plot that the airline passengers foiled. In April 2002, al-Qaida firebombed a synagogue in Djerba, Tunisia, killing at least 20 people and injuring dozens. In June 2002, al-Qaida detonated a bomb outside the U.S. Consulate in Karachi, Pakistan, killing 11 persons and injuring 51. On October 6, 2002, al-Qaida was most likely responsible for a suicide attack against the French oil tanker, the MV Limburg, off the coast of Yemen, killing one and injuring four. On October 8, 2002,

al-Qaida gunmen attacked U.S. Marines on Failaka Island in Kuwait, killing one U.S. Marine and wounding another. On November 28, 2002, in Mombasa, Kenya, al-Qaida detonated a car bomb in front of the Paradise Hotel, killing 15 persons and wounding 40 others. That same day, terrorists launched two anti-aircraft missiles at a civilian aircraft, and narrowly missed downing a Boeing 757 taking off from Mombassa en route to Israel. Al-Qaida claimed responsibility for the attacks.

On May 12, 2003, al-Qaida suicide bombers in Saudi Arabia attacked three residential compounds for foreign workers, killing 34, including 10 U.S. citizens, and injuring 139 others. On November 9, 2003, al-Qaida was responsible for the assault and bombing of a housing complex in Riyadh, Saudi Arabia, that killed 17 and injured 100 others. On November 15, 2003, two al-Qaida suicide truck bombs exploded outside the Neve Shalom and Beth Israel Synagogues in Istanbul, killing 20 and wounding 300 more. On November 20, 2003, two al-Qaida suicide truck bombs exploded near the British consulate and the HSBC Bank in Istanbul, killing 30, including the British Consul General, and injuring more than 309. In December 2003, al-Qaida conducted two assassination attempts against Pakistan President Musharraf.

In 2004, the Saudi-based al-Qaida network and associated extremists launched at least 11 attacks, killing more than 60 people, including 6 Americans, and wounding more than 225. Al-Qaida primarily focused on targets associated with U.S. and Western presence and Saudi security forces located in Riyadh, Yanbu, Jeddah, and Dhahran.

In October 2004, Abu Mus'ab al-Zarqawi announced a merger between his organization, Jama`at al-Tawhid was-al-Jihad or JTJ and Usama Bin Ladin's al-Qaida. Bin Ladin endorsed Zarqawi as his official emissary in Iraq in December. The new organization, Al-Qaida of Jihad organization in the Land of the Two Rivers or QJBR, has the immediate goal of establishing an Islamic state in Iraq. Prior to the merger of the two organizations, Zarqawi's groups had been conducting a number of attacks in Iraq, including the attack responsible for the death of the Secretary-General's Special Representative for Iraq.

In conclusion, it is clear that al-Qaida and its affiliates and supporters have planned and continue to plan and perpetrate armed attacks against the United States and its coalition partners; and they directly target civilians in blatant violation of the laws of war.

II. DETAINEES – CAPTURING, HOLDING, RELEASING, AND/OR TRYING

A. Brief Overview of the Detainee Populations Held by the U.S. Armed Forces at Guantanamo Bay and in Afghanistan

During the course of the war in Afghanistan, the U.S. Armed Forces and allied forces have captured or procured the surrender of thousands of individuals fighting as part of the al-Qaida and Taliban effort. The law of war has long recognized the right to detain combatants until the cessation of hostilities.[3] Detaining enemy combatants prevents them from returning to the battlefield and engaging in further armed attacks against innocent civilians and U.S. forces. Further, detention serves as a deterrent against future attacks by denying the enemy the fighters needed to conduct war. Interrogations during detention enable the United States to gather important intelligence to prevent future attacks during ongoing hostilities.

The first group of enemy combatants captured in the war against al-Qaida, the Taliban, and their affiliates and supporters arrived in Guantanamo Bay, Cuba, in January 2002. The United States has approximately 520 detainees in custody at Guantanamo (see http://www.defenselink.mil/releases/2005/nr20050419-2661.html (visited April 28, 2005)) and slightly more than 500 detainees in Afghanistan. These numbers represent a small percentage of the total number of individuals the United States has detained, at one point or another, in fighting the war against al-Qaida and the Taliban.

Since the war began in Afghanistan (and long before the U.S. Supreme Court decisions in the detainee cases of June 2004), the United States has captured, screened and released approximately 10,000 individuals. It transferred to Guantanamo fewer than ten percent of those screened. The United States only wishes to hold those enemy combatants who are part of or supporting Taliban or al-Qaida forces (or associated forces) and who, if released, would present a threat of reengaging in belligerent acts or directly aiding and supporting ongoing hostilities against the United States or its allies. We have made mistakes: of the detainees we have released, we have later recaptured or killed about 5% of them while they were engaged in hostile action against U.S. forces.

Detainees in Afghanistan and Guantanamo include many senior al-Qaida and Taliban operatives and leaders, in addition to rank-and-file jihadists who took up arms against the United States. The individuals currently held by the United States were at one time actively committing belligerent terrorist acts as part of al-Qaida, the Taliban or their affiliates and supporters who engaged in hostilities against the United States and its allies. Generally, the enemy combatants held at Guantanamo Bay comprise enemy combatants who are part of al-Qaida, the Taliban, or affiliated forces, or their supporters, whether captured committing acts of belligerency themselves or directly supporting hostilities in aid of such enemy forces. Examples of enemy combatants held in U.S. custody include:

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[3] As the Supreme Court recently made clear in *Hamdi*, the United States may detain enemy combatants, including U.S. citizens who are enemy combatants, for the duration of hostilities. The Court held that Congress has authorized such detentions. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639-42 (2003). Notably, hostilities in Afghanistan have not yet ended.

- Terrorists linked to major al-Qaida attacks on the United States, such as the East Africa U.S. Embassy bombings and the USS Cole attack;

- Terrorists who taught or received training on arms and explosives, surveillance, and interrogation resistance techniques at al-Qaida camps;

- Terrorists continuing to express their desire to kill Americans if released. In particular, some have threatened their guards and the families of the guards;

- Terrorists who have sworn personal allegiance ("bayat") to Usama bin Laden; and

- Terrorists linked to several al-Qaida operational plans, including the targeting of U.S. facilities and interests.

Representative examples of specific Guantanamo detainees include:

- An al-Qaida explosives trainer who has provided information on the September 2001 assassination of Northern Alliance leader Ahmad Shah Masoud;

- A Taliban fighter linked to al-Qaida operatives connected to the East Africa U.S. Embassy bombings;

- An individual captured on the battlefield, with links to a financier of the September 11th plots, who attempted to enter the United States in August 2001 to meet hijacker Mohammed Atta;

- Two individuals associated with senior al-Qaida members developing remotely detonated explosive devices for use against U.S. forces;

- A member of an al-Qaida supported terrorist cell in Afghanistan that targeted civilians and was responsible for a grenade attack on a foreign journalist's automobile;

- An al-Qaida member who plotted to attack oil tankers in the Persian Gulf;

- An individual who served as a bodyguard for Usama Bin Laden;

- An al-Qaida member who served as an explosives trainer for al-Qaida and designed a prototype shoe bomb and a magnetic mine; and

- An individual who trained al-Qaida associates in the use of explosives and worked on a plot to use cell phones to detonate bombs.

B. Status of Detainees at Guantanamo Bay and in Afghanistan

On February 7, 2002, shortly after the United States began operations in Afghanistan, President Bush's Press Secretary announced the President's determination that the Geneva Convention "appl[ies] to the Taliban detainees, but not to the al Qaeda international terrorists" because Afghanistan is a party to the Geneva Convention, but al Qaeda -- an international terrorist group -- is not. Statement by the U.S. Press Secretary, The James S. Brady Briefing Room, in Washington, D.C. (Feb. 7, 2002) (at <http://www.state.gov/s/l/38727.htm>(visited March 1, 2005)). Although the President determined that the Geneva Convention applies to Taliban detainees, he determined that, under Article 4, such detainees are not entitled to POW status. *Id.* He explained that:

> Under Article 4 of the Geneva Convention, . . . Taliban detainees are not entitled to POW status . . . .
>
> The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. . . .
>
> Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty.

Statement by the U.S. Press Secretary, The James S. Brady Briefing Room, in Washington, D.C. (Feb. 7, 2002) (at <http://www.state.gov/s/l/38727.htm> (visited March 1, 2005)); *see also*, White House Memorandum - Humane Treatment of al Qaeda and Taliban Detainees, February 7, 2002, at 2(c) & (d) (released and declassified in full on June 17, 2004). (At <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf > (visited March 1, 2005)).

After the President's decision, the United States concluded that those who are part of al-Qaida, the Taliban or their affiliates and supporters, or support such forces are enemy combatants whom we may detain for the duration of hostilities; these unprivileged combatants do not enjoy the privileges of POWs (*i.e.*, privileged combatants) under the Third Geneva Convention.[4] International law, including the Geneva Conventions, has long recognized a nation's authority to detain unlawful enemy combatants without benefit of POW status.[5] *See, e.g.,* INGRID DETTER, THE LAW OF WAR 148 (2000)

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[4] *See, e.g.,* Secretary Rumsfeld's statement that the detainees "are not POWs" and instead are "unlawful combatants." Gerry J. Gilmore, *Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba*, American Forces Press Service, Jan. 27, 2002. (At <http://www.defenselink.mil/news/Jan2002/n01272002_200201271.html> (visited April 11, 2002)).

[5] The U.S. Supreme Court, citing numerous authoritative international sources, has held that unlawful combatants "are subject to capture and detention, [as well as] trial and punishment by military tribunals for acts which render their belligerency unlawful." *See Ex parte Quirin*, 317 U.S. 1, 31 (1942) (citing GREAT BRITAIN, WAR OFFICE, MANUAL OF MILITARY, ch. xiv, §§ 445-451; REGOLAMENTO DI SERVIZIO IN GUERRA, § 133, 3 LEGGI E DECRETI DEL REGNO D'ITALIA (1896) 3184; 7 MOORE, DIGEST OF INTERNATIONAL LAW, § 1109; 2 HYDE, INTERNATIONAL LAW, §§ 654, 652; 2 HALLECK, INTERNATIONAL

("Unlawful combatants . . . though they are a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status."); *see also United States v. Lindh*, 212 F. Supp. 2d. 541, 558 (E.D. Va. 2002) (confirming the Executive branch view that "the Taliban falls far short when measured against the four GPW criteria for determining entitlement to lawful combatant immunity.")

Because there is no doubt under international law as to the status of al-Qaida, the Taliban, their affiliates and supporters, there is no need or requirement to review individually whether each enemy combatant detained at Guantanamo is entitled to POW status. For example, Article 5 of the Third Geneva Convention requires a tribunal in certain cases to determine whether a belligerent (or combatant) is entitled to POW status under the Convention only when there is doubt under any of the categories enumerated in Article 4.[6] The United States concluded that Article 5 tribunals were unnecessary because there is no doubt as to the status of these individuals.

After the decisions of the U.S. Supreme Court in *Rasul v. Bush*, 124 S.Ct. 2686 (2004), and *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), which are described below in Section G, the U.S. Government established a process on July 7, 2004, to conduct Combatant Status Review Tribunals (CSRTs) at Guantanamo Bay. (At <www.defenselink.mil/transcripts/2004/tr200440707-0981.html> (visited March 1, 2005) (DoD Briefing on Combatant Status Review Tribunal, dated July 7, 2004)). Consistent with the Supreme Court decision in *Rasul*, these tribunals supplement the prior screening procedures and serve as fora for detainees to contest their designation as enemy combatants and thereby the legal basis for their detention. The tribunals were established in response to the Supreme Court decision in *Rasul* and draw upon guidance contained in the U.S. Supreme Court decision in *Hamdi* that would apply to citizen-enemy combatants in the United States.

C. Combatant Status Review Tribunals (CSRTs) for Detainees at Guantanamo Bay

Between August 2004 and January 2005, various Combatant Status Review Tribunals (CSRTs) have reviewed the status of all individuals detained at Guantanamo, in a fact-based proceeding, to determine whether the individual is still classified as an enemy combatant. As reflected in the Order establishing the CSRTs, an enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or

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LAW (4th Ed. 1908) § 4; 2 OPPENHEIM, INTERNATIONAL LAW, § 254; HALL, INTERNATIONAL LAW, §§ 127, 135; BATY & MORGAN, WAR, ITS CONDUCT AND LEGAL RESULTS (1915) 172; BLUNTSCHI, DROIT INTERNATIONAL, §§ 570 bis).

[6] Article 5 states:
"Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the *protection* of the present Convention *until* such time as their status has been determined by a competent tribunal." [emphasis added]. Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, Signed at Geneva on Aug. 12, 1949; entered into force on Oct. 21, 1950 (entered into force for the United States, Feb. 2, 1956).

associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." CSRT Order ¶B (at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (visited March 1, 2005)). Each detainee has the opportunity to contest such designation. The Deputy Secretary of Defense appointed the Secretary of the Navy, The Honorable Gordon England, to implement and oversee this process. On July 29, 2004, Secretary England issued the implementation directive for the CSRTs, giving specific procedural and substantive guidance. (At <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> (visited March 1, 2005)). On July 12-14, 2004, the United States notified all detainees then at Guantanamo of their opportunity to contest their enemy combatant status under this process, and that a Federal court has jurisdiction to entertain a petition for habeas corpus brought on their behalf. The Government has also provided them with information on how to file habeas corpus petitions in the U.S. court system. (At http://www.defenselink.mil/news/Dec2004/d20041209ARB.pdf (visited March 1, 2005)). When the Government has added new detainees, it has also informed them of these legal rights.

CSRTs offer many of the procedures contained in US Army Regulation 190-8. The Supreme Court specifically cited these Army procedures as sufficient for U.S. citizen-detainees entitled to due process under the U.S. Constitution. For example:

- Tribunals are composed of three neutral commissioned officers, plus a non-voting officer who serves as a recorder;
- Decisions are by a preponderance of the evidence by a majority of the voting members who are sworn to execute their duties impartially;
- The detainee has the right to (a) call reasonably available witnesses, (b) question witnesses called by the tribunal, (c) testify or otherwise address the tribunal, (d) not be compelled to testify, and (e) attend the open portions of the proceedings;
- An interpreter is provided to the detainee, if necessary; and
- The Tribunal creates a written report of its decision that the Staff Judge Advocate reviews for legal sufficiency. See CSRT Implementation Memorandum, July 29, 2004 (at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> (visited March 1, 2005)).

Unlike an Article 5 tribunal, the CSRT guarantees the detainee *additional* rights, such as the right to a personal representative to assist in reviewing information and preparing the detainee's case, presenting information, and questioning witnesses at the CSRT. The rules entitle the detainee to receive an unclassified summary of the evidence in advance of the hearing in the detainee's native language, and to introduce relevant documentary evidence. *See* CSRT Order ¶g(1); Implementation Memorandum Encl. (1)

¶¶ F(8), H (5); CSRT Order ¶g(10); Implementation Memorandum Encl. (1) ¶ F (6). In addition, the rules require the Recorder to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee should not be designated as an enemy combatant." *See* Implementation Memorandum Encl. (2), ¶B(1). The detainee's Personal Representative also has access to the government files and can search for and provide relevant evidence that would support the detainee's position.

A higher authority (the CSRT Director) automatically reviews the result of every CSRT. He has the power to return the record to the tribunal for further proceedings if appropriate. *See* CSRT Order ¶ h; Implementation Memorandum Encl. (1) ¶¶ I (8). The CSRT Director is a two-star admiral--a senior military officer. CSRTs are transparent proceedings. Members of the media, the International Committee of the Red Cross (ICRC), and non-governmental organizations may observe military commissions and the unclassified portions of the CSRT proceedings. They also have access to the unclassified materials filed in Federal court. Every detainee now held at Guantanamo Bay has had a CSRT hearing. New detainees will have the same rights.

As of March 29, 2005, the CSRT Director had taken final action in all 558 cases. Thirty-eight detainees were determined no longer to be enemy combatants; twenty-three of them have been subsequently released to their home countries, and at the time of this Report's submission, arrangements are underway for the release of the others. (At <http://www.defenselink.mil/releases/2005/nr20050419-2661.html> (visited April 25, 2005)).

D. Assessing Detainees for Release/Transfer

1. Guantanamo Bay

The detention of each Guantanamo detainee is reviewed annually by an Administrative Review Board (ARB), established by an order on May 11, 2004 (*Review Procedure Announced for Guantanamo Detainees*, Department of Defense Press Release, May 18, 2004) (at <http://www.defenselink.mil/releases/2004/nr20040518-0806.html> (visited February 28, 2005)) and supplemented by an implementing directive on September 14, 2004. See *Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (at <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf> (visited February 28, 2005)).

The ARB assesses whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention. The process permits the detainee to appear in person before an ARB panel of three military officers to explain why the detainee is no longer a threat to the United States or its allies, and to provide informationto support the detainee's release.

Each enemy combatant is provided with an unclassified written summary of the primary factors favoring the detainee's continued detention and the primary factors

favoring the detainee's release or transfer from Guantanamo. The enemy combatant is also provided with a military officer to provide assistance throughout the ARB process. In addition, the review board will accept written information from the government of nationality, and from the detainee's relatives through that government, as well as from counsel representing detainees in habeas corpus proceedings. Based on all of this information, as well as submissions by U.S. Government agencies, the ARB by majority vote makes a written assessment on whether there is reason to believe that the enemy combatant no longer poses a threat to the United States or its allies in the ongoing armed conflict and any other factors bearing on the need for continued detention. The Board also makes a written recommendation on whether detention should be continued. The recommendations of the board are reviewed by a judge advocate for legal sufficiency and then go to the Designated Civilian Official (currently Secretary of the Navy Gordon England), who decides whether to release, transfer or continue to detain the individual.

As of April 26, 2005, the Department of Defense has announced its intent to conduct Administrative Review Board reviews for 254 detainees; it has informed the detainees' respective host countries and asked them to notify the detainees' relatives; and it has invited them to provide information for the hearings. (At <www.defenselink.mil/news/combatant_Tribunals.html> (visited April 28, 2005)). The first Annual Administrative Review Board began on December 14, 2004, and 91 Administrative Review Boards have been conducted as of April 26, 2005.

The United States has no interest in detaining enemy combatants any longer than necessary. On an ongoing basis, even prior to the Annual Administrative Review Boards, the U.S. Government has reviewed the continued detention of each enemy combatant. The United States releases detainees when it believes they no longer continue to pose a threat to the United States and its allies. Furthermore, the United States has transferred some detainees to the custody of their home governments when those governments 1) are prepared to take the steps necessary to ensure that the person will not pose a continuing threat to the United States or its allies; and/or 2) are prepared to investigate or prosecute the person, as appropriate. The United States may also transfer a detainee to a country other than the country of the detainee's nationality, when the country requests transfer for purposes of criminal prosecution.

As of April 26, 2005, the United States has transferred 234 persons from Guantanamo — 169 transferred for release and 66 transferred to the custody of other governments for further detention, investigation, prosecution, or control. Of the 66 detainees who were transferred to the control of other governments, 29 were transferred to Pakistan, seven to Russia, five to Morocco, nine to the United Kingdom, six to France, four to Saudi Arabia, two to Belgium, one to Kuwait, one to Spain, one to Australia, and one to Sweden.

In some situations, it has been difficult to find locations to which to transfer safely detainees from Guantanamo when they do not want to return to their country of nationality or when they have expressed reasonable fears if returned. Until the United States can find a suitable location for the safe release of a detainee, the detainee remains

in U.S. control.

It is often difficult to assess whether an individual released from Guantanamo will return to combat and pose a threat to the United States or its allies. Determining whether an individual truly poses a threat is made more difficult by information that is often ambiguous or conflicting, as well as by denial and deception efforts on the part of the individual detainees. Based on information seized at al-Qaida camps in Afghanistan and elsewhere, the United States is aware that Taliban and al-Qaida fighters are trained in counter-interrogation techniques and instructed to claim, for example, that they are cooks, religious students, or teachers. It has proven challenging to ascertain the true facts and has required a great deal of time to investigate fully the background of each detainee. There is a concerted, professional effort to assess information from the field, from interrogations, and from other detainees. In spite of rigorous U.S. review procedures, some detainees who were released from Guantanamo have returned to fighting in Afghanistan against U.S. and allied forces. Based on a variety of reports, as many as twelve individuals have returned to terrorism upon return to their country of citizenship.

Some examples of detainees who have returned to the fight include:

- A former Guantanamo detainee who reportedly killed an Afghan judge leaving a mosque in Afghanistan;
- A former Guantanamo detainee (released by the United States in January 2004) who was recaptured in May 2004 when he shot at U.S. forces and was found to be carrying a letter of introduction from the Taliban; and
- Two detainees (released from Guantanamo in May 2003 and April 2004, respectively) who were killed in the summer of 2004 while engaged in combat operations in Afghanistan.

The fact that some detainees upon their release are returning to combat underscores the ongoing nature of the armed conflict with al-Qaida and the practical reality that in defending itself against al-Qaida, the United States must proceed very carefully in its determination of whether a detainee no longer poses a threat to the United States and its allies.

2. Afghanistan

Detainees under Department of Defense control in Afghanistan are subject to a review process that first determines whether an individual is an enemy combatant. The detaining Combatant Commander, or designee, shall review the initial determination that the detainee is an enemy combatant. This review is based on all available and relevant information available on the date of the review and may be subject to further review based upon newly discovered evidence or information. The Commander will review the initial determination that the detainee is an enemy combatant within 90 days from the time that a detainee comes under DoD control. After the initial 90-day status review, the

detaining combatant commander, on an annual basis, is required to reassess the status of each detainee. Detainees assessed to be enemy combatants under this process remain under DoD control until they no longer present a threat. The review process is conducted under the authority of the Commander, U.S. Central Command (USCENTCOM). If, as a result of the periodic Enemy Combatant status review (90-day or annual), a detaining combatant commander concludes that a detainee no longer meets the definition of an enemy combatant, the detainee is released.

E. Transfers or Releases to Third Countries

After it is determined that a detainee no longer continues to pose a threat to the U.S. security interests or that a detainee no longer meets the criteria of enemy combatant and is eligible for release or transfer, the United States generally seeks to return the detainee to his or her country of nationality. The DoD has transferred detainees to the control of their governments of nationality when those governments are prepared to take the steps necessary to ensure that the detainees will not pose a continuing threat to the United States and only after the United States receives assurances that the government concerned will treat the detainee humanely and in a manner consistent with its international obligations. A detainee may be considered for transfer to a country other than his country of nationality, such as in circumstances where that country requests transfer of the detainee for purposes of criminal prosecution. Of particular concern to the United States is whether the foreign government concerned will treat the detainee humanely, in a manner consistent with its international obligations, and will not persecute the individual because of his race, religion, nationality, membership in a social group, or political opinion. In some cases, however, transfers cannot easily be arranged. U.S. policy is not to transfer a person to a country if it is determined that it is more likely than not that the person will be tortured or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds. If a case were to arise in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government unless the concerns were satisfactorily resolved. Circumstances have arisen in the past where the Department of Defense elected not to transfer detainees to their country of origin because of torture concerns.

With respect to the application of these policies to detainees at Guantanamo Bay, the U.S. Government in February of 2005 filed factual declarations with a Federal court for use in domestic litigation. These declarations describe in greater detail the application of the policy described above as it applies to the detainees at Guantanamo Bay, and are attached as Tab 1 to this Annex.

F. Military Commissions to Try Detainees Held at Guantanamo Bay

In 2001, the President authorized military commissions to try those detainees charged with war crimes. *See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,* November 13, 2001 (at <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> (visited February 28, 2005)). The Geneva Conventions recognize military fora as legitimate and appropriate to try those persons who engage in belligerent acts in contravention of the law of war. The United States has used military commissions throughout its history. During the Civil War, Union Commanders conducted more than 2,000 military commissions. Following the Civil War, the United States used military commissions to try eight conspirators (all U.S. citizens and civilians) in President Lincoln's assassination. During World War II, President Roosevelt used military commissions to prosecute eight Nazi saboteurs for spying (including at least one U.S. citizen). A military commission tried Japanese General Yamashita for war crimes committed while defending the Philippine Islands. In addition to the international war crimes tribunals, the Allied Powers, such as England, France, and the United States, tried hundreds of lesser-known persons by military commissions in Germany and the Pacific theater after World War II.

To date, the President has designated fifteen individuals as eligible for prosecution by military commission. Of those, the United States has since transferred three to their country of nationality, which has released them. Four Guantanamo detainees have been charged and have had preliminary hearings before a military commission. These four cases are currently in abeyance, pending appellate court review of the recent U.S. District Court for the District of Columbia's decision of November 8, 2004, in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).

The U.S. District Court ruled that Hamdan, the petitioner, may not be tried by military commission unless and until a competent tribunal determines he is not entitled to Prisoner of War status under the Third Geneva Convention and until a procedural rule is altered regarding closure of the commission hearing to the accused. On November 12, 2004, the U.S. Government appealed that ruling to the U.S. Court of Appeals for the District of Columbia Circuit. The U.S. Court of Appeals ordered an expedited case schedule and held oral argument on April 7, 2005.

In light of this pending case, it will not be possible to address the Military Commissions in further detail at this time.

G. Access to U.S. Courts

In 2003, petitions for writ of habeas corpus were filed in U.S. courts on behalf of some of the detainees at Guantanamo seeking review of their detention. On June 28, 2004, the United States Supreme Court, the highest judicial body in the United States, issued two decisions pertinent to many enemy combatants. One of the decisions directly pertained to enemy combatants detained at Guantanamo Bay, and the other pertained to a citizen enemy combatant held in the United States. *See Rasul v. Bush,* 124 S.Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004); *see also Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004) (involving a decision on which U.S. Federal court has jurisdiction over

habeas action). In *Rasul v. Bush,* the Supreme Court decided only the question of jurisdiction. The Court ruled that the U.S. District Court for the District of Columbia had jurisdiction to consider habeas challenges to the legality of the detention of foreign nationals at Guantanamo. 124 S.Ct. at 2698. The Court held that aliens apprehended abroad and detained at Guantanamo Bay, Cuba, as enemy combatants, "no less than citizens," could invoke the habeas jurisdiction of a district court. *Id.* at 2696. The Supreme Court left it to the lower courts to decide "[w]hether and what further proceedings may become necessary after [the United States Government parties] make their response to the merits of petitioners' claims." *Id.* at 2699. In *Hamdi v. Rumsfeld,* the Supreme Court held that the United States is entitled to detain enemy combatants, even American citizens, until the end of hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms. The Court recognized the detention of such individuals is such a fundamental and accepted incident of war that it is part of the "necessary and appropriate" force that Congress authorized the President to use against nations, organizations, or persons associated with the September 11 terrorist attacks. 124 S.Ct. at 2639-42 (plurality op.); *id., at 2679 (Thomas J.,* dissenting).

A plurality of the Court addressed the entitlements of a U.S. citizen designated as an enemy combatant and held that the Due Process Clause of the U.S. Constitution requires "notice of the factual basis for [the citizen-detainee's] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 2648. A plurality of the Court observed: "There remains the possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," and proffered as a benchmark for comparison the regulations titled, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, §1-6 (1997). *Id.* at 2651

These Supreme Court rulings have resulted in further proceedings at the Federal trial and appellate court levels. As of April 27, 2005, there are 55 habeas corpus cases involving 153 Guantanamo detainees pending before ten district court judges. These include thirty-nine Yemenis, twenty-six Saudis, eleven Kuwaitis, eleven Moroccans, ten Algerians, six Bahrainis, seven Tunisians, five Jordanians, five Sudanese, four Syrians, four Mauritanians, three Chinese, three Egyptians, three Libyans, two each from Palestine and Chad; and one from each of the following: Qatar, Kazakhstan, Tajikistan, Uganda, Iraq, Australia, Canada, Somalia, Turkey, Afghanistan, Pakistan and Ethiopia. Additionally, a habeas corpus petition has been filed under the name of "John Doe" on behalf of all detainees who do not currently have habeas corpus petitions pending. Other detainees may have since filed habeas corpus petitions. Due to the recent transfer of four British, one Australian and one Kuwaiti detainee, the government has moved to dismiss their petitions. Those motions are still pending.

The various habeas corpus petitions seek the detainees' release, claiming that the detentions violate the Fifth, Sixth, Eighth and Fourteenth Amendments, and the War Powers and Article I Suspension clauses of the Constitution. Some of the petitions have also alleged claims under the Administrative Procedure Act, the Alien Tort Statute, Army

Regulation 190-8, customary international law, and international treaties including the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Geneva Conventions of 1949.

During the course of these habeas corpus proceedings, the Federal courts have reviewed or are reviewing numerous motions and other requests including motions to dismiss the petitions, motions to enjoin tribunal proceedings, including military commission prosecutions and transfers to foreign governments and requests for discovery. For example, in August 2004, the Federal District Court in the cases of *Gherebi v. Bush*, No. 04-CV-1164-RBW (D.D.C.) (unpublished ruling of Jul. 27, 2004), *Boumediene v. Bush*, No. 04-CV-1166-RJL (D.D.C.) (unpublished ruling of Aug. 3, 2004), and *El-Banna v. Bush*, No. 04-CV-1144-RWR (D.D.C.) (unpublished ruling of August 6, 2004) separately denied requests by petitioners for relief enjoining ongoing CSRT proceedings. *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005). The judges ruled that the courts could address any alleged defect in the CSRT proceedings if petitioners later sought any relief with regard to their detention. Further, pursuant to briefing orders issued by Judge Green, the senior district court judge who was, until recently, coordinating the numerous detainee cases, the government filed factual returns in a number of the cases, indicating both the classified and unclassified factual bases for the enemy combatant status of each petitioner-detainee based on the record of CSRT proceedings. The court has full access to the records of the CSRT proceedings.

In January 2005, two district court judges reached conflicting decisions regarding the constitutional rights of enemy combatants at Guantanamo. In *Khalid v. Bush*, Judge Richard J. Leon determined that Congress had authorized the President to capture and detain enemy combatants and that the enemy combatants at Guantanamo do not have rights under the U.S. Constitution and that there was no viable theory under federal law, international treaties or customary international law that would make their detention unlawful. 355 F.Supp.2d 311 (D.D.C. 2005). In contrast, Judge Joyce Hens Green ruled that at least certain rights under the U.S. Constitution apply at Guantanamo and that that CSRT procedures were unconstitutional, as they did not comport with the Fifth Amendment right to due process. *In re Guantanamo Detainee Cases*, 2005 WL 195356 (D.D.C.) (Jan. 31, 2005). Judge Green ruled that if the detainee was not going to have access to classified material, then counsel with access to such material should be permitted to advocate for the detainee at the CSRT. She also found that the inquiry conducted had been inadequate in cases where detainees alleged that coercion or torture was used during interrogations.

The parties have appealed two conflicting decisions to the U.S. Court of Appeals for the District of Columbia Circuit on an expedited basis.

In conclusion, domestic judicial proceedings are ongoing, which may address allegations of mistreatment that have arisen with respect to Guantanamo Bay. As described elsewhere in this report, individuals who engage in torture or other physical abuse of detainees are subject to prosecutions and other sanctions under U.S. law.

III. DETAINEES – TREATMENT

A. Description of Conditions of Detention at Department of Defense Facilities

1. Guantanamo Bay

The Department of Defense has released to the public several photographs of the detention facilities in Guantanamo Bay. (At <http://www.defenselink.mil/home/features/gtmo> (visited March 17, 2005)). These photographs reflect U.S. policy and practices regarding treatment of detainees at Guantanamo Bay, including the U.S. requirement that all detainees receive adequate housing, recreation facilities, and medical facilities.

Detainees receive:

- Three meals per day that meet cultural dietary requirements;
- Adequate shelter, including cells with beds, mattresses, and sheets;
- Adequate clothing, including shoes, uniforms, and hygiene items;
- Opportunity to worship, including prayer beads, rugs, and copies of the Koran;
- The means to send and receive mail;
- Reading materials, including allowing detainees to keep books in their cells; and
- Excellent medical care.

All enemy combatants get state-of-the art medical and dental care that is comparable to that received by U.S. Armed Forces deployed overseas. Wounded enemy combatants are treated humanely and nursed back to health, with amputees fitted with modern prosthetics.

Detainees write to and receive mail from their families and friends. Detainees who are illiterate, but trustworthy enough for a classroom setting, are taught to read and write in their native language so they, too, can communicate with their families and friends.

Enemy combatants at Guantanamo may worship as desired and in accordance with their beliefs. They have access to a Koran and other prayer accessories. Traditional

garb is available for some detainees.

Where security permits, detainees are eligible for communal living in a new Medium Security Facility, with fan-cooled dormitories, family-style dinners, and increased outdoor recreation time, where they play board games like chess and checkers, and team sports like soccer.

The United States permits the International Committee of the Red Cross to visit privately with every detainee in DoD control at Guantanamo. Communications between the U.S. Government and the ICRC are confidential.

In addition, legal counsel representing the detainees in habeas corpus cases have visited detainees at Guantanamo since late August 2004. As of late April 2005, counsel in nineteen cases had personally met with the 74 detainees they represent, and counsel in seventeen of those cases have made repeat visits to Guantanamo. To date, every request by American counsel of record in the habeas cases to visit detainees at Guantanamo has been granted, after that counsel has received the requisite security clearance and agreed to the terms of the protective order issued by the Federal court. The Government does not monitor these meetings (or the written correspondence between counsel and detainees), which occur in a confidential manner. The Government also allows foreign and domestic media to visit the facilities.

2. Afghanistan

The Department of Defense holds individuals in Afghanistan in a safe, secure, and humane environment. The primary focus of Department of Defense detainee operations in Afghanistan is to secure detainees from harm, recognizing the reality that the U.S. Armed Forces continue to engage in combat in Afghanistan.

The Department of Defense operates theater internment facilities at Kandahar and Bagram. These facilities house enemy combatants identified in the war against al-Qaida, the Taliban and their affiliates. The Department of Defense has registered with the ICRC individuals held under its control in Afghanistan. ICRC has access to these DoD facilities and conducts private interviews with detainees. In addition, the U.S. Armed Forces operates forward operating bases that, from time to time, may house on a temporary basis individuals detained because of combat operations against al-Qaida, Taliban, and affiliated forces.

The DoD provides detainees in Afghanistan with adequate food, shelter, clothing, and opportunity to worship. In addition, DoD initiatives will increase available resources for literacy and education training. The DoD also gives Afghani detainees information regarding the establishment of the new Afghan government, as well as a copy of the Afghan Constitution.

The U.S. Government is also in a process of improving the detention facilities at

both Bagram and Kandahar. Improved facilities should be available to detainees later in 2005.

B. Allegations of Mistreatment of Persons Detained by the Department of Defense

1. Introduction

The United States is well aware of the concerns about the mistreatment of persons detained by the Department of Defense in Afghanistan and at Guantanamo Bay, Cuba. Indeed, the United States has taken and continues to take all allegations of abuse very seriously. Specifically, in response to specific complaints of abuse in Afghanistan and at Guantanamo Bay, Cuba, the Department of Defense has ordered a number of studies that focused, *inter alia,* on detainee operations and interrogation methods to determine if there was merit to the complaints of mistreatment.

Although these extensive investigative reports have identified problems and proffered recommendations, none of them found that any governmental policy directed, encouraged or condoned these abuses. The reports pertaining to Guantanamo Bay are summarized in Section B.2 below and those pertaining to Afghanistan are summarized in Section B.3 below.

In general, for both Afghanistan and Guantanamo Bay, these reports have assisted in identifying and investigating all credible allegations of abuse. When a credible allegation of improper conduct by Department of Defense personnel surfaces, it is reviewed, and when factually warranted, investigated. As a result of investigation, administrative, disciplinary, or judicial action is taken as appropriate. Those credible allegations were and are now being resolved within the Combatant Command structure.

Concerns have also been generated by an August 1, 2002, memorandum prepared by the Office of Legal Counsel (OLC) at the U.S. Department of Justice (DOJ), on the definition of torture and the possible defenses to torture under U.S. law and a Department of Defense Working Group Report on detainee operations, dated April 4, 2003, the latter of which was the basis for the Secretary of Defense's approval of certain counter resistance techniques on April 16, 2003. The 2002 DOJ OLC memorandum was withdrawn on June 22, 2004 and replaced with a December 30, 2004, memorandum interpreting the legal standards applicable under 18 U.S.C. 2340-2340A, also known as the Federal Torture Statute. *See* Annex 2.

On March 10, 2005 Vice Admiral Church (the former U.S. Naval Inspector General) released an executive summary of his report, which included an examination of this issue. His Report examined the precise question of "whether DoD had promulgated interrogation policies or guidance that directed, sanctioned or encouraged the abuse of detainees." Church Report, Executive Summary, at 3, released March 10, 2005 (relying upon data available as of September 30, 2005) (at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (visited March 23,

2005)). In his Report, he wrote that "this was not the case," *id.*, finding that "it is clear that *none* of the approved policies – no matter which version the interrogators followed – would have permitted the types of abuse that occurred." *Id.*, at 15. In response to intensive questioning before the U.S. Senate Armed Services Committee as to whether the 2002 DOJ memo or subsequently authorized interrogation practices had contributed to individual soldiers committing abuses, he responded that "clearly there was no policy, written or otherwise, at any level, that directed or condoned torture or abuse; there was no link between the authorized interrogation techniques and the abuses that, in fact, occurred." Transcript at 7. Although Vice Admiral Church's investigation is the most comprehensive to date on this issue, it was consistent with the findings of earlier investigations on this point. *See, e.g.*, Army Inspector General Assessment, released July 2004 (at <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/index.html > (visited March 1, 2005)).

Vice Admiral Church's finding was also consistent with earlier statements by high-level U.S. officials, including by the previous White House Counsel Alberto Gonzales, who had stated:

> The administration has made clear before and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws.
>
> . . . .
>
> . . . [L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable.

Press Briefing by White House Counsel Judge Alberto Gonzales, DoD General Counsel William Haynes, DoD Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander, June 22, 2004, (at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (visited February 28, 2005)).

Subsequent to the release of the December 2004 DOJ memo interpreting the Federal Torture Statute, the Deputy Secretary of Defense ordered a "top-down" review within the Department to ensure that the policies, procedures, directives, regulations, and actions of the department comply fully with the requirements of the new Justice Department Memorandum.[7] The Office of Detainee Affairs in the Office of the Under Secretary of Defense for Policy coordinates this process of review.

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[7] Department of Defense Memorandum (Jan. 27, 2005).

2. Reports of Abuses, Summary of Abuse Investigations and Actions to Hold Persons Accountable - Guantanamo Bay

As described above in the introductory section, there have been multiple reports/investigations concerning the treatment of detainees at Guantanamo Bay. For example, the Naval Inspector General reviewed the intelligence and detainee operations at Guantanamo Bay to ensure compliance with DoD orders and policies. The review, conducted in May 2004, concluded that the Secretary of Defense's directions with respect to humane treatment of detainees and interrogation techniques were fully implemented. The Naval Inspector General documented eight minor infractions involving contact with detainees as stated below (two additional incidents occurred after this investigation was completed). In each of those cases, the chain of command took swift and effective action.. Administrative actions ranging from admonishment to reduction in grade.[8]

In a subsequent report, the Naval Inspector General engaged in a comprehensive review of DoD detention operations and detainee interrogation operations covering not only Guantanamo, but Iraq and Afghanistan. This report expanded upon his earlier finding with respect to interrogation operations at Guantanamo, noting that while "there have been over 24,000 interrogation sessions since the beginning of interrogation operations, there are only three cases of closed, substantiated interrogation-related abuse, all consisting of minor assaults in which MI interrogators, exceeded the bounds of approved interrogation policy." Church Report, Executive Summary, at 14, released March 10, 2005 (using data as of September 30, 2004) (at <www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (visited March 23, 2005)). He highlighted that "[w]e found no link between approved interrogation techniques and detainee abuse." *Id.*, at 13.

One investigation remains ongoing and will be completed soon. On December 29, 2004, the Commander U.S. Southern Command appointed a General Officer to investigate the facts and circumstances surrounding allegations of detainee abuse contained in documents recently released under the Freedom of Information Act, including those released by the Federal Bureau of Investigation, and to conduct an inquiry into any credible allegation contained in those documents.

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[8] *See* 10 U.S.C. § 815. The intent of nonjudicial punishment (colloquially referred to as an "Article 15" or "Captain's Mast") is to provide the commander with enough latitude to resolve a disciplinary problem appropriately in order to maintain "good order and discipline" within the unit. Nonjudicial punishment is designed for minor offenses. It allows a commander to correct, educate, and reform offenders while simultaneously preserving the service member's record of service from unnecessary stigma and furthering military efficiency. A service member is provided appropriate due process rights when considered for nonjudicial punishment. The service member has the right to consult with counsel, the right to remain silent, turn down the nonjudicial punishment and, in turn, possibly face trial by court-martial (unless attached to or embarked upon a vessel), request an open hearing, a spokesperson to speak on the service member's behalf at the hearing, examine all available evidence, present evidence and call witnesses, and, if nonjudicial punishment is imposed, the right to appeal.

Therefore, although there have been allegations of serious abuse of detainees at Guantanamo Bay, the United States has not found evidence substantiating such claims. Instead, it has identified 10 substantiated incidents[9] of misconduct at Guantanamo:

- A female interrogator inappropriately touched a detainee on April 17, 2003 by running her fingers through the detainee's hair, and made sexually suggestive comments and body movements, including sitting on the detainee's lap, during an interrogation. The female interrogator received a written admonishment and additional training.

- On April 22, 2003, an interrogator assaulted a detainee by directing military policemen repeatedly to bring the detainee from a standing to a prone position and back. A review of medical records indicated superficial bruising to the detainee's knees. The interrogator received a letter of reprimand.

- A female interrogator, at an unknown date, in response to being spit upon by a detainee, assaulted the detainee by wiping red dye from a red magic marker on the detainee's shirt and telling the detainee that the red stain was blood. The interrogator received a verbal reprimand for her behavior.

- In October 2002, an interrogator used duct tape to tape shut the mouth of a detainee who was being extremely disruptive during an interrogation. The tape did not harm the detainee and the interrogator received a verbal reprimand for his behavior.

- A military policeman (MP) assaulted a detainee on September 17, 2002, by attempting to spray him with a hose after the detainee had thrown an unidentified, foul-smelling liquid on the MP. The MP received non-judicial punishment that included seven days restriction and reduction in grade from Specialist (E-4) to Private First Class (E-3).

- On March 23, 2003, after a detainee threw unidentified liquid on an MP, the MP sprayed the detainee with pepper spray. The MP declined non-judicial punishment,[10] and he was subsequently tried by special court-martial where he was acquitted of all charges.

- On April 10, 2003, after a detainee had struck an MP in the face (causing the MP to lose a tooth) and bitten another MP, the MP struck the detainee with a handheld radio. This MP was given non-judicial punishment, received 45 days extra-duty, and was reduced in grade from Specialist (E-4) to Private

[9] There has also been an investigation in response to a request by the Australian Government following claims of mistreatment of two Australian detainees at Guantanamo. Although not initially substantiated, the Naval Criminal Investigative Service is conducting an independent investigation into these allegations of abuse.

[10] See description, *id.*

First Class (E-3).

- On January 4, 2004, an MP platoon leader received an initial allegation that one of his guards had thrown cleaning fluid on a detainee and later made inappropriate comments to the detainee. The platoon leader, however, did not properly investigate the allegation or report it to his chain of command. The initial allegation against the guard ultimately turned out to be substantiated. The MP was given non-judicial punishment and received forfeiture of pay of $150 per month for two months and reduction in grade from Private (E-2) to Private (E-1). The platoon leader was issued a reprimand for dereliction of duty.

- On February 10, 2004, an MP inappropriately joked with a detainee, and dared the detainee to throw a cup of water on him. After the detainee did so, the MP threw a cup of water on the detainee. The MP was removed from further duty because of these inappropriate actions.

- On February 15, 2004, a barber intentionally gave two detainees unusual haircuts, including an "inverse Mohawk," in an effort to frustrate the detainees' request for similar haircuts as a sign of unity. The barber and his company commander were both counseled because of this incident.

The above list of substantiated abuses at Guantanamo Bay demonstrates that misconduct will not be tolerated.

3. Reports of Abuses, Summary of Abuse Investigations and Actions to Hold Persons Accountable – Afghanistan

The United States acted swiftly in response to allegations of serious abuses by Department of Defense personnel in Afghanistan. There have been 23 investigations into allegations of abuse of detainees in Afghanistan, of which 22 were substantiated and one was unsubstantiated. Seven investigations are open and continue to be investigated. As of March 1, 2005, penalties have varied and include 2 courts-martial, 10 non-judicial punishments, and two reprimands. A number of actions are still pending.

What follows are a few examples of substantiated abuses and a summary of the status:

- The investigations into the death of two detainees (Mr. Mullah Habibullah and Mr. Dilawar) at the Bagram detention facility on December 4 and 10, 2002, identified 28 military members who may have committed offenses punishable under the UCMJ. Investigations determined that the detainees had been beaten by several military members. Commanders are considering the full range of administrative and disciplinary measures, including trial by court-martial. As of this writing, charges have been preferred against two military members.

- The Naval Criminal Investigation Service (NCIS) opened an investigation in May 2004 involving allegations of an Afghan police officer who claimed he was abused in while under coalition control in Gardez and Bagram. This investigation remains open.

As described in the Introduction to this Section, there have been multiple important substantive reports/investigations into alleged detainee abuse in Department of Defense facilities in Afghanistan, none of which found a governmental policy directing, encouraging, or condoning abuse:

- *Major General Ryder's report*
  This assessment of detention operations was completed on November 6, 2003. His report covered specific operations in Iraq and Afghanistan relating to the conduct of detention operations, identifying some difficulties and making some recommendations.

- *Army IG Assessment*
  The Army Inspector General (IG), LTG Mikolashek, released a report in July 2004 that reviewed U.S. Army detainee operations in Afghanistan and Iraq. As a part of this review, the Army IG inspected internment, detention operations, and interrogation procedures. The inspection was not an investigation into specific incidents but rather a comprehensive review of how the Army conducts detainee operations in those two countries. The Army IG found that the Army is properly accomplishing its mission with regard to the capture, care, and custody of detainees, and in its interrogation operations. Although cases of abuse were noted and numerous recommendations were made, the Report found no systemic problem in detainee handling or flawed policy, doctrine, or training, and that the overwhelming majority of leaders and subordinate personnel understand and adhere to the requirement to treat detainees humanely and consistent with the laws of land warfare. The Report considered the abuse cases to be the result of individual instances of indiscipline, and not representative of policy, doctrine, or training. This report was released in July 2004. This report is available at http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/index.htm (visited March 1, 2005).

- *Jacoby Review*
  In May 2004, Lieutenant General Barno, Commander, Combined Forces Command-Afghanistan, initiated an inspection of detainee operations in his area of responsibility in Afghanistan. The inspection was conducted by Brigadier General Jacoby during the period May 19 through June 26, 2004. The primary purpose of this inspection was to ascertain the standard of treatment provided to persons detained by U.S. forces throughout the detention process from capture to release or detention. The Jacoby report did not disclose new allegations of abuse or misconduct. The consistent and overarching observation that flowed from the inspection was that forces assigned to the command understood the

concept of humane treatment and are providing humane treatment to detainees consistent with the principles of the Geneva Conventions.

- *Church Report*
  On May 25, 2004, the Secretary of Defense directed the Naval Inspector General at that time, Vice Admiral Albert T. Church, III, to conduct a comprehensive review of Department of Defense Detention Operations and Detainee Interrogation Techniques in Guantanamo Bay, Cuba, Iraq, and Afghanistan. The Executive Summary of the Report was released on March 10, 2005, and relied upon data available as of September 30, 2004. Vice Admiral Church found that "the vast majority of detainees held" under DoD control "have been treated humanely, and that the overwhelming majority of U.S. personnel have served honorably." Executive Summary at 21. He found that "without exception, that the DoD officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely which is fundamentally inconsistent with the notion that such officials or commanders ever accepted that detainee abuse would be permissible." *Id,* at 3. Although noting a number of "missed opportunities in the policy development process," for example, that "no specific guidance on interrogation techniques was provided to the commanders responsible for Afghanistan and Iraq...," he concluded that "authorized interrogation techniques have not been a causal factor in detainee abuse." *Id.,* at 13, 21. He could not identify a single overarching reason for abuse but addressed the stressful combat situation, particularly at the point of capture, commenting that "a breakdown of good order and discipline in some units could account for some incidents of abuse." *Id.*, at 16. Although he candidly pointed out: "[d]issemination of interrogation policy in Iraq and Afghanistan was generally poor and interrogators fell back on their training and experience, often relying on a broad interpretation of Army Field Manual F.M. 34-52," he continued, "[w]hile these problems of policy dissemination and compliance were certainly cause for concern, we found that they did not lead to the employment of illegal or abusive interrogation techniques." *Id.,* at 10. He found that interrogators knew that abusive behavior was prohibited. *Id.*, at 10, 15. The Executive Summary of this Report is available at www.defenselink.mil/news/Mar2005/d20050310exe.pdf (visited March 23, 2005).

- *Naval Inspector General Report*
  On January 13, 2005, the Deputy Secretary of Defense directed the Naval Inspector General, Vice Admiral Route, to review documents related to detainees recently released under the Freedom of Information Act, including those released by the Federal Bureau of Investigation, and conduct an inquiry into any credible allegations contained in those documents with respect to Afghanistan and Iraq. The Naval Inspector General will take any additional actions with respect to these documents, as he deems appropriate. The report is expected to be finalized soon.

IV. TRAINING OF U.S. ARMED FORCES

Personnel assigned to detention operations go through an extensive professional and sensitivity training process to ensure they understand the procedures for protecting the rights and dignity of detainees.

- Personnel mobilizing to detention operations receive training prior to deployment on detention facility operations, self-defense, safety, and rules on the use of force. Before beginning work, personnel again receive training on the law of armed conflict, the rules of engagement, the Standard Operating Procedures, military justice, and specific policies applying to detention operations in their area of responsibility. This is true of all service members deploying to serve in detention operations. All U.S. service members receive general training on the law of armed conflict, including the Geneva Conventions, as well as further law of armed conflict training commensurate with their duties.

- During their operational tours, U.S. service members continue to receive briefings and are briefed again before every detainee movement on the rules, procedures, and policies in operating detention facilities.

- Mobile training teams are visiting and training at every field detention site to conduct training as required by commanders on the proper handling of detainees.

- All interrogators and counterintelligence personnel are required to undergo 10 days of in-theater certification training. This certification process ensures all applicable standards are understood and enforced.

- Cultural awareness training is conducted for all military personnel during pre-deployment train-up and periodically while in the theater of operations.

- The Combat Training Centers operated by the U.S. Armed Forces in the United States and Germany include the synchronization and integration of detainee operations into every military unit's training rotation prior to deployment. The U.S. Army Military Police School sends a Mobile Training Team to conduct "train the trainer" education for their observer controllers on detainee operations. This training covers detainee operations, personal safety, forced cell movements, restraint procedures, communications with detainees, and case studies.

- It is a violation of the Uniform Code of Military Justice (UCMJ) for military personnel to abuse detainees and to fail to report instances of abuse. DoD personnel are trained on this requirement and briefed regularly on their responsibilities and the appropriate treatment of detainees, including the duty to report mistreatment.

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PART TWO -

INDIVIDUALS UNDER THE CONTROL OF U.S. ARMED FORCES IN IRAQ CAPTURED DURING MILITARY OPERATIONS

I. BACKGROUND ON U.S. MILITARY OPERATIONS IN IRAQ

The United States has approximately 150,000 U.S. military personnel currently deployed in Iraq as a part of the United Nations Security Council-authorized Multi-National Force in Iraq (MNF-I). This force includes 28 other nations and the North Atlantic Treaty Organization (which is providing training support) that are contributing approximately 25,000 military personnel to conduct stability operations in Iraq. Recognizing the importance of Iraq successfully transitioning to a democratically elected government and aware that the situation in Iraq continues to pose a threat to international peace and security, the Security Council authorized MNF-I to "take all necessary measures to contribute to the maintenance of security and stability in Iraq . . . ." U.N. S.C. Res. 1546 (June 8, 2004). (At http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement (visited March 5, 2005)). MNF-I plays a key role in supporting first the Iraqi Interim Government and now the Iraqi Transitional Government (ITG) in its effort to stabilize the current security situation to allow democracy and freedom to take root.

In January 2005, Iraq held its first democratic elections since the collapse of the Saddam Hussein regime. Even though Iraq has elected a National Assembly, there are still many hostile forces in Iraq that seek to thwart the country's transition to democracy and the rule of law by destabilizing the country through hostile armed attacks against civilian targets and MNF-I forces in Iraq. Saddam loyalists, former Baathists, international terrorists, and Islamic jihadists—knowing that they cannot win at the ballot box—have sustained a terrorist campaign designed to spread fear and instability.

MNF-I and Iraqi forces remain actively engaged in combating these hostile forces across Iraq. An essential tool in the effort to contain and end the violence is the ability of MNF-I to capture and detain hostile forces. UN Security Council Resolution 1546 authorizes MNF-I to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters to the President of the Security Council from Dr. Ayad Allawi and Secretary of State Colin Powell. The letter from Secretary Powell noted the MNF-I's readiness to undertake those tasks necessary to counter the security threats posed by forces seeking to influence Iraq's future through violence, including the internment of individuals "where this is necessary for imperative reasons of security...." (At http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement (visited March 5, 2005)). In addition, because hostilities are ongoing, MNF-I may

continue to detain enemy prisoners of war ("EPWs"). MNF-I may also continue to detain civilian internees who were detained prior to June 28, 2004, as long as their detention remains necessary for imperative reasons of security. Finally, in accordance with UN Security Council Resolution 1546 and the authorities contained in Coalition Provisional Authority Memorandum No. 3 (Revised) (at http://cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf (visited March 1, 2005)), which continues in effect under the Transitional Administrative Law (TAL), MNF-I may apprehend individuals who are suspected of having committed criminal acts and who are not considered security internees. MNF-I may retain such criminal detainees in its facilities at the request of appropriate Iraqi authorities.

II. DETAINEES – CAPTURING, HOLDING, AND/OR RELEASING

A. Brief Overview of the Detainee Population Held by MNF-I

As of April 1, 2005, MNF-I was detaining approximately 10,000 persons in Iraq. The vast majority of the detainee population is composed of individuals who are held for imperative reasons of security, consistent with UN Security Council Resolution 1546. In addition to security internees, the MNF-I holds a small number of enemy prisoners of war (EPWs) and, on behalf of the ITG, a number of persons suspected of violating Iraqi criminal laws. The MNF-I has established several detention facilities in various locations throughout Iraq that are operated by the U.S. Army under the Commander, MNF-I. The U.S. Army operates three theater internment facilities: Abu Ghraib (Baghdad Central Correction Facility), Camp Cropper, and Camp Bucca.

B. Status Review of Detainees

Detainees under DoD control in Iraq undergo the review process described herein in order to confirm their status and ensure that they are being lawfully detained. Upon capture by a detaining unit, a detainee is moved as expeditiously as possible to a theater internment facility. A military magistrate reviews an individual's detention to assess whether to continue to detain or to release him or her. If detention is continued, the Combined Review and Release Board assumes the responsibility for subsequently reviewing whether continued detention is appropriate.

With regard to individuals detained on suspicion of having committed criminal acts, those individuals must be handed over to Iraqi authorities as soon as reasonably practicable, but may be held by MNF-I at the request of appropriate Iraqi authorities based on security or detention facility capacity considerations. If MNF-I retains custody at the request of appropriate Iraqi authorities, CPA Memorandum No. 3 (Revised) establishes a series of procedural protections for the detainee, including the right to remain silent, to consult with an attorney within 72 hours, to be promptly informed in writing of charges, to be brought before a judicial officer within 90 days, and to be visited by the ICRC. (At http://cpa-Iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf (visited

March 1, 2005)).

C. Decisions on Continued Detention or Release of Detainees

The Combined Review and Release Board (CRRB) was created to provide detainees a method by which to have their detention status reviewed. The CRRB first met on August 21, 2004. It consists of nine members: three MNF-I officers, and two members each from the Iraqi Ministry of Justice, Ministry of Interior, and Ministry of Human Rights. The CRRB meets and reviews detention cases several times per week and reviews approximately 100 detainee files at each meeting. Consistent with the Geneva Conventions, the case of each detainee who remains in MNF-I custody is reviewed at least once every six months. The CRRB reviews the status of each detainee and recommends one of three options: release, conditional release, or continued detention. A detainee may file an appeal of internment to the CRRB for its consideration.

III. DETAINEES – TREATMENT

A. Description of Conditions of Detention in U.S. Department of Defense Facilities

The primary goal of U.S. detention operations in Iraq has been to operate safe, secure, and humane facilities consistent with the Geneva Conventions. U.S. and other MNF-I forces continue to make physical improvements to various facilities throughout Iraq. Since the incidents of abuse at Abu Ghraib, the United States has made substantial improvements in all areas of detention operations, including facilities and living conditions. Families may visit detainees at visitation centers set up at each detention facility. Detainees are provided with prayer materials and allowed the open and free expression of religion in detention. Detainees also have access to medical facilities, consistent with the Geneva Conventions.

As set forth in CPA Memorandum No. 3 (Revised), and consistent with the provisions of the Geneva Conventions, the ICRC is provided with notice of detainees under the control of the U.S. contingent of MNF-I as soon as reasonably possible and is provided access to such detainees unless reasons of imperative military necessity require otherwise.

B. Allegations of Mistreatment of Persons Detained by the Department of Defense

1. Legal Framework

As noted above, UN Security Council Resolution 1546 provides authority for MNF-I security operations in Iraq, including detention operations. The United States contingent to MNF-I conducts its detention operations consistent with the Geneva Conventions, including pursuant to CPA Memorandum No. 3 (Revised), for operations

after June 28, 2004. The Geneva Conventions prohibit the torture or inhumane treatment of protected persons. U.S. Armed Forces in Iraq are instructed to act consistently with these provisions with regard to all detainees and to treat all detainees humanely. Detainees under the control of U.S. Armed Forces receive shelter, food, clothing, water, and medical care, and are able to practice their religion.

U.S. military interrogators are instructed to conduct interrogations consistent with the Geneva Conventions. Further, military regulations strictly regulate permissible interrogation techniques. Department of Defense policy prohibits the use of force, mental and physical torture, or any form of inhumane treatment during an interrogation.

Army Regulation (AR) 190-8 provides policy, procedures, and responsibilities for the administration and treatment of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI), and other detainees in the custody of U.S. Armed Forces. (At <http://www.usapa.army.mil/pdffiles/r190_8.pdf>(visited March 1, 2005).) A.R. 190-8, paragraph 1-5 provides:

> General Protection Policy
>
> a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:
>
> (1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.
>
> (2) All persons taken into custody by U.S. forces will be provided with the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) until some other legal status is determined by competent authority.
>
> (3) The punishment of EPW, CI, and RP known to have, or suspected of having committed serous offenses will be administered [in accordance with] due process of law and under legally constituted authority per the GPW, [the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War], the Uniform Code of Military Justice and the Manual for Courts Martial.
>
> (4) The inhumane treatment of EPW, CI, and RP is prohibited and is not justified under the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

Department of Defense Directive 5100.77 further requires that all possible, suspected, or alleged violations of the law of war committed by United States persons be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action. December 9, 1998, (at <http://www.dtic.mil/whs/directives/corres/pdf2/d510077p.pdf > (visited February 28, 2005)). For instance, U.S. forces are subject to the Uniform Code of Military Justice (UCMJ), which provides that those who commit acts of abuse, whether or not during an armed conflict, are criminally liable for their actions. Article 93 of the UCMJ provides: "Any person subject to this chapter who is guilty of cruelty toward, or oppression or

maltreatment of, any person subject to his orders shall be punished as a court-martial may direct." A member of the U.S. forces suspected of mistreating or abusing persons in U.S. detention is subject to prosecution under this and other applicable UCMJ articles.[11]

In the context of detainee abuse cases, however, not every potentially applicable offense under the UCMJ has a parallel federal offense in the U.S. Code. For example, Failure to Obey a Lawful Order or Regulation (Article 92, UCMJ) and Dereliction of Duty (Article 92, UCMJ) have no comparable federal offenses in this context. Additionally, the Federal Torture Statute requires a much higher level of proof than does Article 93 of the UCMJ, which punishes cruelty and maltreatment of prisoners.

Interrogation techniques are developed and approved to ensure compliance with legal and policy requirements. Throughout the conflict in Iraq, military, policy, and legal officials have met, and continue to meet, regularly to review interrogation policy and procedures to ensure their compatibility with applicable domestic and international legal standards. The United States will continue to review and update its interrogation techniques in order to remain in full compliance with applicable law.

2. Reports of Abuses and Summary of Abuse Investigations

Allegations of detainee abuse at the Abu Ghraib prison in Iraq became known with incidents documented in photographs and reported in the media throughout the world. These photographs, which depict acts of abuse and mistreatment of detainees by certain members of the U.S. Armed Forces in Iraq, were abhorrent to Americans and others around the world. These incidents, which to date could implicate 54 military personnel, involved blatant violations of the UCMJ and the law of war. The United States deeply regrets these abuses. Indeed, on May 6, 2004, the President of the United States said that he "was sorry for the humiliation suffered by the Iraqi prisoners and the humiliation suffered by their families" and that "the wrongdoers will be brought to justice...." Remarks by President Bush and His Majesty King Abdullah II of the Hashemite Kingdom of Jordan at <http://www.whitehouse.gov/news/releases/2004/05/20040506-9.html> (visited March 1, 2005).

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[11] A member, or former member, of the U.S. Armed Forces, who is either a national of the United States, or later present in the United States, who, while outside the United States, commits acts that meet the definition of torture under the relevant statute (18 U.S.C. §2340) is subject to federal prosecution under 18 U.S.C. §2340A, if not previously prosecuted for the same offense under the UCMJ.

A member of the U.S. Armed Forces who, while outside the United States, commits a crime that would constitute a felony if committed within the Special Maritime Territory Jurisdiction (SMTJ), and does so with one or more other defendants, at least one of whom is not subject to the UCMJ, is subject to federal prosecution. Similarly, a former member of the U.S. Armed Forces, who has ceased to be subject to the UCMJ, but who was subject to the UCMJ at the time that he was outside the territory of the United States and committed a crime that would be a felony if committed within the SMTJ, is subject to federal criminal prosecution.

In response to these allegations of abuse, the U.S. Government has acted swiftly to investigate and take action to address the abuses. The United States is investigating allegations of abuse thoroughly and making structural, personnel, and policy changes necessary to reduce the risk of further such incidents. All credible allegations of inappropriate conduct by U.S. personnel are thoroughly investigated. A rapid response to allegations of abuse, accompanied by accountability, sends an unequivocal signal to all U.S. military personnel and the international community that mistreatment of detainees will not be tolerated under any circumstances. To the extent allegations of misconduct have been levied against private contractors, the U.S. Department of Justice has conducted or initiated investigations. For example, following the reports at Abu Ghraib, the Department of Justice received referrals from Military Investigators regarding contract employees and their potential involvement in the abuses. DOJ subsequently opened an investigation.

At the direction of the President, the Secretary of Defense, and the military chain of command, nine different senior-level investigative bodies convened to review military policy from top-to-bottom in order to understand the facts in these cases and identify any systemic factors that may have been relevant. The assignment of these entities was to identify and investigate the circumstances of all alleged instances of abuse, review command structure and policy, and recommend personnel and policy changes to improve accountability and reduce the possibility of future abuse.

The United States has ordered a number of studies and reports subsequent to allegations of mistreatment in Iraq, particularly at Abu Ghraib. Again, as described in Part One of this Report, it is impossible to characterize and summarize fully these reports, but it can be stated that although these investigations identified problems and made recommendations, none found a governmental policy directing, encouraging, or condoning the abuses that occurred. What follows is a brief summary of each of the investigative reports:

- *Miller Report*
  Major General Miller's report on detention and interrogation operations in Iraq was completed on September 9, 2003. General Miller's report assessed the conditions and operations of detention facilities in Iraq.

- *Ryder Report*
  Major General Ryder's assessment of detention operations in Iraq was completed on November 6, 2003, as described in Part 1, Section III.B.3. General Ryder's report covered specific operations in Iraq and Afghanistan relating to the conduct of detention operations.

- *Taguba Report*
  Major General Taguba completed his investigation into detainee operations and the 800th Military Police Brigade on March 12, 2004. This report focused primarily on the allegations of detainee abuse at the Abu Ghraib detention facility arising from disclosures made by U.S. service members.

- *The Army Inspector General Report*
  The Army Inspector General conducted a review of alleged detainee abuse committed by U.S. Army personnel in Iraq and Afghanistan, which was released in July 2004, as described in Part 1, Section III.B.3. (At <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf> (visited March 1, 2005)).

- *Report by Major General Fay, Lieutenant General Jones, and General Kern*
  This was completed on August 13, 2004. This report covered Military Intelligence (MI) and DoD contractor interrogation policies in Iraq. This report revealed that 27 military personnel or civilians appeared to have abused Iraqi prisoners due to criminal activity or confusing interrogation rules. Twenty-three military intelligence personnel and four civilian contractors were alleged to be involved in abuse. Eight others, including six military officers and two civilians, were alleged to have learned of the abuse and of failing to report the abuse to authorities. This report found 44 cases of abuse. In an interview after the report's release, General Kern told reporters, "We found that the pictures you have seen, as revolting as they are, were not the result of any doctrine, training or policy failures, but violations of the law and misconduct." (At http://www.defenselink.mil/transcripts/2004/tr20040825-1224.html (visited April 5, 2005)). The report found that the abuses were carried out by a small group of "morally corrupt" soldiers and civilians and caused by a lack of discipline by leaders and soldiers of the brigade and a "failure or lack of leadership by multiple echelons" within a unit within the U.S. military forces in Iraq. *See* Report at 2. This report was publicly released and can be found at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> (visited February 28, 2005).

- *Schlessinger Report*
  This Report was completed in August 2004. The Secretary of Defense named a panel of four distinguished former public officials, including two former Secretaries of Defense, to evaluate the areas under review in the ongoing investigations and to determine if there was a need for additional areas of investigation. The Report found that "[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities." *See* Report at 5. It stated that "the most egregious instances of detainee abuse were caused by the aberrant behavior of a limited number of soldiers and the predilections of the non-commissioned officers on the night shift of Tier 1 at Abu Ghraib," although noting that "commanding officers and their staffs at various levels failed in their duties and that such failure contributed directly or indirectly to detainee abuse." *See* Report at p. 43. This report was publicly released and can be found at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (visited February 28, 2005).

- *Formica Report*
  Brigadier General Formica initiated a report on May 15, 2004 that focuses on allegations of abuse by Special Operations Forces in Iraq. The investigation is complete. The report's contents are classified because of the highly sensitive operations that were examined and that remain ongoing.

- *Church Report*
  Vice Admiral Church's comprehensive review of Department of Defense Detention Operations and Interrogation Techniques was completed on March 10, 2005 and is described in Part One, Section III.B.3. of this Annex. The Executive Summary of the Report is available at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (visited March 23, 2005).

- *Naval Inspector General Report*
  The Naval Inspector General (Vice Admiral Route) is conducting a review of documents related to detainees recently released under the Freedom of Information Act and is expected to release his findings soon as described in Part 1, Section III.B.3.

From the nine reports that have been completed, it is clear that serious abuses occurred, but it is also clear that the vast majority of the 150,000 military personnel who that have been stationed in Iraq have conducted themselves honorably. The U.S. Armed Forces is committed to ensuring that those who committed abuses are accountable and that such abuses do not occur again.

It is important to remember that the U.S. Armed Forces began the process of assessing detainee operations, investigating allegations of abuse, and implementing changes at Abu Ghraib, well before the media and the international community began to focus on detainee abuse at that facility. Both before and after the public disclosure of these abuses, the United States pursued swift and thorough investigations of problems.

In conducting the major reviews, the United States reached out broadly, interviewed more than 1,700 people, and compiled more than 13,000 pages of information to address detainee abuse. Much of this information is publicly available. In an effort to be transparent and keep the public and our government informed, the Department of Defense delivered more than 60 briefings to the U.S. Congress.

The Department of Defense has improved its detention operations in Iraq and elsewhere, improvements have been made based upon the lessons learned, and in part because of the broad investigations and focused inquiries into specific allegations. These comprehensive reports, reforms, investigations and prosecutions make clear the commitment of the Department of Defense to do everything possible to ensure that detainee abuse such as occurred at Abu Ghraib never happens again.

Finally, the highest levels of the Department of Defense are reviewing and acting on all of the reports and investigations. The Department has established an inter-departmental committee, called the Senior Leadership Oversight Committee, that comprises senior members of the Joint Staff, the Provost Marshal General's Office, the Office of Detainee Affairs, and the Military Departments engaged in detention operations.

This group is specifically responsible for ensuring that the recommendations of the panels and investigations are followed through to their conclusion, and for monitoring changes made by combatant commands and the relevant offices in the Department of Defense. To date, the committee has met three times and has reviewed more than 600 recommendations. The Department has already implemented a significant number of recommendations and is examining the remainder of them. The Oversight Council will continue to meet on a periodic basis until the recommendations of the investigations and panels have been addressed fully.

3. Summary of Actions to Hold Persons Accountable

The Department of Defense takes all allegations of abuse seriously and investigates them. Those people who are found to have committed unlawful acts are held accountable and disciplined as the circumstances warrant. Investigations are thorough and have high priority.

Some criminal investigations have been completed and others continue with respect to abuse of detainees in Iraq. Although it would be inappropriate to comment on the specifics of on-going investigations, as of March 1, 2005, 190 incidents of abuse have been substantiated. Some are minor, while others are not: penalties have ranged from administrative to criminal sanctions, including 30 courts-martial, 46 non-judicial punishments, 15 reprimands, and 15 administrative actions, separations, or other administrative relief. A number of actions are pending.

Some examples of service members convicted at a court-martial[12] for acts related to detainee maltreatment include:

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[12] U.S. Armed Forces are subject to the Uniform Code of Military Justice (UCMJ), which provides that those who commit acts of abuse, whether or not during an armed conflict, may be held criminally liable for their actions. Article 93 of the UCMJ provides: "Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct." A member of the U.S. Armed Forces who is suspected of mistreating or abusing persons in U.S. detention is subject to prosecution under this and other applicable UCMJ articles.

Other charges that may apply will depend on the circumstances of the abuse. For example, U.S. Armed Forces may be charged with assault, Article 128, UCMJ, or if the abuse results in the death of a detainee, Article 118, Murder, or Article 119, Manslaughter, or Article 134, Negligent Homicide. For allegations of abuse involving theft of money or other possessions from a detainee, U.S. Armed Forces may be charged with Article 121, Larceny. For allegations of sexual assault, U.S. Armed Forces may be charged with Article 120, Rape, Article 125, Sodomy, or Article 134, Indecent Assault.

(1) A Staff Sergeant, charged with numerous offenses related to maltreatment of detainees at the Abu Ghraib Detention Facility, pled guilty on October 21, 2004, at a General Court-Martial to conspiracy, maltreatment of detainees, simple battery, and indecent acts. The Military Judge sentenced him to 10 years confinement, total forfeitures of pay and allowances, reduction from Staff Sergeant (a non-commissioned officer rank) to the lowest enlisted grade (enlisted grade of Private), and discharge from the U.S. Army with a dishonorable discharge. Because of a plea agreement, the Staff Sergeant will ultimately be confined for eight years, if he cooperates with future prosecutions per the plea arrangement.

(2) A Sergeant, charged with numerous offenses related to maltreatment of detainees at the Abu-Ghraib Detention Facility, pled guilty on February 4, 2005, to battery, dereliction of duty, and false official statement. A court-martial panel sentenced him to confinement for 6 months, reduction to the lowest enlisted grade, and discharge from the U.S. Army with a bad conduct discharge.

(3) A Specialist charged with conspiracy to maltreat subordinates, dereliction of duty of duty, and maltreatment of detainees at the Abu Ghraib Detention Facility, pled guilty to all charges at a Special Court-Martial on May 19, 2004. The Military Judge sentenced him to confinement for a period of 12 months, reduction in rank to the lowest enlisted grade, and a discharge from the U.S. Army with a bad conduct discharge.

(4) A Specialist, charged with numerous offenses related to maltreatment of detainees at the Abu Ghraib Detention Facility, was convicted on January 7, 2005, by a 10-member panel of five counts, including assault, maltreatment, and conspiracy. He was sentenced to 10 years confinement, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge from the U.S. Army.

(5) A Specialist, charged with participating in and directing the abuse of two Iraqi detainees by handcuffing the detainees together naked at the Abu Ghraib Detention Facility, was tried at a Special Court-Martial on September 11, 2004, and convicted of conspiracy to maltreat detainees and the maltreatment of the detainees. The Specialist was sentenced to confinement for eight months, a reduction to the lowest enlisted grade, and a bad conduct discharge from the U.S. Army.

Over the course of 2005, substantially more information will become public on these matters as accountability processes come to completion. Accordingly, the United States will be prepared to present further information on the status of its investigations and prosecutions during its presentation of this Report to the Committee Against Torture.

C. Remedies for Victims of Abuse

The United States is committed to adequately compensating the victims of abuse and mistreatment by U.S. military personnel in Iraq. The U.S. Army is responsible for handling all claims in Iraq. Several claims statutes allow the United States to compensate victims of misconduct by U.S. military personnel. The primary mechanism for paying claims for allegations of abuse and mistreatment by U.S. personnel in Iraq is through the Foreign Claims Act (FCA), 10 U.S.C. § 2734. Under the FCA, Foreign Claims Commissions are tasked with investigating, adjudicating, and settling meritorious claims arising out of an individual's detention. There are currently 78 Foreign Claims Commission personnel in Iraq. Claims may be submitted to the claims personnel, who regularly visit detention facilities, or they may be presented to the Iraqi Assistance Center. For persons with U.S. residency, claims may be brought pursuant to the Military Claims Act, 10 U.S.C. § 2733. All allegations of detainee abuse are investigated by the U.S. Army Claims Service (USARCS), and the Department of the Army Office of the General Counsel is the approval authority.

In addition, the Secretary of Defense has directed the Secretary of the Army to review all claims for compensation based on allegations of abuse in Iraq and to act on them in his discretion. In instances where meritorious claims are not payable under the FCA or the MCA, the Secretary of the Army is responsible for identifying alternative authorities to provide compensation and either to take such action or forward the claim to the Deputy Secretary of Defense with a recommendation for action.

IV. TRAINING OF U.S. ARMED FORCES

As discussed in the section on training in Part 1, Section IV, of this Annex, U.S. Armed Forces receive significant training before being deployed and during their deployment. The United States incorporates by reference that section and reiterates that all employees and armed forces deployed in detention missions receive extensive training and education on the laws and customs of armed conflict, including humane treatment procedures and the obligations of the United States in conducting detention operations. With respect to Iraq, U.S. armed forces serving as interrogators and detention personnel are also trained to conduct themselves in accordance with the principles (including the prohibition on torture) set forth in the Geneva Conventions and to treat detainees humanely regardless of status.

Since allegations of abuse became known, corrections specialists are now stationed at detention facilities to provide additional skills and experience to the detention mission. In addition, the Department of Defense is developing procedures and policies to ensure that contractors used by the Department receive training and understand the U.S. Government's commitments and policies before being deployed in detention operations.

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TEXT CLEARED BY DOD, NSC, CIA, DOJ, DOS
(DRAFT OF APRIL 29, 2005)

V. LESSONS LEARNED AND POLICY REFORMS

It is clear that certain individual service members committed serious abuses during U.S. detention operations in Iraq. Apart from proceedings to hold accountable the perpetrators of abuse, the U.S. Armed Forces have been studying the larger question of how to ensure that these types of abuses will not occur in the future. The nine detainee reports released to date have made more than 300 recommendations for short and long-term changes to improve detainee handling, accountability, investigation, supervision, and coordination. Further investigations remain in progress. The Office of the Secretary of Defense, the Military Departments, the Combatant Commands, and the Joint Staff have each taken concrete steps to implement many of these changes and will continue to do so.

The Department of Defense has responded to the abuses committed by taking steps designed to improve senior-level supervision and coordination of detainee matters. The Secretary of Defense has:

- Established a Detainee Affairs office overseen by the Deputy Assistant Secretary of Defense for Detainee Affairs;
- Established a Joint Detainee Coordination Committee on Detainee Affairs;
- Issued policy for "Handling of Reports from the International Committee of the Red Cross";
- Issued a policy on "Procedures for Investigations into the Death of Detainees in the Custody of the Armed Forces of the U.S."; and
- Initiated a department-wide review of detainee-related policy directives.

Other steps that the Department of Defense has taken include:

- Designation of a Major General as Deputy Commanding General for Detainee Operations, MNF-I. He is the Department's primary point of contact with the Iraqi Transitional Government for detainee operations. He is responsible for ensuring that all persons captured, detained, interned, or otherwise held in under MNF-I control are treated humanely and consistent with the Geneva Conventions and all applicable law from the moment they fall into the hands of U.S. forces until their final release from MNF-I control or their repatriation. He ensures that it is made clear that inhumane treatment is prohibited and is a punishable violation under the Uniform Code of Military Justice. All service members have an obligation to report allegations of detainee abuse to the responsible command or law enforcement agency.
- The posting of the Geneva Conventions and Camp rules in a language the detainee can understand.

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- Ensuring widespread publication of the findings of reports and investigations by publishing unclassified information on the Department of Defense website http://www.defenselink.mil. The Department has established an entire sub-site on detainee operations.

RELEASED IN FULL

LD53B

May 1, 2006

Dear Mr. Bellinger:

I promised during our recent Advisory Committee meeting to send you a fuller list of questions that might be useful with respect to your prospective oral presentation before the Committee on Torture. Knowing how well L lawyers prepare, I suspect that none of the questions/issues below will come as a surprise but I am forwarding them in case they might prove useful. (These are, of course, simply for your use and I certainly do not expect answers.)

At the outset, allow me to commend your office for the May 6, 2005 U.S. Report to the COT that you sent to us. It was the first time that I read it closely and it is a substantial achievement in terms of depth of analysis and respect for international law. Indeed, its sheer level of detail, particularly with respect to U.S. statutory law and caselaw, inspires some of the questions below, simply because at least on my reading, the U.S.'s answers with respect to these points appear more ambiguous:

(1) Given press allegations of secret CIA flights involving "ghost detainees," it seems particularly important to be clearer with respect to whether the USG views any or all of its obligations under the Torture Convention, and underlying customary law, to apply to its actions abroad, including actions by the CIA in Europe, or by US agents in Guantanamo, Afghanistan, and Iraq. While the U.S. Torture Report includes a blanket affirmation that the U.S. does not engage in torture anywhere and does not claim a "wartime" exception to this ban (see para. 6, p. 4), elsewhere the Report affirms only that certain detainees only have the right to be treated "humanely" (p. 47).

(2) Which U.S. laws criminalize or otherwise penalize the activities of all of our agents who act abroad, including the CIA, should they be involved in the arrest and subsequent rendering of individuals to places where they are likely to be tortured? (The relevant paragraphs of the report (paras. 44. 49, 52) appear to suggest that the rendering of "ghost detainees" abroad may not be penalized under U.S. laws or that U.S. laws criminalize only the actions of those supporting the mission of the Department of Defense.)

(3) If even the decision to extradite made on US territory is not subject to judicial review (para. 42), does this mean that there is no opportunity for meaningful judicial scrutiny of decisions to render individuals to countries abroad (whether or not this occurs with respect to individuals in or out of the United States)? Assuming this to be the case, is it against the clearly enunciated policy of the USG not to render or transfer individuals to countries that our own State Department Human Rights reports brand as regular practitioners of torture?

(4) Given our reservation with respect to article 16 of the Torture Convention (discussed at para. 88), is it the U.S. position that the protection against cruel, inhuman or degrading treatment does not apply abroad since our own constitutional protections do not so extend? (And is this the meaning to be attributed to the President Bush's signing statement for the McCain bill?) If so, it

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 04 AUG 2009 200706444

is our position that US agents are free to treat detainees "cruelly" or in an "inhumane" fashion and can render individuals to countries where such treatment is to be expected? [With respect to the U.S. reservation to article 16, I am sure that you are aware that it raises the reciprocity problem noted by Professor Franck in the course of our meeting. As I understand it, we have raised objections (as in the ICCPR) with respect to similarly "self-judging" reservations made by Islamic states (in which human rights norms are made subject to Sharia law as determined by their religious courts from time to time) on the grounds that such self-judging reservations gut the obligation to "respect and to ensure" human rights treaties and are therefore inconsistent with these treaties' object and purpose. As you know, the Human Rights Committee has agreed with this and I would assume that the propriety of the U.S. reservation to article 16 will continue to be questioned on comparable grounds.]

(5) You can expect close questioning on whether the U.S. permits coerced statements to be used as evidence (cf. article 15 of the Torture Convention) in any and all of its military commissions.

(6) Does the U.S. still affirm that Geneva law continues to apply to Iraq despite the formal end of occupation pursuant to Security Council resolutions? If so, what is the U.S.'s position on the continued application of article 49 of Geneva IV (barring the transfer or deportation of protected persons from occupied territory including for purposes of facilitating interrogation)? [Committee members may be aware that the US has not renounced the legal analysis contained in the Mar. 19, 2004 draft memorandum by then Assistant Attorney General Jack Goldsmith, even though this memo has been widely disseminated and is included in Greenberg and Dratel's The Torture Papers. There may therefore be understandable confusion about whether the US has ever transferred individuals from inside Iraq since its invasion, pursuant to that memo's (surely overbroad?) claims that transfers of any aliens or even Iraqis to facilitate interrogation is legal so long as "temporary."]

(7) It is, of course, to be expected that the US will be closely questioned as to which interrogation techniques it now sees as permissible despite the treaty and customary prohibitions on torture and cruel, inhuman treatment. [This is especially likely given Attorney General Gonzales's refusal to rule out such egregious techniques as water-boarding.] To the extent the US military or other services is now working on a new list of permissible interrogation techniques, to what extent has the US taken into account the detailed reports issued by, for example, the UN Special Rapporteur on Torture with respect to such techniques?

(8) At p. 52, the US report continues to affirm that since there is "no doubt" that members of the Taliban and Al Qaida are not entitled to the protections of Geneva, article 5 status tribunals are not required. Keep in mind that this assertion is especially likely to be questioned with respect to individuals that come into US custody far from any battlefield and as a result of the say so of unknown agents responding to bounty payments. Is the US claiming that it can hold anyone from any nationality without reasonably prompt scrutiny of the status of such individuals? This claim is all the more likely to be questioned since in the absence of article 5 tribunals, the US appears to be claiming a right to indefinite

and prolonged arbitrary detention – which in itself appears to be a jus cogens violation even under the US's relatively conservative US Restatement of Foreign Relations. This is an instance where the US assertion that neither Geneva nor human rights law applies appears to result in a legal blackhole that is fundamentally repugnant to the rule of law.

(9) Questions are likely to be expected even by the COT which is not expert on such matters with respect to US claims that it has the right to use specially designed military commissions (whose procedures fall short of those applied to US military) to try detainees of "war crimes." Apart from predictable questions as to the fairness (and stability of) the procedural and evidentiary rules applied by such commissions, questions are likely to be raised about whether the crimes that we are charging (e.g., waging war against the US military or engaging in a conspiracy towards that end) are truly "war crimes" as understood by international humanitarian law.

Hope that at least some of the above prove useful to you and/or Bob Harris.

Finally, I want to express my deep thanks to you for including me in your Advisory Committee. I deeply appreciate the frankness and openness with which you have conducted these meetings, including with respect to sensitive topics such as the subject of this letter. For me, being a member of the Advisory Committee these many years has made the remoteness of the Ivory Tower a little more bearable and has only enhanced my historic respect for L, including my former colleagues (and their much younger colleagues, some of whom have been my students). Since I recognize that you will be re-constituting your committee and I may not be included in its new membership, I thought I would take the opportunity to express my sincere appreciation.

Of course, whether or not I am a member of your new Advisory Committee, I hope that we can collaborate on matters of mutual interest during my Presidency of the ASIL.

Sincerely yours,

Jose E. Alvarez

Schou, Nina E LD12

RELEASED IN PART B6 B6

From: Steven Hill [redacted]
Sent: Saturday, April 29, 2006 9:59 AM
To: Bob Harris; Nina Schou
Cc: Steven Hill; Bob Harris; Nina Schou; Julianna Bentes
Subject: Script thus far

Attachments: CAT_script.doc

CAT_script.doc
(183 KB)

Bob,

I've gotten about halfway through the script (up to question 28) and have managed to cut about 10 pages so far, which is crucial since Julianna and I discovered yesterday that it takes between 1:15 to 1:30 to read one double-spaced page. We are currently down to 66 pages, and assuming the same rate of cutting for the second half of the document as I did in the first half, that should give us about 55 pages in the end. This would work out to 70-80 minutes for the whole thing, still a touch too long. We may have to cut more radically and/or identify certain answers that could be combined. Some of the stuff on DHS procedures might be a good candidate but let me think about it.

We also need to bear in mind that there are at least two questions whether the Army Field Manual comes up and where additional material might be required.

I have to go help a friend move today and won't be able to turn to this again until late this afternoon. I'm sending it to you now in case you or Nina want to work on it further during the day.

Call if you have any questions or want to touch base -- [redacted] B6

Nina, if you get a chance, take a look at how I restructured the forced disappearances question: it seemed a bit hard to understand before.

Steve

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: FRANK H PEREZ
DATE/CASE ID: 12 AUG 2009 200706444

RELEASED IN PART B6

LD14

Schou, Nina E

From: Gorove, Katherine M
Sent: Monday, May 02, 2005 9:33 AM
To: Harris, Robert K; Schou, Nina E
Subject: FW: CAT Annex

Attachments: Legal-#10876-v1-CAT_Annex__april_29__almost_final.DOC

-----Original Message-----
From: Gorove, Katherine M
Sent: Friday, April 29, 2005 8:07 PM
To: [redacted] B6
Subject: CAT Annex

Here it is; after hours of technical problems, I think it's finished. But, I think we need to check on consistencies between its cover sheet and other annexes. Also, Nina, you need to indent your footnotes in main report. Also, I wonder if each annex shouldn't have a header in it; will the main report have a header, just so every page, says 2nd periodic report of United States to U.N. C.A.T. Committee and then annexes also say their annex number. I think it'd be easier for the world & not that hard to do. Nina, I can't locate Prosper and Waxman. My e-mail keeps crashing. Can you try to pull up on Monday morning.

Legal-#10876-v1-CAT_Annex__apr...

Enjoy!

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 04 AUG 2009 200706444

Schou, Nina E

From: Hill, Steven R
Sent: Thursday, March 23, 2006 12:06 PM
To: Hill, Steven R; Christopher_N._Camponovo [redacted] B6
[redacted] igor.timofeyev@dhs.gov; Andrew.Steinberg@dhs.gov; Brian.Kelliher1@dhs.gov; daniel.brown@dhs.gov; molly.groom@dhs.gov; nader.baroukh@dhs.gov; roger.sagerman@dhs.gov; ron.rosenberg@dhs.gov; Ronald.whitney@dhs.gov; Thomas.Monheim@usdoj.gov; omar.vargas@usdoj.gov; rena.comisac@usdoj.gov; laurence.rothenberg@usdoj.gov; matthew.friedrich2@usdoj.gov
Cc: Harris, Robert K; Brancato, Gilda M; Schou, Nina E; [redacted] Bentes, Julianna W; Grummon, Caroline E.; Haines, Avril D; Hodgkinson, Sandra L; Johnson, Thomas A; Lagon, Mark P; Noyes, Julieta V (DRL) B6
Subject: RE: Draft Consolidated CAT Replies for Interagency Review

Attachments: LEGAL-#23552-v1-CAT_agency_questions_by_page.DOC

Attached is list of questions posed to each agency. These questions appear throughout the text circulated yesterday, but having them all in one place might prove useful in your review.

LEGAL-#23552-v1-CAT_agency_que...

From: Hill, Steven R
Sent: Wednesday, March 22, 2006 5:52 PM
To: 'Christopher_N._Camponovo [redacted] B6
'igor.timofeyev@dhs.gov'; 'Andrew.Steinberg@dhs.gov'; 'Brian.Kelliher1@dhs.gov'; 'daniel.brown@dhs.gov'; 'molly.groom@dhs.gov'; 'nader.baroukh@dhs.gov'; 'roger.sagerman@dhs.gov'; 'ron.rosenberg@dhs.gov'; 'Ronald.whitney@dhs.gov'; 'Thomas.Monheim@usdoj.gov'; 'omar.vargas@usdoj.gov'; 'rena.comisac@usdoj.gov'; 'laurence.rothenberg@usdoj.gov'; 'matthew.friedrich2@usdoj.gov'
Cc: Harris, Robert K; Brancato, Gilda M; Schou, Nina E; [redacted] Bentes, Julianna W; Grummon, Caroline E.; Haines, Avril D; Hodgkinson, Sandra L; Johnson, Thomas A; Lagon, Mark P; Noyes, Julieta V (DRL) B6
Subject: Draft Consolidated CAT Replies for Interagency Review

Dear Interagency CAT Team:

On behalf of Bob Harris and my State colleagues, I'd like to thank you for your excellent contributions to our effort to assemble a USG response to the Committee's "List of Issues."

We have integrated the DHS, DOD, and DOJ contributions into the attached draft document along with our suggested edits to those contributions (indicated in the "tracked changes" format) and additional questions relating to them. Note that in some places, we moved detailed information (such as statistical data) into annexes.

While this is not a request for final clearance on the document, we are trying to get the document as close to final as possible and would therefore greatly appreciate your review of the entire document as well as, of course, answers to the specific questions addressed to your agency.

Please provide your input by COB next Tuesday, March 28.

If you have any questions or comments, please let us know.

Thanks,

Steve

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
DATE/CASE ID: 18 AUG 2009 200706444

<< File: CAT Reply Interagency March 22.doc >>

****

Steven Hill
U.S. Department of State
Office of the Legal Adviser
Human Rights and Refugees
(202) 647-4065 (tel)
(202) 736-7028 (fax)
hillsr@state.gov

RELEASED IN PART
B6 LD28

Schou, Nina E

From: Nina Schou [redacted] B6
Sent: Thursday, March 23, 2006 3:34 PM
To: schoune@state.gov
Subject: Fwd: FW: Draft Consolidated CAT Replies for Interagency Review
Attachments: pat768833926

"Hill, Steven R" <HillSR@state.gov> wrote:

From: "Hill, Steven R" <HillSR@state.gov>
To: Robert Harris <[redacted] Nina Schou <[redacted] B6
CC: "'Steven Hill'" <[redacted] B6
Subject: FW: Draft Consolidated CAT Replies for Interagency Review
Date: Wed, 22 Mar 2006 17:50:32 -0500

The beast has gone out to the interagency and around the building as well. Hope you're having fun, Bob.

From: Hill, Steven R
Sent: Wednesday, March 22, 2006 5:52 PM
To: [redacted] B6
'igor.timofeyev@dhs.gov'; 'Andrew.Steinberg@dhs.gov'; 'Brian.Kelliher1@dhs.gov'; 'daniel.brown@dhs.gov'; 'molly.groom@dhs.gov'; 'nader.baroukh@dhs.gov'; 'roger.sagerman@dhs.gov'; 'ron.rosenberg@dhs.gov'; 'Ronald.whitney@dhs.gov'; 'Thomas.Monheim@usdoj.gov'; 'omar.vargas@usdoj.gov'; 'rena.comisac@usdoj.gov'; 'laurence.rothenberg@usdoj.gov'; 'matthew.friedrich2@usdoj.gov'
Cc: Harris, Robert K; Brancato, Gilda M; Schou, Nina E; [redacted] Bentes, Julianna W; Grummon, Caroline E.; Haines, Avril D; [redacted] Johnson, Thomas A; Lagon, Mark P; Noyes, Julieta V (DRL) B6 B6
Subject: Draft Consolidated CAT Replies for Interagency Review

Dear Interagency CAT Team:
On behalf of Bob Harris and my State colleagues, I'd like to thank you for your excellent contributions to our effort to assemble a USG response to the Committee's "List of Issues."
We have integrated the DHS, DOD, and DOJ contributions into the attached draft document along with our suggested edits to those contributions (indicated in the "tracked changes" format) and additional questions relating to them. Note that in some places, we moved detailed information (such as statistical data) into annexes.
While this is not a request for final clearance on the document, we are trying to get the document as ! close to final as possible and would therefore greatly appreciate your review of the entire document as well as, of course, answers to the specific questions addressed to your agency.
Please provide your input by COB next Tuesday, March 28.
If you have any questions or comments, please let us know.
Thanks,

Steve
<<CAT Reply Interagency March 22.doc>>
****
Steven Hill
U.S. Department of State
Office of the Legal Adviser

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: FRANK H PEREZ
DATE/CASE ID: 12 AUG 2009 200706444

Human Rights and Refugees
(202) 647-4065 (tel)
(202) 736-7028 (fax)
hillsr@state.gov

New Yahoo! Messenger with Voice. Call regular phones from your PC for low, low rates.

Schou, Nina E LD35

RELEASED IN PART
B6, B5

B6

From: Steven Hill
Sent: Friday, April 21, 2006 3:59 AM
To: Bob Harris; Bob Harris
Cc: Nina Schou; Nina Schou; Steven Hill; Julianna Bentes; Julianna W Bentes
Subject: CAT

Attachments: CAT 4-21 4 AM (clean with jbb changes marked).doc; CAT 4-21 4 AM (markup).doc; dagmemo-1.pdf

CAT 4-21 4 AM (clean with jbb ...

CAT 4-21 4 AM (markup).doc (1 ...

dagmemo-1.pdf (1,018 KB)

Bob,

The attached documents integrate what I was able to do with John's comments. The most up-to-date is the rather unwieldy document with all the tracked changes. The other document is clean except for the text I added in response to John's comments.

I will work tomorrow -- with Julianna if she's feeling better -- on accepting all changes in the track changes-filled beast (we had done a quick "accept all" for the clean document that went to JBB, but this hasty action may have resulted in losing some things that should actually go in) and then proofing it with a view toward getting something clean ready for interagency circulation in the afternoon.

As we work on that, I need your guidance on how to deal with three of John's comments

B5

You'll also note that I added a request to DOD to provide a breakdown of cause of death information.

I'll forward this to L/PM as well tomorrow morning.

Steve

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: FRANK H PEREZ
DATE/CASE ID: 12 AUG 2009 200706444

RELEASED IN PART
B6, B5

LD41

Schou, Nina E

From: Harris, Robert K
Sent: Thursday, May 11, 2006 1:21 PM
To: Laurence.Rothenberg@usdoj.gov; [redacted] Julianna Bentes; L/HRR:Julianna Bentes (Business Fax); L/HRR:NinaSchou/home [redacted] L/HRR:RobertHarris/home (HarrisRK2@state.gov); L/HRR:SteveHill/home [redacted]; Kovar, Jeffrey D
Cc: Camponovo, Christopher N.; Kovar, Jeffrey D(Geneva); Barton, Paula J; DOJ:Brent.McIntosh@usdoj.gov; Kelliher, Brian; Padmanabhan, Vijay M; Legal-L-HRR
Subject: FW:

B6
B6
B6
B6

Attachments: LEGAL-#25346-v1-CAT_Follow-Up.DOC

LEGAL-#25346-v1-CAT_Follow-Up....

Larry,

Here are State's suggested edits to the DOJ follow-up questions. We need to get the final out of here today around 4. It probably makes sense for you to be the keeper of the pen at this point and send me what you have heard from DOD by 4. I'll send the text Jeff Kovar at our Mission. The Committee staff confirmed that they have to receive our submission by tomorrow morning Geneva time for it to be of use.

Bryan and Cully,

We still need to see the first draft of the DOD Qs and As.

Bob

-----Original Message-----
From: Padmanabhan, Vijay M
Sent: Thursday, May 11, 2006 1:01 PM
To: Dorosin, Joshua L; Harris, Robert K
Cc: ''; Schou, Nina E; Bentes, Julianna W
Subject: RE:

[redacted] B5

-----Original Message-----
From: Dorosin, Joshua L
Sent: Thursday, May 11, 2006 9:45 AM
To: Padmanabhan, Vijay M
Cc: Schou, Nina E; Bentes, Julianna W; Harris, Robert K
Subject: FW:

Vijay -

Could you review for L/PM. Bob needs comments ASAP; especially need views on the judicial review questions.

Thanks. Josh

-----Original Message-----
From: Robert Harris [mailto:[redacted] B6
Sent: Thursday, May 11, 2006 8:02 AM

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: FRANK H PEREZ
DATE/CASE ID: 12 AUG 2009 200706444

To: harrisrk2@state.gov
Cc: [redacted] schoune@state.gov; BentesJW@state.gov; dorosinjl@state.gov
Subject: B6

I tried to send this message a few minutes ago, but it doesn't appear I was successful.

Attached are follow-up questions to the Committee Against Torture, drafted by DOJ and edited by Nina. We need to get them back for DOJ to review this morning. Would L/PM be willing to quickly look at the Q and A on habeas access for GTMO detainees. Thanks.

Bob

RELEASED IN FULL LE6

Gorove, Katherine M

From: Waller, Robert P
Sent: Wednesday, March 23, 2005 8:28 AM
To: Gorove, Katherine M
Subject: Legal-#9547-v3-CAT__draft_11__with_DOD_edits_accepted_and_DOS_qs

Attachments: Legal-#9547-v3-CAT__draft_11__with_DOD_edits_accepted_and_DOS_qs.DOC

Legal-#9547-v3-CA
T__draft_11__...

Clear, but please see question in the text regarding number of Amcits killed in the Nairobi and Tanzania attacks. Thanks,

Rob

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 06 AUG 2009 200706444

Gorove, Katherine M LE15

From: Gorove, Katherine M
Sent: Friday, March 18, 2005 4:04 PM
To: Aswad, Evelyn M (Washington); Brancato, Gilda M
Subject: FW: CLEAR - Annex to CAT- GTMO, Afghanistan, Iraq

Attachments: Legal-#9547-v3-CAT__draft_11__with_DOD_edits_accepted_and_DOS_qs.DOC

I sent CAT annex to Bellinger and left phone message, but he was on another line. E-mail and annex below.

-----Original Message-----
From: Gorove, Katherine M
Sent: Friday, March 18, 2005 2:42 PM
To: Bellinger, John B
Cc: Harris, Robert K; Schou, Nina E
Subject: CLEAR - Annex to CAT- GTMO, Afghanistan, Iraq

Attached is the draft Annex to the CAT Report to be submitted at the end of the month to the Committee Against Torture. We would like to request your clearance (or any edits) by noon on Tuesday (March 22), if possible.

DOD PDGC has cleared the last version. Brad Wiegman input into an earlier version and DOJ working level cleared an earlier version. I have worked with working level DOD OGC to fill in gaps since those earlier drafts and what is attached represents the best DOD can provide at this time. I am now sending this version around to all agencies asking for final clearances by noon on Tuesday also.. I am promising all agencies that if you or Acting A/S Kozak or Pierre Prosper make any further changes that we will re-clear those changes with them. We hope to send an information to Dr. Rice on Thursday March 24, attaching the final text of the Report and this Annex, to inform her that we will submit this text to the United Nations on March 31st.

Thank you very much,

Kate
x68355

Legal-#9547-v3-CA
T__draft_11__...

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 06 AUG 2009 200706444

RELEASED IN PART LE101
B5, B6

Gorove, Katherine M

From: Gorove, Katherine M
Sent: Thursday, April 21, 2005 3:43 PM
To: Schou, Nina E; 'Robert Harris'; Harris, Robert K; [redacted] B6
Subject: RE: LEGAL-#10482-v1-CAT_REPORT_PRESS_GUIDANCE.DOC

[redacted] B5

-----Original Message-----
From: Schou, Nina E
Sent: Thursday, April 21, 2005 3:32 PM
To: Gorove, Katherine M; 'Robert Harris'; Harris, Robert K; [redacted] B6
Subject: RE: LEGAL-#10482-v1-CAT_REPORT_PRESS_GUIDANCE.DOC

[redacted] B5

-----Original Message-----
From: Gorove, Katherine M
Sent: Wednesday, April 20, 2005 12:35 PM
To: 'Robert Harris'; Schou, Nina E; Harris, Robert K; [redacted] B6
Subject: RE: LEGAL-#10482-v1-CAT_REPORT_PRESS_GUIDANCE.DOC

Some further edits.

-----Original Message-----
From: Robert Harris [mailto:[redacted] B6
Sent: Tuesday, April 19, 2005 8:29 PM
To: SchouNE@state.gov; HarrisRK2@state.gov; GOROVEKM@state.gov; [redacted] B6
Subject: RE: LEGAL-#10482-v1-CAT_REPORT_PRESS_GUIDANCE.DOC

Kate and Nina,

I played around a bit with this. I made some smaller changes in non-track change format, but put some of the later ones that I wanted you both to see in that format. I would love to have Kate's eye over the whole thing and tee up one if pressed question that I hope Kate can easily write. Kate, if you see anything else you think should be in here, please feel free to add it.

Bob

Could i ahplayed
>From: "Schou, Nina E" <SchouNE@state.gov>
>To: "Harris, Robert K" <HarrisRK2@state.gov>, "Gorove, Katherine M"
><GOROVEKM@state.gov>, [redacted] B6
>Subject: LEGAL-#10482-v1-CAT_REPORT_PRESS_GUIDANCE.DOC
>Date: Tue, 19 Apr 2005 16:48:30 -0400
>
> <<LEGAL-#10482-v1-CAT_REPORT_PRESS_GUIDANCE.DOC>>
>
>Here are my contributions.
>>< LEGAL-_10482-v1-CAT_REPORT_PRESS_GUIDANCE.DOC >>

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 19 AUG 2009 200706444

LL17

Johnson, Clifton M

RELEASED IN PART
B5

From: Propp, Kenneth R
Sent: Thursday, May 17, 2007 11:40 AM
To: Johnson, Clifton M
Subject: FW: Spain: CIA Flights Case

Attachments: (CO) MADRID 173

Cliff -- Response from Madrid (the excellent Ricardo Zuniga); Lisbon and Bern still pending.

From: Clements, Gary A
Sent: Thursday, May 17, 2007 10:07 AM
To: Propp, Kenneth R
Cc: EUR-WE-Spain-DL; Opstrup, Kevin R
Subject: FW: CIA Flights Case

Ken,

[redacted] B5

Gary A. Clements
Senior Country Officer for Spain and Andorra
U.S. Department of State
Ph: 202-647-3151
Fax: 202-647-3459

From: Zuniga, Ricardo X (Madrid)
Sent: Thursday, May 17, 2007 5:32 AM
To: Clements, Gary A
Cc: Madrid_POL; EUR-WE-Spain-DL
Subject: CIA Flights Case

[redacted] B5

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 21 AUG 2009 200706444

From: Zuniga, Ricardo X (Madrid)
Sent: Thursday, February 01, 2007 6:53 PM
To: EUR-WE-Spain-DL
Cc: Madrid_POL; Madrid_Econ; Llorens, Hugo; Shumake, Josie S. (Madrid)
Subject: FW: (CO) SPAIN/CIA FLIGHTS: JUDGE ORDERS DECLASSIFICATION OF INFO RELATED TO FLIGHTS

NotesTele.txt (16 KB)

Madrid Daily Report for Friday, February 02, 2007
The latest on the CIA flights

(U) All Spanish media cover today Spanish parliamentary reaction to the CIA flights issue. Fatima Aburto and Gustavo de Aristegui, PSOE and PP Spokespersons for the Congress' Commission for Foreign Affairs, said February 1 that their parties support the declassification of the Spanish National Intelligence (CNI) documents if it a) helps to shed some light on what may have happened in Spanish airports, b) indicates whether human rights or international treaties have been violated in Spanish territory, and c) clarifies any possible legal responsibilities, all without damaging the fight against terrorism. Diego Lopez Garrido, PSOE overall spokesman in Congress, said he did not have any doubts that the GOS will observe the High Court decision, and that the GOS will ask for the declassification of the documents. The Office of the Secretary of State for Communication said that, "as of today, the GOS stands by the explanations given by the Minister of Foreign Affairs in Congress and in the European Parliament." **(All Media)**

Madrid Daily Report for Monday, February 12, 2007
Spanish media question military flights to Guantanamo

(U) EL PAIS reported Feburary 12 that the U.S. military used bases in Torrejón, Morón and Rota for military flights to and from Guantanamo Bay. EL PAIS gained access to Portuguese air traffic control flight records which showed seven direct flights between Guantanamo and U.S. bases in Spain since 2002. EL PAIS cited the bilateral convention prohibiting the transport of "controversial cargo" and implied that at least some of the flights must have contained controversial cargo (i.e. rendered individuals). The article acknowledges that there is no way of knowing either way, since U.S. flights receive blanket clearances at the bases and are not inspected by Spanish authorities. **(EL PAIS)**

(C) COMMENT: Embassy suspects that the United Left (IU) and others will attempt to use this information to expand the existing judicial inquiry into alleged CIA rendition flights transiting Spanish commercial airports. END COMMENT. **(EMBASSY)**

Madrid Daily Report for Wednesday, February 21, 2007
Congress will not investigate visit of Spanish authorities to Guantanamo

(U) The United Left (IU) party and the Catalan Republican Left (ERC) party registered a request in Congress on February 20 to create a commission to investigate military flights to and from Guantanamo Bay which also transited U.S. bases in Spain, as well as to investigate whether Spanish officials broke any laws by traveling to Guantanamo Bay to interrogate Spanish detainees. PSOE's congressional spokesman said February 20 that PSOE will not support the creation of such a commission. In the case of the flights, Lopez-Garrido noted a judicial investigation is already open. In the matter of the visit of Spanish authorities to Guantanamo he said, "the Congress cannot spend its time asking for explanations from the previous government." **(EL PAIS)**

Madrid Daily Report for Wednesday, March 07, 2007
Spanish judge will look into USMil Guantanamo flights
(U) Judge Ismael Moreno announced March 7 that he will formally request from Portuguese authorities all information pertaining to flights originated in Guantanamo going through the Iberian Peninsula airspace since 2001. Moreno has also asked the Spanish airport authority AENA for information on the seven direct flights between Guantanamo and the U.S. military bases of Rota, Morón, and Torrejón. **(EUROPA PRESS)**

Madrid Daily Report for Monday, March 12, 2007
Nothing new from GOS disclosure on CIA flights
(U) According to EL PAIS, documents provided by Spanish intelligence to National Court Judge Ismael Moreno on alleged CIA rendition flights do not provide any significant new information, and the documents have been heavily redacted, omitting names of drafters, recipients, and other details. **(EL PAIS)**

LQ10

Conklin, Maegan L

RELEASED IN FULL

From: Schulz, Kirsten A
Sent: Wednesday, July 25, 2007 11:16 AM
To: Mills, Richard M Jr.; Johnson, David T
Cc: Bellinger, John B (L Bureau); Roy, Kenneth M; Pease, Leah; Pomper, Stephen; Adams, Kelli; Poisson, Beth L; Ereli, Adam J; Bishop, Vaughn F; Tsou, Leslie M; Bell, Richard K; Tremont, Pamela M; Bilgesu, Deniz X; Deeks, Ashley S
Subject: Intelligence and Security Committee/Renditions

Rick, David,

(C) The Embassy received the Intelligence and Security Committee report on Rendition today. The report is some seventy pages in length and includes some ten pages of summary and recommendations. At first, cursory reading, the report appears to be a history of what the British Intelligence services (MI5, MI6) knew about U.S. detainee and rendition policy and when, as well as a description of HMG's evolving policy toward U.S. detainee and rendition policy since 9/11. Not having read the report in its entirety, I highlight some of its language:

(U) The nature of intelligence sharing

Our intelligence-sharing relationships, particularly with the United States, are critical to providing the breadth and depth of intelligence coverage required to counter the threat to the UK posed by global terrorism. These relationships have saved lives and must continue...

Implications for the Special Relationship...

What the rendition programme has shown is that in what it refers to as 'the war on terror' the U.S. will take whatever action it deems necessary, within U.S. law, to protect its national security from those it considers to pose a serious threat. Although the U.S. may take note of UK protests and concerns, this does not appear materially to affect its strategy on rendition.

It is to the credit of our Agencies that they have now managed to adapt their procedures to work round these problems and maintain the exchange of intelligence that is so critical.

...

The UK Agencies
Conclusions and Recommendations

...The Committee considers that "secret detention," without legal or other representation, is of itself mistreatment. Where there is a real possibility of "rendition to detention" to a secret facility, even if it would be for a limited time, then approval must never be given.

...

Summary of conclusions and recommendations...

Our intelligence-sharing relationships, particularly with the United States, are critical to providing the breadth and depth of intelligence coverage required to counter the threat to the UK posed by global terrorism. These relationships have saved lives and must continue...

In the immediate aftermath of the 9/11 attacks, the UK Agencies were authorized to assist U.S. "rendition to justice" operations in Afghanistan. This involved assistance to the CIA to capture "unlawful combatants" in Afghanistan...

By mid-2003, following the case of Khaled Sheik Mohammed and suspicions that the U.S. authorities were operating "black sites," the Agencies had appreciated the potential risk of renditions and possible mistreatment of detainees. From this point the Agencies correctly sought Ministerial approval and assurances from foreign liaison services whenever there were real risks of rendition operations resulting from their actions...

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

The Committee has strong concerns, however, about a potential operation in early 2005 which, had it gone ahead, might have resulted in the xxxxx (sic) The operation was conditional approved by Ministers, subject to assurances on humane treatment and a time limit on detention. These were not obtained and so the operation was dropped. xxx (sic) ...

The use of UK airspace and airports by CIA-operated aircraft is not in doubt. There have been many allegations related to these flights but there have been no allegations, and we have seen no evidence, that suggest that any of these CIA flights have transferred detainees through UK airspace (other than two "rendition to justice" cases in 1998 which were approved by the UK Government following U.S. request.)...

We consider that it would be unreasonable ...to check whether every aircraft transiting UK airspace might have been, at some point in the past, and without UK knowledge, involved in a possibly unlawful operation. We are satisfied that, where there is sufficient evidence of unlawful activity on board an aircraft in UK airspace, be it a rendition operation of otherwise, this would be investigated by UK authorities...

The alleged use of military airfields in the UK by rendition flights has been investigated in response to our questions to the Prime Minister. We are satisfied that there is not evidence that U.S. rendition flights have used UK airspace (except the two cases in 1998 referred to earlier in the report) and that there is no evidence of them having landed at UK military airfields."

There is also language on Guantanamo detainees el-Banna and el-Rawi, among others.

Regards,
Kirsten

Conklin, Maegan L

LQ11

RELEASED IN FULL

From: Deeks, Ashley S
Sent: Monday, July 09, 2007 3:04 PM
To: Bellinger, John B (L Bureau); Johnson, Clifton M; Propp, Kenneth R
Cc: Padmanabhan, Vijay M.
Subject: FW: Germany: Bundestag Appoints Special Counsel for CIA renditions

FYI.

From: Robinson, John G
Sent: Monday, July 09, 2007 3:04 PM
To: Deeks, Ashley S; Padmanabhan, Vijay M; Sicade, Lynn M (DRL); Hammond, Sylvia L (DRL)
Subject: Germany: Bundestag Appoints Special Counsel for CIA renditions

Germany: Bundestag Appoints Special Counsel for CIA renditions

(U) This week the Bundestag's Intelligence fact-finding committee appointed a special counsel to deal solely with questions of CIA renditions, secret prisons, and CIA secret flights. The counsel, Joachim Jacob, previously served as the government's data protection commissioner. Jacob's appointment is for six months. (Hugo Guevara, x 7-0345, Embassy Press Summary)

John G. Robinson
EUR/ERA
(202) 647-3913

Classified Confidential by Political Officer John G. Robinson, EUR/ERA, based on definitions provided in E.O. 12958, reasons 1.4 (b) and (d). decl.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

LQ15B

Congress of the United States

Washington, DC 20515

RELEASED IN FULL

July 2, 2007

The Honorable Condoleezza Rice
Secretary of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Madam Secretary:

The House Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, and the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties are conducting a joint inquiry into the United States's policies and practices in connection with the extrajudicial transfer of a person from one state (i.e., country) to another, often referred to as "extraordinary rendition." The United States's involvement in extraordinary renditions has received world-wide press attention, and has resulted in the attempted prosecution of United States executive branch personnel in Italy. We therefore seek information regarding the United States's policy and practice on renditions.[1]

The purpose of this letter is not to request information or documents relating to any specific rendition, nor is it to request any information or documents that relate to any operational matters associated with any rendition. Rather, we are interested in obtaining documents or information as follows:

1) Please provide any written materials in the nature of policies or guidelines that relate to the circumstances where the United States will participate in or conduct an extraordinary rendition;

2) Please provide written materials or other information that describe or set forth the approval process within the State Department and any and all other branches of government (including, but not limited to the intelligence agencies, the Defense Department, the Department of Justice, the White House, and any other agencies);

3) Please provide written materials or other information that describe the legal and factual findings that are typically made or required to be made prior to any such rendition, and please provide a sample set of such findings that redact information that would identify the person to be involuntarily rendered;

4) Please provide any written materials in the nature of policies or guidelines that relate to the steps taken by the United States's to determine what the country to which the individual is to

---

[1]As used in this letter, the term "rendition" means the transfer of a person from one state to another in the absence of an extradition treaty or other formal legal process and includes "extraordinary rendition" or "irregular rendition."

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

be rendered will do with the individual when rendered, including but not limited to, steps taken and written materials or other information that is obtained as to the country's commitments not to engage in torture (i.e., "diplomatic assurances"). Please indicate how the communications with the receiving country are memorialized and retained. Please also provide information on how the United States ensures that the receiving country abides by its treatment commitment and what, if any, remedy is taken if the United States receives credible information that the receiving country has tortured the rendered individual or otherwise failed to honor its commitments;

5) Please provide any legal analyses that provide authority for the United States's participation in the extraordinary rendition process;

6) As to each of the above categories, please provide documents or information that reflect whether the policies or practices (including legal policies) have remained constant or have changed over time;

7) Please provide documents or information explaining how many times the United States has participate in or conducted a rendition since January 20, 2001; and

8) Please provide documents or information explaining how many times the United States has determined that those rendered were not dangerous terrorists.

We appreciate your prompt attention to this letter, and would request a response no later than Monday, July 16, 2007. If you have any questions, please contact Natalie Coburn, Counsel to the Subcommittee on International Organizations, Human Rights and Oversight at (202) 226-6434, or Heather Sawyer, Counsel to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, at (202) 225-2585

Sincerely,

WILLIAM D. DELAHUNT
Chairman
Subcommittee on
International Organizations,
Human Rights and Oversight
Committee on Foreign Affairs

JERROLD NADLER
Chairman,
Subcommittee on
the Constitution,
Civil Rights, and Civil Liberties
Committee on the Judiciary

JEFF FLAKE
Member of Congress

RON PAUL
Member of Congress

L Q20

Conklin, Maegan L

RELEASED IN FULL

From: Buchwald, Todd F (L-UNA)
Sent: Friday, December 02, 2005 5:16 PM
To: Bellinger, John B (L Bureau)
Cc: Harris, Robert K; Witten, Samuel M; Dorosin, Joshua L
Subject: -- Are there black sites

Attachments: LEGAL-#124221-v1-Sec_Q's__A's_-_Black_sites__etca1_.doc

LEGAL-#124221-v1
-Sec_Q's__A's_...

This has the change that Bob just discussed with you (Euro Commission vice Euro Court) for the Carlos the Jackal case - he's walking it up in hard copy,

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

Conklin, Maegan L

L021

RELEASED IN FULL

From: Graffy, Colleen P
Sent: Wednesday, November 23, 2005 3:59 PM
To: Bellinger, John B (L Bureau); Hughes, Karen P(R)
Subject: Assessments from Posts

Attached are assessments by posts on the media coverage that renditions, black sites and Guantanamo are getting in their respective country and its affect on public diplomacy.

This includes Armenia, Austria, Cyprus, Finland, Iceland, Lithuania, Luxembourg, NATO, Slovenia, Spain, Sweden, Turkey and United Kingdom & Netherlands.

On the unclass side is Bosnia and Denmark

Colleen

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

RELEASED IN FULL LQ 33A.

Susan M Ball 11/16/2005 03:54:32 PM From DB/Inbox: Susan M Ball

Cable
Text:

UNCLASSIFIED
TELEGRAM November 16, 2005

To: SECSTATE WASHDC - IMMEDIATE

Action: EUR

From: AMEMBASSY PARIS (PARIS 7785 - IMMEDIATE)

TAGS: PINR, PINS, PREL, FR

Captions: None

Subject: ACTION REQUEST: GUIDANCE ON RESPONSE TO COE INVESTIGATION

Ref: None

---

1. (U) This is an action request. See para 3.

2. (U) Amb. Stapleton received by fax a letter (full text para 4) from Dick Marty, whom the Council of Europe Parliamentary Assembly has appointed to investigate the allegations of CIA secret detention centers in CoE member countries. The key phrase reads, "I would very much appreciate receiving from your authorities any pertinent information they may be able to provide me with on this subject."

3. (U) ACTION REQUEST: Please provide authorized language for use by Ambassador and Strasbourg consulate in response to COE requests.

4. (U) Text of Marty letter:

Parliamentary Assembly
The Council of Europe
Committee on Legal Affairs and Human Rights
The Chairperson

14 November 2005

Dear Mr. Roberts Stapleton,

I address this letter to you in your capacity as Permanent Observer of the United States of America to the Council of Europe.

As you are no doubt aware, I have recently been instructed by the Parliamentary Assembly,s Committee on Legal Affairs and Human Rights to collect information on &alleged secret detention centres in Council of Europe member states8 as a result of communications received on this subject from a number of sources, especially Human Rights Watch.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

With this in mind, and in particular the existence of serious allegations concerning your country,s involvement in such activities in Council of Europe member States as of 2001, I would very much appreciate receiving from your authorities any pertinent information they may be able to provide me with on this subject.

I look forward to receiving a reply to my request at your earliest convenience and thank you for your cooperation.

Yours Sincerely,

Dick Marty

END LETTER TEXT

Please visit Paris' Classified Website at:
http://www.state.sgov.gov/p/eur/paris/index.cfm
Hofmann

Additional Addressees:
None

CC:
AMCONSUL STRASBOURG
EUROPEAN POLITICAL COLLECTIVE

Distribution:

TED9534
ACTION EUR-00

INFO	LOG-00	NP-00	ACQ-00	CIAE-00	DODE-00	DS-00	UTED-00
	VCI-00	TEDE-00	INR-00	IO-00	L-00	VCIE-00	NSAE-00
	ISN-00	NSCE-00	OMB-00	PA-00	PM-00	PRS-00	P-00
	SP-00	SS-00	TRSE-00	T-00	IIP-00	PMB-00	DSCC-00
	DRL-00	G-00	SAS-00	/000W			

----------5EFB8C 161334Z /80

O 161231Z NOV 05
FM AMEMBASSY PARIS
TO SECSTATE WASHDC IMMEDIATE 1456
INFO EUROPEAN POLITICAL COLLECTIVE PRIORITY
AMCONSUL STRASBOURG PRIORITY

UNCLAS PARIS 007785

E.O. 12958: N/A
TAGS: PREL, PINR, PINS, FR
SUBJECT: ACTION REQUEST: GUIDANCE ON RESPONSE TO COE INVESTIGATION

End Cable Text

Susan M Ball 11/16/2005 03:54:32 PM From DB/Inbox: Susan M Ball

Recipient/Profile Information
Cable Recipients:
Steve Adams-Smith
Joanne E Addison
Michael J Adler
Damola A Akeredolu
Worth S Anderson
Jorgan K Andrews
Richard H Appleton
Katherine Arcieri
Michelle E Azevedo
Alejandro H Baez
Susan M Ball
Stephen B Banks
Rene L Bebeau
John P Becker
Lisa J Benthien
Mark A Betka
Joshua Black
Sharon Bowman
Scott A Brandon
Jamar P Broussard
Tiffani Brown
Mia Buck
Jody L Buckneberg
Mary J Bushnaq
Andrea Cameron
Martha L Campbell
Raphael Carland
Amy C Carlon
Amy A Carnie
Lauren W Catipon
Angela M Cervetti
Tania Chomiak-Salvi
Gary A Clements
Marcia E Cole
Ronald Collins
John Conlon
Celeste A Connors
Nerissa J Cook
Anti Crime
John R Crosby
Shawn P Crowley
Thomas R Cunningham
Jennifer M Darrington
Margaret M Dean
Lillian G deValcourt-Ayala
Annick P Ducher
David A Eastmond
Joao M Ecsodi
Colleen S Eddy
Jennifer A Eldridge
Christopher A Ellis
John F Erath
EUR Sp Asst
Mark R Evans
Robert J Faucher
Michael A Feldman

John J Fennerty
Terrance R Flynn
Daniel Fried
Martin C Gage
Michael F Gallagher
Gregory G Garramone
Juliette Garvis
Linda A Gayles
Stephen M Geis
Theresa A Grencik
Danny Hall
Morgan C Hall
Joshua Hatcher
Margaret Hawley-Young
Kathryn A Hayter
John Hennessey-niland
Priscilla G Hernandez
John J Hillmeyer
Marcus A Hirsch
Marjorie T Hoefler
Greta C Holtz
Arnold Horowitz
Todd M Huizinga
Cornelia L Johnson
Kim Johnson
Seth A Johnston
Donald L Jordan
Stephanie S Kinney
Heather X Kitchens
Eric W Kneedler
Mary Koenig
David J Kostelancik
Adam D Lamoreaux
John F Larrea
Jacqueline A Lawrence
Thomas M Leary
Frank J Ledahawsky
Thomas E Lersten
Aaron H Levy-Forsythe
J D Lippeatt
Debra Lo
Maria A Longi
Andrew R Lorenz
John O Maher
Joseph Manganiello
Carolann Marino
Gregory L Mattson
James Miervaldis
Stephanie A Miley
Katherine L Mitchell
Matthias J Mitman
Pamela P Montgomery
Joann Moore
Connie A Morella
Alessandro P Nardi
Alain G Norman
Mary M O'Keefe
Thomas A O'Keeffe
Tabitha R Oman
Howard Perlow
Peggy L Plunkett
Denise M Pontacoloni
Pamela M Powell

Kathleen A Powers
Richard L Prosen
Jay Raman
Stephanie A Raney
Jeffrey D Rathke
Lonni H Reasor
Helen G Recinos
Christen C Rhodes
Lawrence G Richter
Gerd Rickert
Maiesha S Riley
John G Robinson
Ana M Rodriguez
Kenneth M Roy
Adele Ruppe
Franciso, D Sainz
Gary E Schaefer
James F Schumaker
Jeffrey R Sexton
Eugenia M Sidereas
Marsha L Singer
Stephen T Smith
Anthony Spakauskas
Lonni H Spiegel
Jeffrey R Starnes
Daphne Z Stavropoulos
Ronald Stephens
Adam H Sterling
Alexandra M Sundquist
David J Tessler
Tracey R Thornton
John C Tucker
Subrena R Tumblin
Robert H Tuttle
Diana N Viggiano
Kurt D Voker
Jacqueline V Voorhees
Ann L Wagner
Ivan S Weinstein
Matthew S Wells
Arkell D Weygandt
Caitlin White
Kami A Witmer
Nelson Wukitsch
Thomas A Yeager
Alan K Yu
Diane R Zeleny
Jane B Zimmerman

LMDS Profiles/Office Symbols:

EUR_AGS_A1
EUR_AGS_A13
EUR_AGS_A3
EUR_BI_A2
EUR_BI_A3
EUR_CAN_A6
EUR_EEA_A7
EUR_EEA_A8
EUR_ERA_A2
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EUR_FO_A2
EUR_FO_A3
EUR_FO_A4
EUR_NAR_A1
EUR_NB_A4

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EUR_RPM_A4
EUR_RPM_A7
EUR_USIS_A1
EUR_WE_A10
EUR_WE_A7

CableXpress Folders:
bakasma1

Bushnaq_1
byrnesk1
cappsr
crouchgd_1
DOFO1 #4
ellis1
kilnerS1
murrayjc1
sas4
arnettdl1
Becker1
DOFO1 #1
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ERA2
hardtdb3
hawthorm3
murraycw2
murraycw6
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secorpf3
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slettenj_1
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HallD_1
hillc_4
rickertg_1
trostlj_3
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brandonSA_1
chomiak-salviT
CupicS1
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ettern_1
EUR_POSTS
fennertj_1
gallagmf
hadda_1
hiltonrb_1
horowitzA1
johnsontc_1
karagiaA1
kostedj3
longmyer3
McdonaldC1
MOZUR-GENERAL
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PGI-1
powellpm1
profaiza1
ROOD1

SaarnioS_1
shinagele_1
slottag
Smithcm1
sullivah_1
TC
turnbulld
Wukitschn1
fabrycky1
snis3
AzevedoM
conlon1
eddyc_1
EXHEADS1
gagem1
kramers1
manningjl2
mcgahuab1
POWERSK_2
princed_1
Prosenr1
schultze_1
snec1
tribbleC1
volkerkd1
ERA1
murraycw1
CarnieAA_1
crouchgd_2
gagem2
goldsteinj2
recinosh_3
TEKACH_5
akeredda
hornblmm1

LQ234

RELEASED IN FULL

November 15, 2005

SENSITIVE BUT UNCLASSIFIED
NOTE FOR THE SECRETARY

FROM: John B. Bellinger

SUBJECT: European Response to Reports of CIA Secret Detention Sites in Europe

Press reports about alleged secret CIA detention sites in Eastern Europe have led the Council of Europe to open an investigation into the existence of such sites, resulting in an official request for information. Further, following press reports of suspect air flights in the region, several European countries (including Germany, Denmark, the UK, Italy, and Iceland) have queried us about possible renditions that might have occurred through their airspace. Recent press reports have also drawn international attention to Spain's ongoing investigation of allegations that the CIA has used facilities on Majorca in connection with prisoner transfers. Finally, the European Union has indicated that it will monitor the outcome of the various investigations underway for evidence that EU member states may have acted in contravention of their EU obligations.

On November 8, the Legal Affairs Committee of the Council of Europe (CoE) Parliamentary Assembly (PACE) appointed its Chairperson, Dick Marty (Switzerland), as rapporteur to examine the subject of alleged secret CIA detention centers, with a view to a possible urgent debate at the next Standing Committee's meeting in Bucharest on November 25. The Committee authorized visits to member States as needed, and Marty has requested that our Ambassador in Paris, in his capacity as U.S. Observer to the CoE, provide information regarding the allegations. In earlier resolutions, the Parliamentary Assembly called upon member States to "ensure that their territory and facilities are not used in connection with practices of secret detention or rendition in possible violation of international human rights law." On November 3 EU Commission spokesperson Roscam Abbing announced that the Commission would not investigate the allegations, suggesting that the task fell to the EU's member states. Yesterday, Commission Vice President Frattini asserted in a statement before the EU Parliament that the conduct described in press reports would constitute a "serious violation of the principles of the European Union" by the member states concerned. Finally, the ICRC remains concerned about all detainees whom it believes the USG has kept from ICRC access.

Romanian President Basescu, Prime Minister Tariceanu, and other Romanian officials have advised that they have no evidence of "secret prisons" alleged by Human Rights Watch. The outgoing Polish Defense and Foreign Ministers categorically denied the Washington Post's allegations, as did the President, and leaders of the incoming government expressed disbelief the story could be true. In Spain, Interior Minister Alonso remarked on television that it would be "very serious and intolerable" if the CIA in fact used Spanish airports to take prisoners to unknown destinations, but asked for "caution" as the investigation continues.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

Drafted: L/HRR - Gilda Brancato x 72773 11/9/05, updated 11/15/05 124032

Cleared: DRL/MLA – Julieta Noyes - ok
EUR – Kurt Volker - ok
L/PM – Josh Dorosin - ok
L/HRR – Robert Harris – ok
L/EUR – Peter Olson& Damon Terrill– ok
PRM/MCE – Carol Santos - ok
EUR/NCE –Janet Garvey - ok
EUR/NB - Vicky Middleton – ok
EUR/ERA – Rob Faucher - ok
G – Joseph Bracken – ok
EUR/WE – Italy / Spain - Kathy Allegrone - ok

CC: USGeneva – Jeffrey Kovar
L – Ronald Bettauer, Samuel Witten
L/LEI - Kenneth Propp
IO- Mark Lagon
IO/SHA – Bill Lucas

LQ25A.
RELEASED IN FULL

UNCLASSIFIED

Q. Europeans say extraordinary renditions violate international law, you say they're legal. Who is right?

-- Properly conducted renditions are permissible under international law, and European tribunals have upheld them in specific cases.

-- I am told for example that the European Commission of Human Rights specifically rejected Carlos the Jackal's claim that his rendition from Sudan violated international law.

-- That is not to say that renditions can never be conducted in a way that would violate international law, such as if torture were involved, either as part of the rendition or if a person were rendered to a place knowing that he would be tortured or even that it is likely that he will be tortured.

-- But I want to be clear:

> -- We take the prohibitions against torture, under both international law and domestic law, very seriously.
>
> -- We do not authorize or condone torture.
>
> -- Where there have been cases of unlawful treatment of detainees, such as in connection with Abu Ghraib, we have investigated and where appropriate we prosecute and punish those responsible.

Q. Are you saying you have rendered people from Europe or through European territory?

-- Again, I cannot and will not comment on intelligence activities, but I can say we have worked and will continue to work cooperatively with our friends and partners in Europe and elsewhere.

-- That said, I can say that a large number of the allegations I have seen in the European media are flatly wrong.

Q. Where are they being rendered to? And who are they?

-- I am not in a position to discuss intelligence information that would compromise our intelligence, law enforcement and military operations.

-- In general, these detainees are extremely dangerous terrorists who are being transferred to countries of which they are nationals or sometimes to countries that are able to detain them or prosecute them.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

Q. Are there black sites?

-- I want to be as forthcoming as possible but for reasons I hope you understand I am not going to confirm or deny intelligence activities.

-- As I have said, our publics – rightfully – hold us responsible for protecting our countries and our citizens.

-- I am just not in a position to discuss intelligence information that would compromise our intelligence, law enforcement and military operations.

Q. Do you think waterboarding is torture? If not, how can you say it is not cruel, inhumane, or degrading?

-- I want to avoid commenting on allegations about the legalities and details of specific practices.

-- As I've said, it is our policy to comply with all of our international obligations in our treatment of detainees: authorized interrogation procedures will not constitute torture or cruel, inhuman, or degrading treatment, as defined by U.S. obligations under the Convention Against Torture.

-- Our interrogation procedures are given careful legal review by the Department of Justice for compliance with the law.

Q. When you ask countries to cooperate in these renditions, aren't you effectively asking them to break their own laws? Isn't this fundamentally inconsistent with the idea that the United States promotes the rule of law?

-- The premise that renditions are illegal is wrong. Renditions are not automatically legal or automatically illegal – it depends on how they are carried out.

-- Cooperation in these rendition efforts is voluntary. Democratic governments have obligations to protect their citizens and their countries from the threats posed by terrorists. These governments must decide whether they want to work with us and how the want to work with us.

-- Democratic governments of course are responsible for complying with their own laws. In some cases we and other countries are finding that we need to change or adapt our laws to deal with the threat.

-- But we are certainly not asking anyone to abandon the rule of law.

Q. Isn't the United States violating the human rights of these individuals? These are enforced disappearances, aren't they? Isn't it correct that international treaties ratified by the U.S. prohibit incommunicado detention of persons in secret locations as well?

-- Members of al Qaeda and its affiliates are unlawful combatants who may be held in accordance with the law of war. And that is what we are doing.

Q. Could the US cooperate in one of these renditions from the United States if another country requested?

-- There are a variety of ways that a person might be "rendered" under US law outside of a traditional extradition procedure. We can cooperate, but it of course depends on what is being requested.

-- So the question is not simply whether the United States could or could not cooperate in a rendition request. There are many, many different kinds of situations, and yes – we would in an appropriate situation cooperate as best we could.

Q. What about the reports that CIA has rendered the wrong people, such as al-Masri from Germany?

-- I am not going to comment on particular allegations.

-- Our military and intelligence agencies make every effort to ensure that any individual who is detained is a member of al-Qaeda or its affiliates and poses a threat to the United States or its allies.

-- If an individual is detained in error, we take corrective action.

-- But simply because errors are sometimes made does not mean that detention activities should be stopped.

Q. Why are you opposing the McCain amendment?

-- The issues involved in the McCain Amendment are more complicated than might first seem, including issues related to separation of powers, about which there have long been differences of views between the Executive and Legislative branches.

-- Under the Constitution and our system of government, the President has responsibilities as Commander-in-Chief.

-- Because of this, there are questions about the extent to which it is appropriate or wise for Congress to make laws about how the President should be required to conduct or not conduct interrogations, or otherwise carry out his responsibilities under the Constitution as Commander-in-Chief.

-- That said, we understand the concerns that some in Congress have expressed.

-- And we are working closely with the Congress to try to reach a satisfactory resolution of this issue.

L027

Conklin, Maegan L

RELEASED IN FULL

From: Terrill, Damon A
Sent: Thursday, December 15, 2005 12:21 PM
To: Bellinger, John B (L Bureau)
Subject: FW: Amnesty says CIA detainee flights used UK territory

John -

This looks like it may have made it to everyone but you, so just passing it along.

Best,

Damon (7-1270)

-----Original Message-----
From: Williams, Veronica X
Sent: Thursday, December 15, 2005 12:19 PM
To: Legal-All-Deputies-dl; Legal-All-ALAs-dl; Legal-L-EUR-dl; Legal-L-PM-dl
Subject: FW: Amnesty says CIA detainee flights used UK territory

-----Original Message-----
From: Shvetz, Brendon
Sent: Thursday, December 15, 2005 11:49 AM
To: LW-EUR; LW-Mahogany; SES-O_Shift-II; LW-L
Subject: Amnesty says CIA detainee flights used UK territory

^BC-SECURITY-BRITAIN-RENDITION
^Amnesty says CIA detainee flights used UK territory
LONDON, Dec 15 (Reuters) - Amnesty International said on Thursday Britain had allowed the CIA to operate flights on its territory to transport terrorism detainees illegally and demanded that the government launch an investigation.
"The UK has allowed these aircraft to land, refuel and take off from their territory," the human rights group's regional director Claudio Cordone said in a statement.
"The UK government must launch an immediate, thorough and independent investigation into mounting evidence that its territory has been used to assist in unlawfully transporting detainees to countries where they may face "disappearance", torture or other ill-treatment," he added.
The British government said on Monday it had no evidence that the current U.S. administration has been transporting terrorism suspects through British airports.
Cordone said: "Whether the U.S. is sending people to other countries to be tortured, or snatching them in other countries to be abused in Guantanamo, international law prohibits the UK, or any other state, from aiding or abetting them."
Human rights groups accuse the CIA of running secret prisons in eastern Europe and covertly transporting detainees -- a practice known as "extraordinary rendition". They say incommunicado detention often leads to torture.
The Amnesty statement named several men it said had been abducted by the CIA and flown to Jordan and Egypt as part of the U.S. campaign of "extraordinary rendition".
In each case a Gulfstream V, registration N379P, had stopped to refuel at Prestwick airport in Scotland on its way back to the United States after dropping off its passengers, it said.
It cited the case of Jamil Qasim Saeed Mohammed who it said was seen being bundled aboard the CIA plane by masked men in Karachi on Oct 23, 2001. The plane then flew to Jordan and the following day, now without its passenger, it flew to Prestwick and then on to Dulles International airport near Washington.
It demanded that the United States reveal Mohammed's whereabouts.
Amnesty said that on Jan. 12, 2002, Indonesian security officials saw Muhammad Saad Iqbal Madni being put on the plane in Jakarta and flown to Cairo. Once again the plane stopped in Prestwick to refuel after depositing its passenger.
It said Iqbal Madni had since been returned to U.S. jurisdiction and was now a detainee in Guantanamo Bay where fellow detainees had said he was on the verge of a breakdown.
Amnesty cited a third case where a Swedish investigation has already revealed that U.S. security officials took Ahmed Agiza and Mohammed al-Zari from Sweden to Cairo for torture.
In total, Gulfstream N379P had been logged between 2001 and 2005 making at least 78 stopovers at British airports while en route to or from destinations such as Baku, Dubai, Cyprus, Karachi, Qatar, Riyadh, Tashkent, and Warsaw, Amnesty said.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

L028

Conklin, Maegan L

RELEASED IN FULL

From: Fried, Daniel
Sent: Thursday, December 22, 2005 9:41 AM
To: Bellinger, John B (L Bureau)
Subject: FW: Blair on renditions
Attachments: image001.jpg; image002.jpg

From: Sterling, Adam H
Sent: Thursday, December 22, 2005 7:59 AM
To: Fried, Daniel
Subject: Blair on renditions

(U) Blair's Final 2005 Press Conference: It has been a tough year for the Prime Minister, but in his monthly press conference on December 21, a confident Tony Blair said he was sure he is "doing the right thing" even though he knows he is "battling on all fronts" to save his public reform program. Blair also brushed aside suggestions he would hand over power to Gordon Brown and, when asked whether he would investigate allegations of UK airports being used for "extraordinary rendition," he said "Investigate what? I have absolutely no evidence to suggest anything illegal has been happening."

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

L029

Conklin, Maegan L

From: Fried, Daniel
Sent: Thursday, January 19, 2006 12:00 PM
To: Bellinger, John B (L Bureau)
Subject: FW: EP resolution on secret prisons

RELEASED IN FULL

From: Sterling, Adam H
Sent: Thursday, January 19, 2006 10:07 AM
To: Sterling, Adam H; Fried, Daniel; Graffy, Colleen P; Pekala, Mark A
Subject: RE: EP resolution on secret prisons

More from the EP:

(U) European Parliament to set up temporary committee on CIA activities in Europe
The European Parliament voted on January 18, by a large majority, to set up a temporary committee to investigate allegations of the transport and illegal detention of prisoners by the CIA in European countries. The list of 46 committee members will be approved on January 19. The temporary committee will have limited powers of investigation and cannot force anyone to appear or testify. It will run for a maximum of twelve months, unless the EP agrees to extend it. The mandate calls for the committee to collect and analyze information to find out: whether the CIA has carried out abductions, detentions at secret sites, torture, inhumane or degrading treatment of prisoners in EU or candidate countries; whether such actions could be considered a violation of EU or international law, including EU-US agreements on extradition; whether European citizens have been detained; and whether EU Member States or institutions have been involved. The committee would cooperate closely with the Council of Europe and provide an interim report within four months after commencement. According to an EP staffer, the committee is expected to hold its first meeting the week of January 23 when appointments of president, vice-presidents and report drafter are expected.

From: Sterling, Adam H
Sent: Thursday, January 19, 2006 10:06 AM
To: Fried, Daniel; Graffy, Colleen P; Pekala, Mark A
Subject: EP resolution on secret prisons

From USEU:

(U) EP calls on the U.S. to close "secret prisons" in Afghanistan and Guantanamo
The European Parliament adopted on January 18 a resolution on Afghanistan which "calls on the U.S. to close any secret 'dark' prison in the country." MEPs also "condemn the transfer of hundreds of men captured by U.S. troops... to [the] illegal Guantanamo detention center, where torture and other ill-treatment by U.S. personnel have, according to numerous testimonies, been commonplace occurrences, and calls for its immediate closure." MEPs also welcomed the success of the recent Afghan elections as "an extraordinary accomplishment," called for greater visibility of EU funding in the region and for the UN to streamline coordination among donors. MEPs urged the Council and Commission to develop a policy for stability and democracy in the region and to study the advisability of concluding an EU-Afghanistan Association Agreement.

UNITED STATES DEPARTMENT OF STATE
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DATE/CASE ID: 22 JUN 2009 200706444

LQ32

Conklin, Maegan L

RELEASED IN FULL

From: Greene, Richard L (PRM)
Sent: Friday, November 04, 2005 6:10 PM
To: McCormack, Sean I(PA FRONT); Bellinger, John B (L Bureau)(L-FO)
Subject: FW: 11-04-05 Daily Press Briefing and final guidances + ICRC guidance

Attachments: dpb # 189 November 4.doc; 110405 ICRC - CIA prison.doc; 11-04-05 Final Guidances.doc

Sean -- from our perspective (and I recognize that there are many perspectives on this issue) well done and thanks

-----Original Message-----
From: Eisenhauer, Peter A
Sent: Friday, November 04, 2005 4:46 PM
To: PRM/DAS; PRM/Directors and Deputies; PRM/MCE
Subject: 11-04-05 Daily Press Briefing and final guidances + ICRC guidance

Excerpt from dpb below is re: ICRC queries. Final guidances did not include the cleared guidance on this topic, which I have also attached here.

dpb # 189 vember 4.doc (89 K

110405 ICRC - CIA prison.doc (...

11-04-05 Final Guidances.doc (...

QUESTION: Have you received requests from the EU for cooperation into the reported secret prisons in Europe?

MR. MCCORMACK: I have checked on that, George, and we have not, at this point, received any requests from the EU concerning those news reports. My understanding from reading the news reports is that the EU is actually make requests of member states or potential member states, states with which they are having accession talks. So at this point, we have not received any inquiries from the EU on those news stories.

QUESTION: A follow-up on that?

MR. MCCORMACK: Jonathan, yeah.

QUESTION: Does the International Red Cross have access to all U.S. prisoners?

MR. MCCORMACK: This is a topic that came up yesterday and we --

QUESTION: Okay. Apologies.

MR. MCCORMACK: We talked a bit about it yesterday. We have an ongoing dialogue with the ICRC on a number of -- across a number of different issues. And that dialogue and the contents of that dialogue, by tradition, has been confidential and that has served the aims and work of the ICRC, so I have to respect the diplomatic confidentiality.

There have been news reports and the ICRC has commented in public that it has requested access to all detainees worldwide. And again, we have a dialogue with the ICRC on a number of different issues and we try to engage them as best we can.

I would note that the Department of Defense has -- the ICRC has access to all Department of Defense facilities

UNITED STATES DEPARTMENT OF STATE
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where detainees are held, whether that's in Iraq or Afghanistan or Guantanomo Bay. We've talked a lot about that over the past couple of days.

If there are any future inquiries from the ICRC on these news accounts, I would expect that we would receive those inquiries and continue our dialogue with the ICRC on the broader issue of detainees.

QUESTION: I think that's a confusing answer though, Sean. You said they have access to DOD facilities in Iraq, Guantanomo and Afghanistan and if they made requests, you would, I guess consider them in the future, you said. But they have made requests that, if you have other locations, they want to visit these detainees.

MR. MCCORMACK: As I said, you know, I have to separate out these two things. We do have an ongoing dialogue with the ICRC. We have -- on any given day, we probably have a meeting with the ICRC on a topic of mutual interest, whether it's detainees or other issues. As I said before, those -- that dialogue is a confidential dialogue. It's a confidential diplomatic exchange. I'm not at liberty to discuss the contents of those dialogues.

And as I said, I have seen ICRC statements, public statements in the past, concerning requests to see all detainees. I can only say that we have an ongoing dialogue with the ICRC on questions related to detainees. And I did point out that the ICRC has access to all detainees held by the Department of Defense in those locations where they may be held, whether it's Iraq, Afghanistan or Guantanomo Bay.

QUESTION: I guess my question is have you not received, through your private channels then, a request from the ICRC? Is the only request you know about the one that you've read publicly in news reports?

MR. MCCORMACK: Like I said, we have -- you know, we have meetings every single day or on any given day we may have a meeting with the ICRC if -- you know, based on their public statements, which again, I have read recently. They said they would renew their request to see all detainees based on the recent news reports that have been out in *The Washington Post* and the *Financial Times* and in other news organizations. And I fully expect that, based on their public statements, that they would renew that request.

QUESTION: So they haven't --

MR. MCCORMACK: And as I said, we have meetings -- we have meetings --

QUESTION: You're just being repetitive. Have they or have they not made the request?

MR. MCCORMACK: Again, we have -- you know, we meet with the ICRC. I will try to keep you updated as best I can if, in fact, they have renewed that request. There are bounds in which -- by which I am constrained in terms of the confidentiality of the ICRC dialogue. I will do my best to keep you updated on any requests that they have made.

QUESTION: Without addressing the question of requests they have made, the original question -- well, not the original, but the first follow-up -- was does it have access to all detainees worldwide, not necessarily limited to DOD detainees?

MR. MCCORMACK: Right. And as I said, we do have -- we have a dialogue with them on that issue.

QUESTION: It doesn't go to dialogue. It goes to do they have access to.

MR. MCCORMACK: As I said, they -- and we've talked about this over the past couple of days. They have access to Department of Defense detainees at facilities where those detainees are held, whether that's Guantanamo Bay, Afghanistan or Iraq.

LQ37

Conklin, Maegan L

RELEASED IN FULL

From: Terrill, Damon A
Sent: Tuesday, November 29, 2005 11:25 AM
To: Bellinger, John B (L Bureau); Allegrone, Kathleen H; Faucher, Robert J; Olson, Peter M; Sagor, Andrew E(S/WCI); Hartley, Brent R(S/CT)
Cc: Witten, Samuel M; Dorosin, Joshua L
Subject: L Press Guidance - EU Inquiry Re: Alleged "Secret Prisons"

Importance: High

Attachments: 112905LPressGuidance.doc

Please see the attached press guidance in response to the below tasking. Your clearance as soon as possible will be most appreciated.

L / EUR / INR / REGION: When do we expect an answer to the EU regarding the secret prisons?

Many thanks.

Damon (7-1270)

112905LPressGuida
nce.doc (28 K...

Damon A. Terrill
Attorney Adviser & Press Officer
United States Department of State
Office of the Legal Adviser
European & Eurasian Affairs (L/EUR)
2201 C Street NW
Washington, DC 20520
(202) 647-1270

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

LQ37A.
RELEASED IN FULL

L Press Guidance
November 29, 2005

Alleged CIA "Secret Prisons" in Europe

Question:

When do we expect an answer to the EU regarding the secret prisons?

Answer:

- We are aware of press reports that the EU plans to make a request for information through the UK Presidency, but we have not yet received any such request.

- We remain in regular communication with our European allies about these issues in the meantime.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

Drafted: L/EUR:DTerrill (7-1270)

Cleared:
L: JBellinger
L/EUR: POlson
EUR/WE: KAllegrone
EUR/ERA: RFaucher
S/CT: BHartley
S/WCI: ASagor

Conklin, Maegan L

L038

RELEASED IN FULL

From: Terrill, Damon A
Sent: Wednesday, December 14, 2005 11:35 AM
To: Bellinger, John B (L Bureau); Witten, Samuel M; Dorosin, Joshua L
Cc: Jacobson, Linda; Harris, Robert K; Olson, Peter M
Subject: PLEASE CLEAR (Press Tasking to L - CoE Statements on Detainees)

Importance: High

Attachments: 121405LPressGuidanceCoEStatement.doc

Can we go with the attached for purposes of today's briefing?

Many thanks.

Damon (7-1270)

121405LPressGuida
nceCoEStateme...

-----Original Message-----
From: Terrill, Damon A
Sent: Wednesday, December 14, 2005 9:54 AM
To: Bellinger, John B (L Bureau); Jacobson, Linda; Harris, Robert K; Witten, Samuel M; Olson, Peter M; Dorosin, Joshua L
Subject: Press Tasking to L - CoE Statements on Detainees
Importance: High

Please note the below press tasking, on which L has the lead. I have attached a copy of the COE's statement, to which the tasking refers, as well as a template for use in creating the guidance.

L / S/WCI / EUR: Comment on the Council of Europe's Committee on Legal Affairs and Human Rights report on inquiry into reports of secret prisons and rendition flights.

Best,

Damon (7-1270)

<< File: COE Statemet Secret Detention Centres in Europe.doc >> << File: 121405LPressGuidanceCoEStatement.doc >>

Damon A. Terrill
Attorney Adviser & Press Officer
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UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

L 0239

Conklin, Maegan L

RELEASED IN FULL

From: Terrill, Damon A
Sent: Tuesday, November 29, 2005 6:13 PM
To: Witten, Samuel M
Cc: Bellinger, John B (L Bureau); Olson, Peter M; Dorosin, Joshua L; Jacobson, Linda; Propp, Kenneth R
Subject: RE: Press Briefing Transcript

Attachments: 11-29-05 Final Guidances.doc

Sam -

The whole of what was in his briefing book for today's press conference is in the attached. Ours is the only guidance on the subject.

He does note that he was in the meeting with the Secretary and the Foreign Minister. I very much assume that he prepared on his own (or in personal consultation with the Secretary in the very short while between the conclusion of the meeting and the press briefing) that portion of his remarks that characterized the meeting. Nonetheless, I've asked AGS whether they prepared anything for Sean outside the context of the press briefing book (the attached) and will let you know what I hear back / will pass along anything they put together.

Best,

Damon

11-29-05 Final Guidances.doc (...

Damon A. Terrill
Attorney Adviser & Press Officer
United States Department of State
Office of the Legal Adviser
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2201 C Street NW
Washington, DC 20520
(202) 647-1270

-----Original Message-----
From: Witten, Samuel M
Sent: Tuesday, November 29, 2005 5:57 PM
To: Terrill, Damon A; Bellinger, John B (L Bureau); Olson, Peter M; Dorosin, Joshua L; Jacobson, Linda; Propp, Kenneth R
Subject: RE: Press Briefing Transcript

Damon - Clearly Sean was working from a much better and more detailed script than we gave them. Do we have a copy of what others prepared for him?

-----Original Message-----
From: Terrill, Damon A
Sent: Tuesday, November 29, 2005 5:54 PM
To: Bellinger, John B (L Bureau); Olson, Peter M; Witten, Samuel M; Dorosin, Joshua L; Jacobson, Linda; Propp, Kenneth R
Subject: Press Briefing Transcript

Please see the attached FYI. Over half of the press briefing today was devoted to detainees / "secret prisons" issues.

Damon (7-1270)

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

<< File: dpb # 202 November 29.doc >>

Damon A. Terrill
Attorney Adviser & Press Officer
United States Department of State
Office of the Legal Adviser
European & Eurasian Affairs (L/EUR)
2201 C Street NW
Washington, DC 20520
(202) 647-1270

LQ39A
RELEASED IN FULL

FINAL GUIDANCES **CONTENTS** **TUESDAY, NOVEMEBER 29, 2005**

POSTED	**Statement**	--	**U.S.-Israel Strategic Dialogue**
	Media Note	--	**Under Secretary for Political Affairs Nicholas Burns to Give Remarks on U.S. Policy Toward Iran (11/28)**
AF	**Kenya**	--	**Ban on Demonstrations**
EAP	**Hong Kong**	--	**Readout of Martin Lee Visit**
EUR	**Region**	--	**Alleged CIA "Secret Prisons"**
	Azerbaijan	--	**U.S.-Azerbaijan Economic Task Force**
NEA	**Iraq**	--	**Police Training**
	Iran	--	**Ambassador Khalilzad Communicating with Iran**
	Israel	--	**U.S.-Israel Strategic Dialog**
	Israel/Palestinians	--	**Secretary's Meeting with Saeb Erekat**
SA	**Bangladesh**	--	**Terrorist Attacks**
	Pakistan	--	**F-16 Sales**
WHA	**Venezuela**	--	**Incident at Airport Involving U.S. Congressional Delegation**
MISC.	**EB**	--	**GAO Report on U.S. Terrorist Finance Efforts**

THERE WAS A DAILY BRIEFING TODAY.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

LQ396

RELEASED IN FULL

L Press Guidance
November 29, 2005

Alleged CIA "Secret Prisons" in Europe

Question:

When do we expect an answer to the EU regarding the secret prisons?

Answer:

- We are aware of press reports that the EU plans to make a request for information through the UK Presidency, but we have not yet received any such request.

- In the meantime, we are in regular communication with our European allies about a wide range of issues, including the war on terrorism.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

Drafted: L/EUR:DTerrill (7-1270)

Cleared:
L: JBellinger - ok
L/EUR: POlson - ok
EUR/WE: KAllegrone - ok
EUR/ERA: RFaucher - ok
S/CT: BHartley - ok
S/WCI: ASagor - ok
INR/EUR/C: DArmitage - ok

LQ40B.

RELEASED IN FULL

December 6, 2005

Dear Mr. Marty:

Thank you for your letter of November 14, 2005, concerning "alleged secret detention centers in Council of Europe member states." On December 5, 2005, our Secretary of State made a statement on this issue, a copy of which I enclose. I trust this statement responds to the concerns that CoE member States have raised.

Sincerely,

Craig R. Stapleton

Enclosure: As stated.

Mr. Dick Marty,
Chairperson,
Committee on Legal Affairs and Human Rights,
Parliamentary Assembly of the Council of Europe,
F-67075 Strasbourg Cedex.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

LQ40C

RELEASED IN FULL

December 6, 2005

Dear Mr. van der Linden:

Thank you for your letter of December 2, 2005, requesting a meeting with the Secretary of State during her European trip this week concerning "reports alleging that territories of some member states have been used in connection with practices of secret detention or extraordinary rendition in possible violation of international human rights law." Unfortunately, as you can imagine, her schedule does not allow for an additional meeting. On December 5, 2005, the Secretary made a statement on this issue, a copy of which I enclose. I trust this statement responds to the concerns that CoE member States have raised.

Sincerely,

Craig R. Stapleton

Enclosure: As stated.

René van der Linden,
President,
Parliamentary Assembly of the Council of Europe,
F-67075 Strasbourg Cedex.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

RELEASED IN FULL

NCLASSIFIED
ROG 11/16/2005
OLM/C:JROSENBLATT
OL:KEBAKER,POL/D: BTURNER
OL/D: BTURNER
OLOUT

MEMBASSY PARIS
ECSTATE WASHDC IMMEDIATE
NFO EUROPEAN POLITICAL COLLECTIVE PRIORITY
MCONSUL STRASBOURG PRIORITY

.O. 12958: N/A
AGS: PREL, PINR, PINS, FR
UBJECT: ACTION REQUEST: GUIDANCE ON RESPONSE TO COE
NVESTIGATION

. (U) This is an action request. See para 3.

. (U) Amb. Stapleton received by fax a letter (full text
ara 4) from Dick Marty, whom the Council of Europe
arliamentary Assembly has appointed to investigate the
llegations of CIA secret detention centers in CoE member
ountries. The key phrase reads, "I would very much
ppreciate receiving from your authorities any pertinent
nformation they may be able to provide me with on this
ubject."

. (U) ACTION REQUEST: Please provide authorized
anguage for use by Ambassador and Strasbourg consulate in
esponse to COE requests.

. (U) Text of Marty letter:

arliamentary Assembly
he Council of Europe
ommittee on Legal Affairs and Human Rights
he *Chairperson*

4 November 2005

ear Mr. Roberts Stapleton,

address this letter to you in your capacity as Permanent

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
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)server of the United States of America to the Council of
ırope.

; you are no doubt aware, I have recently been instructed
/ the Parliamentary Assembly's Committee on Legal Affairs
ıd Human Rights to collect information on "alleged secret
:tention centres in Council of Europe member states" as a
:sult of communications received on this subject from a
ımber of sources, especially Human Rights Watch.

ıth this in mind, and in particular the existence of
:rious allegations concerning your country's involvement
ı such activities in Council of Europe member States as of
)01, I would very much appreciate receiving from your
ıthorities any pertinent information they may be able to
:ovide me with on this subject.

look forward to receiving a reply to my request at your
ırliest convenience and thank you for your cooperation.

)urs Sincerely,

ick Marty

ND LETTER TEXT

lease visit Paris' Classified Website at:
ttp://www.state.sgov.gov/p/eur/paris/index.cfm
)fmann

LQ406.

Council of Europe

Parliamentary Assembly

RELEASED IN FULL

The President

Strasbourg, 6 December 2005

Dear Secretary of State,

I write further to my letter of 2 December 2005, in which I enquired about the possibility of a meeting with you during your visit to Europe. The purpose of this meeting would have been to discuss the issue of allegations relating to secret detentions and extraordinary renditions involving the C.I.A. and taking place on the territory of Council of Europe member States.

I understand that the programme of your visit did not allow for such a meeting to take place. I would like to take this opportunity, therefore, to express some of the concerns that I would otherwise have stated in person.

Democratic Europe has always enjoyed excellent mutual relations with the USA. We all stand for the same values, given effect through the basic principles of democracy, human rights and the rule of law. I fear, however, that the current allegations risk damaging the image of the USA in Europe and undermining transatlantic relationships, at a time when the global security situation requires strong alliances between our countries.

For the Parliamentary Assembly of the Council of Europe, which brings together 630 members of national parliaments from 46 European countries, this matter is of utmost importance. We consider that such possible practices as secret detention and extraordinary rendition are in clear violation of our basic legal standards concerning the prohibition on torture and inhuman treatment and the right to liberty and security of the person. We have responded to the current situation by establishing an enquiry, to be conducted by the Chairperson of our Committee on Legal Affairs and Human Rights, Mr Dick Marty.

I would urge the U.S. authorities to cooperate fully with Mr Marty's enquiries in order to discover and make public the truth about these allegations. Your country's position on this issue is crucial in order to demonstrate that the same rules apply to all countries. Failing this would seriously undermine the moral foundations of the democratic world order.

Yours sincerely,

René van der Linden

Secretary of State Dr. Condoleezza RICE
U.S. Department of State
2201 C Street NW
Washington DC 20520
United States of America

Postal Address:
F-67075 Strasbourg Cedex
France

Tel. +33 (0) 3 88 41 20 94
Fax +33 (0) 3 88 41 27 56
rene.vanderlinden@coe.int

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

L044.

Conklin, Maegan L

RELEASED IN FULL

From: Terrill, Damon A
Sent: Friday, November 04, 2005 11:40 AM
To: Dorosin, Joshua L; Bellinger, John B (L Bureau)
Subject: RE: URGENT: ICRC - CIA Prisons Press Guidance

Importance: High

Attachments: LPressGuidanceICRCInquiry.doc

John and Josh -

This is due now. Really now. Briefing is at noon.

Without objection, I will take down the attached.

Damon

LPressGuidanceICR CInquiry.doc ...

-----Original Message-----
From: Dorosin, Joshua L
Sent: Friday, November 04, 2005 11:29 AM
To: Eisenhauer, Peter A(SA-1); Santos, Carol A(SA-1); Pollack, Margaret J(SA-1); Gorjance, Mary A(SA-1); Miller, Ronald W(S/WCI); Amadeo, Stefanie(P); Fritz, Jonathan D(D); Lagon, Mark P; Greene, Richard L (PRM)(Main State Rm 5824)
Cc: Terrill, Damon A; Schou, Nina E
Subject: URGENT: ICRC - CIA Prisons Press Guidance

<< File: Doc2_.doc >>
All -

We understand that the tasking for guidance on ICRC is back on -- please review the attached as soon as possible. We've taken Peter's initial draft and incorporated points from John Bellinger.

Thanks. Josh

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

LQ44A

RELEASED IN FULL

L Press Guidance
November 4, 2005

ICRC Inquiry About Detention Facilities

Question:

Have we received any requests from the ICRC regarding the reported CIA detention facilities?

Answer:

- The ICRC plays an important humanitarian role and we have an excellent working relationship with them.
- As you know, our relationship is predicated on confidentiality.
- That said, we anticipate that we will be in consultation with them on this story.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

Drafted: L/PM:JDorosin

Cleared:
L: JBellinger
PRM: MPollack
PRM: MGorjance

LQ53

Conklin, Maegan L

RELEASED IN FULL

From: Deeks, Ashley S
Sent: Friday, May 12, 2006 6:54 PM
To: Bellinger, John B (L Bureau)
Cc: Filippatos, James; Dorosin, Joshua L
Subject: IM to D on ICRC/undisclosed detention

Attachments: LEGAL-#125689-v1-im_on_undisclosed_detention.doc

LEGAL-#125689-v1
-im_on_undiscl...

John: Here's a draft Info Memo for D on the ICRC and undisclosed detention. If this looks ok to you, I'll get clearances from P and D staff and PRM Monday morning.

Thanks.

Ashley

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

LQ57

Conklin, Maegan L

From: *Dorosin, Joshua L*
Sent: Tuesday, April 25, 2006 6:39 PM
To: Bellinger, John B (L Bureau)
Cc: Deeks, Ashley S
Subject: Note to S on ICRC Report

RELEASED IN FULL

Attachments: note to S on undisclosed detention_.doc

note to S on undisclosed deten...

John -

Attached for your comments is a draft note from you to S on the ICRC's undisclosed locations report.

Josh

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

Conklin, Maegan L

L083

RELEASED IN FULL

From: Dolan, JoAnn (L-PM)
Sent: Thursday, October 21, 2004 6:43 PM
To: Thessin, James H (SBU); Deeks, Ashley S (L-PM); Dorosin, Joshua L (L-PM)
Subject: FW: 10/11 AP Report: Al Qaeda suspects have 'disappeared'

more of same

Report: Al Qaeda suspects have 'disappeared'

NEW YORK (AP) -- At least 11 al Qaeda suspects have "disappeared" in U.S. custody, and some may have been tortured, Human Rights Watch said in a report issued Monday.

The prisoners are probably being held outside the United States without access to the Red Cross or any oversight of their treatment, the human rights group said. In some cases, the United States will not even acknowledge the prisoners are in custody.

The report said the prisoners include the alleged architect of the September 11 attacks, Khalid Shaikh Mohammed, as well as Abu Zubaydah, who is believed to be a close aide to Osama bin Laden.

In refusing to disclose the prisoners' whereabouts or acknowledge the detentions, Human Rights Watch said, the U.S. government has violated international law, international treaties and the Geneva Convention. The group called on the government to bring all the prisoners "under the protection of the law."

"I think the U.S. demeans itself when it adopts the philosophy that the ends justify the means in the fight against terror," said Reed Brody, special counsel with Human Rights Watch.

CIA spokesman Mark Mansfield said the agency has not seen the report and declined to comment.

The report -- titled "The United States' `Disappeared:' The CIA's Long-term 'Ghost Detainees'" -- said many of the prisoners have provided valuable intelligence to U.S. officials. But it also cited reports that some detainees have lied under pressure to please their interrogators.

Human Rights Watch has no firsthand knowledge of the treatment of these detainees. Much of the report stems from news accounts that have cited unidentified government sources acknowledging the torture or mistreatment of detainees.

The report provides a brief sketch of 11 detainees believed to be incommunicado in undisclosed locations. They hail from countries across the Arab world, including Libya, Yemen,

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Saudi Arabia and Kuwait. U.S. authorities have confirmed the detention of six of them, the report said.

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News Transcript
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Presenter: Secretary of Defense Donald Rumsfeld and General Peter Pace, Vice Chairman, Joint Chiefs of Staff

Thursday, June 17, 2004
2:31 p.m. EDT

Defense Department Regular Briefing

SEC. RUMSFELD: Good afternoon.

Media reports in the last few days have focused on what some have termed a surge in violence in Iraq, the attacks being waged by enemies of freedom who are threatened by the steady advances that are being made in that country. The extremists' efforts to intimidate the Iraqi people I believe will fail.

A new Iraqi government is being established with the endorsement of the United Nations and the international community. Iraqis are working to build a free and peaceful society, and the new leaders have thanked the American people for their support and for their sacrifices. A recent survey found that 63 percent of Iraqis believe that the interim government will improve life in their country.

Growing numbers of Iraqi security forces and coalition soldiers will continue to help provide security and train the new Iraqi army and police forces so security responsibilities can be passed to them as rapidly as is possible. Thousands of courageous Iraqis have stepped forward to defend their country, and thousands more are volunteering every day. The number of recruits standing in line to join the various elements of the Iraqi security forces is impressive. As we have seen, this is something that terrorists and assassins want desperately to prevent.

This much is certain: coalition forces cannot be defeated on the battlefield. The only way this effort could fail is if people were to be persuaded that the cause is lost or that it's not worth the pain, or if those who seem to measure progress in Iraq against a more perfect world convince others to throw in the towel. I'm confident that that will not happen.

On another note, I want to address recent suggestions that somehow the war in Iraq might derail our efforts to transform the armed forces to enable them to be better equipped to confront the new threats of the 21st century. I would say that just the opposite is true.

As with any large organization, change can be slow. Sometimes it takes a major event to cause people to realign their priorities. The global war on terror was such an event, and the requirements of its new challenges have allowed us, for example, to begin the urgent task of rebalancing the active and reserve components of our armed forces, moving skill sets that are now found almost exclusively in the Guard and Reserve into the active force so that we're not excessively reliant on the Guard and Reserve for those frequently needed skills.

Second, we're transforming the Army to make brigades more self- contained, more self-sustaining, and available to serve any division commander.

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And third, we're adjusting our global posture from a somewhat static, Cold War era defense to one that will enable us to work closely with our friends and allies both within and across regions, and to develop more rapidly deployable capabilities rather than focusing on presence and mass.

These and other changes are needed, and in some cases they were long overdue. The global war on terror has compelled us to take action, and the men and women in uniform and our strong civilian workforce are, in my view, working effectively to achieve these needed changes.

General Pace?

GEN. PACE: Thank you, Mr. Secretary.

There is certainly some good news for the forces that are working in Haiti in support of the new Haitian government. As you know, we've been there about three months now -- U.S. forces, French forces, Canadian and Chilean -- to restore stability over the last three months. At the end of April, the U.N. Security Council voted unanimously to support a resolution to support the Haitian government and the Haitian people, and to have it under U.N. mandate. Brazil has stepped forward as the lead nation. They have the lead elements of their command team there now. During the rest of this month of June the current forces that are there will be replaced by other coalition forces underneath Brazilian leadership. And the U.N. and the coalition countries that have volunteered will continue to provide stability so that the Haitian people can get about forming their own government and becoming more prosperous.

With that, we'll take your questions.

SEC. RUMSFELD: Charlie?

Q Mr. Secretary, I'd like to ask why last November you ordered the U.S. military to keep a suspected Ansar al-Islam prisoner in Iraq secret from the Red Cross. He's now been secret for more than seven months. And there are other such shadowy prisoners in Iraq who are being kept secret from the Red Cross.

SEC. RUMSFELD: With respect to the -- I want to separate the two. Iraq, my understanding is that the investigations on that subject are going forward.

With respect to the detainee you're talking about, I'm not an expert on this, but I was requested by the Director of Central Intelligence to take custody of an Iraqi national who was believed to be a high-ranking member of Ansar al-Islam. And we did so. We were asked to not immediately register the individual. And we did that. It would -- it was -- he was brought to the attention of the Department, the senior level of the Department I think late last month. And we're in the process of registering him with the ICRC at the present time.

Q Well, why did you not register the individual, and has this man simply been lost in the system for -- why didn't you tell the Red Cross that you had him?

SEC. RUMSFELD: The decision was made that it would be appropriate not to for a period. And he wasn't lost in the system. They've known where he was, and that he was there in Iraq, for this period of time.

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Q How is that appropriate, sir, when you say that you -- all prisoners in Iraq are being treated humanely under rules set up --

SEC. RUMSFELD: He has been treated humanely. There's no implication of any problem. He was not at Abu Ghraib. He is not there now. He has never been there, to my knowledge. There's no question at all about whether or not he's received humane treatment.

Q But then why wasn't the -- why wasn't the Red Cross told, and there are other such prisoners being detained without the knowledge of the Red Cross?

SEC. RUMSFELD: There are -- there are instances where that occurs. And a request was made to do that, and we did.

Q I -- I mean -- excuse me, is there a reason for that, sir, why -- why they're not told? There are those who would say, I guess, that -- that you're not telling them because you might be mistreating such prisoners. That might be the suspicion.

SEC. RUMSFELD: That -- I understand that. That's not the case at all. And I think that will be clear.

Q Well, the other thing is General Taguba has criticized this practice in his report, calling them ghost detainees.

SEC. RUMSFELD: I recall that. And as I say, that's being investigated. This -- this individual, this Ansar al-Islam individual I think should be looked at separately from that.

Q Why is that? Is he a ghost detainee --

Q Which --

Q -- was he a ghost detainee?

SEC. RUMSFELD: We've had subject matter experts down here to brief you, and they've been briefing the Congress, and the Congress has been briefed on this extensively, I think, Dan, is that correct? And they've been down here and briefed the press as they're able to.

The -- you say why treat them differently. Because, as I understand it, the people who briefed you on the Taguba report have indicated that they are looking into that, that was part of his investigation, and that is ongoing. This is not one of those cases, is my point.

Q Mr. Secretary?

SEC. RUMSFELD: Yes.

Q First of all, where have you been? We've missed you.

SEC. RUMSFELD: (Laughs.) God, where have I been?

(Laughter.)

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Q The Army chief of staff, General Schoomaker, the other day, in answer to a question, referred to the difference between pneumonia and cancer, and the implication was that terrorism is a cancer incurable and will be with us forever. Do you agree? And if not, have you taken him to the woodshed?

(Light laughter.)

SEC. RUMSFELD: Pretty big guy to be going to the woodshed. No, I certainly agree with him that this is a long-term proposition. And we've said that repeatedly -- the president has; I have.

You say where have I been. I'm told by Larry that I've done something like eight press and media availabilities since I've been here, and seven major speeches with Q&As and three testimonies before Congress and six media interviews of various types. So I've been very much involved.

Q We just want to see you up there, sir.

SEC. RUMSFELD: Do you?

(Laughter.)

Q Mr. Secretary, I'm wondering, when you get a call or a contact from CIA Director Tenet, and he asks you to do something like this, I have two questions.

SEC. RUMSFELD: Mmm hmm.

Q How does that go about? Does he say -- in other words, "We need you to do this," and then doesn't tell you necessarily why for, you know, as an agreement, and you trust him?

And then second, do you sort of them monitor the progress of an individual like this? In other words, how's he or she doing?

SEC. RUMSFELD: Okay, let me -- yeah. As I recall, it wasn't a phone call in this case, and Dan Dell'Orto is here. I think it was a letter, but I could be wrong. It was a phone call?

DANIEL DELL'ORTO (DoD deputy general counsel): If it was, it was certainly followed up by a letter shortly thereafter.

SEC. RUMSFELD: Yeah. So it was a letter. We know from our knowledge that he has the authority to do this.

And second, I can't speak for every case, but I have some confidence that in most every case, it has been either in writing or very well understood orally that the -- that the specifics that were provided are accurate. And --

Q (Inaudible) -- why the request is made.

SEC. RUMSFELD: And the nature of this individual and why it's important to do what they're doing.

Q And then do you get then follow-up information on, say, the intelligence gleaned from this

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individual? I'm trying to ascertain how you get the intelligence on him and other key people.

SEC. RUMSFELD: I don't. I tend not to get the interrogation reports. There are, what, how many thousand detainees in various types and various places? And they're being interviewed, and the people who have the responsibility for doing the interrogating and for integrating that type of intelligence feed the intelligence to people who need it. In some cases -- if you arrest somebody, for example, in a IED manufacturing facility, the question is where did they put the last ones? And so it's more immediate information. If it's a high-ranking Ansar al-Islam individual like this, it's a different type, and then it goes more into the macro or strategic intelligence as to how we might address the entire network.

Q But you're not --

GEN. PACE: It's also important to reaffirm, very important to reaffirm that regardless of how the U.S. military gets custody of an individual that we are expected to treat them humanely -- we will treat them humanely -- and that the orders that go out with regard to those kinds of things are humane treatment. So there's a question --

Q But you're not on the blower saying, "Hey, what's new with the intelligence? Tell me when you hear something new from these folks."

SEC. RUMSFELD: That's true not only of anyone that we might be asked to hold for another government agency, but it's also true of those that we pull in, our forces pull in, whether it's in Afghanistan or in Iraq.

You know, let me say one thing to follow on Pete's comment. I've been kind of following the headlines and the bullets in the television -- the big, powerful hits on torture and this type of thing that we've seen. Needless to say, I can't read all the articles, and so I'm no expert on what every person says, and I know headline writers and people dramatize things.

But in thinking about it all, and I have to be a little careful -- we know that there's still more investigations going on, and we're going to learn more information, so no one can speak with finality or definitively or conclusively at this stage. But -- and second, I have to be a little careful about what I say because of the risk of command influence. But let me just say this: I have read this -- editorials, "torture" -- and one after another. Washington Post the other day -- I forget when it was -- just a great, bold "torture."

The implication -- think of the people who read that around the world. First of all, our forces read it. And the implication is that the United States government has, in one way or another, ordered, authorized, permitted, tolerated torture. Not true. And our forces read that, and they've got to wonder, do we? And as General Pace said, we don't. The President said people will be treated humanely, and that is what the orders are. That's what the requirements are.

Now, we know that people have done some things they shouldn't do. Anyone who looks at those photographs know that. But that's quite a different thing. And that is not the implication that's out there. The implication that's out there is the United States government is engaging in torture as a matter of policy, and that's not true. Think of the second group of people who see it. All those people in the region and in Iraq and in Afghanistan, that we need their cooperation, we need their help, the people in those countries, the people in the neighboring countries, and think how unhelpful that is for them to gain the inaccurate impression that that is what's taking place.

Third, think of the people who, for whatever -- whenever -- today, tomorrow, next year -- capture an American civilian or American military personnel and will use all those headlines about torture and the impact in the world that people think that's what's taking place, and use that as an excuse to torture our people. So this is a very serious business that this country's engaged in.

Now, we're in a war, and I can understand that someone who doesn't think they're in a war or aren't in a war, sitting in an air-conditioned room someplace can decide they want to be critical of this or critical of that, or misstate that or misrepresent something else, or be fast and loose with the facts. But there's an effect to that, and I think we have to be careful. I think people ought to be accountable for that, just as we're accountable.

If you -- when I get up in the morning, I do not say, "Gee, I wonder what some political critic or some editorial writer could say bad about something I'm deciding." When I get up in the morning and have to decide something and -- I have to think about -- people in our positions of responsibility have to think about protecting the American people, and that's what we do, and we have do it in a manner that's legal, that follows the President's admonition on humane treatment, that is consistent with our laws, consistent with our international treaty obligations -- and we do.

Q (Off mike.)

SEC. RUMSFELD: That -- I can say this. Number one, we're not through with these investigations. But at the moment, I have high confidence that I have not seen anything that suggests that a senior civilian or military official of the United States of America has acted in a manner that's inconsistent with the President's request that everyone be treated humanely, that is -- could be characterized as ordering or authorizing or permitting torture or acts that are inconsistent with our international treaty obligations or our laws or our values as a country.

Now I have not -- I have not seen anything. I have not spent 24 hours a day into all this, but I've been briefed by most of the investigations. I've been briefed by the ones that have been completed. There are a lot of criminal investigations under way. There are various other investigations under way. And there's no question but the people doing -- correction, there's no question but that the photographs depict activities that are, in my view, inhumane and improper. No doubt about that. But that's quite a different thing from what I'm talking about.

Q Mr. Secretary, I'd like to just get a clarification on --

SEC. RUMSFELD: I'll do my best.

Q In the Taguba report, the suggestion is that the movement of prisoners to hide them from the Red Cross is improper. In fact, he says it's deceptive, contrary to Army doctrine and in violation of international law. And that, as you said, is being investigated to the extent that that happened.

SEC. RUMSFELD: We -- and to my knowledge, the --

Q You seem to be drawing a distinction between that and the order that you sent out that allowed this other prisoner to be not registered immediately. Why is --

SEC. RUMSFELD: I'm not an expert on that. Dan Dell'Orto is. And what I can say is that I think it's broadly understood that people do not have be registered in 15 minutes when they come in.

L0694

What the appropriate period of time is I don't know. It may very well be a lot less than seven months, but it may be a month or more.

Dan, do you want to -- is there --

MR. DELL'ORTO: And they should be registered promptly, sir. So --

SEC. RUMSFELD: Its phraseology is "promptly?"

MR. DELL'ORTO: Roughly that, yes.

SEC. RUMSFELD: Fair enough.

Q So -- but was there an intention to hide this prisoner from the Red Cross?

SEC. RUMSFELD: Not on my part.

Q What's the purpose of not registering a prisoner?

SEC. RUMSFELD: I can guess some purposes. Some could be improper, obviously, and that's the concern. You don't want to not register somebody for a reason that you're trying to prevent the ICRC from seeing something that they -- you wouldn't want them to know.

The only reason for a delay in it that I can think of would be that your interest is in not interrupting an interrogation process of some kind.

Q But how did this -- (off mike) -- interrogation --

SEC. RUMSFELD: By having the ICRC gain access.

Q The ICRC --

(Cross talk.)

SEC. RUMSFELD: But I'm not an expert.

Dan, do you want to comment?

Q What did George Tenet ask? Why did he want this done?

SEC. RUMSFELD: We've asked them.

Q Well, can you say what he said to you?

Q I mean, you --

Q It says you received a letter from him, sir.

SEC. RUMSFELD: I did. I think I did in this case. And it's a classified letter.

L0695

Q What was his reasoning? Why did he --

SEC. RUMSFELD: Ask him. It's a classified letter.

Q Well, Mr. Secretary, how many --

SEC. RUMSFELD: Just a minute. Just a minute. Dan, I don't want say something that's not accurate here. Do you want to stand up and -- this is the deputy general counsel -- and be clear. You're a lawyer.

Q Microphone. (Cross talk.)

Q If you could just (go to ?) the microphone, sir, so we could all hear what you --

SEC. RUMSFELD: Yeah.

DANIEL J. DELL'ORTO (principal deputy general counsel, the Department of Defense): The Red Cross serial number should have been registered soon, relatively soon. In terms of access, for purposes of imperative military necessity, the Red Cross could be denied access for some period of time to deal with the sorts of things the secretary has indicated. You need to interrogate. You need to find information on this person, and the mere availability of this person for that purpose, for the purpose of seeing the ICRC, might interrupt that or disturb your ability to get information you need to get, particularly there and on the ground, where we had a terrorist of a known terrorist organization, of high rank.

We believe that, again, we should have registered him much sooner than we did. It didn't have to be at the very instant we brought him into our custody. And that's something that we'll just have to examine as to whether there was a breakdown in the quickness with which we registered him.

And that's about, I think, the most we can say at this point.

(Cross talk.)

Q But registering him doesn't mean automatic access by the Red Cross.

MR. DELL'ORTO: True. True.

Q You could say to the Red Cross, "We have Prisoner X. Here is the serial number."

MR. DELL'ORTO: True.

Q "But you can't see him because we're interrogating him."

MR. DELL'ORTO: Yes.

Q Okay.

(Cross talk.)

GEN. PACE: But there are reasons -- if I could -- and I know nothing about the specific case,

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so I can say this in a generic sense, and that is, I can see a thing where -- on the battlefield where you would not want others to know that you have captured a particular individual. When you register that individual, that then becomes public knowledge that you now have Peter Pace in your custody. And there may be a reason for a period of time, a short period of time, where you would like to keep that hidden.

SEC. RUMSFELD: And as we get more information, we'll make it available. The Congress has been briefed extensively on this, as I understand it. No.

MR. DELL'ORTO: Not this particular case, as far as I know.

MR. DIRITA: Yes. No, we've done some notifications to the staff on the Hill, both us and the CIA, with respect to the details of this particular case. And as we get more, we will provide it.

SEC. RUMSFELD: As we get more, we'll provide more here that we can.

Q Sir, did he ask you to do this or tell you to do this? You say you had no intention of keeping this man secret from the Red Cross, so why didn't then you --

SEC. RUMSFELD: We had no --

Q -- tell Mr. Tenet, "All right, we'll take custody but we're not going to -- we're going to register him"?

SEC. RUMSFELD: As we get more information, we'll make it available to you.

Q And the last thing. (Off mike.) How is this case different from what Taguba was talking about, the ghost detainees?

SEC. RUMSFELD: It is just different, that's all.

Q But can you explain how and why?

SEC. RUMSFELD: I can't. But we'll be happy to have someone come down and brief you and explain it.

Q In this case, this is not a violation of international law, as opposed to some of the cases that General Taguba was talking about?

SEC. RUMSFELD: I said I don't know. Are you making assertions for the benefit of everyone else?

Q No. No. My question --

SEC. RUMSFELD: I don't know.

Q Okay.

Q Mr. Secretary, is this a one-of-a-kind case, or is this one of several or more?

L0697

SEC. RUMSFELD: We have on occasion received people from the agency -- I can think of an additional case right off the top of my head -- where they have, for whatever reason, captured somebody or arrested somebody or been given somebody and at some moment brought them to us and said would you please take custody of this person. I think there are some -- (to staff)-- that's correct, isn't it? Yeah.

Q But how many have they asked you not to register?

SEC. RUMSFELD: I don't know. As I say, we'll be happy to tell you more when we get more.

Q Did Director Tenet ask you to wait for a particular period of time --

SEC. RUMSFELD: Not that I recall.

Q -- or was this an open-ended thing?

SEC. RUMSFELD: Not that I recall.

Q Mr. Secretary, to take you back a little further, to late summer, when a lot of -- a number of officials were expressing concern that adequate intelligence was not being gotten from detainees in Iraq, do you recall discussing that with Steve Cambone? And did you ask that anything in particular be done about that at that point?

SEC. RUMSFELD: I don't recall that.

What I do recall is that when the war started, we began capturing large numbers of detainees, and I can remember vividly saying we don't want large numbers of prisoners of war; that an awful lot of those folks have to be low-level conscripts; and what one ought to do is to do a quick triage, look at them, take their weapons, and to the extent they look not to be a threat, send them back into their communities and be rid of them rather than retaining them. That is a subject I came back to frequently.

But I do not remember the conversation that you're talking about.

Q The problem of not giving adequate intelligence so it could be acted upon quickly to deal with the insurgency as it was developing in late summer. That's what I'm asking about.

SEC. RUMSFELD: Well, there's -- I can remember in -- certainly I can remember military personnel -- (chuckles) -- so can Pete -- saying, "Okay, we need more information. We're getting people killed and wounded, and we need more information about where these terrorists are, and more information about where these IEDs are coming -- the improvised explosive devices are coming from, and help, intelligence community." And: "CIA, give us more information."

I can certainly -- that's a fairly typical thing in a conflict.

Q But did you in particular ask somebody to do something about it to improve the situation?

SEC. RUMSFELD: Not that I recall. I mean, we, obviously, would talk to the intelligence community and say what can we do to gather better information. But I don't remember any specific conversation.

L0698

(To General Pace) Do you?

GEN. PACE: No, I do not, sir.

Q Mr. Secretary, how closely has the Pentagon been monitoring the situation in Western Sudan's Darfur region, where even the U.N. is saying a genocide might be underway? The State Department recently described this as a top priority for the administration. Has the Pentagon been looking at possible, either humanitarian or military intervention?

SEC. RUMSFELD: We've not been asked to prepare an intervention, if that's your question.

GEN. PACE: General Jones, who is the European commander, obviously would be keeping -- has been keeping a very close watch on that and provides input as far as the situation is concerned. The actual workings with Sudan and the international community currently reside with the State Department.

Q General Pace, do you have any indications that Abu Musaab al Zarqawi is in Fallujah or has been using that city as a sanctuary? And if so, does it make you think twice about how Fallujah has been handled so far?

GEN. PACE: We have had some information -- I don't recall whether I read it in the newspaper or saw it on television or got it in a telephone call, to be honest with you, but have certainly heard the possibility that Zarqawi is in and around the Fallujah area. Whether that is true, I do not know whether or not that is true.

But I still believe that the process which we have been following in Fallujah is the correct process. We certainly have overwhelming military power available to be brought to bear anytime we need to and want to in that city. What we have chosen to do, what the commanders on the ground have chosen to do, properly, in my mind, is to work with the city fathers, to work with the new Iraqi interim government to find a peaceful Iraqi solution to an Iraqi problem.

SEC. RUMSFELD: Go ahead with the follow-up, and then we'll make this the last question.

Q All right. Mr. Secretary, has the picture of the connection between Saddam Hussein and al Qaeda become clearer since the regime fell, and how so?

SEC. RUMSFELD: This is the question that everyone keeps asking. It -- do you think --

Q (Off mike, laughter.)

SEC. RUMSFELD: It sounds -- you sound like a broken record to me, Brett.

The -- I think the way I would put it is that George Tenet -- first of all, I would say that the -- Iraq has been on the terrorist list for decades, as I recall. Second, they were giving -- Saddam Hussein was giving some $25,000 to families of people who would go out and become suicide bombers and kill people. Ansar al-Islam was active in the country. Abu Nabal (sic - Nidal) lived there in Baghdad. Zarqawi was there for long periods. People -- George Tenet testified on this subject before the Senate Intelligence Committee, as I recall, and then -- on a classified basis, and then made public an unclassified version of what his testimony was. And it was what it was. And for me to get into the middle of the debate about how to characterize it I think is not terribly useful.

L0699

The other thing I would say is that it appears -- I guess I don't know if I should say this or not, but I -- I suppose I can -- it appears that Zarqawi -- who is, everyone in the intelligence community seems to agree, is engaged as a significant leader of a network in Iraq and has in his past been identified by at least some intelligence as being a leader with respect to terrorist activities in other countries, not just Iraq -- may very well not have sworn allegiance to UBL. But he -- maybe, because he disagrees with him on something, maybe because he wants to be "The Man" himself, and maybe for a reason that's not known to me.

Now, therefore you probably -- someone could legitimately say he's not al Qaeda. On the other hand, as many people have testified to in open hearings, the linkages in the relationships and the similarities, in some cases of financing as well as methods of operation, are such that even though he may not have sworn allegiance, he clearly is someone that is doing work of a very similar nature. And therefore, I don't -- since I am not in the intelligence business, my instinct is to leave the direct answer to your question to what was said by Director Tenet before the Senate Intelligence Committee unless the agency is updating it since.

Yeah.

Q Back to Fallujah. Fallujah, General Pace. Zarqawi aside, is there any evidence that any terrorist groups or organizations are using Fallujah as a base of operation to launch attacks in other parts of Iraq? Are the Iraqis involved in the Fallujah Brigade who were involved in the negotiations living up to their end of the bargain in trying to root out those forces from Fallujah? And do you think it may be necessary to use that U.S. force you were talking about a minute ago to go in and clean out those areas of Fallujah in which these elements apparently are still operating?

GEN. PACE: First of all, I do not know whether or not the individuals, the terrorists, the insurgents who are in Fallujah, whether or not they are conducting operations from there. They certainly are there in the city. We do know that. There are pockets of them in the city.

So the Fallujah Brigade, which was the solution of -- from the governing fathers of the city and the interim government, has been the current attempt by the Iraqi people themselves to regain control of their own city. Some of the things have gone very, very well. Since 3 May I think it is there has not been a cease-fire violation throughout that city. That's a significant success. On the other hand, we do not yet have accountability for the murder and torture and desecration of the bodies of the Americans who were burned in their vehicles in Fallujah. We do not yet have large turn in of crew-served weapons and the like. So there's still work to do, but there is progress being made.

As I said, we have more than sufficient -- we have overwhelming coalition-U.S. military power available. However, the best solution is an Iraqi solution, and I believe we're on the correct path with the Iraqi government to find a peaceful way to make this work.

SEC. RUMSFELD: Let me just say one last thing. Larry or Dan, is there anything we want to calibrate on this detainee subject that we talked about? We -- our policy here -- I mean, I'm -- we really want to be careful about this. We want to communicate accurately. And we have a team of people who are working hard on this. Our policy is clear, unambiguous and demonstrable. We are giving everything we find to the Congress. We are doing it is as promptly as we can. To the extent it's appropriate and possible to do it, we're giving it to the press and the American people. And we intend to keep on doing that.

One thing I should say before we close, about Iraq and Afghanistan. The American people had a chance to see the president of Afghanistan, Hamid Karzai, here in this country thanking the American people and the Congress and the President for liberating his country, some 25 million people. They are making progress in practically every aspect of what they're doing. It is an important and I think thrilling accomplishment that is being achieved in that country. Women are registering to vote, whereas previously they weren't allowed to sing or laugh or wear bright colored shoes or do practically anything in that country without being severely punished.

In Iraq we have -- something significant is in the process of being accomplished. We've -- and it's, again, truly impressive, although admittedly, we're a year and a half or so behind Afghanistan. And the violence is at a higher level and Iraqi people are being killed by the people who are determined to try to stop what's taking place. But the ability we now have to work with a single individual instead of a 25-person Governing Council is dramatic.

This individual -- the prime minister -- and his team -- the ministers, the president, the vice presidents, the deputy prime minister -- but particularly the prime minister, where the power resides -- has the ability to make a decision. He can do something. He's calling meetings of neighboring countries to talk about border security. He's calling up and making phone calls to friends in the region to ask for additional troops to come in. He is working with the ministries to see that they stand up and get about the task of taking over.

I'm not suggesting that it's going to be a pretty sight between here and when they complete this process of a large conclave with a constitutional convention eventually, and then elections based on the new constitution. It's going to be -- there are going to be bumps in the road. It will difficult, but it's always been difficult. But I am personally convinced that they are off to an excellent start and that they are increasingly going to gain support from the Iraqi people.

People talk about the security situation there and how do you deal with that, what do you do about it? The fact is that the solution to the security situation is not security only; these things have to move together. The Iraqi people have got to see that Iraqis are running that country and not some occupying power or some foreign coalition. They've got to see that Iraqis are making those decisions. And they in fact are.

Will they make decisions that we might not have made? You bet. Will they make decisions we may not even like in some instances? You bet. But is that what it has to be? Absolutely. It's their country. They're going to have to grab hold of it. They're going to be the ones who are going to have to provide security for it. They're going to have to find the template that will allow them to fashion a representative system that is respectful of all of the religious and ethnic minorities in that country. They're going to have to fashion relationships with their neighbors. And they will end up with an Iraqi solution, not a U.S. solution or a U.K. solution, but a solution that will be appropriate to them. And I think they're off -- getting off to a darn good start.

Thank you very much.

Q Secretary, you still haven't mentioned the 9/11 report, the commission today.

SEC. RUMSFELD: I haven't heard their report or read their report. I understand they were on television today.

Q It was kind of scathing in its criticism of --

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SEC. RUMSFELD: Why am I not surprised you'd characterize it that way.

(Laughter.)

Q See you tomorrow!

(Laughter.)

Q Thank you.

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http://www.defenselink.mil/transcripts/2004/tr20040617-secdef0881.html

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Detainee Working Group: 11/4/04 Meeting

Tab 1: Notification and Treatment of Detainees/Ghost Detainees

- January 6, 2004 ICRC Note Verbale Concerning Detainees in Afghanistan
- March 25, 2004 ICRC List of Detainees Not Notified
- July 19, 2004 Report on Detention at Undisclosed Locations
- July 21, 2004 Memo to Secretary Powell
- August 18, 2004 Memo from NSA Rice (draft response to ICRC on notification)
- August 26, 2004 Memo to NSA Rice (State comments on draft response to ICRC on notification)
- September 30, 2004 ICRC Letter to General Casey (attached to October 14, 2004 ICRC Letter to DOD

Tab 2: Transfer of Four Individuals

- July 20, 2004 ICRC Letter to General Casey (attached to July 23, 2004 ICRC Letter to DOD
- Draft DOD Response (with State/L Edits)

Tab 3: Transfer of One Individual

- September 30, 2004 ICRC Letter to General Miller (attached to October 14, 2004 ICRC Letter to DOD)
- October 26, 2004 Taft Letters to DOJ/Criminal and CIA/OIG

Tab 4: Iraq: Nature of Conflict and Treatment

- August 8, 2004 ICRC Statement on Nature of Conflict
- August 11 State Draft Paper on Iraq Detention Authorities
- October 11, 2004 Cable from Embassy Baghdad
- September 13, 2004 ICRC Letter to General Casey
- December 20, 2002 U.S. Aide Memoire on Nature of Conflict in Afghanistan
- November 19, 2002 ICRC Aide Memoire on Nature of Conflict in Afghanistan

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5. Numerous press articles have discussed memoranda that authe the transfer or rendition of terrorist suspects and other detainees third nations or other secret locations for interrogation. (A) On December 27, 2004, the *Washington Post* reported that the CIA h... authority to carry out renditions under a presidential directive. Did President Bush sign or renew a presidential directive or other document authorizing rendition? If so, please provide this document to the Committee. If not, under what authority is the CIA and/or other government entities transferring, or rendering, individuals.

Response: It is my understanding that the United States does not render individuals to countries where we believe it is more likely than not they will be tortured. A presidential directive to the CIA of the sort you describe would, if it exists, be subject to the oversight of the Intelligence Committees.

(B) On January 6, 2005, the Washington Post described an OLC memo dated March 13, 2002, titled "The President's Power as Commander-in-Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations." The article states that you were involved in the development of the policy reflected in the memo. Will you provide us with a copy of that OLC memo? What did OLC conclude, and do you agree with its conclusion(s)?

Response: As a general matter, it is not the role of Counsel to the President to develop policy. The role of Counsel is to determine which legal issues should be examined by the Justice Department. OLC, as a general matter, provides the definitive legal views of the Executive Branch. The Executive Branch has a substantial need for confidentiality with respect to non-public OLC opinions, in order to protect the deliberative processes of the Executive Branch and the attorney-client relationship between Administration officials and OLC. The longstanding practice is that non-public OLC opinions are not disclosed outside the Executive Branch. Based on this policy, I respectfully must decline either to provide a copy of the opinion or to reveal its conclusions.

6. As you noted in your testimony, several DOD investigations into U.S. detention policies are now complete. However, the narrow mandates and limited scope of these investigations prevented them from addressing critical issues. Key inquiries into issues like contractor abuses and "ghost detainees" were left unexplored. The on-going

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investigations are similarly constrained. In a letter to President Bush dated September 7, 2004, eight retired generals and admirals called for a comprehensive, independent commission to investigate U.S. detention and interrogation practices at Abu Ghraib and other U.S.-operated detention facilities. Do you support the creation of such a commission? If not, why not?

Response: There have been a number of completed investigations into issues relating to detainee operations and interrogations. I understand that a number of investigations are still ongoing, and those should be allowed to proceed. Additionally, there have been numerous trials, courts martial, and administrative proceedings examining individual conduct relating to detainee operations and interrogations. These too should be allowed to proceed. Congress has held numerous hearings and received numerous briefings. Finally, I have read in press accounts that there are several ongoing criminal investigations and those should be allowed to proceed. Relatedly, wherever there is reason to believe that crimes may have been committed that are within the authority of the Department of Justice, you can be assured that if I am confirmed, the Department under my leadership would investigate and, where appropriate, prosecute such crimes. Because there is so much ongoing review, I do not currently have reason to believe that the proposed commission is advisable, but I reserve judgment on that question.

7. *Newsweek* reported on January 8, 2005, that the Defense Department was considering a plan to recruit, train and deploy "death squads" as part of a decapitation operation targeting Iraqi insurgents. Under the proposed plan, insurgents could be assassinated or targeted in so-called "snatch" operations, in which the individuals are sent to secret facilities for interrogation. (A) Were you consulted about this plan? (B) Did the President make a determination of any kind authorizing assassinations in Iraq? (C) Was there an amendment or modification to Executive Order 12333 to implement this program or any other program authorizing assassinations?

Response: I do not recall being consulted about any such plan, nor am I aware
of any Presidential determination of the sort described or modification of the Executive Order.

Geneva Conventions

8. You implied at the hearing that had the United States applied the Geneva Conventions to the conflict in Afghanistan, as Secretary Powell recommended, all persons detained there, including members of al Qaeda, wo uld have been entitled to all the benefits of POW status. (A) Do you acknowledge that had the United States applied Geneva broadly to the conflict, it could still have denied suspected terrorists the privileges of POW treatment, even while retaining its legal obligation to treat them humanely?

Response: Afghanistan as a nation state and signatory is a party to the Geneva Conventions, and the President determined that the Geneva Conventions apply to the United States' armed conflict with the Taliban. The President determined that members of the Taliban were not entitled to the privileges of POW status, in part because they did not fight in accordance with the laws of war. By contrast, al Qaeda plainly is not a party to those Conventions, and thus the United States has no legal obligation under the Geneva Conventions to al Qaeda or its terrorist fighters. Al Qaeda operatives would not qualify for POW status even if the Geneva Conventions applied, however, because among other things they (like their Taliban allies) do not wear an insignia distinguishing them from the civilian population or conduct their operations in accordance with the laws of war.

(B) What advantage did we gain as a nation in not going through the process set forth by Article 5 of the Geneva Convention relative to the Treatment of Prisoners of War ("GPW") and U.S. military regulations for affording or denying POW status to individual detainees?

Response: The Geneva Conventions are treaties; they are contracts between nation-states. And as a general proposition, words and terms in contracts and agreements mean something. The provisions of a treaty are carefully crafted by the Executive Branch. Treaties are signed by a President with a clear understanding of its terms and ratified by the Senate, subject to certain restrictions, understandings, and declarations. For these reasons I believe that in declaring our legal obligations under a treat, one has to follow the words of the treaty, irrespective of possible conflicting views of an Executive Branch official, an international organization, or another country. The process set forth in article 5 applies only "[s]hould any doubt arise" as to whether captured belligerents satisfy the requirements set forth in article 4

for POW status. The President determined that there was no doubt as to the status of belligerents captured in Afghanistan because al Qaeda plainly was not a party to the Conventions and since the Taliban militia plainly did not satisfy the requirements for POW status because, among other things, they did not distinguish themselves from the civilian population or comply with the laws of war. It is widely recognized that if a group does not satisfy the requirements of article 4, its members are not qualified for POW status, and the United States has made group-based decisions as to POW status in other conflicts, including World War II and Vietnam. Accordingly, article 5 hearings to determine whether individual Taliban or al Qaeda belligerents were eligible for POW status would have been futile. Combatant Status Review Tribunals, the procedures of which are in many ways patterned after article 5 tribunals, are currently conducting individual reviews of the separate question of whether the al Qaeda and Taliban detainees at GTMO are enemy combatants subject to detention under the laws of war.

9. What were the practical consequences of the President's different determinations regarding the applicability of GPW to captured members of al Qaeda and the Taliban? Must al Qaeda and Taliban detainees be treated any differently as a result of the decision to apply GPW to the latter and not the former? Have they been treated any differently in fact?

Response: Neither al Qaeda nor Taliban detainees are entitled to POW status. Both types of detainees are protected by the President's February 7, 2002, directive, by the United States' clear policy against torture, and by various other treaty and statutory provisions. See answers to Question 1 and 2, above.

10. In your draft memo to the President dated January 25, 2002, you identified a number of "positive" ramifications of a presidential determination that GPW does not apply to the Taliban, including "[s]ubstantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)." Elaborating on this ramification, you wrote, "[I]t is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism." What did you mean by that? Please give examples of "needs and circumstances" that could, in your view, justify violations of the War Crimes Act by U.S. personnel.

Response: The document to which you refer is a draft that was leaked and never sent to the President in that form. I cannot envision needs or circumstances that would justify violations of the War Crimes Act by U.S. personnel.

11. Defense Secretary Rumsfeld and former CIA Director Tenet have admitted to hiding individuals from the Red Cross in Iraq. (A) Would you agree that this practice violates GPW?

Response: It is my understanding that our legal obligations with respect to the ICRC are derived from the Geneva Conventions. As to specific individuals, my understanding is that there are investigations ongoing into these matters which presumably will determine whether there were any violations of the Geneva Conventions or any other law or treaty.

(B) Do you believe that those who willfully violate GPW should be punished for doing so?

Response: Yes. Pursuant to article 1 of GPW, the United States has undertaken "to respect and to ensure respect for the present Convention in all circumstances." Pursuant to article 129, the United States has undertaken to bring persons who commit grave breaches of GPW "before its own courts" for prosecution, and to "take measures necessary for the suppression" of other violations of the Convention.

(C) When did you first learn that U.S. forces were hiding prisoners from the Red Cross? What did you do about it?

Response: I do not recall when I became aware of issues surrounding ICRC access to certain detainees, but I would have gained such awareness as an attendee at meetings of senior administration officials. I recall understanding that the Department of Defense was investigating the issue.

12. You testified that you relied upon OLC in advising the President because it had "the expertise, the institutional history, [and] the institutional knowledge about what the law is." In January 2002, who did you think had greater expertise and experience in interpreting the Geneva Conventions: John Ashcroft and the lawyers at OLC, or Colin Powell and the lawyers at the State Department? Who did you rely

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conduct interrogations in Abu Ghraib contributed to the belief that additional interrogation techniques were condoned in order to gain intelligence (Jones, pages 15-16; Fay, pages 8, 10, 22).
□The lines of authority and the prior legal opinions became blurred (Fay, page 10).
□The existence of multiple policies on interrogation operations for use in different theatres confused Army and civilian interrogators at Abu Ghraib (Fay Finding No. 7).
□CIA detention and interrogation practices in Iraq (conducted under authority of the Bybee Memorandum) led to a loss of accountability, abuse, reduced interagency cooperation, and an unhealthy attitude that poisoned the atmosphere at Abu Ghraib (Fay, pages 52-53).
□The CIA techniques and practices (in accordance with the Bybee memo) led to a perception that such techniques and practices were suitable for Defense Department operations (Fay, pages 118-119).

Response: I would respectfully submit that the Schlesinger, Fay, and Jones reports speak for themselves on the subjects you indicate. However, the Fay and Jones reports conclude there is no single simple explanation for why the abuses at Abu Ghraib occurred. The primary causes are misconduct (ranging from inhumane to sadistic) by a small group of morally corrupt soldiers and civilians, a lack of discipline on the part of the leaders and soldiers of the 205 th MI BDE, and a fa ilure or lack of leadership by multiple echelons within CJTF-7. The reports went on to conclude that contributing factors can be traced to issues affecting command and control, doctrine, training, and the experience of the soldiers we asked to perform this vital mission. The reports also say the abuses at Abu Ghraib primarily fall into two categories: a) intentional violent or sexual abuse and, b) abusive actions taken based on misinterpretations or confusion regarding law or policy. Finally, the reports say that neither the Department of Defense nor Army doctrine caused any abuses; that abuses would not have occurred had doctrine been followed and mission training conducted. The Schlesinger report stated that the "Panel accepts the proposition that these terrorists are not combatants entitled to the protections of Geneva Convention III."

9) In his report on the abuse at Abu Ghraib, General Antonio Taguba concluded that the process of maintaining "ghost detainees" – holding and moving prisoners to avoid review by the International Red Cross – was deceptive and contrary to Army doctrine and a violation of international law. (a) Do you agree with General Taguba's conclusions

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about the practice of maintaining ghost detainees? (b) Are you aw any investigations that have been, are being, or will be conducted i the practice of maintaining ghost detainees? If so please:
i. Identify the agency or person responsible for the investigation, th title of the investigation, and whether it has been completed.
ii. Provide a copy of all completed or provisional reports of those investigations.

Response: I believe the work of the International Committee of the Red Cross is vitally important, and I honor this important group for its continuing efforts. Assessments of whether particular practices were consistent with Army doctrine is a matter for determination by the Department of Defense. I am not familiar enough with the facts of the particular instances you cite to have a view whether they represent violations of any law. In any event, I would consult with appropriate lawyers in the Department of Justice before reaching such a conclusion. I am not aware of what investigations may have been, are being, or will be conducted concerning allegations involving "ghost detainees."

10) On March 19, 2004, the Office of Legal Counsel provided a Memorandum, signed by Jack Goldsmith, in response to your request for an opinion on whether the CIA was permitted to relocate prisoners from Iraq to "facilitate interrogation."
(a) Why did you ask OLC for that opinion?
(b) Was it your intent to justify the practice of maintaining ghost detainees?
(c) Why would it ever be necessary to hide a detainee from the International Red Cross?

Response: The memorandum to which you refer was a draft memorandum that was never finalized nor signed. The draft was prepared to assist U.S. personnel abide by all applicable legal requirements. I believe the United States has complied with all of its legal obligations to notify the ICRC.

(d) Do you agree that one consequence of the OLC opinion was to permit abusive interrogation practices to occur without outside monitoring?

Response: No.

(e) Was this and is this the intent of our policy?

Response: The policy of the United States is to comply with all of our legal obligations
under the Geneva Conventions.

(f) What do you know about actions conducted under the authority of that opinion?

Response: I do not know whether any actions were conducted in reliance on the draft memorandum.

(g) Do you agree with the legal analysis interpreting Article 49 of the Fourth Geneva Convention contained in the March 19, 2004 Goldsmith Memo?

Response: Because the draft memorandum was never finalized, I did not have occasion to come to definitive views concerning the analysis contained in the draft. I recall believing at the time that the draft presented a reasonable and scholarly interpretation of the terms of the Geneva Convention.

(h) Please identify and provide all notes, correspondence, memoranda, e-mail, audio-recordings, documents of any kind which reflect your request for the Goldsmith memo, requests made to you for opinions on the meaning of Article 49, your positions, advice, assessments, analysis or recommendations after your receipt of the Goldsmith memo, and any objections provided by any Administration personnel to the substance and/or conclusions in the Goldsmith memo.

Response: I have no present knowledge of any such documents, although I have not conducted a search. Any records reflecting the information you specify would involve deliberative material that I am not at liberty to disclose.

(i) Please describe in detail the discussions between you and Mr. Goldsmith on the Bybee Memorandum.

Response: Any discussions between me and Mr. Goldsmith concerning the August 1, 2002 memorandum would involve internal deliberations of the Executive Branch that I am not at liberty to disclose.

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intelligence reform legislation that it opposed a provision in the draft legislation that would have provided legal protections to foreign prisoners to which they are not now entitled. The President has repeatedly stated that his Administration does not authorize or condone torture under any circumstances by U.S. personnel. I, of course, fully support the President's policy in this area.

e) The same New York Times story reported that the Defense Department opposed a measure in the military authorization bill which would have explicitly prohibited the use of torture, and cruel, inhuman and other degrading treatment by Defense Department personnel? Why did the administration oppose that provision? Did you participate in the decision to oppose the decision? Did you lobby anyone in Congress on the issue? Do you think the provision should have been included in the legislation?

Response: I am not familiar with the matters referred to in the New York Times story.

16) The trial of Army Specialist Charles Graner for mistreating detainees at Abu Ghraib recently began in Ft. Hood, Texas. Specialist Graner's defense is that the abuse he committed was authorized by his supervisors. As I indicated at the hearing, and as corroborated by the Fay and Schlesinger reports, the policy memos on the Geneva Conventions, torture, and ghost detainees that you wrote, requested, authorized, endorsed, or implemented appear to have contributed to detainee abuses in Afghanistan, Guantanamo Bay, and Iraq, including those at Abu Ghraib prison.
(a) Do you agree that you should personally be disqualified from any investigation or inquiry into detainee abuses due to the appearance of, or actual, conflicts of interest that your past activities as White House Counsel may create?

Response: In a press briefing on August 24, 2004, the Schlesinger Panel clearly concluded that there was no government policy that called for the torture or inhumane treatment of detainees. "But a series of failures across the Department of Defense, the Army, and U.S. Central Command contributed to an atmosphere that allowed some of these abuses to occur." (Congresswoman Fowler) If confirmed, I would take extremely seriously my obligation to recuse myself from any matter whenever appropriate, and

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would consult with other lawyers with experience and expertise at the Department of Justice if any such question arises. I would do my best to ensure that the Department does not become politicized. I would treat with equal seriousness my responsibility to enforce the law fairly and equally on behalf of all Americans.

17) When did you first become aware that FBI personnel had observed, and/or complained about, and/or departed various locations because of, such abuses by military, intelligence, or contractor personnel? How were you informed? What did you do in response to that discovery? Please provide details.

Response: I became aware of the reports to which you refer when they were reported in the press. I am confident that all credible allegations of abuse are being vigorously investigated by the appropriate agencies.

18) During the hearing, you made specific reference to the possibility of your having a role in investigating the substance of the FBI e-mails produced by the ACLU that reported interrogation abuses at Guantanamo Bay. You called the accuracy of the e-mails into question due to a claimed erroneous reference to an "Executive Order." I am disturbed that you expressed skepticism about the general veracity of FBI agents reporting human rights violations at Guantanamo Bay because of a possible mistake in bureaucratic terminology.
(a) Do you really believe that FBI agents would falsely describe serious criminal activities by other government agents that they witnessed at Guantanamo Bay in their official, internal correspondence?

Response: I did not express skepticism about the "general veracity of FBI agents." An Executive Order of the type referenced in the e- mail you have cited simply does not exist, and it is, in my view, appropriate to make that fact clear. I have no reason to believe that FBI agents would knowingly provide false descriptions; that does not mean that they are not mistaken.

(b) Don't your comments serve to discourage the reporting of abuses and contribute to an environment that values secrecy above candor?

Response: No. I encourage anyone with information regarding abuses to make that information known to the appropriate authorities.

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GONZALES CONFIRMATION HEARING

THURSDAY, JANUARY 6, 2005

INTERNATIONAL LAW ISSUES

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Spector: The focus of media attention has been on the issue of Judge Gonzales' roles in analysis and recommendations on the handling of the detainees. Judge Gonzales had issued an opinion to the President that the Geneva Convention did not apply with respect to certain of the combatants. In his memorandum of January 25, 2000, he said, "In my judgment, this new paradigm"--referring to the war on terrorism--"renders obsolete Geneva's strict limitations on questioning of enemy prisoners..." The Committee will seek further amplification on a number of substantive issues from that memorandum, including Judge Gonzales' statement that, "In the treatment of detainees, the United States will continue to be constrained by its commitment to treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Convention." This statement raises the question of what is the meaning of military necessity and what extent, if at all, does military necessity impact on the "commitment to treat" a detainee humanely.

OPENING STATEMENT OF HON. PATRICK J. LEAHY

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Now, the job of Attorney General is not about crafting rationalizations for ill-conceived ideas. It is a much more vital role than that. The Attorney General is about being a forceful, independent--independent--voice in our continuing quest for justice and in defense of the constitutional rights of every single American. We have seen what happens when the rule of law plays second fiddle to a President's policy agenda. Attorney General Ashcroft and with the White House Counsel's office has impulsively facilitated rather than cautiously vetted serious constitutional issues. The administration has taken one untenable legal position after another regarding the rule of law as we fight terrorism. . . .

The policies include this nominee's role in developing interpretation of the law to justify harsh treatment of prisoners. Harsh treatment is tantamount to torture.

America's troops and citizens are at greater risk because of those actions, with terrible repercussions throughout so much of the world. The searing photographs from Abu Ghraib have made it harder to create and maintain the alliances we need to prevail against the vicious terrorists who threaten us, and those abuses serve as recruiting posters for the terrorists. The scandal of Abu Ghraib, allegations of mistreatment at Guantanamo, charges from cases in Iraq and Afghanistan are serious matters, and

to date we have unresolved accountability.

. . . From the outset of public disclosure of the Abu Ghraib photographs, the Bush administration maintained that any wrongdoing was simply a case of a few bad apples. But as bits of information have been made public not by the administration but by the press over the last year, it has become clear to all that these incidents at U.S. facilities around the world are not just the actions of a few low-ranking members of the military; rather, in the upper reaches of the executive branch, a process was set in motion that rolled forward to produce scandalous results, almost like somebody opening the floodgates in a dam and the water flowed downstream until it overwhelmed everybody below.

The Army Field Manual reflects our Nation's long-held policy toward prisoners. My young son was in the Marines, and he was called up for Desert Storm, the war that was so quick that he was not in harm's way. He was taught these things even as a Marine. But the Army Field Manual reflects our Nation's long-held policies toward prisoners, and it says, "The goal of any interrogation is to obtain reliable information in a lawful manner. U.S. policy expressly prohibits acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment, as a means of or to aid

interrogation."

Now, the policy is in place for a very good reason. The Field Manual continues, "The use of torture is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear." It also may place U.S. and allied personnel in enemy hands at greater risk. But senior officials in the Bush White House, the Ashcroft Justice Department, and the Rumsfeld Pentagon set in motion a systematic effort to minimize, distort, and even ignore our laws, our policies, our international agreements on torture and the treatment of prisoners. Defense Secretary Rumsfeld and later Lieutenant General Ricardo Sanchez authorized the use of techniques that were contrary to both U.S. military manuals, but also international law. Former CIA Director Tenet requested and Secretary Rumsfeld approved the secret detention of ghost detainees in Iraq. They did that so they could be hidden from the International Committee of the Red Cross. And still unexplained are instances where the U.S. Government delivered prisoners to other countries so they could be tortured.

. . . .So these hearings, if I may conclude, are an opportunity at long last for some accountability for this meltdown of longstanding U.S. policy on torture. White

House Counsel Judge Gonzales was at the center of discussions on the applicability of the Geneva Conventions to the wars in Afghanistan and Iraq and the legality of detention and interrogation methods that have been seen as tantamount to torture. He oversaw the formulation of this administration's extreme views of unfettered executive power and unprecedented government secrecy.

Senator Cornyn: . . . .Take, for example, the harsh criticism about the Geneva Convention. Judge Gonzales has been harshly attacked for advising the President that all detainees be treated humanely, but that as a legal mater al Qaeda and Taliban fighters are not covered by the Geneva Convention.

Now, I hate to ruin a good story by the President's political opponents who are attacking him through this nominee, but let me just say there is one important point that needs to be made. Judge Gonzales is absolutely right. You do not have to take my word for it. First of all, al Qaeda never signed the Geneva Conventions, but moreover, the Red Cross' own guidelines state that to be entitled to Geneva protection as a prisoner of war, combatants must satisfy four conditions: being commanded by a person responsible for his subordinates; secondly, having a fixed,

distinctive sign recognizable at a distance; number three, carrying arms openly; and, number four, conducting their operations in accordance with the laws and customs of war.

Does anyone on this Committee, or anywhere else, for that matter, seriously argue that al Qaeda terrorists comply with the law of war?

By the way, it is important to note that Judge Gonzales' legal advice has also been affirmed by three Federal courts throughout this country and has also been endorsed by numerous legal scholars and international legal experts across the political spectrum, as well as both the 9/11 Commission, by the way; the final Schlesinger report, an independent report on DOD detention operations; and a brief filed recently in the United States Supreme Court by former Carter administration officials, State Department legal advisers, judge advocates and military commanders, and liberal international law scholars, who concluded that "[t]he President's conclusion that members of al Qaeda, and the Taliban, are unlawful combatants" is clearly correct. Even Washington advocacy director for the Human Rights Watch, Tom Malinowski, a vocal Bush administration critic, has grudgingly conceded that the administration's interpretation was "probably correct."

Now, the administration's Geneva position is not just right as a legal matter. It is also essential as a matter

of national security.

I recently published an op-ed that explained that Geneva Convention protections to al Qaeda would threaten the security of our soldiers, dramatically disable us from obtaining the intelligence needed to prevent further attacks on U.S. civilians and soldiers, and badly undermine international law itself, and I would ask, Mr. Chairman, that that be made a part of the record.

. . . .

Just take a look at all the numerous privileges provided by the Geneva Convention for traditional prisoners of war. For example, questioners could not entice detainees to answer questions by offering them creature comforts or even preferential treatment, even though that is the standard operating procedure in police stations throughout the United States. Because the Convention prohibits the holding of detainees in isolation, al Qaeda fighters would be able to coordinate with each other in a way that would thwart or could thwart effective questioning. POW status, even confers broad combat immunity against current criminal prosecution before civilian and military tribunals alike.

Mr. Chairman, surely, no member of the Committee or anyone else on our side of this conflict actually believes that an al Qaeda terrorist deserves to be treated better

than an American citizen accused of a crime. I certainly would not think so. President Reagan did not think so, neither did each of his successors in office. Nearly two decades ago President Reagan and every President since that time has rejected a proposed amendment to the Geneva Convention known as Protocol 1 of 1977 to extend that Convention to protect terrorists. As President Reagan rightly argued we must not and need not give recognition and protection to terrorist groups as a price for progress in humanitarian law. Notably even the New York Times and Washington Post agreed at the time.

All of this support from multiple Federal courts, from the 9/11 Commission, the Schlesinger Report, liberal international legal scholars, Carter administration officials, even the New York Times and Washington Post, yet Judge Gonzales is criticized for taking exactly that same position.

Take one more issue, the Justice Department memos that have been alluded to here construing the Federal torture statute. Judge Gonzales is being attacked for a memo he did not write, interpreting the law that he did not draft. It was Congress, not Judge Gonzales, that enacted a strict definition of torture. It was Congress, not Judge Gonzales, that specifically provided that only specific intent to inflict severe pain or mental pain or suffering

would constitute torture.

As I said, President Bush and Judge Gonzales have both unequivocally, clearly and repeatedly rejected the use of torture. But is there anyone here today who would fail to use every legal means to collect intelligence from terrorists in order to protect American lives? I certainly hope not.

Finally, I know we are going to hear some about Abu Ghraib today, we already have, and I think it is safe to say that everyone agrees that Abu Ghraib represents a shameful episode in this Nation's history, yet some people actually want to exploit that tragedy for their own purposes. Abu Ghraib should be treated seriously, not politically. The Defense Department has been vigorously investigating the misconduct and prosecuting the violators. The independent Schlesinger Report that I alluded to earlier, concluded that, "No approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities." So if there is no evidence whatsoever that Judge Gonzales was any way responsible for the criminal acts that occurred at Abu Ghraib by a few, why are we talking about this in Judge Gonzales' confirmation hearing? This after all is a confirmation hearing to head the Department of Justice, not

an oversight hearing of the Department of Defense.

. . . .

STATEMENT OF HON. ALBERTO R. GONZALES

. . . .

While I look forward to answering your specific questions concerning my actions and my views, I think it is important to stress at the outset that I am and will remain deeply committed to ensuring the United States Government complies with all of its legal obligations as it fights the war on terror, whether those obligations arise from domestic or international law. These obligations include, of course, honoring the Geneva Conventions whenever they apply. Honoring our Geneva obligations provide critical protection for our fighting men and women, and advances norms for the community of nations to follow in times of conflict. Contrary to reports, I consider the Geneva Conventions neither obsolete nor quaint.

After the attacks of 9/11, our Government had fundamental decisions to make concerning how to apply treaties and U.S. law to an enemy that does not wear a uniform, owes no allegiance to any country, is not a party to any treaties, and most importantly, does not fight according to the laws of war.

As we have debated these questions, the President has

made clear that he is prepared to protect and defend the United States and its citizens and will do so vigorously, but always in a manner consistent with our Nation's values and applicable law, including our treaty obligations.

Having said that, like all of you, I have been deeply troubled and offended by reports of abuse. The photos from Abu Ghraib sickened and outraged me, and left a stain on our Nation's reputation. And the President has made clear that he condemns this conduct, and that these activities are inconsistent with his policies. He has also made clear that America stands against and will not tolerate torture under any circumstances.

I share his resolve that torture and abuse will not be tolerated by this administration, and commit to you today, that if confirmed, I will ensure that the Department of Justice aggressively pursues those responsible for such abhorrent actions.

Chairman Specter. At the outset of your testimony, Judge Gonzales, you have already covered the matter, but I think it is important to have an unequivocal statement and really a repeat of an unequivocal statement of the position of the administration and your personal views. Do you approve of torture?

Judge Gonzales. Absolutely not, Senator.

Chairman Specter. Do you condemn the interrogators--

and you already answered this in part--at Abu Ghraib and Guantanamo, but again, for the record, do you condemn the interrogators' techniques at Abu Ghraib shown on the widely publicized photographs?

Judge Gonzales. Let me say, Senator, that as a human being I am sickened and outraged by those photos. But as someone who may be head of the Department, I obviously don't want to provide any kind of legal opinion as to whether or not that conduct might be criminal, and obviously, if anyone is involved in any kind of conduct that is subject to prosecution, I would not want to do anything today to prejudge that prosecution and jeopardize that prosecution. But obviously, if that conduct falls within the jurisdiction of the Department of Justice, I will pursue it aggressively, and you have my word on that.

Chairman Specter. . . . . Do you similarly condemn any similar interrogation techniques at Guantanamo?

Judge Gonzales. I am not sure of which specific techniques you're referring to, Senator, but obviously, there is a range of conduct that would be in clear violation of our legal obligations, and those I would absolutely condemn, yes, sir.

Senator Leahy.

I would also note that while al Qaeda does not have POW protection, Geneva still applies, as Secretary Colin

Powell has stated very emphatically. I do not want to leave the impression that somehow Geneva does not apply just because it involves al Qaeda.

I would like to ask you a few questions about the torture memo that is dated back in August 1st, 2002, signed by Assistant Attorney General Jay Bybee, and he is now a Federal Appellate Court Judge. The memo is addressed to you. It was written at your request. It concludes--this is actually the memo, this is actually the memo here. It is a fairly lengthy memo, but addressed a memorandum from Alberto Gonzales, Counsel to the President. And it says for an act to violate the torture statute it must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death. In August 2002, did you agree with that conclusion?

Judge Gonzales. Senator, in connection with that opinion, I did my job as the Counsel to the President to ask the question.

Senator Leahy. I just want to know, did you agree--I mean we could spend an hour with that answer, but I am trying to keep it very simple. Did you agree with that interpretation of the torture statute back in August 2002?

Judge Gonzales. If I may, sir, let me try to--I'm going to give you a very quick answer, but I'd like to put

a little bit of context. Obviously, we were interpreting a statute that had never been reviewed in the courts, a statute drafted by Congress. We were trying the interpretation of a standard by Congress. There was discussion between the White House and the Department of Justice as well as other agencies about what does this statute mean? It was very, very difficult. I don't recall today whether or not I was in agreement with all of the analysis, but I don't have a disagreement with the conclusions then reached by the Department.

Ultimately, it is the responsibility of the Department to tell us what the law means, Senator.

Senator Leahy. Do you agree today that for an act to violate the torture statute it must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death?

Judge Gonzales. I do not, Senator. That does not represent the position of the Executive Branch. As you know--

. . . .

Senator Leahy. But it was the position in 2002--

Judge Gonzales. Senator, what you're asking the counsel to do is to interject himself and direct the Department of Justice, who is supposed to be free of any

kind of political influence, in reaching a legal interpretation of a law passed by Congress. I certainly give my views. There was of course conversation and a give and take discussion about what does the law mean, but ultimately, ultimately by statute the Department of Justice is charged by Congress to provide legal advice on behalf of the President. We asked the question. That memo represented the position of the Executive Branch at the time it was issued.

Senator Leahy. Well, let me then ask you, if you are going to be Attorney General--and I will accept what you said--and let us put on the hat if you are going to be confirmed as Attorney General, the Bybee memo concludes the President has authority as Commander in Chief to override domestic and international laws prohibiting torture, and can immunize from prosecution anyone, anyone, who commits torture under his act. Whether legal or not he can immunize them. Now, as Attorney General, would you believe the President has authority to exercise a Commander in Chief override and immunize acts of torture?

Judge Gonzales. First of all, Senator, the President has said we are not going to engage in torture under any circumstances. And so you're asking me to answer a hypothetical that is never going to occur. This President has said we're not going to engage in torture under any

circumstances, and therefore, that portion of the opinion was unnecessary and was the reason that we asked that that portion be withdrawn.

Senator Leahy. I am trying to think what type of opinions you might give as Attorney General. Do you agree with that conclusion?

. . . .

Judge Gonzales. Senator, I do believe there may come an occasion when the Congress might pass a statute that the President may view as unconstitutional, and that is a position and a view not just of this President but many, many Presidents from both sides of the aisle. Obviously, a decision as to whether or not to ignore a statute passed by Congress is a very, very serious one, and it would be one that I would spend a great deal of time and attention before arriving at a conclusion that in fact a President had the authority under the Constitution to—

. . . .

Senator Leahy. Mr. Gonzales, I would almost think that you had served in the Senate. You have learned how to filibuster so well, because I asked a specific question. Does the President have the authority, in your judgment, to exercise a Commander in Chief override and immunize acts of torture?

Judge Gonzales. With all due respect, Senator, the

President has said we're not going to engage in torture. That is a hypothetical question that would involve an analysis of a great number of factors, and the President simply--

Senator Leahy. How about putting it this way: do you think that other world leaders would have authority to authorize a torture of U.S. citizens if they deemed it necessary for their national security?

Judge Gonzales. Senator, I don't know what laws other world leaders would be bound by. I think it would--I'm not in a position to answer that question.

Senator Leahy. The only reason I ask this is this memo was DOJ policy for a couple years, and it sat there from sometime in 2002, and then just a couple weeks before 2005, late on a Thursday afternoon, it seems to be somewhat overridden. Of course, that may be coincidentally because your confirmation hearing was coming up. Do you think if the Bybee memo had not been leaked to the press, it would still be--because it had never been shown to Congress even though we had asked for it--do you think it would still be the overriding legal opinion?

Judge Gonzales. Sir, that I do not know. I do know that when it became--it was leaked, we had concerns about the fact that people assumed that the President was somehow exercising that authority to engage in torture, and we

wanted to clarify the record that the President had not authorized or condoned torture, nor had directed any actions or excused any actions under the Commander in Chief override that might otherwise constitute torture, and that was the reason that the decision was made to delete that portion of the opinion.

Senator Leahy. Do you think there is any connection whatsoever between the policies which actually you have to formulate regarding treatment and interrogation of prisoners, policies that were sent out to the Department of Defense and elsewhere, and the widespread abuses that have occurred? Do you acknowledge any accountability for such things, any connection?

Judge Gonzales. Senator, as I said in my remarks, I categorically condemn the conduct that we see reflected in these pictures at Abu Ghraib. I would refer you to the eight completed investigations of what happened at Abu Ghraib and in Guantanamo, and there are still three ongoing. I'm talking about the Taguba report, the Fay-Jones-Kern Report, the Schlesinger report, the Navy IG, the Army IG, Jacoby, Ryder, Miller, all of these reports. And if you listened to the press briefings given in connection with the roll-out of these reports, they do conclude that with respect to the conduct not reflected in the photos, not the conduct that we find the most offensive, but

conduct related to pure interrogations, that there was some confusion--

Senator Leahy. The same reports you talk about say the Department of Defense relied on the memo. It is quoted extensively int DOD Working Group report on interrogations. That report has never been repudiated. So apparently they did rely on the memo, and when we find out about the abuses we never find out from the administration, we find out because the press reports it. Is there any accountability here anywhere?

You know, as I mentioned earlier, my son was in the military. He was held to very, very strict standards. He is trained for combat, held to very, very strict standards. The vast majority of the men and women in the military are held to those same strict standards. I am just trying to find out where the accountability is for this terrible blot that you and I both agree is a terrible blot on the United States.

Judge Gonzales. I believe that is a very good question, Senator, and that is why we have these eight completed investigations and these three pending investigations, while we've had four hearings involving the Secretary of Defense and you've had 18 hearings involving the Deputy Secretary, Under Secretary of Defense, you've had over 40 briefings with the Congress, because we care

very much about finding out what happened and holding people accountable. Unlike other countries that simply talk about Geneva, if there is an allegation that we've done something wrong, we investigate it. We're very serious about our commitments, our legal obligations in Iraq, and if people have done things that they shouldn't have done in violation of our legal obligations, they are going to be held accountable.

. . . .

Senator Hatch.

I think today's hearing is certainly going to dwell to a large degree on ongoing public policy on that debate on how a democratic society with a long tradition of protecting civil liberties should conduct itself when it finds itself threatened and attacked by terrorist groups and individuals who will stop at literally nothing to destroy our way of life, and who do not represent a particular country, do not wear uniforms, do not abide by international principles, and who really are rogue in every sense of that term. It is my hope that in addition to providing an adequate record about Judge Gonzales' qualifications to serve as Attorney General, one of the outcomes of today's hearing will be to educate the Committee and the public about the facts of what actions were taken and were not taken with respect to the treatment

and interrogations of various classes of individuals who have been detained and taken into custody by the United States as part of our response to the horrific 9/11 terrorist attacks on America.

. . . .

Senator Hatch. Let me just ask some questions by reviewing some of the key points with respect to the treatment of detainees. Like most Americans, I was appalled by the abuses at Abu Ghraib. Some have stated that the President's February 7th, 2002 memorandum is somehow responsible for the abuses at Abu Ghraib, at that prison facility in Iraq. But is it not true that the February 7th, 2002 memorandum actually makes clear that the Geneva Conventions do apply in both Afghanistan and Iraq?

Judge Gonzales. Senator, I don't recall that the memo actually talked about Iraq. The President--there was a decision by the President that Geneva would apply with respect to our conflict with the Taliban. However, and I believe there's little disagreement about this as a legal matter, because of the way the Taliban have fought against the United States, that they forfeited their right to enjoy prisoner of war legal protections. There was never any question about whether Geneva would apply in Iraq. There was no decision for the President to make. Iraq was a signatory to the Geneva Convention, so there was no

decision for the President to make. There was no decision by the Department of Justice as to what kind of techniques should be approved with respect to interrogations in Iraq, because the understanding throughout the administration was the Geneva Conventions apply in Iraq.

Senator Hatch. Is it not also true that the President's February 7th, 2002 memorandum, which is entitled "Humane Treatment of al Qaeda and Taliban Detainees," also requires American forces to treat all detainees humanely, regardless of whether the Geneva Conventions apply; is that not true?

Judge Gonzales. That is correct. The President gave a directive to the military that despite the fact that Geneva may not apply with respect to the conflict and the war on terrorism, it is that everyone should be treated humanely.

Senator Hatch. That was more than two years ago.

Judge Gonzales. That is correct.

Senator Hatch. Am I correct in my understanding that at no time did the President authorize the use of torture against detainees regardless of any of the legal memoranda produced by various entities of the U.S. Government, including the August 2002 Department of Justice memo, the so-called Bybee memo?

Judge Gonzales. Senator, the position of the

President on torture is very, very clear, and there is a clear record of this. He does not believe in torture, condone torture, has never ordered torture, and anyone engaged in conduct that constitutes torture is going to be held accountable.

Senator Hatch. And that has never been a problem with regard to the President or you as his adviser?

Judge Gonzales. Absolutely not, Senator.

Senator Hatch. As Counsel to the President of the United States, is it your responsibility to approve opinions issued by the Department of Justice?

Judge Gonzales. No, sir, I don't believe it is my responsibility, because it really would politicize the work of the career professionals at the Department of Justice. I know that some have been critical of my actions in not trying to force the opinion a certain way, people that are concerned about certain sections of that opinion, but we have to be very, very careful here. When you use the White House as a shield, it can also be used as a sword. It can be used as a sword to force an opinion, to reach an outcome that would be politically advantageous to the White House, and we don't want that to happen. And so I take my responsibilities very seriously in respecting the role of the Department of Justice given to the Department by Congress to decide for the Executive Branch what the law

requires.

Senator Hatch. In fact, the Bybee memo was actually withdrawn by the Department of Justice in June of 2004; am I right on that?

Judge Gonzales. The opinion was withdrawn, yes, sir.

Senator Hatch. The Bybee memo was issued, I believe, six months after the President issued his February 7th, 2002 memo requiring all detainees to be treated humanely; is that correct?

Judge Gonzales. That is correct. It has always been the case that everyone should be--that the military would treat detainees humanely, consistent with the President's February order.

Senator Hatch. So that memo did not overrule what the President's 2002 memo actually said?

Judge Gonzales. Of course not.

. . . .

Senator Kennedy. I sit on the Judiciary Committee and also on the Armed Services Committee, and I was a member of the Armed Services Committee in the time that all America saw the Abu Ghraib photos. And just subsequent to that, we, in the Armed Services Committee, had General Taguba, who did the Taguba report that was leaked, and we read the report before a copy was actually provided to the Congress. And immediately the administration claimed during the

hearings that we had with General Taguba, that the Abu Ghraib was just a few bad apples, there was no higher level of support or encouragement for the mistreatment of detainees.

Then we learned that the Defense Department's Working Group report of April 2003 had provided the broad legal support for the harsh interrogation tactics, and it dramatically narrowed the definition of torture, and it recognized the novel defenses for those who committed the torture. Then we learned that the legal basis for the Working Group report had been provided by the Justice Department in the Bybee memo.

Now, that is what has come up from the administration. That is what has come up, including the President of the United States. This Committee, the Armed Services Committee has asked for these memos. We have depended upon what has been leaked, what has been put on the Internet, and what has been obtained in the Freedom of Information and by various attorneys. So there is a certain kind of sense by many of us here that the administration--and you are the point person on the administration--has not been forthcoming on the whole issues of torture, which not just committed at Abu Ghraib, but is happening today.

The Bybee torture memoranda, written at your request--and I would be interested in your reactions to this--made

abuse of interrogation easier. It sharply narrowed the definition of torture and recognized it as new defense for officials who commit torture. For two years, for two years, from August 2002 to June 2004 you never repudiated it. That is the record, you never repudiated it. It was written by the CIA's bidding, and you can clarify that if that is false. We can assume it was probably provided to the CIA as written. Its principles were adopted in the Defense Department's Working Group report. I have it right here, and I will read the identical provisions in the Bybee report that were put in the Defense Department Working Group report that has been the document which has been made available to the Defense Department about how they ought to view torture. This person assumes that the Bybee report has already gone to the CIA in his complacency.

Now, according to the Defense Department's own investigation--you referred to Senator Leahy earlier--as to the Defense Department, the Working Group report was used to justify--this is DOD--was used to justify the many abuses that occurred in Afghanistan and Guantanamo. And according to Fay and Schlesinger, who testified in the Armed Services Committee, the abuse of policies and practice in Afghanistan and Guantanamo migrated to Iraq. You have never repudiated the Bybee assertion that presidential power overrides all the prohibitions against

torture enacted and ratified. The President's directive to act humanely was hollow. It was vague. It allowed for military necessity exception and did not even apply to the CIA, did not even apply to the CIA. Abuses are still being reported. And you were warned by Secretary Powell and other top military leaders that ignoring our longstanding traditions and rules would lead to abuse and undermine military culture, and that is what has happened.

I am going to get to how the Bybee amendment was first written. As I understand, there is the report in the Washington Post that the CIA asked you for a legal opinion about how much pain and suffering an intelligence officer could inflict on a detainee without violating the '94 anti-torture statute, which I might point out was strongly supported by Ronald Reagan and Bush I, and passed the Foreign Relations Committee unanimously. Republicans have been as concerned about torture as Democrats, and we will get into the various statutes that have been passed in recent times which would indicate that.

Now, the Post article states you chaired several meetings at which various interrogation techniques were discussed. These techniques included the threat of live burial and water-boarding, whereby the detainee is strapped to a board, forcibly pushed under water, wrapped in a wet towel and made to believe he might drown. The article

states that you raised no objections, and without consulting military and State Department experts. They were not consulted. They were not invited to important meetings. They might have been important to some, but we know what Secretary Taft has said about his exclusion from these. Experts in laws of torture and war prove the resulting memo gave CIA interrogators the legal blessings they sought.

Now, was it the CIA that asked you?

Judge Gonzales. Sir, I don't have specific recollection. I read the same article. I don't know whether or not it was the CIA. What I can say is that after this war began, against this new kind of threat, this new kind of enemy, we realized that there was a premium on receiving information. In many ways this war on terror is a war about information. If we have information we can defeat the enemy. We had captured some really bad people who we were concerned had information that might prevent the loss of American lives in the future. It was important to receive that information, and people at the agencies wanted to be sure that they would not do anything that would violate our legal obligations, and so they did the right thing. They asked questions. What is lawful conduct? Because we don't want to do anything that violates the law.

Senator Kennedy. You asked, at their request--if this is incorrect, then correct me. I am not attempting, or if there are provisions in that comment here that are inaccurate, I want to be corrected. I want to be fair on this. But it is my understanding, certainly was in the report, that the CIA came to you, asked for the clarification. You went to the OLC. Now, I want to ask you, did you ever talk to any members of the OLC while they were drafting the memoranda? Did you ever suggest to them that they ought to lean forward on this issue about supporting the extreme uses of torture, as reported in the newspaper?

Judge Gonzales. Sir, I don't ever recall using the term "leaning forward" in terms of stretching what the law is.

Senator Kennedy. You talked to the OLC during the drafting of it?

Judge Gonzales. There is always discussions--not always discussions, but there often is discussions between the Department of Justice and OLC and the Counsel's office regarding legal issues. I think that's perfectly appropriate. This is an issue that the White House cared very much about to ensure that the agencies were not engaged in conduct--

Senator Kennedy. What were you urging them? What

were you urging? They are, as I understand, charged to interpret the law. We have the series of six or seven different laws and conventions on torture and on the rest of it. They are charged to develop and say what the statute is. Now, what did you believe your role was in talking with the OLC and recommending--

Judge Gonzales. To understand their views about the interpretation--

Senator Kennedy. Weren't you going to get the document? Weren't you going to get their document? Why did you have to talk to them during the time of the drafting? It suggests in here that you were urging them to go as far as they possibly could. That is what the newspaper reported. Your testimony is that you did talk to them but you cannot remember what you told them.

Judge Gonzales. Sir, I'm sure there was discussion about the analysis about a very tough statute, a new statute, as I've said repeatedly, that had never been interpreted by our courts, and we wanted to make sure that we got it right. So we were engaged in interpreting a very tough statute, and I think it is perfectly reasonable and customary for lawyers at the Department of Justice to talk with lawyers at the White House. Again, it was not my role to direct that we should use certain kinds of methods of receiving information from terrorists. That was a decision

made by the operational agencies, and they said we need to try to get this information. What is lawful? And we look to the Department of Justice to tell us what would, in fact, be within the law.

Senator Kennedy. . . . . What I would like to do is include in the record the Bybee memoranda and the Defense Department working group report, the analysis where they use virtually word by word the Bybee memoranda in the key aspects of the working group report, which was the basic document which has been the guide to our military about how they should treat prisoners.

. . . .

Senator Biden. . . . . my good friend from Texas, he held up three reports that did not say what he said they said. The three reports he held up that I am aware of, maybe four, asserting essentially that they confirmed the judgment that you made in your recommendations to the President of the United States of America relating to torture and other matters.

Now, the reason why it is appropriate to ask you about Abu Ghraib is not to go back and rehash Abu Ghraib, but it is relevant as to whether or not what occurred at Abu Ghraib came as a consequence of the judgments made and embraced by the President that were then essentially sent out to the field. The Schlesinger report that was cited,

it finds, "Lieutenant General Sanchez signed a memo authorizing a dozen interrogation techniques beyond standard Army practice, including five beyond those applied at Guantanamo." He did so "using reasoning from the President's memo of February 7, 2002." So I say to my friend from Texas, that is why this is relevant.

The very reports cited say that--and I will not go through them all. The Red Cross report, the Red Cross did not sign off and say that, you know, the conduct or the recommendations or the memoranda were, in fact, appropriate.

. . . .You know, there is that play we have all seen, "A Man for All Seasons," and there is an exchange in there where Sir Thomas More is engaging Roper, and Roper says--a young man came to seek a job, and he said, "Arrest him. He means you harm." And he said, "He has broken no law." And Roper said, "But he means you harm." And if my recollection is correct, you have Thomas More turning to Roper and saying, "This country is planted thick with laws, coast to coast, man's laws not God's, and if you cut them down, Roper, as you would, what will you do when the devil turns 'round on you? Yes, I give the devil benefit of law for my own safety's sake."

That is the fundamental principle we debate among ourselves here, no matter how you cut it. And that is what

the debate that took place on these torture memos between Taft and Yoo. I have a copy of the report, the memo sent by the Secretary of State to you all on February 7th, which I am not going to make public. But in that memo, he takes significant issue with the recommendations coming out of your shop, and Mr. Yoo's. And he ends by saying, "Let's talk. We need to talk." And he goes into great detail, as other reports do. Powell contemporaneously on the 7th says basically--and I have the report right here. He says basically, look, you go forward with the line of reasoning you guys are using, and you are going to put my troops, my former troops, in jeopardy. This is about the safety and security of American forces. And he says in here, "What you are doing is putting that in jeopardy." You have the former head of JAG, the top lawyer in the United States military, saying, Hey, man, this is way beyond the interrogation techniques you are signing off, way beyond what the manual, the military manual for guidance of how to deal with prisoners says.

And so the point I am trying to make here--and I will come back with questions, if I have any time--well, I do not have any time. This is important stuff because there was a fundamental disagreement within the administration. And based on the record, it seems to me, although it may not be totally--it may not be dispositive, your judgment

was not as good as the judgment of the Secretary of State. Your judgment was not as good or as sound as the chief lawyer from the JAG. Your judgment was not as sound. And the question I want to debate about is the judgment. How did you arrive at this, different than these serious people like you who thought what you were doing, recommending to the President in the various memos, was jeopardizing the security of American troops? And that is what I want to get back to, but I want to explain to the public and anybody listening. This is not about your integrity. This is not a witch hunt. This is about your judgment. That is all we are trying to do.

And so when I get to ask my questions, I hope you will be candid about it because--not that it is relevant--I like you. I like you. You are the real deal.

Chairman Specter. Senator Biden, your red light is on.

Senator Biden. My red light is on.

[Laughter.]

Senator Biden. Thank you.

Chairman Specter. Judge Gonzales, while Senator Biden is awaiting round two to formulate a question--

[Laughter.]

Chairman Specter. --I think you ought to be given an opportunity to respond to Senator Biden's observations and

implicit, perhaps, two dozen questions. So the floor is yours.

Judge Gonzales. Senator Biden, when you are referring to the Powell memo, I'm not sure which memo you're referring to. And I presume you're referring--

Senator Biden. Let me give you a copy of it. For the record, Mr. Chairman, it is dated January 11, 2002, to John Yoo from William Taft, Legal Adviser, and there is overwhelming evidence that you saw it. There was discussion about it, and that is what I am referring to.

Judge Gonzales. There was a great deal of debate within the administration, as that memo partly reflects, about what was legally required and perhaps a policy judgment to be made by the President. And the fact that there was disagreement about something so significant I think should not be surprising to anyone.

Senator Biden. Of course not.

Judge Gonzales. Of course not. And reasonable people can differ.

In the end, it is the Department of Justice who is charged by statute to provide the definitive legal advice on behalf of the executive branch to the President of the United States. What I can tell you--

Senator Biden. With due respect, that does not matter. I do not care about their judgment. I am looking

at yours.

Judge Gonzales. Sir, of course, I convey to the President my own views about what the law requires, often informed by what the Department of Justice says the law is, because, again, by statute you have conferred upon them that responsibility.

I can tell you that with respect to the decision the President ultimately made, everyone involved, including the Secretary of State, including the chairman of the Joint Chiefs, all of the principals who had equities in the decision about the application of Geneva had an opportunity to present their views and their concerns directly to the President of the United States, and he made a decision.

Chairman Specter. Thank you, Judge Gonzales.

. . . .

Senator Sessions. . . . . Now, the Department of Justice under the Judiciary Act of 1789 is empowered by statute to issue opinions on various questions of law.

Judge Gonzales. That is correct, Senator.

Senator Sessions. And they have an Office of Legal Counsel.

Judge Gonzales. Yes, sir.

Senator Sessions. That really specializes in that on behalf of the Attorney General.

Judge Gonzales. The Office of Legal Counsel has been

delegated by regulation the authority of the Attorney General to provide legal advice to the executive branch.

Senator Sessions. Now, the President of the United States is executing a war on terrorism after 3,000 of our people have been killed by what can only be described as unlawful combatants. And it is a difficult, tough time, and you were concerned and the President was deeply concerned that there may be other groups of unlawful combatants, saboteurs that were in the United States planning further attacks to kill more American citizens. And that is the way it was, isn't it?

Judge Gonzales. The President was very concerned about protecting this country from future attacks and doing everything that we could do within the law to protect this country from future attacks.

Senator Sessions. And in the course of all of that, agencies that we had out there, their lives at risk--the military and other agencies--to serve our people, to protect our people, asked the President what the law was with regard to their rights and duties and responsibilities of interrogating people they have apprehended. That came to your attention, I guess, as Counsel to the President.

Judge Gonzales. My understanding is that people in the agencies were very concerned about--they understood that they had a direction from the President to do what

they could to protect this country within the limits of the law, and they wanted to clearly understand what those limits were.

Senator Sessions. And so you did not undertake to give them an off-the-cuff opinion, as Senator Biden suggests you ought to be able to do today on any question he would desire to ask you, I suppose.

Judge Gonzales. I hope not, Senator. I have been criticized, quite frankly, for going too much to the Department of Justice and making sure that the legal advice we give to the President is the right advice. That is very important to me. I understand that the Office of Legal Counsel, they have the expertise, the institutional history, the institutional knowledge about what the law is. And so I have a great deal of respect for that office and rely upon that office in the advice that I give to the President of the United States.

Senator Sessions. And it is staffed with career people who have dealt with these issues for many, many years, certainly, and when this issue arose, I think you did the absolutely proper thing. You asked the entity of the United States Government that is charged with the responsibility of making those opinions, you asked them to render an opinion.

Judge Gonzales. Absolutely, Senator. We want to get

it right. It also provides, quite candidly, as the lawyer for the President, protection for the President. We want to make sure the President does not authorize or somehow suggest conduct that is unlawful. And so I felt that I had an obligation as a prudent lawyer to check with the professionals at the Department of Justice.

Senator Sessions. Well, I think you did, and I think that was the first step.

Now, it has been suggested that this was your opinion, that it is your opinion, you asked for this opinion, as if you asked for them to say precisely what they said. You asked for them to give an opinion on the legal question involved. You did not ask them to give an opinion that you wanted. Is that correct?

Judge Gonzales. As I said in my earlier testimony, there was give-and-take. There were discussions about the opinion, but ultimately the opinion represents the position of the Department of Justice. And as such it's a position that I supported at the time.

Senator Sessions. And there is no doubt in anyone's mind, the Office of Legal Counsel or the Attorney General, that that opinion was one that they worked on, that they debated internally, and when they put their name on it, it was their opinion. Isn't that correct?

Judge Gonzales. It was the work of the Department of

Justice and, again, reflected the position of the executive branch.

Senator Sessions. The official position. Now, the President of the United States--well, let me follow this up: Having been an Attorney General and been involved in the Department of Justice as a part of the executive branch, as you were part of the executive branch, and lawyers in the Department of Justice have to be very careful, do they not, when they issue an opinion that they are not circumscribing legitimate constitutional powers that belong to the executive branch. And they are going to be careful not to render an opinion that would remove constitutional powers that the President legitimately has.

Judge Gonzales. That is correct. But my view about the Office of Legal Counsel is to call them as they see them, I mean, interpret the law and give us their best judgment about what the law is.

Senator Sessions. Well, I agree with that. But once this opinion came in from the Office of Legal Counsel and the President and you, I am sure, reviewed it, he issued some orders, it seemed to me, that were far less expansive than the authority the Legal Counsel said he had.

Judge Gonzales. Well, I am not sure which orders you might be referring to. Let me emphasize for the record that the President was not involved personally in deciding

which kinds of methods could be used to question terrorists who might have information that might save American lives. The President was not involved personally in connection with that.

What he expected and what he deserved--and I think what he got--was people within the administration trying to understand what the law was and conforming their conduct to legal requirements.

Senator Sessions. And the opinion of the Department of Justice Legal Counsel really isn't policy, is it? It is just the opinion of the Office of Legal Counsel.

Judge Gonzales. At the end of the day, again, as I described to you, I expect the Office of Legal Counsel to give me their best judgment, their best interpretation of what the law is.

Senator Sessions. And the President sets the policy based on his judgment after having received that advice?

Judge Gonzales. That is correct.

Senator Sessions. Now, with regard to al Qaeda, I do not think there is anyone on this Committee, on either side of the aisle, that would say that al Qaeda represents a lawful combatant that is, therefore, entitled to the full protections of the Geneva Conventions, would they? I mean, that is pretty well undisputed that they are not representatives of an organized state and that they do not

carry arms openly and that they do not--and they clearly do not follow the laws of warfare in the surreptitious methods by which they bomb innocent civilians?

Judge Gonzales. Senator, that is correct. Senator Biden spoke earlier about my judgment. My judgment was based on just reading the words of the Geneva Conventions is that it would not apply to al Qaeda. They weren't a signatory to the Convention and, therefore, it didn't seem to me that they could be--our conflict with al Qaeda could be covered. But obviously--

Senator Sessions. And that would--

Judge Gonzales. The decision by--if I might just interrupt you, the decision by the President as to the fact that Geneva would not apply was not just based upon my judgment. That was the considered judgment of the Department of Justice.

Senator Sessions. And it was clearly correct and clearly consistent with Ex Parte Quirin, the Supreme Court case during World War II.

Judge Gonzales. That is correct, sir.

Senator Sessions. President Roosevelt captured some German saboteurs inside the United States and had a trial or a hearing in the Department of Justice or the FBI building and executed them. I do not think the public even knew about it until after they had been executed. So an

unlawful combatant is a different matter.

Now, in Iraq, you have said the Geneva Conventions would apply, basically, as I understand it.

. . . .

Senator Sessions. And truth be known, a number of those people involved in Iraq really should not qualify, but the President has really gone further than the law requires, it seems to me, in granting them privileges that he did not necessarily have to do as a matter of effecting his policy of humane treatment.

Judge Gonzales. Senator, I think the administration--it is more accurate to say that the administration policy is and always has been that in our conflict with Iraq, Geneva does apply and we are bound by the requirements of the Geneva Convention. Iraq is a signatory to the Geneva Conventions, and there were never any question, any debate that I'm aware of as to whether or not Geneva would apply with respect to our conflict in Iraq.

Senator Sessions. But the Zarqawi people do not strictly qualify, in my opinion, as a lawful combatant.

. . . .

Senator Kohl. Judge Gonzales, the 9/11 Commission's report recognized that winning the hearts and the minds of the Arab world is vital to our success in the war on terror. Photographs that have come out of Abu Ghraib have

undoubtedly hurt those efforts and contributed to a rising tide of anti-Americanism in that part of the world. Secretary of State Colin Powell and others raised concerns about the decision not to apply the Geneva Conventions, some even suggesting that it could well undermine U.S. military culture. And we now know that those concerns in large part or significantly were well founded.

When drafting your recommendations for the President on the application of Geneva Conventions, did you ever consider the impact that this could have on winning the hearts and minds of the Arab world in the war on terror? And in light of what has happened, if you could make the recommendation all over again, would you do something different than what you did?

Judge Gonzales. Senator, that is a very good question and thank you for asking that. I think the decision not to apply Geneva in our conflict with al Qaeda was absolutely the right decision for a variety of reasons. First of all, it really would be a dishonor to the Geneva Convention. It would honor and reward bad conduct. It would actually make it more difficult, in my judgment, for our troops to win in our conflict against al Qaeda. It would limit our ability to solicit information from detainees. It would require us to keep detainees housed together where they could share information, they could coordinate their stories, they

could plan attacks against guards. It would mean that they would enjoy combat immunity from prosecutions of certain war crimes. And so for a variety of reasons, it makes absolutely no sense.

In addition to that, Senator, it is contrary to decades of executive branch position. There was an attempt in 1977, Protocol 1, to provide prisoner of war legal status to terrorists. Now, that protocol included some wonderful humanitarian provisions dealing with extraditions and hostages and things of that nature. But the United States, and many other countries, never ratified that protocol, and the reason is because the protocol arguably provided prisoner of war legal status to terrorists. And so it has been the consistent executive branch position since then that we are not going to do that because it hurts our soldiers. It is contrary to the spirit of Geneva to do so. And so I do believe the decision by the President was absolutely the right thing to do.

Now, that's not to say that we don't--that we are not--that we don't operate without legal limitations and that we don't treat people consistent with our values as Americans. The President was very clear in providing directives that even though Geneva would not apply as a matter of law, we would treat detainees humanely and subject to military necessity and as appropriate,

consistent with the principles of Geneva.

In my judgment, there has been a very strong attempt to do so at Guantanamo. There has been never any question, as I said in response to earlier questions, about whether or not Geneva should apply in Iraq. That's always been the case.

Do I regret the abuses at Abu Ghraib? Absolutely. I condemn them. Do I believe that they may have hurt us in winning the hearts and minds of Muslims around the world? Yes. And I do regret that. But one of the ways we address that is to show the world that we do not just talk about Geneva, we enforce Geneva. And so as I said in response to an earlier question, that's why we're doing these investigations. That's why you have these military court martials. That's why you have these administrative penalties imposed upon those responsible, because we want to find out what happened so it doesn't happen again. And if someone has done something wrong, they're going to be held accountable.

Senator Kohl. Well, let me ask you, do you think that what happened at Abu Ghraib was just spontaneous, or do you think that those relatively low-level perpetrators got some sort of a sign from people above them who got signs from people above them that these things would be tolerated? What is your opinion?

Judge Gonzales. Well, we don't know for sure. First of all, I'm not--I haven't conducted an independent investigation. We know eight have been completed. There are at least three ongoing. We know that the Congress is conducting--you know, through hearings and briefings, they're looking at this as well.

As I listened to the briefings of Schlesinger and Faye and Kearns and people like that about their findings and their reports, they divide up the abuses into two categories. One category is the violent physical abuse and sexual abuse. That is the first category. And the second category are abuses related to interrogations and gathering intelligence, stem from confusion about what the policies and the strictures were.

As to the first category, as I read the briefings, they all seem to conclude that what you see in the pictures, the most horrific of the abuses that we see, the ones that we all, you know, condemn and abhor, those do not relate to confusion about policies. Those were not related to interrogations or confusion about how much you could--what you could do in terms of gathering intelligence. This was simply people who were morally bankrupt trying to--having fun, and I condemn that.

As to the second category, the reports seem to indicate that there was migration. There was migration

between what happened in Guantanamo. You had people and standard operating policies that migrated from Guantanamo to Afghanistan and then into Iraq. And so there was some confusion about what were the appropriate standards to use in connection with interrogations and in connection with intelligence gathering.

However, as I read the briefings and the reports, they seem to indicate that the reason that the abuses occurred was not because of some decision back in 2001 or 2002, but because of the fact that you had a prison that was outmanned, under-resourced, and focused on fighting an insurgency, and they didn't pay enough attention to detainee operations. There wasn't adequate supervision. There wasn't adequate training about what the limits were with respect to interrogation. That's how I read the findings and conclusions of some of these reports.

But it's not done yet. Again, there are still ongoing investigations. And so we'll have to wait and see--

Senator Kohl. That would seem to indicate, although we will see what happens, that people above the level of those who committed the atrocities are likely--and we will see what happens--to escape being held accountable. We will see what happens. I know you and I cannot know that right now, but I think I am getting a drift from you that those people who committed the atrocities were acting on

their own. There really wasn't anybody at a higher level who understood and approved or at least condoned, and the accountability should be held at that level.

I think the American people, by and large, Judge Gonzales, believe that accountability should at least be focused on people above the level of those at that level who committed the atrocities. What do you think, Judge Gonzales?

Judge Gonzales. I believe that people should be held accountable. I do think--and perhaps I misspoke in describing how I reviewed the briefings and how I read the reports. The reports seem to indicate that there was a failure, there was a failure of discipline amongst the supervisors of the guards there at Abu Ghraib, and also they found that there was a failure in training and oversight at multiple layers of Command Joint Task Force 7. And so I think there was clearly a failure well above the actions of the individuals who actually were in the prison. At least that's what the reports seem to indicate, as I review them.

Senator Kohl. Finally, Attorney General Ashcroft said that he does not really believe in torture in the sense that it does not produce anything of value. He has said that on the record. Do you agree with that?

Judge Gonzales. Sir, I don't have a way of reaching a

conclusion on that. All I know is that the President has said we are not going to torture under any circumstances.

Senator Kohl. Well, do you believe that the policy is a correct one, that we never should have had any torture at Guantanamo or at Abu Ghraib among other reasons because it really does not produce anything of value?

Judge Gonzales. Sir, the United States has never had a policy of torture.

. . . .

Senator Graham. . . . .

Monday morning quarterbacking is part of a democracy, so just bear with us because what we are trying to do is figure out how to correct mistakes. Now, I am a very ardent supporter of the war. I really do believe if you are going to win the war on terror, you take dictatorships like Saddam Hussein, who was part of the problem, and you give people who lived under his oppression a chance to be free. That is not easy, and I believe we made mistakes along the way.

But one of the reasons that we are talking about this has a lot to do with your confirmation, but really not. I think we have dramatically undermined the war effort by getting on a slipper slope in terms of playing cute with the law because it has come back to bite us. Abu Ghraib has hurt us in many ways. I travel throughout the world

like the rest of the Members of the Senate, and I can tell you it is a club that our enemies use, and we need to take that club out of their hands.

Guantanamo Bay, the way it has been run, has hurt the war effort. So if we are going to win this war, Judge Gonzales, we need friends and we need to recapture the moral high ground. And my questions are along that line.

To those who think that you can't win a war with the Geneva Convention applying, I have another role in life, I am a judge advocate. I am a reserve judge in the Air Force. I have never been in combat. I had some clients that probably wanted to kill, but I have never been shot at. But part of my job for the last 20 years, along with other judge advocates, is to advise commanders about the law of armed conflict. And I have never had a more willing group of people to listen to the law, because every Air Force wing commander lives in fear of an air crew being shot down and falling into enemy hands. And we instill in our people as much as possible that you are to follow the law of armed conflict because that is what your Nation stands for, that is what you are fighting for, and you are to follow it because it is there to protect you.

Now, to Secretary Powell, he took a position that I disagreed with legally but in hindsight might have been right. I agree with you, Judge Gonzales, that to give

Geneva Convention protection to al Qaeda and other people like al Qaeda would in the long run undermine the purpose of the Geneva Convention. You would be giving a status in the law to people who do not deserve it, which would erode the Convention.

But Secretary Powell had another role in life, too. He was a four-star general and Chairman of the Joint Chiefs. And to those who think that the Geneva Convention is a nicety or that taking torture off the table is naive and a sign of weakness, my answer to them is the following: that Secretary Powell has been in combat, and I think you weaken yourself as a nation when you try to play cute and become more like your enemy instead of like who you want to be. So I want to publicly say that the lawyers in the Secretary of State's office, while I may disagree with them and while I may disagree with Secretary Powell, were advocating the best sense of who we are as people.

Now, having said that, the Department of Justice memo that we are all talking about now was, in my opinion, Judge Gonzales, not a little bit wrong but entirely wrong in its focus because it excluded another body of law called the Uniform Code of Military Justice. And, Mr. Chairman, I have asked since October for memos from the working group by Judge Advocate General representatives that commented on this Department of Justice policy, and I have yet to get

those memos. I have read those memos. They are classified, for some bizarre reason. But, generally speaking, those memos talk about that if you go down the road suggested, you are making a U-turn as a nation, that you are going to lose the moral high ground, but more importantly, that some of the techniques and legal reasoning being employed into what torture is, which is an honest thing to talk about--it is okay to ask for legal advice. You should ask for legal advice. But this legal memo I think put our troops in jeopardy because the Uniform Code of Military Justice specifically makes it a crime for a member of our uniformed forces to abuse a detainee. It is a specific article of the Uniform Code of Military Justice for a purpose because we want to show our troops, not just in words but in deeds, that you have an obligation to follow the law.

And I would like for you to comment, if you could, and I would like you to reject, if you would, the reasoning in that memo when it came time to give a tortious view of torture. Will you be willing to do that here today?

Judge Gonzales. Senator, there is a lot to respond to in your statements. I would respectfully disagree with your statement that we're becoming more like our enemy. We are nothing like our enemy, Senator. While we are struggling mightily to try to find out what happened at Abu

Ghraib, they are beheading people like Danny Pearl and Nick Berg. We are nothing like our enemy, Senator.

Senator Graham. Can I suggest to you that I did not say that we are like our enemy, that the worst thing we did when you compare it to Saddam Hussein was a good day there. But we are not like who we want to be and who we have been. And that is the point I am trying to make, that when you start looking at torture statutes and you look at ways around the spirit of the law, you are losing the moral high ground. And that was the counsel from the Secretary of State's office, that once you start down this road, it is very hard to come back. So I do believe we have lost our way, and my challenge to you as a leader of this Nation is to help us find our way without giving up our obligation and right to fight our enemy.

And the second question--and then I will shut up--is Guantanamo Bay. The Supreme Court has rejected this administration's legal view of Guantanamo Bay. I believe it is a legal chaos down there and that it is not inconsistent to have due process and aggressively fight the war on terror. Nobody wants to coddle a terrorist, and if you mention giving rights to a terrorist, all of a sudden you are naive and weak. I can assure you, sir, I am not naive and weak.

Judge Gonzales. Thank you, Senator.

With respect to Guantanamo Bay, it is correct that in the Rasul decision the Supreme Court did disagree with the administration position. We felt, reading Supreme Court precedent in Johnson v. Eisentrager, that a non-American enemy combatant held outside the United States did not have the right to file a habeas challenge.

Senator Graham. It is a correct position to take, but you lost. Now here is my question: What do we do now that you lost?

Judge Gonzales. We have implemented a process to provide the opportunity for people at Guantanamo Bay to know of the reasons they're being detained and to have a meaningful opportunity to contest the factual basis of their detention before a neutral decisionmaker, all in accordance with the decision in Hamdi.

Senator Graham. How is that being worked? Who is working on that?

Judge Gonzales. That is being worked through Secretary England, and they have assumed responsibility for--the Navy has assumed responsibility for standing at the combatant status review tribunals, and I can't tell you today where we are in the process, but we are providing a level of process which we believe meets the requirements set out by the Supreme Court.

Senator Graham. Okay. I would like to be informed,

if possible, in an appropriate way what the executive department is doing to fill in that gap. I do not know if we need legislative action. But the reason I am going to vote for you is because I think I have followed this information enough to know that you are a good lawyer, you ask good questions, and it was ultimately the President's decision. And I think he was right. I think Geneva Convention protection should not be applied to terrorists.

I think humane treatment is the way to go, the only way that we can win this war. My problem is that the DOJ memo was out there for two years, and the only people I can find that spoke against it were professional military lawyers who are worried about our own troops. I want you to get that memo, and if we need three rounds, we will do three rounds. But I would like to get you to comment, if you could.

Is my time up?

Chairman Specter. Almost.

Senator Graham. Okay. Comment if you could. Do you believe that a professional military lawyer's opinion that this memo may put our troops in jeopardy under the Uniform Code of Military Justice was a correct opinion?

Judge Gonzales. Would you like me to try to answer that now, Mr. Chairman?

Chairman Specter. Yes. Judge Gonzales, the question

is pending.

Judge Gonzales. And the question is do I believe that the military lawyer's judgment that--

Senator Graham. The techniques being espoused in the memo may put our troops at jeopardy under the Uniform Code of Military Justice. And if you want to take some time, that is fine.

Judge Gonzales. Thank you, Senator.

Senator Graham. I mean I want sometime later for you to answer that question, but you do not have to do it right now.

Chairman Specter. Do you want to think it over, Judge Gonzales and respond later?

Judge Gonzales. I do. Thank you, Mr. Chairman..

Chairman Specter. Later during the hearing, that is fine.

Senator Feingold. . . . First I want to follow up on your answer to Senator Kennedy and Senator Leahy regarding the OLC memo. You told Senator Leahy that you did not want to politicize the work of career professionals of DOJ, so you could not weigh in against the interpretation of the law that was expressed in that memo. But then you told Senator Kennedy that it was totally appropriate to have discussions with the DOJ while the memo was being prepared because it was a complicated statute that had never before

been interpreted. I think there is something of a contradiction there, which I would like you to comment on, but I would like to make two other points first.

First, the authors of the torture memo, in fact, Judge, were political appointees, not career professionals. Second, the issue is whether you disagree with that memo and express that disagreement to the President. You are the President's lawyer. Is it not your job to express your independent view to the President if you disagree with the opinion of the Justice Department, or do you just simply pass on the DOJ's opinion no matter how erroneous or outrageous, and just say to the President, in effect, this is what the DOJ says the law is?

Judge Gonzales. Thank you, Senator, for that question. Let me try to clarify my comments regarding my role in connection with the memo and my role generally as I view it as counsel to the President.

It is of course customary, and I think to be expected that there would be discussions between the Department of Justice and the Counsel's Office about legal interpretation of, say, a statute that had never been interpreted before, one that would be extremely emotional, say, if you're talking about what are the limits of torture under a domestic criminal statute? And so there was discussion about that. But I understand, and it is my judgment that I

don't get to decide for the Executive Branch what the law is. Ultimately, that is the President, of course. By statute the Department of Justice is giving me authority to provide advice to the Executive Branch. And so while I certainly participate in discussions about these matters, at the end of the day, that opinion represents the position of the Department and therefore the position of the Executive Branch.

Senator Feingold. I am puzzled by that because I think it must be your job as Counsel to the President to give him your opinion about whether the DOJ document was right before he makes a judgment to approve it, and I have always assumed anyway, that that would be the job of the President's lawyer.

Judge Gonzales. I certainly do of course give the President my own opinions about particular matters, but as I said earlier in response to a question, my own judgment, my own conclusions, very often are informed, and very often influenced by the advice given to me by the Department of Justice, and often I communicate with the President, not only sort of my views, but the views of the Department, which of course, by statute, that's their job to do, and so that the President has that information in hand in weighing a decision.

Senator Feingold. I am still puzzled by that. If you

were my lawyer, I would sure want to know your opinion about something like that independent, but let me move on.

. . . .

Senator Cornyn. Judge Gonzales, has it been your experience as a lawyer that sometimes lawyers disagree?

Judge Gonzales. That has been my experience, yes, sir.

Senator Cornyn. That has been my experience too, and I guess it is best exemplified by the lawyers on this Committee who from time to time will disagree with one another, and certainly that is understandable when we disagree about policy matters, even inferences to be drawn from facts which we all know to be true. But I think perhaps if I heard correctly, the Senator from Delaware was questioning whether my facts were correct when I presented the opening statement referring to a number of acknowledgements of the correctness of your judgment and the President's decision that the Geneva Convention does not formally apply to terrorists. So I would like to just quickly refer specifically to the pages, and I would like to ask unanimous consent that they be made part of the record.

First, page 379 through 380, where the 9/11 Commission says that since the international struggle against Islamic terrorism is not internal, these provisions do not formally

apply.

And then the Schlesinger report, which studied the Department of Defense detention policies, which concluded that there were no high level policies or procedures in place that would allow for torture or abuse of detainees. On page 81 they say the panel accepts the proposition that these terrorists are not combatants entitled to the protection of the Geneva Convention.

And then there was the reference I made to the Red Cross Manual on the Geneva Convention, which on page 53 sets out the three-part test on whether the Geneva Convention actually applies under any given circumstances, and I would like to ask unanimous consent that those be made part of the record, and I am confident they will. But let me ask you this. This has also been contested in three separate Federal courts, has it not?

Judge Gonzales. It has.

Senator Cornyn. And what has been the result?

Judge Gonzales. That the President's decision was the correct legal decision.

Senator Cornyn. Even though lawyers can disagree about judgments, legal judgments or opinions--here again, I hope we do not disagree about certain basic facts, and that is the reason I wanted to go over the content of these documents which the Senator from Delaware suggested I was

mistaken about. Let me ask you whether you agree with this proposition. Do you agree the that United States Government should use all lawful means to gather intelligence from terrorists in order to save American lives?

Judge Gonzales. I do agree with that. Obviously, that is a policy decision. I think that that is the position of the President of the United States, because as I said earlier, the war on terror is a war about information, and we need information to be successful in winning this war.

Senator Cornyn. You will not be the only witness in this hearing, and here again we are going to hear, I anticipate, since we have had the chance to see their prepared testimony, from other witnesses, who may express different opinions than you have expressed here, as well as the opinions expressed by the 9/11 Commission, the Schlesinger report and those three Federal courts. But I for one do think you have been candid in response to the questions, and I do not suggest I am the only one. . . . . question, they will not be motivated by some improper . . . .

Finally, let me just say that there was some suggestion that you have been less, or the White House has been less than responsive about requests for documents.

Let me just hold up here what I believe to be part of the response that the White House has made to the request by Senator Leahy and others on the other side of the aisle with respect to documents of your office. Does that look at least like a--I will not have you go through them page by page--but have you produced voluminous documents? Has the White House produced voluminous documents in response to Committee requests?

Judge Gonzales. Senator, it's hard for me to gage whether or not that reflects our response. Because of my nomination, I have recused myself from any decisions regarding production of documents that this Committee has requested in connection with my nomination. Decisions about production of documents are being made by others at the White House, as it should be.

Senator Cornyn. Thank you for that clarification. It is my understanding, I have been advised, that the White House has complied completely with the request for documents with two exceptions. One is a document which the White House is claiming wherein the President has received confidential and candid advice from senior advisers relating to the memorandum concerning the application of the Geneva Convention to al Qaeda and the Taliban. The second document that the White House has declined to produce is an Office of Legal Counsel opinion dated

November 6, 2001, and the reason stated is because that is currently the subject of litigation.

I would just say that this Committee last year had the occasion to revisit the importance of our ability as Senators to receive confidential advice from our own staff, and we learned, unfortunately, that there had been a theft of some staff memos to Senators, and that now has been referred for investigation and possible prosecution.

But do you recognize the importance as a general principle of confidential communications between the President and his senior advisers, or for that matter, between the United States Senate and our staff?

Judge Gonzales. I think it is a very important principle, Senator, that needs to be respected. I think the principals should be able to rely upon candid advice from their advisers. I've seen in four years how it does make a difference in affecting the way you present advice, if not the advice you actually give. And so I think that that is a principle that should be respected, and of course, there is a competing principle as well, and that is, sometimes there is a strong or legitimate Government purpose to try to receive information and to look at that information, either as part of some kind of criminal investigation, or part of the oversight function of a committee, but that always involves a balancing it seems to

me. It's sort of a case by case analysis in terms of where do you draw the line as to when to produce deliberative information and when not to. But, yes, I think it is a principle that one should always be mindful of, is the fact that you don't want to inhibit candid advice to principals. Otherwise, in my judgment, you do inhibit the decision-making of that principal, and I don't think that's good for the American people.

. . . .

Senator Durbin. . . . . I am sorry that there has been some breakdown between this Committee and the White House about the production of documents. As I told you in our office meeting, it is very difficult for us to sit on this side of the table and believe that we have the whole story when the White House refuses to produce documents that tell us what happened about many of the issues that we are raising. But based on what we do have, I want to try to get into a few specific questions on the issue of torture.

The images of Abu Ghraib are likely to be with us for a lifetime and beyond, as many images of war can be. The tragedy of Abu Ghraib and the embarrassment and scandal to the United States are likely to be with us for decades and beyond. Yesterday we paid tribute to our colleague Congressman Robert Matsui, not only a great Congressman but

particularly great in light of the fact that as a Japanese American, he was sent to an internment camp by his Government that did not trust his patriotism or the patriotism of his family. That shameful chapter in American history is recounted even today more than 50 years later as we think about it. I am afraid that the torture that occurred in Abu Ghraib and Guantanamo will similarly be recounted 50 years from now as a shameful chapter in American history.

When you answered Senator Kohl, you said we are going to divide what happened in Abu Ghraib into two areas: physical and sexual torture, never acceptable; some idea of fun by depraved people. And you condemned it. Then a second area, interrogation techniques that went too far, and you conceded that those interrogation techniques might have migrated or started at Guantanamo and somehow made it to Iraq.

My question to you is: Would you not also concede that your decision and the decision of the President to call into question the definition of torture, the need to comply with the Geneva Conventions, at least opened up a permissive environment for conduct which had been ruled as totally unacceptable by Presidents of both parties for decades?

Judge Gonzales. Thank you, Senator, for the question.

Maybe perhaps I did misspeak. I thought I was clear that I was not dividing up the categories of abuse into two categories, that that was really--that division had been done within these reports themselves. And those reports did indicate that there was some migration as to the second category. But the reports and the briefings were fairly clear in my judgment, and others may disagree, that the reasons for the migration were because there was inadequate training and supervision, that if there had been adequate training and supervision, if there had been adherence to doctrine, then the abuses would not have occurred. And that's what I see in the reports and what I see in the briefings.

As to whether or not there was a permissive environment, you and I spoke about this in our meeting. The findings in these eight reports universally were that a great majority, an overwhelming majority of our detention operations have been conducted consistent with American values and consistent with our legal obligations. What we saw happen on that cell block in the night shift was limited to the night shift on that cell block with respect to that first category, the more offensive, the intentional severe physical and the sexual abuse, the subject of those pictures. And this isn't just Al Gonzales speaking. This is what, if you look at it, the Schlesinger report

concludes. And so what you see is that you have got this kind of conduct occurring at the night shift, but the day shift, they don't engage in that kind of conduct because they understand what the rules were.

And so I respectfully disagree with the characterization there was some sort of permissive environment. That's just not the case. The facts don't bear that out, sir.

Senator Durbin. Then let's go to specific questions. Can U.S. personnel legally engage in torture or cruel, inhuman, or degrading treatment under any circumstances?

Judge Gonzales. Absolutely no. Our policy is we do not engage in torture.

Senator Durbin. Good. I am glad that you have stated that for the record. Do you believe that there are circumstances where other legal restrictions like the War Crimes Act would not apply to U.S. personnel?

Judge Gonzales. Senator, I don't believe that that would be the case, but I would like the opportunity to--I want to be very candid with you and obviously thorough in my response to that question. It is sort of a legal conclusion, and I would like to have the opportunity to get back to you on that.

Senator Durbin. I will give you that change.

In your August memo, you created the possibility that

the President could invoke his authority as Commander-in-Chief to not only suspend the Geneva Convention but the application of other laws. Do you stand by that position?

Judge Gonzales. I believe that I said in response to an earlier question that I do believe it is possible, theoretically possible, for the Congress to pass a law that would be viewed as unconstitutional by a President of the United States. And that is not just the position of this President. That has been the position of Presidents on both sides of the aisle.

In my judgment, making that kind of conclusion is one that requires a great deal of care and consideration, but if you're asking me if it's theoretically possible that Congress could pass a statute that we view as unconstitutional, I'd have to concede, sir, that I believe that's theoretically possible.

Senator Durbin. Has this President ever invoked that authority, as Commander-in-Chief or otherwise, to conclude that a law was unconstitutional and refused to comply with it?

Judge Gonzales. I believe that I stated in my June briefing about these memos that the President has not exercised that authority.

Senator Durbin. But you believe he has that authority? He could ignore a law passed by this Congress,

signed by this President or another one, and decide that it is unconstitutional and refuse to comply with that law?

Judge Gonzales. Senator, again, you are asking me whether hypothetically does that authority exist, and I guess I would have to say that hypothetically that authority may exist. But let me also just say that we certainly understand and recognize the role of the courts in our system of Government. We have to deal with some very difficult issues, very, very complicated. Sometimes the answers are not so clear.

The President's position on this is that ultimately the judges, the courts will make the decision as to whether or not we've drawn the right balance here. And in certain circumstances, the courts have agreed with administration positions, and in certain circumstances, the courts have disagreed. And we will respect those decisions.

Senator Durbin. Fifty-two years ago, a President named Harry Truman decided to test that premise in Youngstown Steel and Tube v. Sawyer in the Supreme Court. The Supreme Court said, as you know, President Truman, you are wrong, you do not have the authority to decide what is constitutional, what laws you like and do not like.

I am troubled that you would think, as our incoming Attorney General, that a President can pick and choose the laws that he thinks are constitutional and ultimately wait

for that test in court to decide whether or not he is going to comply with the law.

Judge Gonzales. Senator, you asked me whether or not it was theoretically possible that the Congress could pass a law that we would view as unconstitutional. My response was that obviously we would take that very, very seriously, look at that very carefully. But I suppose it is theoretically possible that that would happen.

Let me just add one final point. We in the executive branch, of course, understand that there are limits on Presidential power. We are very, very mindful of Justice O'Connor's statement in the Hamdi decision that a state of war is not a blank check for the President of the United States with respect to the rights of American citizens. I understand that and I agree with that.

Senator Durbin. Well, let me just say in conclusion, I am glad to hear that. I am troubled by the introduction. The hypothetical is one that you raised in the memo relative to torture as to whether the President had the authority as Commander-in-Chief to ignore the Geneva Conventions or certain other laws. This is not something that comes from our side of the table of our own creation. It is your creation, the hypothetical you created.

My concern is this: I do not believe that this Government should become a symbol for a departure from

time-honored traditions where we have said that we will not engage in torture, directly or indirectly by rendition--which I hope to ask you about in the next round--that we will stand by the same standards of Geneva Conventions since World War II and, frankly, dating back to Abraham Lincoln and the Civil War, in terms of the treatment of prisoners.

I am concerned that that round of memos that went through the Department of Justice, Mr. Bybee, into the Department of Defense, into Guantanamo, and then migrated somehow to interrogation techniques in Abu Ghraib has stained our world reputation. I want to win this war on terrorism, but I do not want to do it at the expense of our soldiers who may someday become prisoners themselves.

Thank you, Mr. Gonzales.

. . . .

Senator Coburn. . . . . I think that the questioning that Senator Graham had I think raises significant questions for us to learn from, especially in terms of the Code of Military Justice that has to be inculcated in decisions that go down the line. But I also want to ask just a couple of questions.

Are you aware of any war that this country has been involved in in its history in which mistakes of human beings have not been made and brought to light?

Judge Gonzales. Well, as you well know, as I well know, human beings are not perfect. Mistakes happen. Abuses occur. We know that that's true in all conflicts. Abuses occur not just in connection with military operations; abuses occur here in our prisons. It is regrettable, and when we find out the abuses have occurred, we need to correct them and hold people accountable. But it is true that abuses occur and have occurred, as far as I know, in all military conflicts.

Senator Coburn. And is it, to your knowledge, a policy of this administration at any time to tolerate torture or inhumane behavior towards any of the detainees that we have?

Judge Gonzales. **It is not the policy of the administration to tolerate torture or inhumane conduct toward any person that the United States is detaining.**

Senator Coburn. And then, finally, I would ask as you look at the Geneva Convention in Iraq and the difference that we apply to that versus that against the Taliban and al Qaeda, was there a consideration for those who are not Iraqis in that combatant field? In other words, did the Geneva Convention necessarily apply to all combatants in Iraq whether or not they were Iraqi citizens or they were foreign mercenaries?

Judge Gonzales. That question was considered by the

Department, and there was a fear about creating a sanctuary for terrorists if we were to say that if you come and fight against America in the conflict with Iraq that you would receive the protections of a prisoner of war. And I believe the Department--I know the Department issued, I believe some guidance, the Department of Justice issued some guidance with respect to whether or not non-Iraqis who came into Iraq as part of the insurgency, whether or not they would also or likewise enjoy the protections of the Geneva Convention. And I believe the conclusion was that they would not. But I would need to go back and confirm that, Senator.

AFTERNOON SESSION, round two.

. . . .

Senator Leahy. Judge, I am going to go back to the so-called Commander in Chief override. I listened to your answer to other Senators, and I checked the transcript, and frankly, you never answered my question. I still want to know whether you think the President can suspend the laws prohibiting torture and thus immunize torturers. I think there is a pretty simple answer. I think the answer is just no, the President cannot suspend such laws. Your

response to me in the earlier round, your comments at your June 2004 press conference, show you disagree, that you presume such power does exist.' Only the President has not exercised it yet. I think this is kind of fundamental. Your view of the scope of Executive power is something we need to understand. If you are going to be the chief law enforcement officer of this country, and if you have this view that there is some extraordinary executive power that allows the President to override the laws of the United States, especially something so fundamental, we should know because that sets in motion a whole lot of other things. We saw this in the Nuremberg trials, and I am not in any way equating our President with the leaders in Germany. What I am saying though is that you had people that said, well, we were just following orders. And if the President is able to set aside laws that have been set in place, those who do things that are wrong can just say, well, we were just following orders. But as the United States has always said, and every President has said, this is not a defense.

So I am going to ask you again, can the President immunize from prosecution those who commit torture under his order? I am not suggesting the President has made such orders, but can a President immunize from prosecution those who would commit torture under his order?

Judge Gonzales. Senator, one thing that I failed to emphasize in the first round is of course if confirmed by the Senate, I will take an oath of office to defend the laws of this country.

Senator Leahy. We all do.

Judge Gonzales. and that means the laws passed by the Congress. So I was responding to a hypothetical question about whether or not is it theoretically possible that Congress could pass a law that a President would not follow because he believed it was unconstitutional, a position that is not unique to this President, but a position--

Senator Leahy. But I am not asking you a hypothetical question. I am asking about a particular law, the torture law. Can the President ignore that law, say it does not apply, and immunize people who then committed torture?

Judge Gonzales. I believe my earlier response, Senator, was that that is a hypothetical situation that is not going to happen. This President is not going to order torture. I will also say--

Senator Leahy. Could a President?

Judge Gonzales. Senator, this President is not going to order torture. We don't condone it. I will say with respect to the opinion, the August 1st opinion has been withdrawn. I reject that opinion. It has been rejected. It does not represent the views of the Executive Branch.

It has been replaced by a new opinion that does not have that discussion. And so as far as I am concerned, it is not an issue in which the Executive Branch has taken a position on it. I am not prepared in this hearing to give you an answer to such an important question.

Senator Leahy. Let me say this. The order stayed in there, was there for a long time until the press got hold of it. Then there is a lot of scrambling around, and on the first three-day weekend prior to your confirmation, all of a sudden they come up, oh, wait a minute, we have a new order. I am not going to be cynical, but some might be. Let me take you another example. The President has claimed authority to lock up a U.S. citizen arrested in the United States and hold him incommunicado for an indefinite period, without access to a lawyer or a family, without real access to the courts. That is not hypothetical. The President has claimed that authority. Does the President have that authority?

Judge Gonzales. The Supreme Court in the Hamdi decision said yes, the President of the United States does have the authority--

Senator Leahy. Hamdi was the case where he was arrested on the battlefield in Afghanistan. What about a case here, an American citizen, in the United States?

Judge Gonzales. Senator, the Supreme Court has not

addressed that decision straight on, but in Hamdi the Court did say that the United States could detain am American citizen here in this country for the duration of the hostilities without filing charges.

Senator Leahy. Do you think that here in the United States the President has authority to have a citizen arrested, a U.S. citizen, held incommunicado for an indefinite period, without access to a lawyer or family?

Judge Gonzales. Senator, the--

Senator Leahy. I asked you if the President has that. Now, in Hamdi of course they were talking about the AUMF, the authorization for the use of military force, the Congress had voted on for military force in Afghanistan. Hamdi was picked up in Afghanistan. We had a second case, Padilla. There the Court kind of punted it, they did not answer the question. They have said the jurisdiction was wrong, it was brought in the wrong court. It should have been brought habeas corpus in another court.

All I am asking, does the President, the President today have the authority to hold a U.S. citizen incommunicado for an indefinite period of time in the United States?

Judge Gonzales. Well, the President does have the authority under Hamdi. That is what the Court said, is you could hold an American citizen. Let me be very, very

clear. The United States Government never took the position that a U.S. citizen detained by its Government could not challenge the detention by the Government.

Senator Leahy. But they are held incommunicado and have no access to a lawyer or a court. Is that not kind of saying, gosh, you could appeal it everywhere else. We are not going to let you out of the cell, we are not going to let you talk to anybody, we are not going to let you have the court. We just want you to know you got all your rights.

Judge Gonzales. Senator, respectfully, not only did Hamdi have access to the courts, he had such good access and such good representation by counsel that his case was heard all the way by the highest court in the land. So, the decision as to whether or not to provide access to counsel is probably one of the most difficult decisions that we have to confront because there are competing interests here. As a lawyer, I have a great deal of concerns about not providing lawyers to American citizens that are being detained by this country. On the other hand, there is a competing interest of gathering information that this American citizen, this enemy combatant, may have information that may save the lives of American citizens, and our position has been is that we provide counsel as quickly as possible that the American

citizen--I'm sorry, Senator, I didn't mean to interrupt you.

Senator Leahy. No, no. I was just going to say we can go back there, and we will have to, because we are talking about a perfect world. If you do a dragnet, as we have found out, in some of these dragnets are people held for a long time, and say, whoops, we have got the wrong guy. We have--

Chairman Specter. Judge Gonzales, did you finish your last answer? Feel free if you want to.

Judge Gonzales. That's fine. Thank you, Senator.

Senator Leahy. Let us take the Bybee memo. It is a lengthy document, 50 single-spaced pages, relies upon a whole wide range of sources. I think somebody has already put it in the record. It references, for example, health care administrative law at least five times, and that is not the issues we are rasing with you. But you know one thing it never does? It never cites this document, which you would think would be the best thing to do, the Army Field Manual on Intelligence Interrogation.

Now, the Army Field Manual on Intelligence Interrogation is something that holds all the experience of this Nation for 200 years, the things we have done right, the things we have done wrong, all the courts. Not once--I mean we are telling our people what to do. Not once does

it mention this, and this is the manual that says U.S. policy expressly prohibits acts of violence or intimidation including physical or mental torture, threats, insults or exposure, inhumane treatment as a means to or aid interrogation. You think it is at all troubling that Bybee never references it? I mean if it had, if it incorporated this, we probably never would have had the issue raised.

Judge Gonzales. Senator, the work of OLC in connection with interpreting the anti-torture statute was an analysis of that domestic statute in Title 18. The fact that the opinion covers only conduct related to that statute doesn't mean that there might not be other legal prohibitions in which our military soldiers might be bound. OLC was looking only at an interpretation of that domestic statute, and the fact that there may be other laws or regulations that might be binding, of course, they would not be excused from following those other laws and regulations by virtue of the opinion, which again, was focused only in interpretation of a statute in Title 18.

. . . . .

Senator Cornyn. Judge Gonzales, I know Senator Durbin has raised the issue of whether a President might try to uphold the Constitution by declining to enforce statutes that are unnecessary, and I found the notion fascinating from a legal standpoint, and so I asked staff to look at

some of the OLC opinions during the Clinton administration during the lunch break, and here is what we found.

In 1994 the Office of Legal Counsel, during the Clinton administration, issued an opinion authored by Walter Dellinger, who is a well-known constitutional legal scholar, that said, "Let me start with a general proposition that I believe to be uncontroversial. There are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional," and of course Presidents of both parties famously reject the War Powers Resolution as unconstitutional. Moreover, in the Dickerson case the Clinton administration refused to defend a Federal statute against constitutional attack in the courts. The Supreme Court had to look to special counsel to offer a defense of that statute. It seems to me that this administration is being attacked for something that the Clinton administration did on a--if not a frequent basis, did at least more than once. Would you care to comment on that?

Judge Gonzales. As I said earlier, Senator, I think that we should look--the Executive Branch should always look very carefully with a great deal of seriousness and care about reaching a decision that a statute passed by Congress is somehow unconstitutional and should not be followed. Certainly if I were confirmed, I would take my

oath very, very seriously to try to defend any act passed by Congress, but it does appear to me, based upon my review of history and precedent is that Presidents and White Houses on both sides of the aisle have taken the consistent position that a President may choose to not enforce the statute that the President believes is unconstitutional.

Senator Cornyn. I would like to shift subjects a little bit to return to something we have been talking about off and on all day, and that is the policy reasons behind the Geneva Convention decision, and I hope that I have been able to establish the position the administration takes and the position that you advocated for enjoys broad support in the legal community, and by scholars of international law, and we can go back to that again if some of my colleagues still disagree with me and the administration on that. But I can think of at least four reasons, four important reasons why the President's legal determination was correct, and this has to do again with giving terrorists, conferring upon them the status of prisoners of war as provided for under the Geneva Convention.

First of all, is it not true that the Geneva Convention gives prisoners of war rights and protections that could directly endanger their captors if given to combatants who do not respect the laws of war? And if you

agree with that, could you please talk about some of them?

Judge Gonzales. If a determination were made that the Geneva Convention applied in our conflict with al Qaeda, we would have to provide certain things, certain access to certain items of comfort that could be used as weapons against our soldiers. Also we would be limited in our ability to put them in individual cells. They would have the right to congregate together and to talk, to talk about strategy and responding to interrogations, to perhaps talk about how to attack a guard, or perhaps talk about how to plan an escape. The additional problem with providing Geneva protections, prisoner of war protections to terrorists who do not abide by the laws of war, is that we would in essence provide combat immunity for their engaging in war crimes.

Senator Cornyn. If I can interrupt you briefly, is that not what John Walker Lindh tried to do, the "American Taliban" I believe he was known as? He claimed an immunity by virtue of his prisoner of war status against criminal prosecution for committing war crimes; is that right?

Judge Gonzales. That's my recollection.

Senator Cornyn. When I traveled to Guantanamo Bay about a year or so ago to see for myself the facilities and the conditions under which detainees were kept, I was interested to learn about certain techniques, here again,

humane techniques, but techniques nonetheless for eliciting cooperation and intelligence from some of these detainees. For example, the providing of certain incentives, for example, what the food that was provided. I remember specifically one instance where detainees who cooperated a little more got to cook out on a grill, basically, or food cooked out on a grill as opposed to the institutional type food they got. They were permitted to move from individual cells into group settings where they could make more arrangements for their own comfort and convenience. Are those the sorts of things that we could do to elicit actionable intelligence if the Geneva Convention applied and these were conventional prisoners of war?

Judge Gonzales. Senator, if the Geneva Conventions applied, you would be prohibited from providing incentives in order to induce cooperation. I, like you, have been down to Guantanamo, and much of the operation of the bases at Guantanamo are to induce cooperation, and we would not be able to do that if the Geneva Conventions applied.

Senator Cornyn. And indeed, I think it has been recounted time and time again, one reason we do not use torture as a matter of policy, period, but one pragmatic reason why it does not work is because people will say things under those circumstances that do not provide good actionable intelligence. So I think one of the things I

observed and was really fascinated to see in practice was the use of some of these essentially incentives that provided for greater cooperation, but gave us the results we needed, which in fact have saved American lives.

Let me ask you, why would extending the Geneva Convention to terrorists, why would that have a negative impact on international law? What would that do to any incentive that might exist on the part of our enemies to comply with the laws of war?

Judge Gonzales. Senator, it seems to me, it seems logical to me that you want to reward good behavior, and if you want members of al Qaeda to fight according to the laws of war, you don't do that by providing them prisoner of war legal protections.

Now, let me emphasize, and I can't emphasize this strongly enough, there are certain basic values that this country stands for and this President certainly believes in, and those values are reflected in the directives that he has issued regarding the treatment of al Qaeda detainees, and those who do not meet those standards are going to be held accountable. In addition, there are of course other legal restrictions. For example, the convention against torture, that would be applicable, Army regulations that would be applicable. All those exist to conscript the type of conduct that our military can engage

in with respect to detainees. And so we want to of course meet basic standards of conduct with respect to treatment of al Qaeda, but information is very, very important, and if there are ways we can get that information, for example, through inducements, it seems to me that there is a responsibility of this government to exercise those needs.

Senator Cornyn. Finally, let me just say that that opinion that you just expressed finds you in pretty good company. I have in my hand a legal textbook called "The Legal Status of Prisoners of War" by Rosas, Alan Rosas, that says on page 344: The only effective sanction against perfidious attacks in civilian dress is a deprivation of prisoner of war status. And I take it you would agree with that conclusion?

Judge Gonzales. Yes, sir.

. . . .

Senator Kennedy. Now, Mr. Gonzales, let me, if I could, during my last round, there are sort of three general areas I want to try and cover in the time that I have. During my last round of questions, and the reason I come back to this is because, when you come right down to it, that Bybee memo, and the views expressed in that, certainly was policy. It was printed in the working group's report. It was reported by those over in Iraq. It has been referred to in the Armed Services Committee, in

the Schlesinger report, as being the policy of the Department of Defense. And the change that memorandum gave, in terms of how we were going to treat detainees in there, I believe, runs roughshod or did run roughshod over the Geneva Conventions. But we have a dispute.

You indicated that this was served up by the Office of Legal Counsel, and it is the interpretation that Legal Counsel has provided for statutes that we have passed in 1994.

Judge Gonzales. Senator, if I may, of course, the August 1 memo has been withdrawn. I mean, in essence, it has been rejected. It does not represent the views of the Executive Branch. The views of the Executive Branch regarding the anti-torture statute are now reflected in the December 30th memo which, as we know, the deputy attorney general announced in June that this was going to happen. It was going to be withdrawn. The opinion would be revisited and issued by the end of the year, and it was issued before the end of the year at the request from a member of this Committee.

Senator Kennedy. Well, I think that is very good news in terms of the future. I think that is very good news. But over this period of time, there have been the most extraordinary abuses that have been reported by DIA and the FBI. And I think it is fine and well, and you say now all

of that memoranda that was interpreted that way is no longer operative. But over a period of time, as has been referenced by others in the Committee, there is no question in my mind--I have listened to you answer the questions about what happened at Abu Ghraib--and there is no question that there were military personnel that bear responsibility, and there is no question there was a lack of training.

But the third part that you have not referenced in any of your answers is that there was also the working group report that effectively would have justified and approved those kinds of activities. Now, you may say that you differ with that. That was the document at DOD, and there is no reason to believe that the same kind of document was not given to the CIA. Was it given to the CIA--the Bybee memo?

Judge Gonzales. Sir, first of all, I am not sure what--was the memo given to the CIA? I suspect that it was given--it represented the Administrative Branch position, and so it would not surprise me, of course, that agencies involved in the war on terror--

Senator Kennedy. Who would have given it to the CIA?

Judge Gonzales. Sir--

Senator Kennedy. Was not this memoranda directed to you?

Judge Gonzales. Sir, it was addressed to me.

Senator Kennedy. Was it not requested by you?

Judge Gonzales. Sir, I do not recall if it was requested by--

Senator Kennedy. We can--

Judge Gonzales. Let me just say, Senator, in practice, how this may work. An agency, of course, has its own in-house shop. An issue comes up, their lawyers get involved in providing legal advice. From time to time, the issues are so complicated or so complex it may cut across various agencies that the issue gets elevated up to the Office of Legal Counsel. And so it may well have been that the CIA or DOD asked OLC, as an initial matter, for their views on this, and then, for whatever reason, the memo was addressed to me.

I accept responsibility that the memo is addressed to me.

Senator Kennedy. Well, do you accept responsibility that you requested it?

Judge Gonzales. Sir--

Senator Kennedy. Is this such a difficult--

Chairman Specter. Let him answer the question, Senator Kennedy.

Judge Gonzales. I don't recall specifically whether or not I requested this memo or whether or not the initial

request came from the CIA or the CIA came to me. I don't recall, Senator.

Senator Kennedy. You do not have notes about these various meetings? You do not jot these down, so you would not be able to know whether this happened? You would have no notes, no information, no memoranda that would indicate? On an issue of this kind of importance and consequence, at the time that this country was at war on this and where there is enormous pressure, as we understand now, to gain information and intelligence from this, you would not be able, even today, to be able to respond to the question about how this was initiated, particularly when it is against the background where OLC indicates that it came from you and from the news reports? This is not enormously complicated--I want to get into some other kinds of things--the fact that you basically initiated.

Judge Gonzales. Senator--

Senator Kennedy. Your answer is you cannot remember.

Judge Gonzales. Senator, I certainly don't want to be argumentative with you. I really do not remember. It seems to me what is important here is that we realize, there was a recognition within the agencies, and I believe within the White House, that this was an important issue and that the Department of Justice should play its traditional role of providing legal advice about the

parameters of this statute.

Senator Kennedy. I just want to point out, if it is true, as the Post reported, that you held several meetings at which the legality of interrogation techniques, such as threat of live burial and water-boarding were discussed; do you remember that?

Judge Gonzales. Senator, I have a recollection that we had some discussions in my office, but let me be very clear with the Committee. It is not my job to decide which type of methods of obtaining information from terrorists would be most effective. That job responsibility falls to folks within the agencies. It is also not my job to make the ultimate decision about whether or not those methods would, in fact, meet the requirements of the anti-torture statute. That would be a job for the Department of Justice. And I never influenced or pressured the Department to bless any of these techniques. I viewed it as their responsibility to make the decision as to whether or not a procedure or method of questioning of these terrorists that an agency wanted, would it, in fact, be lawful.

Senator Kennedy. Well, just as an attorney, as a human being, I would have thought that if there were recommendations that were so blatantly and flagrantly over the line, in terms of torture, that you might have

recognized them. I mean, it certainly appears to me that water-boarding, with all its descriptions about drowning someone to that kind of a point, would come awfully close to getting over the border and that you would be able to at least say today there were some that were recommended or suggested on that, but I certainly would not have had a part of that as a human being.

Judge Gonzales. Well--

Senator Kennedy. But as I understand, you say now that no matter what they recommended or what they discussed, there was not going to be anything in there that was going to be too bad or too outrageous for you to at least raise some objection.

Judge Gonzales. Senator, of course, we had some discussions about it. And I can't tell you today whether or not I said, "That's offensive. That's not offensive." But it seems to me it's the job of the lawyers to make a determination as to whether or not something is lawful or not and then for the policymakers, the principals, to decide whether or not this is a method of receiving information from terrorists is something that we want to pursue, that the lawyers have deemed lawful, under the directive of a President, who says that we should do everything that we can to win this war on terror, so long as we are meeting our legal obligations.

Senator Kennedy. Earlier today, you know, this is all against a background, as you know, Mr. Gonzales, of a series of statutes on torture that the Congress has passed in recent times. This is not a new issue. We had the Federal Antitorture Statute in 1994 that both President Reagan and President Bush, unanimous Committee, the Federal War Crimes Act of 1996, the Uniform Code of Military Justice goes back to 1950, the Convention Against Torture ratified by Congress, one was domestic, the other international. The International Covenant on Civil and Political Rights, in 1992, provides "no one shall be subject to torture or cruel, inhumane, degrading treatment or punishment." And then last year Congress reaffirmed, virtually unanimously, that the Nation's commitment not to engage in torture, cruel, inhumane and degrading.

So this is a subject matter that Republicans and Democrats have spoken out very clearly, and many of us find, and perhaps you do--certainly, you do at the present time--that the Bybee memo certainly was in conflict with those particular statutes.

But let me ask you this: In these reports on Guantanamo--

. . . . What I would be interested, just quickly, should you be confirmed, what you are going to do with regards to the FBI. They have been involved in many of

these reports that they have been involved. It would be interesting if you could tell the Committee what you are going to do, confirm, about the involvement of the FBI in this. And I was going to ask, just the two, if the fact that this memo has been repealed, whether that information now has been communicated to the CIA and the CIA has accepted it and DOD, if they are all together. But if you could just let me know--

Judge Gonzales. Senator, my presumption is--

. . . --my presumption is it has been communicated to the agencies. I have not, myself, communicated the new position, but again it does represent administrative policy.

And with respect to FBI involvement, the recent reports about these FBI e-mails about abuses in Guantanamo, quite frankly, surprised and shocked me because it is certainly inconsistent with what I have seen. I have traveled down there. And it is certainly inconsistent with other reports I have seen with respect to investigations about activities in Guantanamo.

I would like to sit down with the folks at the FBI and other folks within the Department of Justice to make sure that the facts are accurate because I know one very important fact in these stories, the FBI--much was made of the fact about an FBI agent referring to an Executive Order

by the President authorizing certain techniques. That is just--that is just plain false. That never occurred. And so if something like that is wrong in these e-mails, there may be other facts that are wrong in the e-mails. And what I am suggesting is I just need to, if confirmed, I need to have the opportunity to go into the Department and the FBI and just try to ascertain the facts.

. . . .

Senator Feingold. . . . .

Let me switch to a subject that has come up a lot here today. In the August 2002 memorandum, the Justice Department concludes that the President, as Commander-in-Chief, may authorize interrogations that violate the criminal laws prohibiting torture and that the Congress may not constitutionally outlaw such activity when it is authorized by the President. This is the claim, essentially, that the President is above the law so long as he is acting in the interest of national security.

A December 30 rewrite of the August memorandum does not repudiate this view. It simply says the issue is irrelevant because the President has prohibited torture.

Today, in response to questions on this subject, you have been unwilling to repudiate this legal theory. You have danced around the question a bit. But as I understand your answers so far, you have said there may be a situation

where the President would believe a statute is unconstitutional and would therefore refuse to comply with it, but would abide by a court's decision on its constitutionality. You, also, I am told, said that many Presidents have asserted the power not to enforce a statute that they believe is unconstitutional. But there is a difference between a President deciding not to enforce a statute which he thinks is unconstitutional and a President claiming to authorize individuals to break the law by torturing individuals or taking other illegal actions.

So what I want to do is press you on that because I think perhaps you have misunderstood the question, and it is an important one. It goes to a very basic principle of the country that no one, not even the President of the United States, is above the law. Of course, the President is entitled to assert that an act of Congress is unconstitutional.

This President did so, for example, with respect to some portions of our McCain-Feingold bill when he signed it, but his Justice Department defended the law in court, as it is bound to do with every law duly enacted by the Congress. And his campaign and his party complied with the law while a court challenge was pending. No one asserted that the President had the power to ignore a law that he thought was unconstitutional.

The question here is what is your view regarding the President's constitutional authority to authorize violations of the criminal law, duly enacted statutes that may have been on the books for many years when acting as Commander-in-Chief? Does he have such authority? The question you have been asked is not about a hypothetical statute in the future that the President might think is unconstitutional. It is about our laws in international treaty obligations concerning torture. The torture memo answered that question in the affirmative, and my colleagues and I would like your answer on that today.

. . . .

Judge Gonzales. Senator, the August 30th memo has been withdrawn. It has been rejected, including that section regarding the Commander-in-Chief's authority to ignore the criminal statutes. So it has been rejected by the Executive Branch. I, categorically, reject it. And, in addition to that, as I have said repeatedly today, this administration does not engage in torture and will not condone torture. And so what we are really discussing is a hypothetical situation that--

Senator Feingold. Judge Gonzales, I have asked a broader question. I am asking whether, in general, the President has a constitutional authority, does he, at least in theory, have the authority to authorize violations of

the criminal law when there are duly enacted statutes simply because he is Commander-in-Chief? Does he have that power?

Judge Gonzales. Senator, in my judgment, you have phrased sort of a hypothetical situation. I would have to know what is the national interest that the President may have to consider. What I am saying is it is impossible to me, based upon the questions you have presented to me, to answer that question. I can say that there is a presumption of constitutionality with respect to any statute passed by Congress. I will take an oath to defend the statutes. And to the extent that there is a decision made to ignore a statute, I consider that a very significant decision and one that I would personally be involved with, I commit to you on that, and one I will take with a great deal of care and seriousness.

Senator Feingold. Well, that sounds to me like the President still remains above the law.

Judge Gonzales. No, sir.

Senator Feingold. If this is something where you take a good look at it, you give a presumption that the President ought to follow the law, you know, to me that is not good enough under our system of Government.

Judge Gonzales. Senator, if I might respond to that, the President is not above the law. Of course, he is not

above the law. But he has an obligation, too. He takes an oath as well. And if Congress passes a law that is unconstitutional, there is a practice and a tradition recognized by Presidents of both parties that he may elect to decide not to enforce that law. Now, I think that that would be--

Senator Feingold. I recognize that and I tried to make that distinction, Judge, between electing not to enforce as opposed to affirmatively telling people they can do certain things in contravention of the law.

Judge Gonzales. Senator, this President is not--it's not the policy or the agenda of this President to authorize actions that would be in contravention of our criminal statutes.

Senator Feingold. Finally, will you commit to notify Congress if the President makes this type of decision and not wait 2 years until a memo is leaked about it?

Judge Gonzales. I will commit to advise the Congress as soon as I reasonably can, yes, sir.

Senator Feingold. Well, I hope that would be a very brief period of time, and I thank you again, Judge Gonzales.

. . . .

Senator Schumer. Let me ask you another question, and that is this: We have had a lot of talk about the Geneva

Convention and what has happened in the past. I want to ask you a prospective question about the Geneva Convention. Do you think that we should seek revisions of the Geneva Convention in the future? I do not know if that is right or wrong, but do you think we should? Have there been any discussions in your office as Counsel or in the White House or in the administration as to whether we should seek those revisions? And if there is a determination that we should seek certain revisions--and I do not know what they would be; they might be reasonable--should Congress be include in that discussion?

Judge Gonzales. Thank you, Senator, for that question. I think it's a very good question because we are fighting a new type of enemy and a new type of war.

Senator Schumer. Sure.

Judge Gonzales. Geneva was ratified in 1949, Geneva Conventions, and I think it is appropriate to revisit whether or not Geneva should be revisited.

Now, I'm not suggesting that the principles of Geneva regarding basic treatment, basic decent treatment of human beings, should be revisited. That should always be our polestar. That should always be the basis on which we look at this. But I am aware--there has been some very preliminary discussion as to whether is this something that we ought to look at. I'm also aware that certain

academicians and international law scholars have written on this subject as to whether or not should we revisit Geneva and asked whether or not the Senate should play a role or the Congress should play a role. Obviously, if you're talking about modifications of Geneva or a new treaty, the Senate would play a very important role in the ratification process.

Senator Schumer. I understand that, but what I am saying is if the new administration were to begin internal discussions on whether Geneva should be modified and in what way, would they include the Senate in those discussions rather than saying here is what we recommend? You know, I mean, obviously this needs to be negotiated in a multilateral way. But would you include us in those--or would you recommend to the President that we be included in those discussions?

Judge Gonzales. Before answering a question, I want to emphasize, when I indicate that there's been some discussion within the White House or the administration, it's not been a systematic project or effort to look at this question, but some--I know certainly with the people that I deal with, the lawyers have questioned maybe this is something that ought to be looked at. So I do not want to leave the impression--

Senator Schumer. I do not hold any brief against

that. Obviously, you can re-examine these things.

Judge Gonzales. And it seems to me that it's probably always better to consult with the Senate since the Senate is going to have a role in the ratification process. I think consultation is usually better than not consulting.

Senator Schumer. Okay. And there is no proposal you know that is being formulated right now, is there?

Judge Gonzales. Not that I'm aware of, Senator.

. . . .

Senator Durbin. Thank you. My gifted legal staff listened closely to your answers to my questions and believe you gave a very carefully worded lawyer answer to a question, which I missed. And so for the record, I want to make certain that I understand your position again on this torture issue. Can U.S. personnel legally engage in torture under any circumstances?

Judge Gonzales. I'm sorry. Can U.S. military personnel--

Senator Durbin. U.S. personnel. Of course, that would include military as well as intelligence personnel, or other who are under the auspices of our Government.

Judge Gonzales. Senator, there are obligations under the treaty against torture and there are obligations under the anti-torture statute. There are obligations, legal obligations in the UCMJ. And so I suppose without--I don't

believe so, but I'd want to get back to you on that and make sure that I don't provide a misleading answer. But I think the answer to that is no, that there are a number of laws that would prohibit that.

Senator Durbin. I would like if you would give me a definitive answer.

Judge Gonzales. Yes, sir.

Senator Durbin. And then the follow-up question which they tell me I did not ask was whether or not it is legally permissible for U.S. personnel to engage in cruel, inhuman, or degrading treatment that does not rise to the level of torture.

Judge Gonzales. Senator, our obligations under the Convention Against Torture with respect to cruel, inhumane, and degrading conduct, as you know, is under Article 16, I believe. As Counsel to the President--

. . . . As Counsel to the President, my job was to ensure that all authorized techniques were presented to the Department of Justice, to the lawyers, to verify that they met all legal obligations, and I have been told that that is the case.

As you know, when the Senate ratified the Convention Against Torture, it took a reservation and said that our requirements under Article 16 were equal to our requirements under the Fifth, Eighth, and 14th Amendment.

As you also know, it has been a long-time position of the executive branch and a position that has been recognized and reaffirmed by the Supreme Court of the United States that aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth, and 14th Amendment. So as a legal matter, we are in compliance. But let me just emphasize, we also believe that we are in--we want to be in compliance as a substantive matter under the Fifth, Eighth, and 14th Amendment. I know Jim Haynes wrote a letter to Senator Leahy about whether or not we were meeting our obligations, and the response certainly would lead one to conclude that what we were saying was that we were meeting our substantive obligations under the Fifth, Eighth, and 14th Amendment. And no one has told me otherwise. My understanding is that we are meeting our obligations under Article 16.

Senator Durbin. It is your belief that we are legally bound to do that; is that correct?

Judge Gonzales. Well, subject to the reservations taken by the Senate in ratifying the treaty--

Senator Durbin. Just by definition, which definitions we use.

Judge Gonzales. We are meeting our legal obligations, yes, sir.

Senator Durbin. And so this morning we read in the paper about rendition, an argument made that we took a prisoner whom we could not, should not torture legally, and turned him over to a country that would torture him. That would be illegal as well, would it not?

Judge Gonzales. Under my understanding of the law, yes, sir, that we have an obligation not to render someone to a country that we believe is going to torture them. That is correct.

. . . .

Senator Graham. . . . . you articulate in a few words your position about the . . . . The working group that was formed in the Pentagon, as I understand it, occurred in the January time frame of 2003, and one of the documents the working group was working off of was the now infamous August DOJ memo. And I asked you a question before about whether or not you believe that the techniques in the August memo being espoused, whether or not that would put some of our troops at risk for court martial. And I do not expect you to answer that off the cuff, but there was a series of JAG memos as part of this working group that suggested that might be the case.

Have you ever seen those memos?

Judge Gonzales. I don't recall. I don't believe so, sir. Let me just say that I don't believe it's the case

that our office had anything to do with the work of the working group. I might also say that with respect to your question, the work of the Department of Justice in reviewing--or in that August 1 opinion was related to a review of the anti-torture statute, a particular statute. I don't believe--I mean, if there were other provisions, other restrictions upon people in the military, the fact that the Department has given guidance about the scopes of the anti-torture statute doesn't mean that somehow other binding regulations wouldn't apply. And so it is possible that you could engage in conduct that would satisfy that statute, according to the memo, but be inconsistent with other obligations that would remain binding upon members in our military.

Senator Graham. I think that is probably what happened, and I am try to learn from this process because you have one Department of the Government suggesting techniques that I think run afoul of the way the military is organized. And what I am trying to get us to look at is to make sure we don't go down that road again. And if you didn't see the memos, that to me is a bit disturbing because you are sort of out of the loop. And I think I better understand your role in this. You are trying to collect information. The working group is trying to implement policy.

Judge Gonzales. If I could just interrupt you, Senator, you said something--if I've said--if I've given the impression that the Department of Justice was suggesting techniques, they never were. What was happening is the Department of Defense, I believe, was suggesting the use of certain methods of obtaining information from the terrorists, and that was presented to the Department of Justice, and the Department then gave its opinion as to whether or not such methods were, in fact, lawful.

Senator Graham. Well, what actually happened, as I understand it, is that the Department of Justice memo in August talks about the torture statutes in ways that I think you and I--I think you have said that you disagree with that original legal reasoning. I can assure you that I do, and it got us into a situation of where we are getting our troops potentially in trouble. And that memo launched a thought process in the Department of Defense that divided the Department. And I think you need to know this and go back and study how this happened because there were 35 techniques suggested, I believe is the number. And when the judge advocates were finally consulted, they looked at the underlying memo from the Department of Justice and said, Whoa, if you go down this road and you look at this definition of what it takes to commit an assault and, you know, the pain level involved, that is

totally inconsistent with how we are going to govern our troops when it comes time to regulate detainees because there is a specific article in the Uniform Code of Military Justice that makes it a crime to assault a detainee.

And here is the good news. After Secretary Rumsfeld understood that there was a debate within the Department between civilian lawyers and military lawyers, he stopped and required a re-evaluation in April of 2004. The techniques were changed.

The only reason I bring this out is that it illustrates to me, Judge, that when you try to cut corners, it always catches up with you. And I think it has caught up with us. And what I am looking for you to hopefully do is bring us back on the right road. And the new memo coming out of the Department of Justice to me is a step in the right direction.

Do you believe that was a necessary thing to have done?

Judge Gonzales. Sir, first of all, let me--your characterization that we're cutting corners, I believe we have good people at the Department of Justice who did the very best they could interpreting, in my judgment, a difficult statute. So I think they did the very best they could.

Senator Graham. Well, that is where me and you

disagree. I think they did a lousy job.

Judge Gonzales. That opinion and the analysis has now been withdrawn. It is rejected. It is no longer the position of the executive branch.

. . . .

Senator Graham. Now to Gitmo. I am very encouraged by the efforts to fill this legal vacuum because once the Supreme Court decided that Gitmo was not Mars and it was part of the American legal system as far as habeas corpus relief, you are confident that this working group now headed by the Navy is going to come up with some due process standards that will meet international scrutiny?

Judge Gonzales. Well, I am not sure it will meet international scrutiny, Senator. What I can say is based upon what I've been told by the lawyers at the Department, what is in place now at Guantanamo should meet our legal obligations as described in the recent Supreme Court cases.

Senator Graham. And maybe the word "international scrutiny" was a bad word, trying to say that there is a French standard that I am trying to adhere to, and that is not it. The point is that the world is watching.

Judge Gonzales. Senator, if I might just comment on that, because I want to emphasize to the Committee how important I think treaties like Geneva are for America, because they do represent our values. And in many way and

at many times they have protected our troops. And it is true that part of winning the war on terror is winning the hearts and minds of certain communities. And to the extent there is a perception--and I think it's a wrong perception, but there's a perception out there that as a matter of policy the United States is ignoring its legal obligations, I think it makes it more difficult to win the hearts and minds of certain communities and, therefore, more difficult to win the war on terror.

Senator Graham. That is encouraging to me, that thought process, but it is not enough, I am afraid, to talk about it unless there are deeds to follow. So what I would suggest--and this is one junior Senator suggesting--is that we do have an international image problem, partly unfair, partly of our own making, that it would serve us well to maybe get Congress involved, maybe not through legislation but to try to form some working environment where we can have input, you can tell us what you think, we can tell you what we think, and the world can see that our country is on the road to correction. I would encourage you to include us where you think we can be fairly included to make sure that what comes out as the new policy at Gitmo is something that kind of achieves the best of who we are and still aggressively fights the war on terror.

. . . .

Senator Kennedy. Mr. Gonzales, on March 19th, the Office of Legal Counsel provided you with a memorandum to allow the CIA to relocate certain prisoners from Iraq for the purpose of "facilitating interrogation." The memo interprets Article 49 of the Fourth Geneva Convention which prohibits the forcible transfer or deportations of protected persons from occupied countries like Iraq, and violations of Article 49 are considered to be grave breaches of the Convention and thereby constitute war crimes under our Federal law.

The cover letter from OLC states that the legal opinion was requested by Judge Gonzales. In the newspaper--I do not know whether it was the Times or the Globe or Post--one of them reported that one intelligence official familiar with the operation said the CIA had used the March draft memo as legal support for secretly transporting as many as a dozen detainees out of Iraq in the last 6 months. The agency has concealed the detainees from the International Committee of the Red Cross and other authorities, the official said. In other words, this memoranda is being used to justify the secret movement and interrogation of ghost detainees.

In his report on the prisoner abuse at Abu Ghraib, General Taguba--and as I mentioned, the members of the Armed Services Committee listened to General Taguba testify

on this very subject matter--criticized the CIA practice of maintaining ghost detainees as deceptive--this is General Taguba--saying that the policy of the CIA maintaining ghost detainees in Iraq is deceptive and contrary to army doctrine and in violation of international law.

Do you agree or disagree with General Taguba's view of the practice?

Judge Gonzales. Senator, I have not reviewed this opinion in quite some time. I believe based on--I believe that we are honoring our legal obligations with respect to these detainees. There was a concern that by the application of Geneva that terrorists would come into Iraq and we would create a safe haven for them, and that's why the opinion was solicited, so that we would not create such a safe haven for al Qaeda, who are not entitled to prisoner of war legal protections. But in terms of the actual facts or specifics of what is actually being done, I don't have any knowledge about what the CIA or DOD is doing. And I am presuming--again, I don't have any knowledge--that they have solicited legal advice as to what constitutes--what would constitute a violation of our legal obligations.

Senator Kennedy. Well, the memo applies to protected persons, as I understand it. As I understand, it was the CIA that actually requested you to request the memoranda, and I think any logical conclusion one would draw is in

order to protect their agents from being prosecuted. At least that would certainly be my conclusion.

Now, this is what the memoranda from the Office of Legal Counsel interprets Article 49 of the Geneva Convention. The Geneva Convention states, "Individual or mass forcible transfers as well as deportations of protected persons from occupied territory to the territory of the occupying power or to that of any other country, occupied or not, are prohibited, regardless of their motive." And in spite of the clear and unequivocal language of the provision, the OLC concluded that Article 49 does not, in fact, prohibit the temporary removal from Iraq of protected persons who have not been accused of a crime to reason that both the words "deportations" and "transfers" imply a permanent uprooting from one's home, and that because a different provision in the Fourth Geneva Convention prohibits the relocation of persons accused of crime, it follows that persons who aren't accused of crime may be temporarily relocated for interrogation.

Do you believe that this legal advice is sound?

Judge Gonzales. Senator, I really would like the opportunity to re-review this memo. My recollection is that this was a genuine concern, that we had members of al Qaeda intent on killing Americans flooding into, coming into Iraq, and the question was legitimately raised in my

judgment as to whether or not--what were the legal limits about how to deal with these terrorists. And I believe--certainly that opinion represents the position of the executive branch.

Senator Kennedy. Well, do you know why the request came from the Agency? Why did the request come from the CIA? Do you know why they requested this? Did they explain why they wanted it? And do you remember what the CIA actually asked for?

Judge Gonzales. I do not, sir.

Senator Kennedy. The language--and I will move on--from the OLC clearly contradicts the plain language of the Convention. And there are many that conclude that this was in order to allow the CIA to engage in the unlawful practice.

Did you form any opinion about the whole policy of ghost detainees, the fact that the CIA was moving individuals, ghost detainees around to different prisons in different parts of the world in terms of interrogating them, as was found and mentioned in the Taguba report and in the Red Cross reports? Have you drawn any personal conclusions yourself as to whether this was sound policy or whether it contradicted the Geneva Conventions?

Judge Gonzales. Quite candidly, Senator, my objective as the Counsel to the President would be to try to ensure

that questions were being asked as to whether or not what kind of conduct someone felt was appropriate or necessary was, in fact, lawful. And I don't think I would have considered it my role necessarily to second-guess whether or not that represented a good policy judgment.

Senator Kennedy. Well, it does appear to some that the CIA is looking out and asking, you know, for the legal authority to do whatever they want to do and be protected from war crimes and other kinds of prosecutions and protections by the Commander-in-Chief provisions. That certainly has been a conclusion that has been drawn by many authorities, and it certainly would appear that way to many.

Judge Gonzales. Sir, if I may, that is the reason why we categorically rejected it, that analysis, when the existence of the memo became public, because we were concerned that someone might assume that, in fact, the President was exercising that authority. That has never been the case, and we have said that there has been no action taken in reliance upon that authority.

Senator Kennedy. Well, you know, we hear now about the recent decision and judgment that was made recently in terms of the Bybee memo. But I asked you at the end what you have done about this since it is so offensive. Clearly you have to feel that given the fact the administration

does that it is not longer operative. And I was interested, since it wasn't, what was done with the Agency and what was done with DOD. And then I asked just at the end what you were going to do with the FBI should you be appointed, and you indicated that with the FBI you are going to consult, find out the facts, and take action.

But I am just wondering what you have done to implement the more recent decision to say that this Bybee memo is no longer operative since it continues to be a part of the working document that has been made available to DOD.

Judge Gonzales. Sir, as far as I'm concerned, the December 30th opinion from the Office of Legal Counsel represents the executive branch position with respect to the interpretation of the anti-torture statute. The August 1 OLC memo has been withdrawn. It has been rejected and does not represent the position of the executive branch.

Senator Kennedy. That is your position now, but when you first saw it and for a 2-year period when it was in effect, you did not object to it, as I understand.

Judge Gonzales. Sir, there was, of course, as with many decisions, tough legal decisions, discussions between the Department of Justice and the Counsel's Office. Ultimately, as I've said repeatedly during this hearing, it is the responsibility of the Department of Justice to make

the final call. Ultimately, it is their decision as to what the law requires. And it was accepted by us as the binding interpretation of that statute.

Senator Kennedy. If I could come back to the unprecedented expansion of executive power contained in the Bybee memo, which you seem to have adopted at the time it was issued, so we are clear, the Bybee memo concluded that the law of the land cannot prevent the President from carrying out his Commander-in-Chief authority in any way he sees fit, even if the directives and actions violate clearly established law.

Judge Gonzales. Senator, that old opinion, as I've said, has been withdrawn. That analysis has been rejected, and I consider it rejected.

Senator Kennedy. But at the time when you first saw it, it still was put into--it was effectively the law of the administration's position for some 2 years.

Judge Gonzales. Well, that certainly reflected the position of the Office of Legal Counsel, but, again, let me re-emphasize that that authority was never exercised. As far as I know, the President was never advised of that authority. And so no actions were taken in reliance upon that authority.

Senator Kennedy. That has been repealed. He hasn't exercised it. Your view whether it is legitimate, whether

it is a legitimate statement of fact.

Judge Gonzales. Sir, respectfully, it doesn't represent the position of the executive branch.

Senator Kennedy. I understand that, but it did for a period of time, and I was just interested in what your view on that is as a legal issue. It has important implications in the separation of powers. It has very important implications on it. We are entitled to understand your view about the separation of powers. This has very important implications on it, and that is why I am asking the question.

Judge Gonzales. Sir, and I appreciate that, Senator, thank you. Whether or not the President has the authority in that circumstance to authorize conduct in violation of a criminal statute is a very, very difficult question, as far as I'm concerned. And I think that any decision relating to this line of reasoning would be one that I would take with a great deal of seriousness, because there is a presumption that the statutes are, in fact, constitutional and should be abided by. And this President does not have a policy or an agenda to execute the war on terror in violation of our criminal statutes.

Senator Kennedy. Let me move on. The Bybee memoranda made up out of whole cloth a necessity defense for torture. It argued that such a defense is viable because Congress

did not make a determination on values vis-a-vis torture. However, the Congress categorically banned the torture when it enacted the statute in 1994. The Convention Against Torture, which the U.S. ratified in 1994, specifically states that no exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability, or any other public emergency may be invoked as a justification of torture.

What did you think when you read the memoranda's section on the necessity provision? Did you realize right away that this was bad law and bad guidance for our military and intelligence?

Judge Gonzales. Sir, I don't recall today my reaction to the line-by-line analysis in that opinion. What I did realize, being a former judge, trying to interpret a statute that may not be as clear as one would normally want to see on an issue this important, was that that was an arguable interpretation of the law. They were relying upon the definition of severe physical pain in other statutes passed by the Congress. And I'm sure we had discussions about it, and ultimately it was accepted because that was the ultimate decision and position of the Office of Legal Counsel.

Senator Kennedy. Well, just to reach the conclusion that torture must involve the kind of pain experienced with

death or organ failure, the Bybee memo relied on unrelated Federal statutes that define emergency medical conditions for purposes of avoiding health benefits, Medicaid statute. I have gone through it. I am not going to take the time on this. But that is how far they went.

As the revised OLC memo on December 30th--

. . . .

Senator Kennedy. As I mentioned on reaching the torture, the OLC used actually the Medicaid standard on health benefits, which is completely unrelated to the whole questions on torture. Now, as the revised OLC memo of December 30th explains, the statutes relied on by the Bybee memo do not define severe pain even in that very different context, and so they do not state that death or organ failure or impairment of bodily function caused severe pain. Clearly, the reasoning was unsound, and I guess what we conclude at this time, I would have thought it would be fairly obvious to you that someone can suffer severe physical pain without being in danger of organ failure.

When I hear this kind of activity, I always remember meeting President Duarte of El Salvador, and when he was in prison, what they did is cut off a joint every week of his fingers. When he shook hands with you, he had four parts of fingers that were left on that part. But every week they used to tell him--they would leave it unattended. It

got infected and caused him enormous kinds of health hazards on these parts. But I am always mindful about what I have seen with some individuals, as one, like others in this Committee, Republicans, who care about human rights and the excesses that have taken place.

The question that I have is: Wasn't it obvious to you that someone can suffer severe physical pain without being in danger of organ failure? Wouldn't the removal of fingers, for example, fall outside the definition of torture and why we wouldn't have expected that you wouldn't have raised some kind of objection to it?

Judge Gonzales. Senator, if I may answer your question, I don't recall reading that analysis to conclude that it would have to be that kind of pain in order to constitute torture. Obviously, things like cutting off fingers, to me that sounds like torture.

Let me just remind you, Senator, that the Office of Legal Counsel was trying to interpret a statute written by the Congress. The Foreign Relations Committee, in making recommendations to the Congress regarding ratification of the Convention Against Torture, described torture as the top of the pyramid in terms of inflicting pain upon a human being. It described it, the Committee described torture as extreme cruel, extreme inhumane, extreme degrading conduct. This is what the Congress said. And I think the people at

the Office of Legal Counsel were simply doing their best to interpret a statute drafted by Congress.

. . . .

Senator Leahy. One, I was glad to hear you say--and correct me if I misunderstood you--to Senator Durbin that it is wrong if a U.S. personnel turns somebody over to another country knowing they are going to be tortured. Did I understand you correctly on that?

Judge Gonzales. I believe that is a law. That's certainly U.S. policy.

Senator Leahy. And so they would be prosecuted, people who did that.

Judge Gonzales. Yes.

Senator Leahy. Now, President Bush signed a memorandum on February 7, 2002, which went through you, in which he directed U.S. armed forces to treat al Qaeda and Taliban prisoners humanely. You have said publicly this was the only formal written directive from the President regarding treatment of detainees. Is it your testimony the President has issued no other directive regarding the treatment of detainees? It is not a trick question. I want to make sure you understand it very clearly because you are under oath. My question is meant to include a directive in any form, to any government personnel, regarding any category of detainee from any theater of

operations, regarding any aspect of detainee treatment, including interrogation.

Judge Gonzales. Senator, I don't have any firsthand knowledge about the President giving directions regarding, say, specific techniques. That was not--in my judgment, in the Schlesinger report, he concluded it would be sort of out of the question to expect the President would be involved in making individual determinations--

Senator Leahy. I am just going by your statement publicly that this was the only formal written directive from the President regarding treatment of detainees. Do you have any firsthand or secondhand knowledge of any other directive?

Judge Gonzales. Sir, other than the directive by the President that we're not going to engage in torture and that we're going to abide by our legal obligations, I'm not aware of any other directive by the President. accusations that that is happening to the Department.

Senator Leahy. . . . . The reason I used that example is like Abu Ghraib in a sense that the administration knew about this torture. They have been asked questions by me, by Republican Senators and others that they refuse to answer about the torture before it became public. Nobody said, oh, my gosh, this is horrible. We're all against torture or anything else. When the pictures started

appearing on the front page of the newspapers or on television, then everybody scrambles around and takes memos and policies that have been in place for some time, and they start changing it. We have talked about the memo on torture that was changed at the beginning of a three-day weekend just before New Year's, coincidentally, just before your coming here to testify. . . .

Here is a softball for you. When he announced your nomination, the President noted that your sharp intellect and sound judgment have helped shape our policies on the war on terror. Looking back on that, were any mistakes made, and were they corrected?

Judge Gonzales. Any mistakes made in the war on terror?

Senator Leahy. Involving you, and were they corrected?

Judge Gonzales. Involving me, Senator, I will be the first to admit I am not perfect, and I make mistakes.

Senator Leahy. Glory, hallelujah, you are the first one in the administration who has said that.

Judge Gonzales. Hopefully, I learned from those mistakes. I think I have learned during these past four years Washington is a different type of environment than the one I am used to. And could I have done things better? Yes. And hopefully I have grown and I have learned. I

think if confirmed it will make me a more effective Attorney General for the people of this country.

. . . .

Senator Cornyn. . . . . I know Senator Kennedy was asking about the memo, I believe it was a draft of March 19th, 2004. This was the memo that was I guess leaked regarding permissibility of relocating certain protected persons from occupied Iraq. It was leaked, was it not?

Judge Gonzales. I believe that's correct.

Senator Cornyn. I will just go back to what I said earlier about very few secrets in Washington, D.C., and I guess this helps to--is further evidence of that. But let me just ask. I see this is a draft memo; is that right?

Judge Gonzales. I believe that is correct.

Senator Cornyn. So it was not a final determination or a final statement of policy or a final legal conclusion, was it?

Judge Gonzales. The draft is a draft.

Senator Cornyn. I also see that the last footnote of the draft--and of course lawyers like footnotes, but they are important--says that protected persons "ordinarily retain Convention benefits." So I guess in a strict sense these are not ghost detainees because the conclusion at least of this draft is that they retain, essentially retain protections under the Convention. Would you agree with

that?

Judge Gonzales. I believe so, Senator, but I would want the opportunity to look at that again before agreeing without any kind of reservation.

Senator Cornyn. Fair enough. That just struck me as a contradiction with the suggestions we had heard earlier that somehow that this is a lawless enterprise, that indeed the conclusion at least of the draft was that ordinarily these detainees retain Convention benefits.

. . . .

Senator Sessions. . . . . You know, you were asked about saying some of the language of the Conventions are quaint. I remember when I was in law school at Alabama, my wife and I lived at Northington Campus, and that was where the German prisoners of war were held. I do not think they had much more than a fence. They had a recreation grounds. I am told that they interfaced with the people in the community, and even went to church and played the organ or sang in choirs.

But this is a different type of prisoner from the World War II group that we were looking at, and we do need to--some of the things are not quite as logical, such as guaranteeing them scientific instruments or giving them pay, paying them while they are prisoners, or athletic equipment and clothes. But I guess also the President--and

you have been with him--feels deeply the responsibility he has and had during this post 9/11 time to protect the American people. That had to be on his mind whenever he made a decision. Is that correct?

Judge Gonzales. That was his number one objective, Senator, to do so, consistent with the legal obligations of this country.

Senator Sessions. And I know that in October of this past year, we released close to 150 detainees at Guantanamo Bay. I guess ACLU or somebody sued over that or whatever, and they were released. Here are some of the headlines that have occurred since. "Freed detainees rejoin fight; Ten ex-Guantanamo inmates have been caught or killed," headline in the Washington Post of October 2004. "Detainees back in battle. At least eight ex-Guantanamo inmates fighting again in Afghanistan," Pittsburgh Post Gazette. "Ten freed from Cuba return to fighting," Chicago Tribune. "Freed detainees return to jihad, at least 10 militants captured or killed Gitmo captors of intent," Orlando Sentinel.

So it is easy to say why do we not just err in the side of being lenient and let people go, but you knew and the President knew and the people supervising Guantanamo Prison knew that there were risks when you did that; is that not true? And that makes you cautious?

Judge Gonzales. Of course, Senator, we don't want to detain anyone that shouldn't be detained, and not for a minute longer than we need to detain someone. There are multiple screening processes in place with respect to detainees that go to Guantanamo. There are multiple screens when they are captured, when they're moved into Bagram into a central holding facility. There's a multiple screen--I mean there's a screen with respect to deciding whether or not they should go to Guantanamo. Then when they arrive at Guantanamo, there's an additional screen to see whether or not they should be at Guantanamo. And then there are annual review screens. We've now implemented a process to ensure that if we no longer need to hold someone, that we should release them. But it is true that some have been released that we've now discovered have come back to fight against Americans, and that of course is the danger. We obviously don't want to hold anybody longer than we have to, but we don't want to be releasing people that are going to end up killing American soldiers. So it's been a challenge.

I think the good people within DOD have exercised, have addressed that challenge in the very best way they can. It hasn't worked perfectly, but they've done a good job in my judgment.

Senator Sessions. And by the way, this was a

Department of Defense decision, is that correct, on releasing there at Guantanamo?

Judge Gonzales. Oh, of course. That's not a decision made by the White House. That would be a decision ultimately made by Department of Defense. But they would also consult with the CIA. They would also consult with the Department of Justice to see whether or not those agencies had any information about the detainee. And so it would be a collaborative effort to gather up the intelligence information about a detainee, but ultimately the Department of Defense would make the decision that this is someone that it would be okay to go ahead and release.

Senator Sessions. Well, you did not run the Department of Defense or have any supervisory control over anybody at the Department of Defense, did you?

Judge Gonzales. Absolutely not.

Senator Sessions. Now, of course, so we have 10 rearrested. I think we can logically conclude that more than 10 have returned to terrorist activities, they just have not been caught, maybe twice or three times that many. So that is a pretty good number out of the 150 we took a change on releasing, who have returned to the battlefield. They were released while the war is continuing. And I just want people to note that this is not just an academic exercise. Lives are at stake. You had to make tough

decisions and recommendations to the President. The President had to make them. Secretary Rumsfeld had to make them. He let some of these go, and some of them returned to battle right away, and we know that is true.

. . . .

Chairman Specter. Just one question about the so-called Bybee memorandum, and it is do you agree with the statement in the memo, "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield"?

Judge Gonzales. I reject that statement, Senator.

Chairman Specter. You reject that statement.

Do you agree with the decision by U.S. District Judge James Robertson, handed down on November 24th of this year, when he stopped the military tribunal's ruling that detainees' rights are guaranteed by the Geneva Conventions?

Judge Gonzales. Sir, I haven't studied the rulings. That decision is on appeal. I believe, generally, we respectfully disagree with the judge.

Chairman Specter. Do you believe that the CIA and other governmental intelligence agencies are bound by the same laws and restrictions that constrain the operations of the U.S. armed forces engaged in detention and interrogations abroad?

Judge Gonzales. Certainly, some of the laws, sir. UCMJ, for example, would be a limitation on military forces that would not be applicable to the CIA.

Chairman Specter. Well, in what circumstances would the CIA have a broader latitude? Why do you not think about that one and give us a response in writing. That is a fairly involved question.

Judge Gonzales. I appreciate that, Mr. Chairman.

Chairman Specter. Do you support affording the International Committee of the Red Cross access to all detainees in U.S. custody?

Judge Gonzales. As a general matter, I very much support the work of the Red Cross and, as a general matter, would agree that they should be provided access. I think the Red Cross serves a very, very important function. They have, in the past, been responsible for the safe treatment and health of U.S. soldiers who are captured by our enemy and so, yes, as a general matter, that is true.

Chairman Specter. Your answer is, yes, to that question.

Judge Gonzales. As a general matter, yes, sir.

. . . .

Senator Cornyn. I neglected earlier, when I was asking about the written response to the document request that Senator Leahy had made to the White House, I neglected

to ask unanimous consent that the three letters that were written, I believe authored by David Leitch, in response to Senator Leahy's request, dated December the 17th, 30th, and January the 5th, be made part of the record.

. . . .

Senator Leahy. If we might, could we, also, then put as part of the record my response letter, pointing out that those were not responsive and my concern that those letters were not responsive.

Chairman Specter. I would offer, for the record, a letter to me, dated December 26th, 2004, from the Committee of Concerned Philadelphia Rabbis.

. . . .

Our first witness, in alphabetical order, is Dean John Hutson. . . ., dean and president of the Franklin Pierce Law Center in Concord, New Hampshire. Dean Hutson has a record as a rear admiral, a graduate of the University of Minnesota Law School, and has had a long and distinguished Naval career, including being the Navy's judge advocate general during the administration of President Bill Clinton.

STATEMENT OF JOHN D. HUTSON, DEAN AND PRESIDENT OF THE FRANKLIN PIERCE LAW CENTER, CONCORD, NEW HAMPSHIRE

Admiral Hutson. . . . .

As Americans, we have been given many gifts by our creator and our forbearers, and we hold these gifts in trust for our progeny and for mankind, generally. One of these gifts is great military strength. This military prowess is enhanced by our legacy of our strong advocacy for human rights for all human beings by virtue of their humanity alone and by our long history of unwavering support and adherence to the rule of law.

These gifts come with a string attached. Like all gifts, there is a responsibility to husband them. We must not squander them; rather, we must nurture them, refine them and pass them on in even better condition than they were given to us. Generations of Americans have understood this responsibility and have accepted it.

In the wake of World War II, Truman, Eisenhower, Marshall, Senator Vinson and others fulfilled their part of that sacred trust. They had seen the horror of war, a horror that few of us have seen, but have only read about. They responded with programs like the Marshall Plan and with international commitments like the Geneva Conventions. I believe that the Geneva Conventions are part of our legacy not unlike the Bill of Rights, the Fourteenth Amendment, and Brown v. Board of Education. They demonstrate the goodness of the United States. They also demonstrate our strength and our military might. Even in

the midst of that most awful of human endeavors--war--we should treat our enemies humanely, even when we have captured them. To do so is a sign of strength, not weakness. To not do so is a sign of desperation.

I come here to speak in opposition to the confirmation of Judge Gonzales because he appears not to understand that. He finds the Geneva Conventions to be an impediment, a hindrance to our present efforts, quaint and obsolete in important respects. His analysis and understanding of the Geneva Conventions, which I discuss in detail in my written statement, is shallow, shortsighted and dangerous. It is wrong legally, morally, diplomatically, and practically. It endangers our troops in this war and future wars, and it makes our Nation less safe.

My 28 years in the Navy tells me that his analysis of the Geneva Conventions and their applicability to the war in Afghanistan and the war on terror is particularly disturbing because it indicates an utter disregard for the rule of law and human rights. Those are the reasons American fighting men and women shed their blood and why we send them into battle. But if we win this battle and lose our soul in the process, we will have lost the war, and their sacrifices will have been for naught.

The Geneva Conventions have protected American troops from harm for many years. Our forces are more forward

deployed than any other Nation's in terms of numbers of deployments, locations to which they are deployed, and the number of forces deployed. This has been the case since World War II and will continue to be true. Because of that there is no country for which adherence to the rule of law and to the Geneva Conventions is more important than it is to the United States. It is our troops that benefit. The original U.S. proponents of the Conventions saw them as a way to protect U.S. troops from the enemy not the enemy from U.S. troops.

It is not good for our military if we now throw them over the side just because some people believe they are inconvenient to the present effort. This is only the present war. It is not the last war. It is not even the next-to-last war.

Another important aspect of the Geneva Conventions is that it prepares us for the peace that will ensue. We cannot so alienate our allies that they will not fight alongside us again nor should we embitter our enemies so that they will fight on longer and harder than they otherwise would or be unwilling to relent, even though their cause is hopeless. Abrogating the Geneva Conventions imperils our troops and undermines the war effort. It encourages reprisals. It lowers morale.

I believe that the prisoner abuses that we have seen

in Iraq, as well as in Afghanistan and Gitmo, found their genesis in the decision to get cute with the Geneva Conventions. At that point, it became a no-holds-barred unlimited warfare not just in Abu Ghraib, but around the country. I remind the Committee that we are conducting 40 or more death investigations in the course of the war on terror for detainees at the hands of their U.S. captors.

Our military doctrine has long been, and I quote from the Department of the Army pamphlet, "The United States abides by the laws of war in spirit and letter. Cruelty on enemy prisoners is never justified."

Twenty-eight years in the military taught me there are two indispensable aspects to military good order and discipline. They are the chain of command and the concept of accountability. Accountability means that you can delegate the authority to take an action, but you may never delegate the responsibility for that action. Young, fresh-caught judge advocates know that Government lawyers cannot hide behind their adviser role to evade accountability for the actions that they recommend.

The value of the chain of command is that what starts at the top of the chain of command drops like a rock down to the bottom of the chain of command, and subordinates execute the orders and adopt the attitudes of their superiors in the chain of command. It has always been

thus, and that is the way we want it to be.

Government lawyers, including Judge Gonzales, let down U.S. troops in a significant way by their ill-conceived advice. They increased the dangers that they face. At the top of the chain of command, to coin a phrase that we have heard in the past, they set the conditions so that many of those troops would commit serious crimes. Nomination to Attorney General is not accountability.

Only recently, in the face of the confirmation process, has the administration attempted to undo the damage. I have three thoughts on that:

One is that I applaud the administration for doing that.

The second is that it is a little late. We have had several years under the other policy.

And last is that I do not see this as an exoneration of Judge Gonzales; rather, it is somewhat of an indictment. It is an acknowledgment of error. Damage has been done, but it is never too late to do the right thing. If Judge Gonzales goes on to be the chief law enforcement officer in the United States after his involvement in this, we will have failed to undo a wrong, but will have only exacerbated it.

We are at a fork in the road. Somewhat ironically, this nomination has given the United States Senate an

opportunity to tell the world what you think about those issues. What you do here will send a message, good or bad, to the world and, importantly, to American armed forces and fighting men and women.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Hutson follows:]

STATEMENT OF DOUGLAS A. JOHNSON, EXECUTIVE DIRECTOR, THE CENTER FOR VICTIMS OF TORTURE, MINNEAPOLIS, MINNESOTA

Mr. Johnson. . . . .

Although there are different physical symptoms associated with the form of torture they endured, there is a remarkably common pattern of profound emotional reactions and psychological symptoms that transcends cultural and national differences. The effects can include, but are not limited to, besides organ failure and death, emotional numbing, depression, disassociation, depersonalization, atypical behavior, such as impulse control problems and high-risk behavior, psychosis, substance abuse, neurophysiological impairment such as the loss of short-term and long-term memory, perceptual difficulties, the loss of ability to sustain attention or concentration and the loss of the ability to learn. The main psychiatric disorders associated with torture are post-traumatic stress disorder and major depression.

While it is important to recognize that not everyone who has been tortured develops a diagnosable mental disorder, it is equally important to recognize that for many survivors the symptoms and aftereffects of torture endure for a lifetime. Torture is said to be one of the most effective weapons against democracy as survivors

usually break their ties with their community and retreat from public life. . . . ..

Now, the memorandum written by and also apparently solicited by White House Counsel Gonzales are replete with legal errors, which the other two members of the Committee will describe, but also, we believe, with political miscalculations and moral lapses. They disregard the human suffering caused by torture and inhumane treatment. They are based on faulty premises, even fantasies about the benefits and payoffs of torture. What is striking about all of these memorandum is the lack of the recognition of the physical and psychological damage of torture and inhumane treatment.

The assumption behind the memoranda, and particularly the Bybee memorandum, and the later Report of the Working Group on Interrogation, is that some form of physical and mental coercion is necessary to get information to protect the American people from terrorism. These are unproven assumptions based on anecdotes from agencies with little transparency, but they have been popularized in the American media by endless repetition of what is called a ticking time bomb scenario.

Based on our experience at the center with torture survivors and understanding the systems in which they have been abused, we believe it is important that these

discussions not be shaped by speculation, but rather through an understanding of how torture is actually used in the world. From our understanding, we have derived eight broad lessons.

And those are, first of all, torture does not yield reliable information;

Secondly, torture does not yield information quickly;

Third, torture has a corrupting effect on the perpetrator;

Fourth, torture will not be used only against the guilty;

In fact, fifth, torture has never been confined to narrow conditions. Once it is used, it broadens.

Psychological torture results in long-term damage;

Stress and duress techniques are forms of torture;

And, finally, number eight, we cannot use torture and still retain the moral high ground.

The cost to America of abandoning strict opposition to all forms of torture are far-reaching; from the disillusionment and fear of individuals, on the one hand, to complications in our ability to conduct foreign policy on the other. It is up to all of us, as Americans, but particularly to members of the Senate and to U.S. Attorney General, to be clear that torture is a line we will not cross under any circumstances or for any purpose. It is

imperative that the Attorney General is in agreement with American values and will use the full scope of American and international law to prevent torture and prosecute torturers.

To that end, I respectfully call on the Senate Judiciary Committee to keep torture on its agenda and to require a routine report from the Department of Justice on its work to stop and prevent the use of torture. I ask the Committee to be vigilant in your oversight until it is clear, in both our tacit and explicit policies, and in our actions, that the U.S. is back on course and is in full compliance with national and international law and American values.

When speaking on the Senate floor in support of ratification of the Convention Against Torture, Kansas Senator Nancy Kassebaum said, "I believe we have nothing to fear abut our compliance with the terms of this treaty. Torture is simply not accepted in this country and never will be."

Let us also make it true today.

Thank you.

[The prepared statement of Mr. Johnson follows:]

Chairman Specter. We now turn to Dean Koh, the dean of the Yale Law School, having been named there earlier, well, in July of last year. He has taught at the Yale Law School since 1985 in international law, served as assistant secretary of state, was a U.S. delegate to the United Nations Human Rights Commission and the U.N. Committee on Torture.

STATEMENT OF HAROLD HONGJU KOH, DEAN AND GERARD C. AND BERNICE LATROBE SMITH PROFESSOR OF INTERNATIONAL LAW, YALE LAW SCHOOL

Mr. Koh. As I mentioned, I have twice been in the U.S. Government. I served in the Clinton administration as the assistant secretary for Human Rights. But previously I was in the Reagan administration as an attorney at the Office of Legal Counsel, which is the very office which has generated these memoranda.

Let me say that I do not appear today to advise you on how to vote. Your decision as to whether this candidate deserves confirmation turns on many factors on which you are the experts and may involve qualifications and positions that I have not reviewed.

But I do appear today because I want to comment on Mr. Gonzales' positions regarding three very important issues. I think these are issues of the highest significance in American life, and these are issues on which I do have

legal expertise and Government experience.

They are, first, the clear and absolute illegality of torture and cruel, inhumane and degrading treatment;

Second, the nonexistence of the President's constitutional powers to authorize torture and cruel treatment by U.S. officials--what Senator Leahy has been calling the Commander-in-Chief override. It does not exist as a matter of constitutional law;

And, third, the broad applicability of the Geneva Conventions on the laws of war to alleged combatants held in U.S. custody. This broad applicability has been for the benefit of our soldiers. The more that we ensure broad applicability of the conventions to others the more our own soldiers are entitled to protection.

With regard to each of these, I think the legal position is clear. As Attorney General, Mr. Gonzales has said that his first allegiance would be to uphold the Constitution and laws of the United States. That would mean he would strictly enforce the laws banning torture, he would strictly enforce the ratified treaties regarding torture and the Geneva Conventions, and he would ensure that the President abides by the constitutional principle of checks and balances. But I think more fundamentally he has to assure that no one is above the law, including the President, and that no one is outside the law, whether they

are an enemy combatant or held in a place like Guantanamo or outside the United States.

And I think that there has been a concern raised about Mr. Gonzales' record and which continues through the hearing today. It is that some of the statements he has made and some of the things that he has tolerated have created the impression that the President is above the law or that certain individuals live outside the law as extralegal persons because they are called enemy combatants or because they are being held in rights-free zones such as Guantanamo.

Let me just address these three issues, starting first with the torture memo--the Bybee memo.

As you mentioned, Senator Specter, I presented the United States report on our compliance with torture in Geneva in 1999 and 2000. And at that presentation, I told the United Nations, as a country, we are unalterably committed to a world without torture. We had cleared through all the agencies at the U.S. Government a statement of zero tolerance, of zero tolerance policy. And the real question is how did we move from the zero tolerance policy of 2000 to the permissive environment that seems to have been created in the last few years.

Now, I think the answer is partly shown by the Bybee memo, and having worked in the Office of Legal Counsel, I

am very sympathetic with the pressures that people are under in drafting opinions like this. Nevertheless, in my professional opinion, as a law professor and a law dean, the Bybee memorandum is perhaps the most clearly legally erroneous opinion I have ever heard. It has five obvious failures.

First, it asks, "How close can we get to the line," when, in fact, it is supposed to be enforcing a zero tolerance policy.

Second, the way that it defines torture would permit many of the things that Saddam Hussein's forces did during his time as not torture. Just for example, the White House website lists that beating, pulling out of fingernails, burning with hot irons, suspension from ceiling fans were all acts of torture committed by Saddam Hussein's forces. Nevertheless, under the Bybee memorandum, if they did not cause serious organ failure or death, they would not constitute torture.

Third, as I said, the memo grossly overreads the President's constitutional power to order torture. If the President has a constitutional power to order torture in the face of a criminal statute preventing it passed by Congress, it is not clear why he could not similarly order genocide or other kinds of acts.

Fourth, the memorandum says that executive officials

can escape prosecution if they carrying out the President's orders as Commander-in-Chief. This is the "following orders" defense which was rejected in Nuremberg and is the very basis of our international criminal law.

And, finally, an important point, the Bybee memo essentially is very tolerant with regard to cruel, inhuman or degrading treatment. A convention against torture, and cruel, inhuman and degrading treatment is read to permit various kinds of cruel, inhuman, and degrading treatment. **And even today there was some lack of clarity in Mr. Gonzales' answer about whether U.S. officials are barred from cruel, inhuman or degrading treatment.**

I think that if this kind of reasoning is left unchallenged, it could be used to justify atrocities of the kind we saw at Abu Ghraib, where lower executive officials felt a license to be cruel, inhuman or degrading to people in their custody.

Now, some have said that the August 1st memo is a lawyer setting out options for their client. But I think, as lawyers, those of you who have served know that if a client asks a lawyer to do something which is flatly illegal, the answer is, no; not here is how we can justify it.

So I believe that this is a stain on our law, a stain on our national reputation, a legal opinion that is so

contrary to a zero tolerance policy, which has a definition of torture that would have exculpated Saddam Hussein, that reads the Commander-in-Chief power to remove Congress as a check on torture that turns Nuremberg on its head and that gives Government officials a license to be cruel is wrong from the beginning.

If the counsel for the President had received such an opinion, you would have expected him to do at least one of two things: First, reject it on the spot and send it back or, second, send it to other parts of the Government and have them give a second opinion, particularly the State Department, which I believe, following the policies in the U.S. Report on the Convention Against Torture, would have said that the opinion is flatly wrong.

Instead, what happened, as you heard, was that that opinion was allowed to become executive branch policy, was incorporated into the DOD working group report, and remained as executive branch policy for some two and a half years, during which time I believe that a permissive environment was inevitably created.

Now, I welcome the very strong statements that Mr. Gonzales made in finally repudiating this analysis. But I think he also was begging the question of whether the parts of the memo that were not explicitly replaced, namely about the President's constitutional powers to order his

subordinates to commit legal--to commit torture, should be repudiated. At the beginning of the testimony, Mr. Gonzales said those parts had been withdrawn; by the end, he said he repudiated it. I think he should say, I rejected--I reject them because they are legally wrong and they never should have been put out there in the first place. I do not think our Nation's chief law enforcement officer should tolerate ambiguity on a matter that is so central to our national values. I think that Mr. Gonzales should repudiate all elements of the memorandum, ask for withdrawal of the Defense Department's working group report, and I also agree with Mr. Johnson that it is a very good idea to have a regular report about what we are doing to root out torture within the executive branch.

With regard to the commander in chief power, a very simple point. The statement is made, "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's vesting of the commander in chief power in the President." If that were strictly true, large sections of the Uniform Code of Military Justice would also be unconstitutional. I think that is an over-broad position, I do not think it is sustainable as a matter of law, and I think it should be repudiated definitively.

Remember that the Attorney General has a duty not just

to serve his client, but to preserve the Constitution's system of checks and balances. I think that to ensure that the President is not above the law, Mr. Gonzales should repudiate the constitutional theory that is put out there. A very simple question which you could have asked him today was--

Chairman Specter. Dean Koh, your red light is on. If you would conclude your current thought, we would appreciate it.

Mr. Koh. **A simple question you could have asked him today is, Is the anti-torture statute constitutional? If the answer to that question is yes, then it cannot be overridden by the President's commander in chief powers.**

And the final thought, the Geneva Conventions, I believe that this point has been made very well. The Geneva Conventions do apply broadly. **And the fact that the administration chose, I think, through Mr. Gonzales's recommendation not to apply the Geneva Conventions in Afghanistan was an error which I think that Secretary Powell properly challenged.**

Chairman Specter. . . . we could explore . . . . the issue of a so-called ticking bomb case on torture.

There are some prominent authorities . . . . that if it was known, probable cause, that an individual had a ticking bomb and was about to blow up hundreds of thousands

of people in a major American city, that consideration might be given to torture. Judge Posner, a very distinguished judge on the Seventh Circuit has commented that this is worth considering, or perhaps even more positively than that. Professor Dershowitz has written extensively on the subject, has come up with a novel idea of a torture warrant. And there runs through some of the considerations on interrogation techniques, not to be decided by the people at the base level but when dealing with higher officials trying to get something out of the ranking al Qaeda person, that an escalation of tactics ought to be left to more mature authorities, perhaps even--well, higher authorities in the Federal chain of command.

The Israeli Supreme Court has opined on the subject by way of dictum. As they put it, recognizing in certain circumstances Israeli interrogators may be able to use torture--not saying they ought to, but those who do may be able to employ the defense of necessity to save lives of a so-called ticking time bomb or other such imminent threat.

Dean Koh, start with you. Are considerations for those tactics ever justifiable even in the face of a ticking bomb threat?

Mr. Koh. Well, Senator, you are a former prosecutor. I think that my approach would be to keep the flat ban, and if someone, the President of the United States, had to make

a decision like that, someone would have to decide whether to prosecute him or not. But I do not think that the answer is to create an exception in the law. Because an exception becomes a loophole and a loophole starts to water down the prohibition.

I think what we saw at Abu Ghraib is the reality of torture. I have had the misfortune to visit many torture dens in my life. Many of them, I am sure, were justified on emergency national security concerns, and at the end of the day, you have places where they are just places where people are routinely mistreated. And not for any broad national security purpose.

Chairman Specter. That sounds essentially like the hypothetical question defense--if the President does it, then it is a prosecution matter. I do not know about that.

Dean Hutson, what do you think? Ever? On occasion? To even consider that?

Admiral Hutson. I agree with Dean Koh that it is always illegal. Now, you may decide that you are going to take the illegal action because you have to, but two points: One is that that is not necessarily the situation--or, not "necessarily," it is not at all the situation we are talking about here with Gitmo or Abu Ghraib or other prisons. There is no implication that there was a ticking bomb anyplace. The other is that you pose a question in

which there is by definition in the question not sufficient time to use more effective methods of getting information--the good guy/bad guy, rewards and punishments, those kinds of things where you are much more capable of getting valuable information.

A third difference is that, by the hypothetical, you are dealing with a particular individual. You are not dealing with 550 people at Gitmo or however many people at Abu Ghraib. So that it is an interesting academic question. We have all debated it. But I do not think that it is the sort of question that the Bybee amendment--or, excuse me, the Bybee memo, for example, addresses.

Chairman Specter. Dean Hutson, there is no doubt that it was not involved at Abu Ghraib for any of the issues which we have taken up. But anybody who has watched on C-SPAN since 9:30, we are off on a long day, might deserve a little academic discussion even if it is only highly theoretical. And it is pretty tough to advocate torture under any circumstances, even with a ticking bomb, so I can understand the reticence of the witnesses because I have the same reticence.

What are your views, Mr. Johnson?

Mr. Johnson. Well, the Israeli Supreme Court concluded that the necessity was a defense in prosecution, it could never be turned on its head to be made a policy

moving forward. And of course the Bybee memo has the same problem. It takes a question of law about how to prosecute someone for torture and turns it into proactive advice on what is allowed and what is not. And that is the moral problem with that Bybee memorandum.

On the specifics of the ticking time bomb, I think that it is very overblown in our imaginations and it is very right with what I could only call fantasy and mythology. The number one issue, as I said, is that torture is unreliable to get information. We look at our clients. Nearly every client we had confessed to something. They confessed to some crime, they gave up some information, they gave up the name of an innocent friend. What they said was, I would do anything, I would say anything to get it to stop. And one of the major problems with torture from a legal perspective, and especially from an interrogation perspective, is it produces so much extraneous information that it actually distracts from good investigation.

But secondly, the second part of this which is often the question of fantasy, is that we have to do it because the bomb will go off in the next hour, and if I do not agree for the next hour, it will go off in the next five minutes--would you do it there? It actually takes time to make someone break. It takes strategy to make someone

break. One of the very disturbing things I find in the memorandum is to know that some of the techniques that were used in Gitmo, such as water-boarding, were being used on our own troops, supposedly to train them to resist torture. I have talked to American soldiers who have gone through that training and who have been required to be engaged in that kind of activity, and they tell me that it has taken them 15 years of therapy to get over it.

So I am very disturbed to think that it is any part of the practice of our soldiers at this point, in this day and age. But at the same time, we know it happens. I know of stories in Argentina, where supposedly the professional criminals go through training to resist torture over the 48 hours they need before they get access to their lawyer. Everything I have heard about the operational sophistication and the commitment of al Qaeda would lead me to believe that they go through the same training. So the notion that torture acts quickly to deal with the ticking time bomb is also a fantasy.

Chairman Specter. Well, it may well be fantasy, and we hope that it never arises.

Mr. Koh. Senator, might I just add--

Chairman Specter. Excuse me, I am in the middle of a sentence, Dean Koh.

Let us hope it is fantasy. And as we have examined

interrogation techniques, we really have not gotten into the subject matter today of the suspect as--or the person subject to interrogation as a relevant factor, or the quality of the information that that person might have, or the sophistication and judgment if it went to the Secretary of Defense or the Under Secretary, where there is more time to have an interrogation technique. And let us hope that no President ever has to face the decision or any official at any level, but there are gradations and complications here which do not provide any easy answers far beyond the scope of what we have heard today.

My red light is on, so I ask no more questions. But you were in the middle of a sentence, Dean Koh.

Mr. Koh. I was just saying that **the new OLC opinion of last week withdraws the necessity defense, and so it would not function to permit the invocation of necessity as a reason for torture.**

Senator Leahy.

And Dean Koh, you heard Judge Gonzales's testimony today. I asked him a number of questions regarding his views of executive power. I asked him if he agreed with the legal conclusion in the August 1, 2002, memo by Assistant Attorney General Jay Bybee--the President has authority as commander in chief to suspend the torture laws and immunize those who commit torture on his order.

I never really did get a yes or no answer on that. But can a President override our laws on torture and immunize the person who did the torture?

Mr. Koh. No.

Senator Leahy. That is a good answer. I happen to agree with it.

Now, I asked Judge Gonzales about the administration's claims regarding enemy combatants. The President has claimed unilateral authority to detain a U.S. citizen whom he suspects of being a terrorist, hold him indefinitely, incommunicado, no access to a lawyer, and so on. He says he has this authority with respect to U.S. citizens both abroad and here. Judge Gonzales said the Supreme Court upheld this in Hamdi. Of course, in Hamdi the Court did not decide that, they simply reached the conclusion that the Congress had authorized this.

Do you believe that the President has authority as commander in chief to lock up a U.S. citizen arrested in the United States, and hold him indefinitely without access to counsel or the courts?

Mr. Koh. No, and not when a civilian court is open. I was surprised by the answer, because I think that if you look at the Hamdi decision, the opinion that he was citing, Justice O'Connor's opinion, is a plurality decision. It does not say that he has a right to hold someone

indefinitely. That very issue is being litigated before the District of South Carolina in the Padilla case on remand. And also, I think at the oral argument in those cases, Justice Stevens asked the solicitor general, How long would you hold the person? And the answer was, For the duration of the war. And he said, What if it was a hundred years war? And then the Government lawyer backed away from the assertion.

So I do not think they were claiming at the time that there was a right to indefinite detention, and I do not think the Supreme Court gave them a right to indefinite detention.

Senator Leahy. Following a question one of the other Senators asked, let us say the President followed Secretary Powell's advice--declared the Geneva Conventions applied to the conflict in Afghanistan. What effect would that have had on our ability to prosecute captured al Qaeda and Taliban fighters for war crimes?

Mr. Koh. Well, I **think what was proposed**, which I think would have made sense, **was for everyone to get a hearing, as required by Article 5 of the Geneva Conventions. Everyone who is taken into captivity ordinarily gets a hearing under the Geneva Conventions, and thousands of these hearings have been given in Iraq and were also given in Vietnam.** That is what was not done. I

think, particularly with regard to the Taliban, they were acting as essentially the army of Afghanistan, and I believe that they should have been given POW status. I think that there was some confusion in the questioning today about whether, quote, Geneva applies or not. Geneva may apply, in the sense that everybody gets a hearing to find out what their status is, but some of them may not be POWs.

Senator Leahy. Well, that is what--thank you. That is what I was looking for. We follow certain standards. Whether the other side does or not, we do. We need to comply with Geneva whether our enemies do or not. Is that not the logic of Geneva?

Mr. Koh. Broad applicability is the logic. We have been the ones who are saying it should apply broadly because we want our troops to have a strong presumption of protection. Afghanistan was the first time in which we said that it did not apply to a conflict. You were also asking questions about rendition. Once it was said that Geneva Conventions did apply in Iraq, there was the danger that people would then be removed from Iraq as a way of bringing them outside of the scope of the Geneva Conventions.

The bottom line, Senator, is we have tried not to create ways in which people can be taken in and out of the

protections of the Convention, because that might happen to our troops.

Senator Leahy. Well, and if we have somebody who is treating our troops inhumanely, or others, we can also eventually bring about prosecutions of them as war criminals, can we not? And there is a lot of tradition of that.

Admiral, the January 2002 draft memo for the President--this was the one signed by Judge Gonzales--argued the war against terrorism is a new paradigm, renders obsolete the Geneva Convention's, quote, strict limitations in questioning of enemy prisoners. But we have talked about the Army Field Manual. That makes it perfectly clear that POWs can be interrogated, is that not correct?

Admiral Hutson. That is absolutely right, Senator. A couple of thoughts. One is that all the wars are new paradigms when you first start to fight them. You know, there's new weapons systems, there's new enemies, there's new tactics, there's new strategy. So that the fact that it is a new paradigm does not necessarily change things.

The other thing is that the Geneva Conventions place on the detainee an obligation to provide certain information. It does not place on the capturer a limitation on the questions or the numbers of questions or the numbers of times to question. You know, this is not a

Miranda kind of situation. You can keep asking questions. It does limit the torture, cruel, inhuman, degrading kinds of ways that you may ask questions. If by "obsolete" Judge Gonzales meant that we are going to have to use more kinds of techniques, harsher techniques, more aggressive techniques, tortuous techniques, then I disagree with him very strongly on that. If he is just saying that we need to throw it over the side because we are dealing with terrorists and we cannot ask any question beyond name, rank, serial number, then he is just wrong on the law. You know, it is one or the other. He is either wrong on the law or he is advocating techniques that I would not support.

Senator Leahy. From a military lawyer's perspective, could we have avoided what we see in Afghanistan, Iraq, and Guantanamo?

Admiral Hutson. Absolutely. It goes back, Senator, to what I think I said in my statement, written and oral statement, about the chain of command. You know, those soldiers that we saw in the pictures, the people that are being investigated otherwise have picked up the attitude that started at the top of the chain of command. And if the attitude that started at the top of the chain of command was, They may be terrorists, they may be evildoers, but they are human beings and we will treat them with the

dignity and respect that Americans treat human beings, we would not have seen what we saw. Rather, the attitude at the top was, They are terrorists so different rules apply--without really explaining what the rules were that applied. And as Dean Koh said, they ended--or I guess Mr. Johnson--they ended up in this never neverland where nothing applied, and then we saw what happened.

Senator Leahy. Well, we have some members of Congress in both parties who have suggested we have some kind of an independent, truly independent, investigation of what happened here. Is that your position, too?

Admiral Hutson. Absolutely, it is, Senator. Judge Gonzales referenced several times the number of investigations that are going on, as if that somehow fixed the problem. And, you know, if 10 investigations is good, then 20 would be even better, and 30 better than that.

That is not the point. The point is that we need an investigation, a comprehensive investigation not unlike the investigation that perhaps Admiral Gammon did in the Challenger disaster, in which the investigating body has subpoena power, the power to administer oaths, which raises the specter of perjury, and is told to go wherever their nose leads it--not to look at the few bad apples, you know, atrocities have been committed by a few bad apples, now go out and demonstrate how that happened. And if it goes to

the E ring, then it goes to the E ring; and if it goes to the Office of Legal Counsel, then it goes to the Office of Legal Counsel. But when you put them in a box with a series of investigations to look at junior enlisted personnel, you are never going to find what happened.

Chairman Specter. Thank you. And Mr. Chairman, you asked the question of Mr. Johnson I was going to ask, basically how effective torture is. And I think he gave a very good answer from his experience. Most people being tortured are going to say whatever you want to stop the torture.

Thank you, Mr. Chairman. And again, I compliment you for the hearing you held today.

Chairman Specter. Thank you very much, Senator Leahy.

Senator Cornyn?

Senator Cornyn. Thank you, Mr. Chairman.

Mr. Johnson, Mr. Koh, Mr. Hutson, thank you for being here with us today. I wanted to just ask whether you agree or disagree with this proposition--to begin with, and then we will get into more questions.

Do you agree or disagree that all lawful means to gather actionable intelligence that is likely to save American lives should be permitted?

Let me say that again. Do you agree or disagree that the United States Government should use all lawful means to

gather actionable intelligence that is likely to save American lives? Dean Hutson?

Admiral Hutson. I agree.

Senator Cornyn. Mr. Koh?

Mr. Koh. I agree with "lawful means," not including torture or cruel, inhuman, or degrading treatment.

Senator Cornyn. Exactly. That is implicit in the question, but thank you for being specific.

Mr. Johnson?

Mr. Johnson. I agree, and my concern is that there has been such a fascination with the supposed effectiveness of forms of torture and duress that all lawful means in fact have not been used.

Senator Cornyn. But as far as the proposition goes, "all lawful means," as qualified--as amplified, I should say, by Dean Koh and you, Mr. Johnson, and Dean Hutson, you would agree with that proposition, would you not, sir?

Mr. Johnson. Yes.

Senator Cornyn. Well, that is the thing. I think we all agree with that. I mean, certainly we do on the Committee, and as I heard Judge Gonzales testify today, that is what he said his position was and what he believed the President's position was.

But let me get to an area where maybe there is--well, I know there is disagreement because we have already talked

about it some here today, not with you, but these witnesses. But first of all, and I would like to maybe start with Dean Koh and then Dean Hutson and then ask Mr. Johnson some other questions.

. . . .

Senator Cornyn. But, you know, I asked earlier Judge Gonzales--I think it was--whether lawyers disagree about even the matters as important as what you have testified here today, Dean Koh and Dean Hutson. And we already, I believe, have established that there are legal scholars and international law experts who hold a contrary opinion to the one you have expressed today, for example, Dean Koh, with regard to the applicability of the Geneva Convention to terrorists. Would you concede the point that there are respectable legal scholars who hold a contrary opinion?

Mr. Koh. Yes. And I think that you have to define exactly what you mean--the applicability to al Qaeda, the applicability to Taliban. There is a different nose count on each one.

Senator Cornyn. I understand your distinction. But let us talk about al Qaeda first. But do you--and you take the position that Geneva applies to al Qaeda. Is that correct, sir?

Mr. Koh. I take the position that Geneva applies to people who are captured and a tribunal could quickly

determine that someone is al Qaeda. And, as for example in the case of Mousawi, he could then be turned over to a criminal proceeding.

Senator Cornyn. But for example, if there is a status hearing to determine the status of an enemy combatant, and they are determined to be, at that status hearing, a member of al Qaeda, would they be entitled to the protections of the Geneva Convention, in your opinion, Dean Koh?

Mr. Koh. Well, they fall under Geneva, but they are not POWs, and they should then be treated as common criminals and prosecuted.

Senator Cornyn. But nevertheless entitled to humane treatment. Is that correct?

Mr. Koh. Yes.

Senator Cornyn. Okay. And Dean Hutson, do you have a contrary view, or do you take the same position?

Admiral Hutson. I take the same view. You know, one of the issues, I think, here, Senator, at least in my mind one of the issues here is that--I do not want to sound pedantic, so forgive me, but, you know, law is not practiced in a vacuum. It is practiced in real life. And sometimes, whether or not lawyers agree or disagree about the gray areas in the middle--and I do not think this is necessarily a gray area in the middle--there are other factors, like protecting U.S. troops, that have to be taken

into consideration in making the decision about whether or not you are going to apply the Geneva Conventions or the role that the Conventions are going to take. And I think it is naive to say, well--not you are, but that others, naive on the part of others to say, well, we are going to very narrowly limit this because we are clever lawyers and we can figure out a way to get around this. Because I think that that, in the end, risks U.S. troops in this or future wars.

Senator Cornyn. Well, Dean Hutson, let me pursue that just a second. Is it not naive to assume that al Qaeda, people who employ suicide bombing attacks, who attack innocent civilians, will have any regard whatsoever for the international norms of conflict?

Admiral Hutson. I do not think that they will have any regard for the international norms of conflict, nor do I think that they are suddenly going to say, oh, gee, if we start conducting our--behaving in other ways, we will get the benefit of being POWs; if we start wearing uniforms, everything is going to be okay. You know, I do not think it makes a difference particularly one way or the other.

Senator Cornyn. So it would not influence their decision to treat our troops, were they captured, in any particular humane way, or when they complied with the Geneva Convention.

Admiral Hutson. I think it may. I think Senator McCain said that he thought that it did in Vietnam. I think that it--

Senator Cornyn. Vietnam is--obviously we were at war with another nation state and one that wore a uniform with insignia and they had a chain of command--all the criteria by which the Geneva Convention is determined to apply--did we not?

Admiral Hutson. They did not necessarily comply with the law of war, which is one of the factors that is determinative of POW status.

Senator Cornyn. Well, let me get back, before we digress too much, to my earlier point, and that is that lawyers disagree. I mean, that is one of the things that attract some of us to the law, either as law professors, as practitioners, or as judges. For example, Dean Koh, you have a colleague at Yale Law School, Ruth Wedgwood, do you not?

Mr. Koh. She has left Yale and gone to Johns Hopkins.

Senator Cornyn. Okay. But at one time she was at Yale. Do you regard her as an expert in international law, including some of the issues we are talking about here, the applicability of Geneva?

Mr. Koh. She is a friend and colleague of mine with whom I often disagree on points of law.

Senator Cornyn. Exactly. That is really my point. And you do know that she has filed--she joined, along with former Carter administration officials, an amicus brief in Shafiq Rasul v. George Bush and argued, for example, that the President's conclusion that members of al Qaeda and the Taliban are unlawful combatants is clearly correct.

Therein lies your disagreement, is that correct?

Mr. Koh. But I think you make an important point, Senator, which is disputes among lawyers are often resolved at the Supreme Court. In that case, the Bush administration's position in Rasul was rejected definitively by the Supreme Court.

Senator Cornyn. Certainly not on the basis of Geneva Convention applicability?

Mr. Koh. The issue was sent to a habeas corpus proceeding, and Justice Souter, in another opinion issued that day, suggested the question that the issue of Geneva could be raised there.

Senator Cornyn. Sure. And one judge does not make a disposition on a controlling issue of law. You would agree with that, would you not?

Mr. Koh. I think we are moving to a definitive resolution of these issues, but I think that these issues are going to continue to be disputed and resolved in the courts.

Senator Cornyn. Well, let me just mention a group of other distinguished lawyers: Professor W. Thomas Malison, who has written in Case Western Reserve Journal of International Law; Professor Alan Rosos, who has written on this subject; Professor Ingrid Dieter; Professor Gregory M. Travaglio--and I hope I pronounced that name correctly. And I will not go through a whole long list. But you would acknowledge that there are others who--other legal scholars, people who have written in this area, who agree with Professor Wedgwood and disagree with you on the application of Geneva to al Qaeda. Would you concede that, Dean Koh?

Mr. Koh. I think the question, Senator, is whether Afghanistan can be removed from the scope of the Geneva Conventions. And I do not know that anybody agrees with that.

Senator Cornyn. So you would not concede that there is a fairly lengthy list of distinguished legal scholarship that holds that al Qaeda fighters are not entitled to the protections of the Geneva Convention? You would not concede that?

Mr. Koh. I think this was a point that was made in your Washington Times op ed quoting Mr. Malinowski from Human Rights Watch. But as I think he pointed out in his letter of response, the danger is an assertion that an

entire conflict is outside the scope of the Geneva Conventions. If that were true, then the U.S. soldiers participating also would not enjoy Geneva Convention protections. So I think the solution is to bring all the combatants who are captured in, to give them hearings, decide who are POWs and who ought to be treated as common criminals, and that al Qaeda members could well be among those who are treated as common criminals.

Chairman Specter. Senator Cornyn, would you like one more round?

Senator Cornyn. . . . .

Well, gentlemen, you know, regardless of the disagreement among lawyers on this particular issue with regard to the application of the Geneva Convention, and regardless of whether you say Geneva does not apply or that Geneva does apply but al Qaeda fighters are exempted from the requirement of Geneva's protections with regard to POW status, would each of you--would you agree, Dean Koh, for example, that, you know, some very important lawyers, namely Federal judges, have decided in three different cases that the President's position and Judge Gonzales's position on the Geneva Convention is correct? Are you aware of that?

Mr. Koh. If one of those cases is the Padilla case, that case was reversed by the Second Circuit. If another

case--

Senator Cornyn. But for lack of jurisdiction, right? And it is not one of the ones I was referring to.

Mr. Koh. And I think you also need to include into the mix Judge Robertson's opinion in the D.C. Circuit, which has in part suspended the military commission proceeding precisely because of the Geneva Conventions. And--

Senator Cornyn. Is that the one that is on appeal right now?

Mr. Koh. Yes. And then--

Senator Cornyn. Well, for the record, the ones I am referring to are the Arnot case, the John Walker Lindh case, the American Taliban--

Mr. Koh. Which is a plea bargain.

Senator Cornyn. Well, I beg your pardon, sir. It is 212 F.Supp.2d 541. It is not a plea bargain. This is the one where he claims immunity from prosecution by virtue of his being protected by the Geneva Convention and a POW, but the court held he was not entitled to the protection of the Geneva Convention.

. . . .

Conklin, Maegan L

RELEASED IN PART
B5

From: Deeks, Ashley S
Sent: Monday, July 23, 2007 12:21 PM
To: Bellinger, John B (L Bureau)
Subject: FW: (U) Accusing MEP of foreknowledge changes the EP mood on CIA activities

[redacted] B5

From: Robinson, John G
Sent: Monday, July 23, 2007 8:24 AM
To: Deeks, Ashley S; Sicade, Lynn M (DRL); Hammond, Sylvia L (DRL)
Cc: Robinson, John G
Subject: (U) Accusing MEP of foreknowledge changes the EP mood on CIA activities

(U) Accusing MEP of foreknowledge changes the EP mood on CIA activities

On July 17, Council of Europe rapporteur Dick Marty presented his report on alleged CIA renditions and secret prisons to members of three committees of the European Parliament. While strongly critical of the U.S. methods in the war against terrorism, the general discussion was positive towards the U.S., stressing that the American system of checks and balances was working well compared to the European one. The atmosphere in the meeting was tense because the report claims two MEPs, Ioan Pascu (PES, Romania) and Marek Siewiec (PES, Poland) knew of the secret detention centers in their previous roles as Defense Ministers. While supporting the conclusions reached by Marty, socialist MEPs were clearly embarrassed and criticized Marty's methodology of citing specific people without revealing his sources. Siewiec has demanded his name to be withdrawn from the report, which Marty ruled out at a press conference after the EP meeting. Marty dared Pascu and Siwiec to provide him with written denials of the report; Pascu drafted such a denial on the spot and handed it to Marty in front of the press. The EP will be coming back to the issue next September with a report to be drafted by the generally pro-US Foreign Affairs committee (AFET). (Pol/MVaneverbeke)

John G. Robinson
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(202) 647-3913

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 06 AUG 2009 200706444

L016

Conklin, Maegan L

From: Zelikow, Philip D
Sent: Friday, December 02, 2005 12:26 PM
To: Wilkinson, James R; McCormack, Sean I; Gunderson, Brian; Hughes, Karen P; Beecroft, Robert S
Cc: Bellinger, John B (L Bureau)(L-FO)
Subject: FW: Germany cools CIA issue, waits for U.S. reply

RELEASED IN PART
B5

[redacted] B5

pz

From: Fogarty, Daniel J
Sent: Friday, December 02, 2005 7:45 AM
To: LW-EUR; SES-O_Shift-II; LW-Mahogany
Subject: Germany cools CIA issue, waits for U.S. reply

^BC-SECURITY-CIA-GERMANY (NO PICTURE)
^Germany cools CIA issue, waits for U.S. reply
BERLIN, Dec 2 (Reuters) - Germany said on Friday it would "wait patiently" for a U.S. response to allegations that the CIA ran secret prisons in Europe and secretly flew terrorist suspects across the continent.
Government spokesman Thomas Steg said Berlin would not rush Washington and did not necessarily expect answers when U.S. Secretary of State Condoleezza Rice visits next week to meet new Chancellor Angela Merkel.
"We're not putting the American government under time pressure," Steg told a news briefing.
"When the other side has given a public assurance that the questions of the Europeans will be answered, then one simply waits patiently for the answer."
His comments were clearly aimed at drawing some of the heat out of the issue, which has prompted the European Union and at least eight member states to request clarification and assurances from the Bush administration.
The Washington Post last month reported that the Central Intelligence Agency had run secret prisons in Eastern Europe for interrogating terrorist suspects.
The continent's leading human rights watchdog, the Council of Europe, is investigating the prisons report and probing flights by 31 aircraft it suspects may have been used by the CIA to transfer prisoners secretly across European borders.
New York-based Human Rights Watch said this week the United States was holding at least 26 "ghost detainees" at undisclosed sites around the world. Critics say incommunicado detention violates international law and often leads to torture.
U.S. officials have defended the use of the secret transfers, known as renditions, as a weapon in the "war on terrorism". They strongly deny that the United States uses torture.
At the same time, Rice this week acknowledged European concerns and pledged that Washington would respond to them.
Merkel's government is keen to improve relations with the Bush administration, which were badly damaged when her predecessor Gerhard Schroeder clashed with Washington over the Iraq war.
But it is under pressure from opposition parties to clarify reports of scores of unexplained CIA flights via German airports.
German prosecutors are investigating two rendition cases -- one involving a German who was seized in Macedonia and taken, allegedly by the CIA, to Afghanistan, and the other an Egyptian who was abducted in Milan and, according to investigators, returned to Egypt via Germany.
But Ernst Uhrlau, the new head of Germany's foreign intelligence agency, said in an interview this week there was no proof German airports had been used for secret prisoner transfers.
"We have no information, no facts, there are only rumours," he told Die Zeit newspaper.

^REUTERS

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

Conklin, Maegan L

W024

From: Buchwald, Todd F (L-UNA)
Sent: Friday, December 02, 2005 6:02 PM
To: Bellinger, John B (L Bureau); Dorosin, Joshua L; Harris, Robert K; Witten, Samuel M
Subject: RE: Q's & A's

Attachments: LEGAL-#124221-v2-Sec_Q's_&_A's_-_Black_sites__etca.DOC

RELEASED IN PART
B5

LEGAL-#124221-v2
-Sec_Q's_&_A's...

As requested, see revised Q&A on renditions from US - highlighted in yellow in attachment.

-----Original Message-----
From: Bellinger, John B (L Bureau)
Sent: Friday, December 02, 2005 5:27 PM
To: Buchwald, Todd F (L-UNA); Dorosin, Joshua L; Harris, Robert K; Witten, Samuel M
Subject: FW: Q's & A's

[redacted] B5

The Q&A on renditions from the US is too long; can I ask someone to edit it down to no more than 2-3 short bullets?

-----Original Message-----
From: Buchwald, Todd F (L-UNA)
Sent: Friday, December 02, 2005 3:56 PM
To: Bellinger, John B (L Bureau)
Cc: Witten, Samuel M; Dorosin, Joshua L; Harris, Robert K
Subject: Q's & A's

<< File: LEGAL-#124221-v1-Sec_Q's__A's_-_Black_sites__etca__.doc >>
John-- Here are the Q's & A's with clearances from Sam, Josh and Bob. Cleared version of backgrounder to follow in a few minutes.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

h-025

Conklin, Maegan L

From: Dorosin, Joshua L
Sent: Sunday, December 04, 2005 10:22 AM
To: Zelikow, Philip D(C); McCormack, Sean I(PA FRONT); Wilkinson, James R(S); Bellinger, John B (L Bureau); Bellinger, John X (Geneva)
Cc: Graffy, Colleen P; Volker, Karen E(R/PPR); Buchwald, Todd F (L-UNA); Witten, Samuel M; SES-O
Subject: REVISED Q/As for the Secretary

Attachments: LEGAL-#124221-v2-Sec_Q's__A's_-_Black_sites__etca_.doc

RELEASED IN PART
B5

LEGAL-#124221-v2
-Sec_Q's__A's_...

TO THE OPS CENTER: PLEASE PASS TO PHILIP ZELIKOW, SEAN MCCORMACK AND JAMES WILKINSON AS SOON AS POSSIBLE

All -

Attached are the Q/As as revised to reflect the change John noted below to the CID question. We've also added two additional points.

Thanks. Josh

-----Original Message-----
From: Bellinger, John B (L Bureau)
Sent: Friday, December 02, 2005 8:08 PM
To: Bellinger, John B (L Bureau); Zelikow, Philip D(C); McCormack, Sean I(PA FRONT); Wilkinson, James R(S)
Cc: Graffy, Colleen P; Volker, Karen E(R/PPR); Dorosin, Joshua L; Buchwald, Todd F (L-UNA); Witten, Samuel M
Subject: RE: Q's & A's

[redacted] B5

Josh et al: Could you pls revise Q&As and resend to Philip? Thanks.

-----Original Message-----
From: Bellinger, John B (L Bureau)
Sent: Friday, December 02, 2005 6:17 PM
To: Zelikow, Philip D(C); McCormack, Sean I(PA FRONT); Wilkinson, James R(S)
Cc: Graffy, Colleen P; Volker, Karen E(R/PPR); Dorosin, Joshua L; Buchwald, Todd F (L-UNA); Witten, Samuel M
Subject: FW: Q's & A's

Philip et al: Attached are draft Q&As for the Secretary's personal use on Monday. [redacted] B5
[redacted] If you want to make changes, Josh Dorosin in my office has the pen. John

-----Original Message-----
From: Buchwald, Todd F (L-UNA)
Sent: Friday, December 02, 2005 6:02 PM
To: Bellinger, John B (L Bureau); Dorosin, Joshua L; Harris, Robert K; Witten, Samuel M
Subject: RE: Q's & A's

<< File: LEGAL-#124221-v2-Sec_Q's_&_A's_-_Black_sites__etca.DOC >> s.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

LQ26

Conklin, Maegan L

From: Allegrone, Kathleen H
Sent: Tuesday, November 29, 2005 8:54 AM
To: Pekala, Mark A; Witten, Samuel M; Bellinger, John B (L Bureau); Faucher, Robert J; Dorosin, Joshua L; Terrill, Damon A; Propp, Kenneth R
Cc: Volker, Kurt D; Graffy, Colleen P
Subject: RE: Tasking List for November 29, 2005

RELEASED IN PART
B5

Have we actually received the formal request from STraw?

[redacted] B5

k

From: Pekala, Mark A
Sent: Tuesday, November 29, 2005 8:52 AM
To: Witten, Samuel M; Bellinger, John B (L Bureau); Faucher, Robert J; Dorosin, Joshua L; Allegrone, Kathleen H; Terrill, Damon A; Propp, Kenneth R
Cc: Volker, Kurt D
Subject: RE: Tasking List for November 29, 2005

[redacted] B5

From: Witten, Samuel M
Sent: Tuesday, November 29, 2005 8:40 AM
To: Bellinger, John B (L Bureau); Pekala, Mark A; Faucher, Robert J; Dorosin, Joshua L; Allegrone, Kathleen H; Terrill, Damon A; Propp, Kenneth R
Cc: Volker, Kurt D
Subject: FW: Tasking List for November 29, 2005
Importance: High

Friends - what are your thoughts on how best to answer the question posed by PA - "When do we expect an answer to the EU regarding the secret prisons?

[redacted] B5

Do you have other/better formulations to suggest? FYI to all - Damon Terrill is back in the office today.

-----Original Message-----
From: Davidson, Terry R
Sent: Tuesday, November 29, 2005 7:55 AM
To: EUR-FO-DL; Faucher, Robert J; Terrill, Damon A; Witten, Samuel M; Dorosin, Joshua L; Propp, Kenneth R
Cc: EUR-PPD-Dirs; EUR-AGS-DL; EUR-PPD-PA
Subject: FW: Tasking List for November 29, 2005
Importance: High

L has the lead on the black sites-EU guidance. Time will be short for AGS readout of FM meeting... please coordinate with Gerry Keener on the guidance, as Linda Hartley is working with PA on press accommodations... last-minute switch back to "walk out" press availability with Steinmeier, so we'll have a huge German press contingent... Terry

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

EUROPEAN AFFAIRS
L / EUR / INR / REGION: When do we expect an answer to the EU regarding the secret prisons?
EUR / GERMANY: Read-out of the Secretary's meeting with Foreign Minister Steinmeier

---

From: Pittman, Susan R
Sent: Tuesday, November 29, 2005 7:42 AM
To: PAPress_TaskingList
Subject: Tasking List for November 29, 2005
Importance: High

Just beginning. Will add more later:

<< File: TASKING LIST TEMPLATE.doc >>

LQ30

Conklin, Maegan L

From: Graffy, Colleen P
Sent: Friday, January 20, 2006 12:27 AM
To: Bellinger, John B (L Bureau)
Cc: Dorosin, Joshua L; Volker, Kurt D; Volker, Karen E(R/PPR)
Subject: UK on Renditions

RELEASED IN PART
B1, 1.4(B)

FYI. Glad Hank got the rendition points before he left. thx

UK: Leaked "Rendition" Memo Raises Questions for PM

(C) According to media reports, the *New Statesman* magazine will publish this week a leaked December 7th FCO memo to Number 10 which advised senior ministers not to get drawn into details about extraordinary rendition. The memo reportedly said "we cannot say that we have received no such requests for the use of UK territory or airspace" and asked "how do we know whether those [prisoners] our Armed Forces have helped to capture in Iraq or Afghanistan have subsequently been sent to interrogation centers?" Number 10 and the FCO had no comment, saying the Government's policy is not to comment on leaked memos. Conservative Party Shadow Minister William Hague asked the government to clarify its position. LibDem foreign affairs spokesman Nick Clegg suggested the memo may be a breach of the Ministerial Code requiring ministers to be as open as possible with Parliament and the public. [redacted] B1

[redacted] (Post/press reporting; EUR/UBI: ACervetti, 7-2456)

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

L0231

NotesTele.txt
Daniel Fried 11/25/2005 09:00:08 AM From DB/Inbox: Daniel Fried

Cable
Text:

RELEASED IN PART
B1, 1.4(B), 1.4(D)

CONFIDENTIAL
TELEGRAM

November 25, 2005

To: No Action Addressee

Action: EUR

From: AMEMBASSY THE HAGUE (THE HAGUE 3172 - IMMEDIATE)

TAGS: EUN, MARR, MOPS, PGOV, PINR, PREL, AF, NL

Captions: None

Subject: NETHERLANDS/ISAF: FM BOT LINKS REPORTS OF SECRET PRISONS AND ISAF STAGE III PLANS

Ref: None

Classified By: Acting Political Counselor Jason Grubb, reasons 1.4 (b,d)

1. (C) Summary: During November 24 parliamentary debates on foreign policy, Dutch Foreign Minister Bernard Bot linked news reports of secret USG prisons and CIA-contracted planes to Dutch participation in military missions in Afghanistan. Bot said that the existence of secret CIA prisons in Europe would have consequences for Dutch participation in OEF and plans to participate in ISAF Stage III. [redacted] B1 [redacted] Post requests Department's guidance on how to respond to Bot's comments. End summary.

Bot Speaks Out

2. (C) Bot said that if the CIA has secret prisons in Europe, then this will affect Dutch participation in OEF and plans to participate in ISAF Stage III. He suggested that the USG is pushing the limits of international law, and said that recent comments by Vice President Cheney on international rules against torture have "aggravated the situation". These comments follow Bot's recent remarks that the U.S. should not "play hide and seek" with regard to the prisons. Media reports suggest that resistance to Dutch participation in military missions in Afghanistan is growing in Parliament.

[redacted] B1

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

[redacted]

B1

BLAKEMAN

Additional Addressees:
None

CC:
AMEMBASSY CANBERRA
AMEMBASSY KABUL
SECSTATE WASHDC
CJCS WASHDC
NATO EU COLLECTIVE
NSC WASHDC

Distribution:

TED5877
ACTION EUR-00

INFO	LOG-00	ACQ-00	CIAE-00	DODE-00	VCI-00	TEDE-00	INR-00
	L-00	VCIE-00	NEA-00	NSAE-00	ISN-00	NSCE-00	OMB-00
	PA-00	PM-00	PRS-00	P-00	ISNE-00	SP-00	SS-00
	TRSE-00	T-00	SA-00	IIP-00	PMB-00	DRL-00	G-00
	SAS-00	/000W					

----------63FE6C 251139Z /34

O 251059Z NOV 05
FM AMEMBASSY THE HAGUE
TO SECSTATE WASHDC IMMEDIATE 4179
INFO NATO EU COLLECTIVE IMMEDIATE
AMEMBASSY CANBERRA IMMEDIATE
AMEMBASSY KABUL IMMEDIATE
CJCS WASHDC IMMEDIATE
NSC WASHDC IMMEDIATE
SECSTATE WASHDC IMMEDIATE 4180

C O N F I D E N T I A L THE HAGUE 003172

E.O. 12958: DECL: 11/25/2015
TAGS: MARR, PREL, PGOV, PINR, MOPS, EUN, AF, NL
SUBJECT: NETHERLANDS/ISAF: FM BOT LINKS REPORTS OF SECRET PRISONS AND ISAF STAGE III PLANS

End Cable Text

Daniel Fried 11/25/2005 09:00:08 AM From DB/Inbox: Daniel Fried

Recipient/Profile Information
Cable Recipients:
Steve Adams-Smith
Joanne E Addison
Michael J Adler
Damola A Akeredolu
Stefanie Altman-Winans
Aaron T Alton
Worth S Anderson
Jorgan K Andrews
Richard H Appleton
Michelle E Azevedo
Joseph R Babb
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Anthony Baird
Stephen B Banks
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Rene L Bebeau
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Tiffani Brown
Jody L Buckneberg
Mary J Bushnaq
Andrea Cameron
Martha L Campbell
Raphael Carland
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Eric Fichte
Terrance R Flynn
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Aaron H Levy-Forsythe
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J D Lippeatt
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Alyssa Watzman
Alyssa Waxman
Ivan S Weinstein
Matthew S Wells
Arkell D Weygandt
Caitlin White
Tamiya Y White
Ernestine Wilson

NotesTele.txt

Jason R Wisniewski
Kami A Witmer
Nelson Wukitsch
Thomas A Yeager
Marie L Yovanovitch
Alan K Yu
Diane R Zeleny LMDS Profiles/Office Symbols:
EUR_AGS_A1
EUR_AGS_A13
EUR_AGS_A3
EUR_BI_A1
EUR_BI_A2
EUR_BI_A3
EUR_CAN_A6
EUR_CASA_A3
EUR_CEN_A4
EUR_ERA_A1
EUR_ERA_A2
EUR_ERA_A6
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EUR_FO_A4
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EUR_RPM_A4
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EUR_SE_A12
EUR_SNIS_A2
EUR_UBI_A3
EUR_UBI_A5
EUR_UBI_A7
EUR_USIS_A1 CableXpress Folders:
oakman2
hardtdb2
hardtdb3
bakasma1
Bushnaq_1
byrnesk1
cockrelj1
DOFO1 #4
ellis1
murrayjc1
NolanER
McdonaldC1
TC
Wukitschn1
oakman1
steinj1
doetsmp2
ecsodijm_1
HallD_1
hillc_4
rickertg_1
trostlj_3
cappsr
cleverlm_1
hwangj1
McKnightA1
Navratil_1
PGI-1
recinosh_1

reicheje_1
sessumsmd1
volkerkd
arnettdl1
Becker1
danielsk1
DOFO1 #1
eatmonfp1
ettern_1
EUR_POSTS
fennertj_1
gallagmf
hadda_1
hawthorm1
horowitzA1
johnsontc_1
karagiaA1
keyesj2
mitchellj1
MOZUR-GENERAL
parent_1
parkerfs_2
powellpm1
profaiza1
secorpf4
shinagele_1
slettenj_1
smisthpr_1
Smithcm1
sullivah_1
turnbulld
johnsonj1
seeverjp
ACE2
AzevedoM
CarnieAA_1
conlon1
gagem2
princed_1
Prosenrl
recinosg_4
RugglesT_2
schultze_1
SeidensM
Tefft1
volkerkd1
akeredda
AndersonW
eddyc_1
ERA1
EXHEADS1
gagem1
hennnessey_nilandJ_2
hiltonrb_2
hornblmm1
kramers1
manningjl2
mcgahuab1
murraycw1
POWERSK_2
riesc2
secorpf1
snec1

snis3
tribbleC1
crouchgd_2
goldsteinj2
recinosh_3
TEKACH_5
hoaglare_3
feldman2

L034

Conklin, Maegan L

RELEASED IN PART
B5

From: Dorosin, Joshua L
Sent: Wednesday, November 30, 2005 11:45 AM
To: Bellinger, John B (L Bureau); Witten, Samuel M
Subject: FW: Crosshatch on Bondsteel

John/Sam -

FYI - the Bondsteel story has been largely deflated by a newer Le Monde story reporting that the former French KFOR Commander has publicly countered Gil Robles allegations.

Josh

-----Original Message-----
From: Rathke, Jeffrey D
Sent: Wednesday, November 30, 2005 10:51 AM
To: Dorosin, Joshua L
Subject: FW: Crosshatch on Bondsteel

Josh:

FYI.

JR

From: Rathke, Jeffrey D
Sent: Wednesday, November 30, 2005 10:51 AM
To: Volker, Kurt D; Warlick, James B (EUR); Robbins, Gary D; Bame, David J(P); English, Charles L
Subject: RE: Crosshatch on Bondsteel

Just talked to Mark Schwendler, who reported the following:

B5

JR

From: Schwendler, Mark H. [mailto:schwendm@nsc.sgov.gov]
Sent: Wednesday, November 30, 2005 10:46 AM
To: Ansley, Judith A. (Europe-NSC); Braun, Bertram D.
Cc: Rathke, Jeffrey D
Subject: Former KFOR Commander Valentin: No Secret Prison at NATO Base in Kosovo [UNCLASSIFIED, Record]

Source-Date: 11/29/2005
EUP20051129029009 Paris Le Monde (Internet Version-WWW) in French 29 Nov 05

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

[Report by Laurent Zecchini: "Kosovo: 'KFOR Denials of 'Secret Prison'"]

[FBIS Translated Text]

France's General Valentin, who commanded NATO's multinational force in Kosovo (KFOR) from October 2001 through October and 2002, countered the charges leveled by Alvaro Gil Robles, the Council of Europe's commissioner for human rights, who gave to understand that the United States' Camp Bondsteel[0] in Kosovo could be a replica of Guantanamo. In a 27 November interview with *Le Monde*, General Valentin was forthright: "I was never shocked by conditions of detention. It was a military prison like many others. Amnesty International and the Red Cross had no complaint about conditions of detention. Of course people were imprisoned there under emergency conditions, and I had emergency powers: in Kosovo there was no judiciary, no police, and no prison service. So prisoners had no attorneys. They were under extended arrest without charge."

General Valentin explained that he met with Mr Gil Robles 7 September 2002. He took the latter to the camp, but did not accompany him inside. On his return, Mr Gil Robles "told me that he was very happy with what he had seen and praised the professionalism displayed by the Americans in managing the detention center," the general recalled. At that time the center held, among others, five Algerian nationals. "They were members of an Algerian NGO accused of photographing NATO facilities. I had them arrested at the end of July, and they were released in September, for lack of evidence."

The former commander of NATO's forces in Kosovo explained that, though the detention center was under his responsibility, its management was entrusted to KFOR's US forces. "Unless I was deaf and blind, this detention center only ever held persons that KFOR was tasked with arresting and detaining, in accordance with UN Resolution 1244," he said. On his arrival, General Valentin found 75 prisoners at the detention center, and they had all left it by the time of his departure.

General Valentin nevertheless admitted that he could not say anything about the rest of this 300-hectare military camp. "All aircraft landing in Pristina were extraterritorial; they were NATO aircraft and nobody checked what they were carrying," he specified. Mr Gil Robles' point that prisoners wore "orange fatigues like those of the prisoners at Guantanamo" made General Valentin smile: "Prisoners in all US prisons wear orange fatigues. As for distinguishing a bearded Albanian from a Taliban... I think that Mr Gil Robles was misled by drawing a certain parallel," he said.

In Pristina, KFOR said that it had never been notified of any use of the Bondsteel[0] detention center beyond that relating to KFOR's mission, and the spokesman for the US troops denied that there is a "secret prison" at Bondsteel[0].

However, the controversy over secret CIA prisons in Europe is not abating: Switzerland has demanded explanations from Washington concerning the overflight of its territory by US aircraft, while German Foreign Minister Frank-Walter Steinmeier has declared himself "concerned" about reports that aircraft carrying arrested Islamists stopped over in Germany.

[Description of Source: Paris Le Monde (Internet Version-WWW) in French -- leading left-of-center daily]

From: Nuland, Victoria
Sent: Wednesday, November 30, 2005 2:06 AM
To: Volker, Kurt D; Warlick, James B (EUR); Robbins, Gary D; Bame, David J(P); Rathke, Jeffrey D
Cc: Koenig, John M
Subject: RE: Crosshatch on Bondsteel

Not surprised. Tx for efforts. Euro-papers today full of S's "promise" to get a good answer soon on "secret

detention" given during her Steinmeier mtg.

From: Volker, Kurt D [mailto:VolkerKD@state.sgov.gov]
Sent: Wednesday, November 30, 2005 3:17 AM
To: Nuland, Victoria; Warlick, James B (EUR); Robbins, Gary D; Bame, David J(P); Rathke, Jeffrey D
Cc: Koenig, John M
Subject: Crosshatch on Bondsteel

Toria - Despite best efforts by OSD and RPM, you will regrettably not get guidance on Bondsteel in time for the NAC. [redacted] B5 We hope to get the crosshatch cleared asap after that, but cannot guarantee at this point. - Kurt

L040

Conklin, Maegan L

From: Terrill, Damon A
Sent: Wednesday, December 14, 2005 11:15 AM
To: Bellinger, John B (L Bureau)
Cc: Jacobson, Linda; Harris, Robert K; Witten, Samuel M; Olson, Peter M; Dorosin, Joshua L
Subject: RE: Press Tasking to L - CoE Statements on Detainees

Importance: High

Attachments: FW: COE Inquiries

RELEASED IN PART
B5

John -

I've just spoken at length with Susan Ball (EUR/WE), who notes that you were to receive the attached momentarily via Dan Fried.

In sum - no, there has been no contact, as far as we're aware, between Dick Marty and the Department, post, or anyone else in the USG, since the delivery by Mr. Marty of his report to the COE's PACE yesterday afternoon.

At Sam's suggestion, I'm now drafting place-holder "we have nothing further at this time" guidance in response to this morning's tasking, which I'll circulate to this list momentarily.

I hope this helps.

Damon

FW: COE Inquiries

Damon A. Terrill
Attorney Adviser & Press Officer
United States Department of State
Office of the Legal Adviser
European & Eurasian Affairs (L/EUR)
2201 C Street NW
Washington, DC 20520
(202) 647-1270

-----Original Message-----
From: Bellinger, John B (L Bureau)
Sent: Wednesday, December 14, 2005 11:01 AM
To: Terrill, Damon A; Jacobson, Linda; Harris, Robert K; Witten, Samuel M; Olson, Peter M; Dorosin, Joshua L
Subject: RE: Press Tasking to L - CoE Statements on Detainees

Damon: [redacted] Do we know if he is talking to anyone in Embassy Paris or in the USG? JBB

B5

-----Original Message-----
From: Terrill, Damon A
Sent: Wednesday, December 14, 2005 9:54 AM
To: Bellinger, John B (L Bureau); Jacobson, Linda; Harris, Robert K; Witten, Samuel M; Olson, Peter M; Dorosin, Joshua L
Subject: Press Tasking to L - CoE Statements on Detainees
Importance: High

Please note the below press tasking, on which L has the lead. I have attached a copy of the COE's statement, to

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 22 JUN 2009 200706444

which the tasking refers, as well as a template for use in creating the guidance.

L / S/WCI / EUR: Comment on the Council of Europe's Committee on Legal Affairs and Human Rights report on inquiry into reports of secret prisons and rendition flights.

Best,

Damon (7-1270)

<< File: COE Statemet Secret Detention Centres in Europe.doc >> << File: 121405LPressGuidanceCoEStatement.doc >>

Damon A. Terrill
Attorney Adviser & Press Officer
United States Department of State
Office of the Legal Adviser
European & Eurasian Affairs (L/EUR)
2201 C Street NW
Washington, DC 20520
(202) 647-1270

LQ40A

Conklin, Maegan L

RELEASED IN PART
B5, B1, 1.4(B), 1.4(D)

From: Ball, Susan M (EUR)
Sent: Wednesday, December 14, 2005 11:09 AM
To: Terrill, Damon A
Subject: FW: COE Inquiries

Attachments: COE Amb Marty letter.doc; COE Amb van der Linden letter.doc; Marty letter.DOC; Van der Linden letter to S.tif

fyi

From: Allegrone, Kathleen H
Sent: Wednesday, December 14, 2005 10:59 AM
To: Sterling, Adam H; Chase, Peter H (EUR); Volker, Kurt D
Cc: EUR-WE-France-DL
Subject: COE Inquiries

For L, P and PA

COE has approached us at various levels on four separate tracks during the past month. We have responded to three of the four requests, including the initial one by Dick Marty, by politely pointing them toward, and attaching, the Secretary's December 5 statement. A draft response from S to the COE Parliamentary Assembly President is in clearance.

[redacted] B5

Details:

- COE member (Dick Marty) charged with investigating detainee etc allegations in Europe. He wrote to Amb Stapleton November 14, asking for information; Ambassador responded on December 7, forwarding to Marty the Secretary's statement.
- On December 2, President of the COE Parliamentary Assembly (Van der Linden) requested a meeting with S in Brussels. On December 7, Embassy Paris responded with a negative, based on consultations with S staff, and attached a copy of the Secretary's statement.
- On December 6, Van der Linden wrote directly to S, urging cooperation with the COE investigation, led by Marty. A draft response is in the clearance process.

[redacted] B1

COE Amb Marty letter.doc (24 K...
COE Amb van der Linden letter....
Marty letter.DOC (28 KB)
Van der Linden letter to S.tif...

UNITED STATES DEPARTMENT OF STATE
CLASSIFIED BY DEPT. OF STATE, L. HEDGBETH, DAS, A/ISS
REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: CONFIDENTIAL REASON: 1.4(B), 1.4(D)
DECLASSIFY AFTER: 14 DEC 2015
DATE/CASE ID: 01 JUL 2009 200706444

LQ45

Conklin, Maegan L

RELEASED IN PART
B5

From: Terrill, Damon A
Sent: Tuesday, November 29, 2005 4:30 PM
To: Bellinger, John B (L Bureau)
Cc: Hata, Marianne J; Olson, Peter M; Witten, Samuel M
Subject: FW: US acknowledges Europe concern on 'secret prisons'

John -

In anticipation of your meeting with Saul tomorrow, please note the below.

Best,

Damon (7-1270)

-----Original Message-----
From: Allegrone, Kathleen H
Sent: Tuesday, November 29, 2005 3:52 PM
To: Witten, Samuel M; Propp, Kenneth R; Terrill, Damon A
Cc: Graffy, Colleen P
Subject: FW: US acknowledges Europe concern on 'secret prisons'

[redacted] B5

From: OS Duty
Sent: Tuesday, November 29, 2005 3:33 PM
To: LW-EUR; LW-Mahogany; SES-O_Shift-II; LW-L; SES-O_Shift-II
Subject: US acknowledges Europe concern on 'secret prisons'

^BC-GERMANY-USA
^US acknowledges Europe concern on 'secret prisons'
By Saul Hudson
WASHINGTON, Nov 29 (Reuters) - Under German pressure, the United States acknowledged for the first time on Tuesday that allegations of secret CIA prisons in Europe have raised widespread concern in the region.
On the first visit by a German official from a coalition that took power last week, Foreign Minister Frank-Walter Steinmeier also won a personal pledge from U.S. Secretary of State Condoleezza Rice that Washington would respond to the accusations.
"The United States realizes that these are topics that are generating interest among European publics as well as parliaments and that these questions need to be responded to," State Department spokesman Sean McCormack told reporters after the diplomats' meeting.
Rice maintained the U.S. position of avoiding denying or confirming a newspaper report that secret centers to interrogate terrorism suspects were located in Eastern Europe, but Steinmeier said he was reassured Washington would be more forthcoming.
Steinmeier said that Rice, who will visit Germany on a trip to Europe next week, pledged to "provide a prompt and detailed response" to an EU request for clarification of the report.
The U.S. acknowledgment of European concerns was a departure from the Bush administration's response to the nearly four-weeks-old scandal, in which it downplayed the controversy by saying it was not a major issue with governments.
Until the eve of the meeting, U.S. officials had also given little sign they would answer growing calls in Europe for an explanation. On Monday, however, McCormack said the United States would try to respond to an EU inquiry into the charges.
The controversy has fueled public and government concern in Europe about America's tactics in its war on terrorism and U.S. handling of detainees in general.
Governments, including Germany as a vocal critic, have already complained of U.S. detainee abuse in Iraq and the detention of prisoners for years in Guantanamo Bay, Cuba.
Human rights groups, who say the United States has used legal technicalities to justify abusive policies in its war on terrorism, say incommunicado detention is illegal and often leads to torture.
Rice sought to allay such fears in her meeting with Steinmeier. McCormack said she told him U.S. actions complied

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DATE/CASE ID: 06 AUG 2009 200706444

with the laws and Constitution of the United States and with international obligations.

U.S. President George W. Bush brushed off reporters' questions on whether the allegations would be investigated. "The United States of America does not torture. And that's important for people around the world to understand," Bush said in Texas.

QUIET DIPLOMACY

Under domestic pressure to make the United States give more information about the secret-prison allegations reported by the Washington Post, Steinmeier told reporters he raised the issue.

But he also sought to stop the controversy from clouding an expected new drive to improve ties after the Bush administration clashed with its key ally over the Iraq war.

Steinmeier agreed to the unusual move of not holding a joint news conference with Rice, where questions on the scandal could have eclipsed a sense of cooperation the governments want to show on such issues as Iran and Afghanistan.

Choosing to pressure in a private meeting was in keeping with what political analysts have predicted will be a change in style from the previous German government's practice of airing its differences in public.

McCormack said the meeting was not dominated by "secret prisons" and lamented that the report had distracted from the countries' diplomacy, which will intensify with Rice's trip, as well as visit this week to Germany by her deputy, Robert Zoellick.

"Certainly I think that in the public discourse it is a topic that is taking up quite a bit of time," McCormack said.

(Additional reporting by Markus Krah in Washington and Patsy Wilson in El Paso, Texas)

^REUTERS

LQ58

Conklin, Maegan L

RELEASED IN PART
B1, 1.4(B), 1.4(D)

From: Pelofsky, Eric J
Sent: \Thursday, March 09, 2006 7:33 PM
To: Bellinger, John B (L Bureau)
Cc: Dorosin, Joshua L
Subject: (C/NODIS) [redacted] B1

Attachments: [redacted] B1

John,

Attached please find a draft note to the Secretary regarding [redacted] B1

thanks,
Eric

[redacted] B1

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CLASSIFICATION: CONFIDENTIAL
DATE/CASE ID: 06 AUG 2009 200706444

LQ59

Conklin, Maegan L

RELEASED IN PART
B1, 1.4(D)

From: Hata, Marianne J
Sent: Thursday, March 02, 2006 12:17 PM
To: Bellinger, John B (L Bureau)
Subject: ICRC report - 15 minutes

Josh and Eric would like to see you shortly at 12:45PM to discuss ICRC report related issues

-----Original Message-----
From: Bellinger, John B (L Bureau)
Sent: Thursday, March 02, 2006 8:07 AM
To: Pelofsky, Eric J
Cc: Dorosin, Joshua L
Subject: RE: ICRC report

Let's set up a mtg.

-----Original Message-----
From: Pelofsky, Eric J
Sent: Wednesday, March 01, 2006 8:55 PM
To: Bellinger, John B (L Bureau)
Cc: Dorosin, Joshua L
Subject: ICRC report

John,

[redacted] We were interested in discussing the report with you – in part, to determine what next steps, if any, we might want to take (including a note to the Secretary). B1

[redacted] We have also shared this report with S/WCI (Hodgkinson) and PRM (Santos). B1

thanks,
Eric

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REVIEW AUTHORITY: ARCHIE M BOLSTER
CLASSIFICATION: CONFIDENTIAL REASON: 1.4(D)
DECLASSIFY AFTER: 2 MAR 2016
DATE/CASE ID: 01 JUL 2009 200706444

LQ69

SECRET//NOFORN//MR

RELEASED IN PART
B5, B1, 1.4(D)

DTG: 041342Z DEC 08
FROM: AMEMBASSY MADRID
SERIAL: MADRID 001280
CLASS: C O N F I D E N T I A L SECTION 01 OF 03 MADRID 001280
SUBJECT: SPAIN: ALLEGED DETAINEE FLIGHTS ISSUE BLOWS UP IN MEDIA.

REF:

A. 07 MADRID 173.

B. MADRID 1021 Classified By: Deputy Chief of Mission Arnold

A. Chacon for reasons 1.4 (b) and (d).
1. (SBU)

TEXT: SUMMARY: A hot issue in the Spanish press since 2005, the detainee transfer flights that allegedly transited Spain from 2002 until 2006 have once again hit the headlines. The most recent flurry of reporting began November 30 when El Pais, Spain's leading newspaper, printed several stories based on internal GOS documents purporting to relate U.S. requests in 2002 for permission to use Spanish airports should an emergency arise on flights transporting terrorism detainees to Guantanamo. [redacted] END SUMMARY. The Story that Will Not Die

2. (SBU) The Guantanamo detainee flight story has long since become a press staple in Spain. The story appears on front pages (starting in El Pais) and disappears every two or three months. An investigation is underway in a Spanish court, brought by an NGO which claims illegally detained persons were transported via Spain. [redacted]

[redacted] B5

Leaks.

3. (SBU) [redacted] B5 It began November 30 when El Pais reported a document recounting a 2002 meeting between the then-Spanish MFA Director General for North America and the Embassy's Political-Military Counselor (NFI) in which the U.S. asked to use Spain as an emergency landing destination for flights moving detainees from Afghanistan to Guantanamo. The newspaper also described a second document from the same MFA official, addressed to the MOD Secretary General for Defense Policy, expressing the MFA's willingness to grant the U.S. request and suggesting use of a "discreet" military airport such as Moron. In a related article December 3, El Pais published a February 2007 letter from the Spanish President of the joint Permanent Committee which manages implementation of the ADC, asking the U.S. section to confirm that the U.S. was in compliance with Article 25.2 of the ADC with respect to U.S. military flights to and from Guantanamo (that article exempts from blanket flight clearances any plane carrying persons or cargo that would be controversial for Spain). The newspaper also published the U.S. section response, which was in the affirmative. (Note: In March 2007, the MOD decided that all flights to and from Guantanamo would require individual clearances; that is the procedure in use today). [redacted] B5

4. (SBU) [redacted] B5 FM Moratinos announced December 1 the formation of an independent investigative team including the Chiefs

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of Staff to the FM, the Secretary of State for Foreign Affairs, and the Undersecretary of State for Foreign Affairs as well as the FM's parliamentary advisor. On December 2, Moratinos confirmed press reports the investigative team has not been able to locate the original of the 2002 document described in paragraph 1 (although El Pais has printed a facsimile).

[redacted]

[redacted]

B1

6. (SBU) THE PROSECUTOR HANDLING THE RELATED COURT CASE INDICATED LAST YEAR THAT THERE WAS NO PLAN TO REQUEST INFORMATION FROM THE USG (REF A). HOWEVER, THE LATEST ROUND OF STORIES HAS INCLUDED SPECULATION THAT THE COURT MIGHT SEEK TESTIMONY FROM AZNAR AND MEMBERS OF HIS ADMINISTRATION AS WELL AS FROM U.S. EMBASSY OFFICIALS. WE HAVE RECEIVED NO OFFICIAL NOTIFICATION OF ANY SUCH REQUESTS, [redacted]

B5

B1

B5

COMMENT

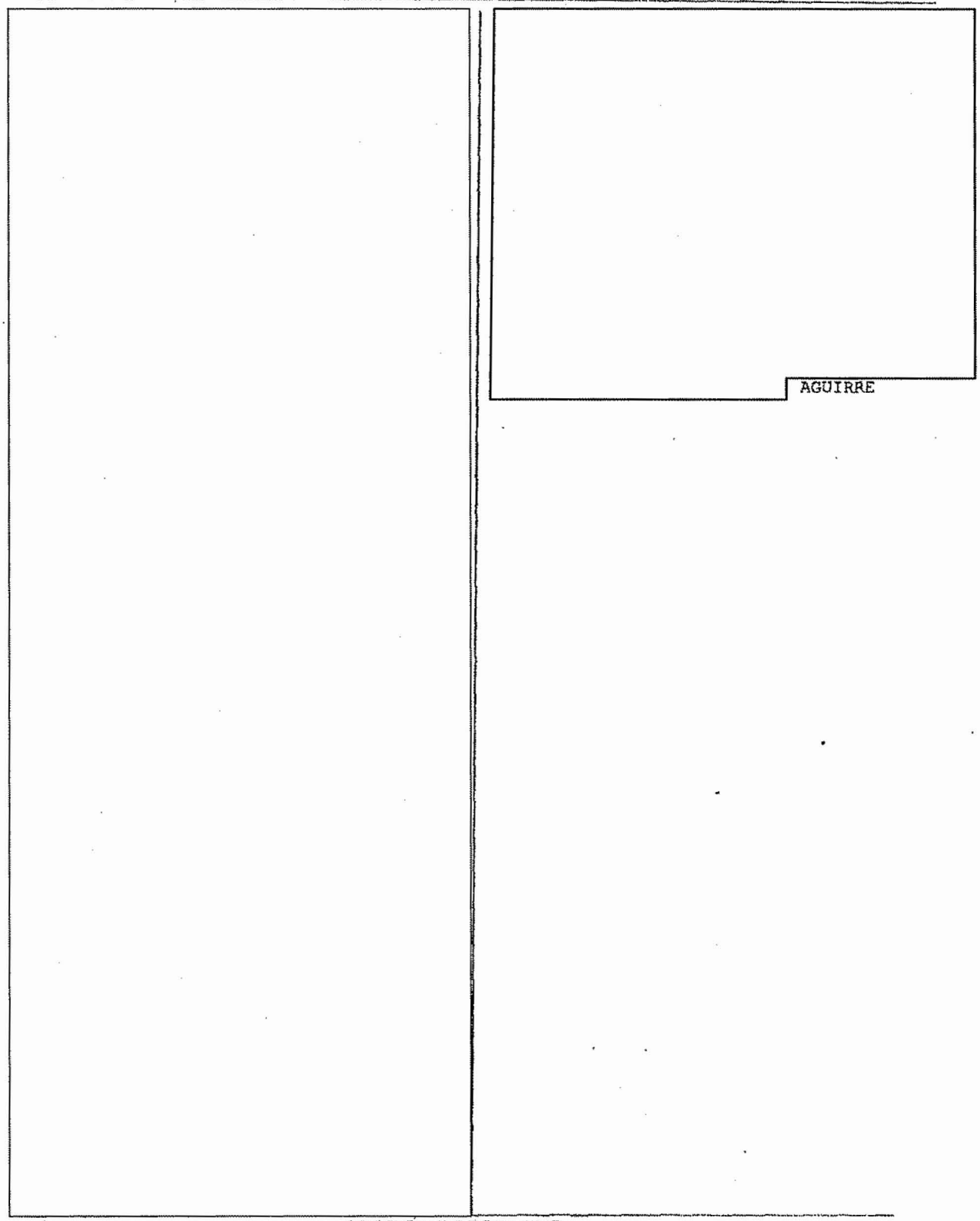
[redacted]

B1

[redacted]

L0913

SECRET//NOFORN//MR



B1

SECRET//NOFORN//MR

Conklin, Maegan L

RELEASED IN PART B5 74

From: Dolan, JoAnn
Sent: Thursday, October 21, 2004 6:08 PM
To: Dorosin, Joshua L; Deeks, Ashley S; Thessin, James H
Subject: FW: Friday 10:30 meeting/UN WG on Disappearances/ inquiry on ghost detainees - guidance needed

[redacted] B5

-----Original Message-----
From: Witten, Samuel M
Sent: Thursday, October 21, 2004 5:19 PM
To: Brancato, Gilda M (Main State); Cummings, Edward R (Main State); Dolan, JoAnn
Cc: Harris, Robert K; Dorosin, Joshua L; Hata, Marianne J; Wright, Elizabeth B
Subject: RE: Friday 10:30 meeting/UN WG on Disappearances/ inquiry on ghost detainees - guidance needed

10:30 is fine with me.

-----Original Message-----
From: Brancato, Gilda M (Main State)
Sent: Thursday, October 21, 2004 5:10 PM
To: Witten, Samuel M; Cummings, Edward R (Main State); Dolan, JoAnn
Cc: Harris, Robert K; Dorosin, Joshua L; Hata, Marianne J
Subject: FW: Friday 10:30 meeting/UN WG on Disappearances/ inquiry on ghost detainees - guidance needed

Could Sam, Ed, and JoAnn kindly meet with Will Taft, Bob and myself tomorrow morning (Friday) between 10:30 and 12:30, with 10:30 the best time for Will, on possible approaches to a UNCHR inquiry from the Working Group on Forced Disappearances about ghost detainees (reproduced below). [redacted] B5

Please confirm that 10:30 Friday works for you. Otherwise we will meet later in the morning (afternoon will not work).
Thank you all, Gilda

ANNEX
WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

General allegations

United States of America

The Working Group received information from non-governmental organizations concerning the reported non-compliance by the Government of the United States of America with provisions of the Declaration on the Protection of All persons from Enforced Disappearance.

Reports were received by the Working Group regarding secret detention centers under United States' authority in various parts of the world, in which an unknown number of persons are detained. Reports assert that there was inadequate provision of notice to families about the capture of detainees and

their conditions, legal status and rights. It is also reported that it is unclear in many circumstances which U.S. agency is ultimately responsible for the arrest or the conditions of confinement of the detainees in these facilities.

Reports further specify that the most sensitive and high-profile detainees are not being held in Guantanamo because it is believed that detainees there will eventually be monitored by the U.S. courts. It is stated that terrorism suspects are detained by the Untied States in "undisclosed locations," presumably outside the United States, with no access to the ICRC, no notification to families, no oversight of any sort of their treatment, and in most cases no acknowledgment that they are even being held. Information was provided on 13 specific alleged detainees, apprehended in places such as Pakistan, Indonesia, Thailand, Morocco, and the United Arab Emirates, who have reportedly disappeared in U.S. custody.

American authorities have also apparently refused to disclose the names of men secretly detained during the past few years within the United States. Families have not been informed on the arrested persons' locations. Reports state that some of these detainees have now been released or deported.

End text.

<< File: LEGAL-#119484-v1-WG_FD_ghost_detainees_with_L_PM_changes.DOC >>

RELEASED IN PART UNCLASSIFIED
B5

Conklin, Maegan L

LQ75

From: Brancato, Gilda M (Main State)
Sent: Friday, October 22, 2004 10:47 AM
To: Brancato, Gilda M (Main State); Witten, Samuel M; Cummings, Edward R (Main State); Dolan, JoAnn
Cc: Harris, Robert K; Dorosin, Joshua L; Hata, Marianne J; Wright, Elizabeth B; Thessin, James H; Gorove, Katherine M
Subject: RE: Friday 11:00 meeting/UN WG on Disappearances/possible options for a reply

Attachments: LEGAL-#119490-v1-Disappearances_with_DOD_insert_SR_reponse.DOC; LEGAL-#119484-v1-WG_FD_ghost_detainees_with_L_PM_changes.DOC

[redacted] B5

We remain open to other options.
See you shortly.
Thank you, Gilda

-----Original Message-----
From: Brancato, Gilda M (Main State)
Sent: Friday, October 22, 2004 10:23 AM
To: Witten, Samuel M; Cummings, Edward R (Main State); Dolan, JoAnn
Cc: Harris, Robert K; Dorosin, Joshua L; Hata, Marianne J; Wright, Elizabeth B
Subject: RE: Friday 11:00 meeting/UN WG on Disappearances/ inquiry on ghost detainees - guidance needed

Reminder to all that our meeting is at eleven today. Thank you

-----Original Message-----
From: Witten, Samuel M
Sent: Thursday, October 21, 2004 5:19 PM
To: Brancato, Gilda M (Main State); Cummings, Edward R (Main State); Dolan, JoAnn
Cc: Harris, Robert K; Dorosin, Joshua L; Hata, Marianne J; Wright, Elizabeth B
Subject: RE: Friday 10:30 meeting/UN WG on Disappearances/ inquiry on ghost detainees - guidance needed

-----Original Message-----
From: Brancato, Gilda M (Main State)
Sent: Thursday, October 21, 2004 5:10 PM
To: Witten, Samuel M; Cummings, Edward R (Main State); Dolan, JoAnn
Cc: Harris, Robert K; Dorosin, Joshua L; Hata, Marianne J
Subject: FW: Friday 10:30 meeting/UN WG on Disappearances/ inquiry on ghost detainees - guidance needed

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Please confirm that 10:30 Friday works for you. Otherwise we will meet later in the morning (afternoon will not work).

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Thank you all, Gilda

ANNEX
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American authorities have also apparently refused to disclose the names of men secretly detained during the past few years within the United States. Families have not been informed on the arrested persons' locations. Reports state that some of these detainees have now been released or deported.

End text.

LEGAL-#119490-v1
-Disappearance...

<< File: LEGAL-#119484-v1-WG_FD_ghost_detainees_with_L_PM_changes.DOC >>

LEGAL-#119484-v1
-WG_FD_ghost_d...

RELEASED IN PART
B5, B1, 1.4(D)

LQ78

Conklin, Maegan L

From: Dolan, JoAnn
Sent: Friday, July 16, 2004 6:56 PM
To: Taft IV, William H; Thessin, James H; Cummings, Edward R (Main State)
Cc: Solomon, Steven A; Cummings, Edward X - Geneva; Dorosin, Joshua L
Subject: RE: ICRC

Will/Jim/Ed: Rich Greene called to report visit this afternoon by ICRC Washington Delegation (Geoffrey Loane and Finn Ruda) to PRM. They indicated that they would be coming around to see L again soon, basically to report developments in their first month.

[redacted] B1

I saw a press transcript on this new office earlier today which I will forward to addressees as well. The Secretary signed an order today creating the office to serve as a single point of focus for detainee affairs within DOD, including dealings with ICRC. [redacted] B5

-----Original Message-----
From: Dolan, JoAnn
Sent: Thursday, July 15, 2004 7:20 PM
To: Taft IV, William H
Subject: FW: ICRC

[redacted] B5

-----Original Message-----
From: Malionek, Tom V
Sent: Thursday, July 15, 2004 1:28 PM
To: Allder, Lois L; Blanck Jr, John I; Cook, Daphne W; Dalton, Robert E; Dennis, Michael J; Dolan, JoAnn; Haines, Avril D; Ingber, Rebecca M; Legal-L-HRR-dl; Peay, T Michael
Subject: ICRC

UNCLASSIFIED per E.O. 12958

Baltimore Sun, July 15, 2004

Pentagon Says It's Hiding No One From Red Cross

WASHINGTON - The Pentagon denied yesterday that it is hiding any imprisoned terrorism suspects from the International Committee of the Red Cross. A Defense Department spokesman would not comment on whether other U.S. agencies might be doing so.

"I can say that ICRC has access to all detainee operations under our control," said Larry Di Rita, chief spokesman for Defense Secretary Donald H. Rumsfeld. "Beyond that, I'm just not prepared to discuss it."

The CIA has declined to comment on whether it might be holding terrorism suspects at foreign locations. On

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DECLASSIFY AFTER: 16 JUL 2014
DATE/CASE ID: 06 AUG 2009 200706444

Tuesday, Antonella Notari, spokeswoman for the Switzerland-based ICRC, said terrorism suspects reported by the FBI as captured have never turned up in detention centers known to the Red Cross, and the United States has failed to reply to Red Cross demands for a list of all detainees.

Tom Malionek
ANALYST FOR Boundaries - Boundary Waters - Conservation - Environment - Fisheries - Human Rights - Maritime Matters
OFFICE OF THE ASSISTANT LEGAL ADVISER FOR TREATY AFFAIRS (L/T)
5420 HST
PHONE 202-647-1336 (direct)
FAX 202-736-7541

Q detainees

LQ104

Memo Lets CIA Take Detainees Out of Iraq

Practice Is Called Serious Breach of Geneva Conventions

By Dana Priest
Washington Post Staff Writer
Sunday, October 24, 2004; Page A01

RELEASED IN PART
B5

At the request of the CIA, the Justice Department drafted a confidential memo that authorizes the agency to transfer detainees out of Iraq for interrogation -- a practice that international legal specialists say contravenes the Geneva Conventions.

One intelligence official familiar with the operation said the CIA has used the March draft memo as legal support for secretly transporting as many as a dozen detainees out of Iraq in the last six months. The agency has concealed the detainees from the International Committee of the Red Cross and other authorities, the official said.

The draft opinion, written by the Justice Department's Office of Legal Counsel and dated March 19, 2004, refers to both Iraqi citizens and foreigners in Iraq, who the memo says are protected by the treaty. It permits the CIA to take Iraqis out of the country to be interrogated for a "brief but not indefinite period." It also says the CIA can permanently remove persons deemed to be "illegal aliens" under "local immigration law."

Some specialists in international law say the opinion amounts to a reinterpretation of one of the most basic rights of Article 49 of the Fourth Geneva Convention, which protects civilians during wartime and occupation, including insurgents who were not part of Iraq's military.

The treaty prohibits the "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory . . . regardless of their motive."

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The 1949 treaty notes that a violation of this particular provision constitutes a "grave breach" of the accord, and thus a "war crime" under U.S. federal law, according to a footnote in the Justice Department draft. "For these reasons," the footnote reads, "we recommend that any contemplated relocations of 'protected persons' from Iraq to facilitate interrogation be carefully evaluated for compliance with Article 49 on a case by case basis." It says that even persons removed from Iraq retain the treaty's protections, which would include humane treatment and access to international monitors.

During the war in Afghanistan, the administration ruled that al Qaeda fighters were not considered "protected persons" under the convention. Many of them were transferred out of the country to the naval base in Guantanamo Bay, Cuba, and elsewhere for interrogations. By contrast, the U.S. government deems former members of Saddam Hussein's Baath Party and military, as well as insurgents and other civilians in Iraq, to be protected by the Geneva Conventions.

International law experts contacted for this article described the legal reasoning contained in the Justice Department memo as unconventional and disturbing.

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"The overall thrust of the Convention is to keep from moving people out of the country and out of the protection of the Convention," said former senior military attorney Scott Silliman, executive director of Duke University's Center on Law, Ethics and National Security. "The memorandum seeks to create a legal regime justifying conduct that the international community clearly considers in violation of international law and the Convention." Silliman reviewed the document at The Post's request.

The CIA, Justice Department and the author of the draft opinion, Jack L. Goldsmith, former director of the Office of Legal Counsel, declined to comment for this article.

CIA officials have not disclosed the identities or locations of its Iraq detainees to congressional oversight committees, the Defense Department or CIA investigators who are reviewing detention policy, according to two informed U.S. government officials and a confidential e-mail on the subject shown to The Washington Post.

White House officials disputed the notion that Goldsmith's interpretation of the treaty was unusual, although they did not explain why. "The Geneva Conventions are applicable to the conflict in Iraq, and our policy is to comply with the Geneva Conventions," White House spokesman Sean McCormick said.

The Office of Legal Counsel also wrote the Aug. 1, 2002, memo on torture that advised the CIA and White House that torturing al Qaeda terrorists in captivity abroad "may be justified," and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in the war on terrorism. President Bush's aides repudiated that memo once it became public this June.

The Office of Legal Counsel writes legal opinions considered binding on federal agencies and departments. The March 19 document obtained by The Post is stamped "draft" and was not finalized, said one U.S. official involved in the legal deliberations. However, the memo was sent to the general counsels at the National Security Council, the CIA and the departments of State and Defense.

"The memo was a green light," an intelligence official said. "The CIA used the memo to remove other people from Iraq."

Since the Sept. 11, 2001, attacks, the CIA has used broad authority granted in a series of legal opinions and guidance from the Office of Legal Counsel and its own general counsel's office to transfer, interrogate and detain individuals suspected of terrorist activities at a series of undisclosed locations around the world.

According to current and former agency officials, the CIA has a rendition policy that has permitted the agency to transfer an unknown number of suspected terrorists captured in one country into the hands of security services in other countries whose record of human rights abuse is well documented. These individuals, as well as those at CIA detention facilities, have no access to any recognized legal process or rights.

The scandal at Abu Ghraib, and the investigations and congressional hearings that followed, forced the disclosure of the Pentagon's behind-closed-doors debate and classified rules for detentions and interrogations at Guantanamo Bay and in Afghanistan and Iraq. Senior defense leaders have repeatedly been called to explain and defend their policies before Congress. But the CIA's policies and practices remain shrouded in secrecy.

The only public account of CIA detainee treatment comes from soldier testimony and Defense Department investigations of military conduct. For instance, Army Maj. Gen. Antonio M. Taguba's

report on Abu Ghraib criticized the CIA practice of maintaining "ghost detainees" -- prisoners who were not officially registered and were moved around inside the prison to hide them from Red Cross teams. Taguba called the practice "deceptive, contrary to Army doctrine and in violation of international law."

Gen. Paul J. Kern, who oversaw another Army inquiry, told Congress that the number of CIA ghost detainees "is in the dozens, to perhaps up to 100."

The March 19, 2004, Justice Department memo by Goldsmith deals with a previously unknown class of people -- those removed from Iraq.

It is not clear why the CIA would feel the need to remove detainees from Iraq for interrogation. A U.S. government official who has been briefed on the CIA's detention practices said some detainees are probably taken to other countries because "that's where the agency has the people, expertise and interrogation facilities, where their people and programs are in place."

The origin of the Justice Department memo is directly related to the only publicly acknowledged ghost detainee, Hiwa Abdul Rahman Rashul, nicknamed "Triple X" by CIA and military officials.

Rashul, a suspected member of the Iraqi Al-Ansar terrorist group, was captured by Kurdish soldiers in June or July of 2003 and turned over to the CIA, which whisked him to Afghanistan for interrogation.

In October, White House counsel Alberto R. Gonzales asked the Office of Legal Counsel to write an opinion on "protected persons" in Iraq and rule on the status of Rashul, according to another U.S. government official involved in the deliberations.

Goldsmith, then head of the office, ruled that Rashul was a "protected person" under the Fourth Geneva Convention and therefore had to be brought back to Iraq, several intelligence and defense officials said.

The CIA was not happy with the decision, according to two intelligence officials. It promptly brought Rashul back and suspended any other transfers out of the country.

At the same time, when transferring Rashul back to Iraq, then-CIA Director George J. Tenet asked Defense Secretary Donald H. Rumsfeld not to give Rashul a prisoner number and to hide him from International Red Cross officials, according to an account provided by Rumsfeld during a June 17 Pentagon news conference. Rumsfeld complied.

As a "ghost detainee," Rashul became lost in the prison system for seven months.

Rumsfeld did not fully explain the reason he had complied with Tenet's request or under what legal authority he could have kept Rashul hidden for so long. "We know from our knowledge that [Tenet] has the authority to do this," he said.

Rashul, defense and intelligence officials noted, had not once been interrogated since he was returned to Iraq. His current status is unknown.

In the one-page October 2003 interim ruling that directed Rashul's return, Goldsmith also created a new category of persons in Iraq whom he said did not qualify for protection under the Geneva Conventions. They are non-Iraqis who are not members of the former Baath Party and who went to Iraq after the invasion.

After Goldsmith's ruling, the CIA and Gonzales asked the Office of Legal Counsel for a more complete legal opinion on "protected persons" in Iraq and on the legality of transferring people out of Iraq for interrogation. "That case started the CIA yammering to Justice to get a better memo," said one intelligence officer familiar with the interagency discussion.

Michael Byers, a professor and international law expert at the University of British Columbia, said that creating a legal justification for removing protected persons from Iraq "is extraordinarily disturbing."

"What they are doing is interpreting an exception into an all-encompassing right, in one of the most fundamental treaties in history," Byers said. The Geneva Convention "is as close as you get to protecting human rights in times of chaos. There's no ambiguity here."

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Baumert, Kevin A

LB204

From: Hill, Steven R
Sent: Wednesday, August 29, 2007 5:41 PM
To: Baumert, Kevin A
Subject: RE: ICCPR One year follow-up

RELEASED IN PART
B5, B6

[redacted] The obligation to prevent cruel, inhuman, or degrading treatment or punishment is in Article 16 of the Convention and in similar provisions in the law of armed conflict. B5

http://www.usmission.ch/Press2006/0505BellingerOpenCAT.html

From: Baumert, Kevin A
Sent: Wednesday, August 29, 2007 4:50 PM
To: Padmanabhan, Vijay M
Cc: Deeks, Ashley S; Harris, Robert K; Hill, Steven R
Subject: FW: ICCPR One year follow-up

[redacted] B5

Thanks,
Kevin

-----Original Message-----
From: Robert Harris [redacted] B6
Sent: Monday, August 20, 2007 2:50 PM
To: Baumert, Kevin A; [redacted] B6
Cc: Hill, Stephen A (Baghdad); Harris, Robert K; [redacted] B6
[redacted] Padmanabhan, Vijay M; Nixon, Gina M B6
Subject: ICCPR One year follow-up

Kevin,

[redacted] B5

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B5

Thanks to all.

Bob

B1

UNCLASSIFIED

Conklin, Maegan L

L05

RELEASED IN PART
B1, 1.4(B), 1.4(D), B5, B6

From: Garber, Judith G
Sent: Wednesday, August 27, 2008 1:21 PM
To: 'Wilson, Damon M. (Europe-NSC)'; Fried, Daniel; Sterling, Adam H. (Europe-NSC)
Cc: Bellinger, John B (L Bureau); Ansley, Judith
Subject: RE: [redacted] B1

Per Embassy Warsaw, Radio Zet reported the information last Friday that the Procuracy had opened an investigation based on information they claimed came from a proseutor in the Giertych case. Others picked up that report and ran with it.

From: Wilson, Damon M. (Europe-NSC) [mailto:[redacted] B6
Sent: Wednesday, August 27, 2008 8:27 AM
To: Fried, Daniel; Sterling, Adam H. (Europe-NSC)
Cc: Bellinger, John B (L Bureau); Garber, Judith G; Ansley, Judith
Subject: [redacted] B1

[redacted] B5

From: Fried, Daniel [mailto:FriedD@state.sgov.gov]
Sent: Wednesday, August 27, 2008 8:05 AM
To: Wilson, Damon M. (Europe-NSC); Sterling, Adam H. (Europe-NSC)
Cc: Bellinger, John B (L Bureau); Garber, Judith G
Subject: [redacted] B1

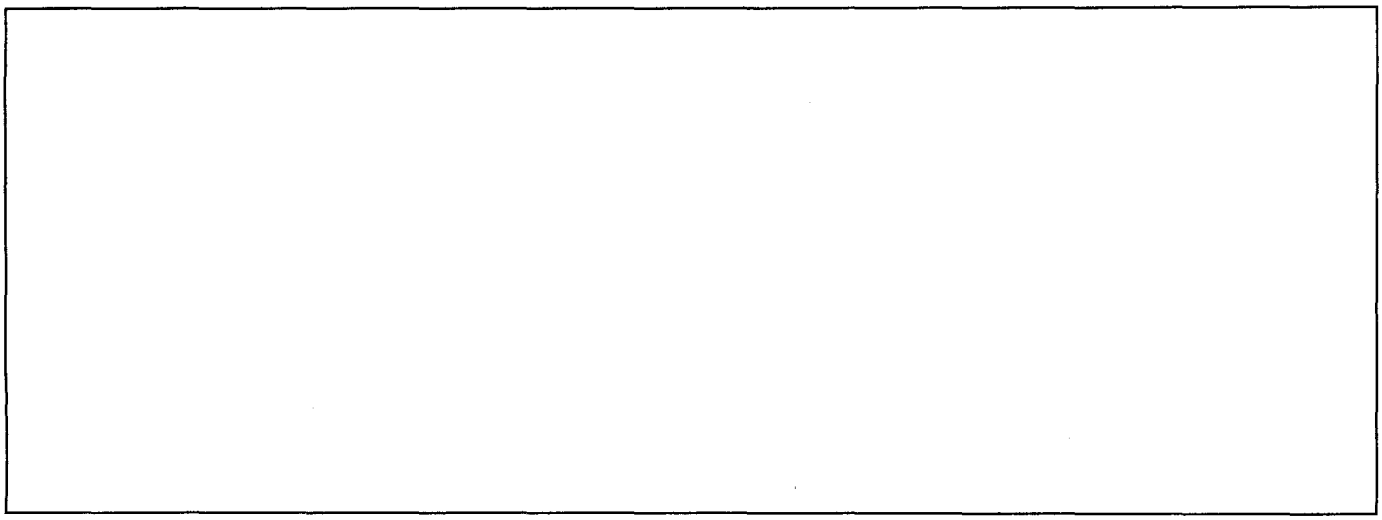
[redacted] B1, B5

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
CLASSIFICATION: SECRET REASON: 1.4(B), 1.4(D)
DECLASSIFY AFTER: 27 AUG 2028
DATE/CASE ID: 24 AUG 2009 200706444

UNCLASSIFIED

B1

B1



Conklin, Maegan L

LQ42

From: Witten, Samuel M
Sent: Wednesday, November 30, 2005 1:22 PM
To: Bellinger, John B (L Bureau); Dorosin, Joshua L
Subject: FW: Transport of prisoners by CIA is not a crime - Portuguese paper

RELEASED IN PART
B5

-----Original Message-----
From: Allegrone, Kathleen H
Sent: Wednesday, November 30, 2005 1:20 PM
To: Witten, Samuel M; Propp, Kenneth R; Graffy, Colleen P
Cc: Volker, Kurt D
Subject: FW: Transport of prisoners by CIA is not a crime - Portuguese paper

B5

[redacted]

From: Vidugiris, Vaida
Sent: Monday, November 28, 2005 3:35 PM
To: EUR-WE-DL
Subject: Transport of prisoners by CIA is not a crime - Portuguese paper

Source-Date: 11/28/2005

Transport of prisoners by CIA is not a crime - Portuguese paper

EUP20051128950037 Lisbon Diario de Noticias (Internet Version-WWW) in Portuguese 0000 GMT 28 Nov 05

[FBIS Translated Text]
Transport of prisoners by CIA is not a crime - Portuguese paper

Text of article by Luis Delgado: "The CIA flights" by Portuguese newspaper Diario de Noticias website on 28 November

Due to a shortage of topics, some politicians, parties and commentators are very concerned about CIA flights coming through Portugal, and in some cases about their landing at national airports, presumably for refuelling. There are pictures, videos and an endless number of details making the story interesting. It is that time of year.

Can anyone imagine, even roughly, how many planes fly every day, at all hours, chartered by various secret services (and we are not speaking about secret polices and similar) throughout the skies, backwards and forwards? Certainly no small number - and perhaps the CIA do what the British, French, German and others' secret services do. Has anyone by any chance seen those planes transporting prisoners or members of Al-Qa'idah or other terrorist organizations. And even if they do transport them, is that a crime?

The CIA, for now, is an intelligence agency of the most democratic of all countries, where the accountability of its institutions, open or secret, is checked every day with a fine toothcomb by dozes of independent groups such as Congress, commissions and a media with unrivalled power anywhere else in the world.

It is public knowledge that many terrorist group prisoners are taken to the Guantanamo base in Cuba. It is said - but this is a different matter from the CIA flights - that they are tortured and maltreated but many opposition congressmen have visited the base and none of this was confirmed.

It is perhaps a good idea to have broader investigations in this area. But what worries some Portuguese parties, however, is whether CIA chartered planes flew over or landed in Portugal. So what? Could it be that our narrow-

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mindedness still allows us to be under the illusion that there is no constant toing and froing of civil and military planes carrying dozens of things, including agents and not prisoners every day of the year? Do the Portuguese think that there are no other means and routes for this toing and froing? For crying out loud.

[Description of Source: Lisbon Diario de Noticias (Internet Version-WWW) in Portuguese -- center-right national daily newspaper; privately owned, part of Lusomundo group; readership: 84,000]

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Unclassified

L2018

Conklin, Maegan L

RELEASED IN PART
B1, 1.4(B), 1.4(D)

From: Aidekman, David S
Sent: Wednesday, January 25, 2006 2:49 PM
To: Hofmann, Karl W(Paris)
Cc: Bellinger, John B (L Bureau)(L-FO); Rosenblatt, Josiah (Paris)(Paris)
Subject: [redacted] B1

Karl -- thanks for your email and good to hear from you.

I just had the first opportunity to speak with Philip today as he landed in Zurich from China. [redacted] B1

Philip is on the phone now with Kurt Volker here and I hope to learn more.

If you need to speak with Philip directly, he is reachable by phone in Davos through State Ops and also tells me that he is receiving unclassified emails on his blackberry.

-Dave

From: Hofmann, Karl W
Sent: Wednesday, January 25, 2006 9:23 AM
To: Zelikow, Philip D(C)
Cc: Aidekman, David S(C); Bellinger, John B (L Bureau); Rosenblatt, Josiah (Paris)
Subject: [redacted] B1

[redacted] B1

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DECLASSIFY AFTER: 25 JAN 2021
DATE/CASE ID: 24 AUG 2009 200706444

RELEASED IN PART
B1, 1.4(B), 1.4(D) L 09

Conklin, Maegan L

From: Volker, Kurt D
Sent: Wednesday, January 25, 2006 8:30 PM
To: Bellinger, John B (L Bureau); Hofmann, Karl W; Zelikow, Philip D(C)
Cc: Aidekman, David S(C); Rosenblatt, Josiah (Paris); Johnson, David T; Skinner, Charles B
Subject: [redacted] B1

[redacted] B1

From: Bellinger, John B (L Bureau)
Sent: Wednesday, January 25, 2006 8:01 PM
To: Hofmann, Karl W; Zelikow, Philip D(C)
Cc: Aidekman, David S(C); Rosenblatt, Josiah (Paris); Volker, Kurt D
Subject: [redacted] B1

Thanks Karl. Philip is in Davos. I think we are hoping to move the meeting up to early afternoon on Monday, January 30. Philip and I will fly over with S and Dan Fried will join us. Kurt is coordinating logistics.

-----Original Message-----
From: Hofmann, Karl W
Sent: Wednesday, January 25, 2006 9:23 AM
To: Zelikow, Philip D(C)
Cc: Aidekman, David S(C); Bellinger, John B (L Bureau); Rosenblatt, Josiah (Paris)
Subject: [redacted] B1

[redacted] B1

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REVIEW AUTHORITY: JOHN S BLODGETT
CLASSIFICATION: CONFIDENTIAL REASON: 1.4(B), 1.4(D)
DECLASSIFY AFTER: 25 JAN 2021
DATE/CASE ID: 24 AUG 2009 200706444

L033

Conklin, Maegan L

RELEASED IN PART
B5, B1, 1.4(B), 1.4(D)

From: Olson, Peter M
Sent: Tuesday, January 24, 2006 9:58 AM
To: Dorosin, Joshua L
Cc: Bellinger, John B (L Bureau)
Subject: FW: Bellinger mtg w/ Danish legal adviser Taksoe-Jensen

Some Denmark-specific detainee issues.

-----Original Message-----
From: Maher, John O
Sent: Monday, January 23, 2006 6:00 PM
To: Olson, Peter M; Lawton, Daniel J
Cc: Middleton, Victoria S
Subject: RE: Bellinger mtg w/ Danish legal adviser Taksoe-Jensen

Peter,

[redacted] The issue has died down somewhat, but not gone away, since the Secretary addressed it a few weeks back. B5

[redacted] B1

A Danish soldier was recently convicted of abusing Iraqi prisoners during interrogations, but got a suspended sentence because the court said her higher commanders were largely to blame for not giving clearer instructions. [redacted] it was along the lines of withholding water and blankets. B5

Dan Lawton of Embassy Copenhagen might have more to add.

John

From: Middleton, Victoria S
Sent: Monday, January 23, 2006 5:55 PM
To: Olson, Peter M; Maher, John O
Subject: RE: Bellinger mtg w/ Danish legal adviser Taksoe-Jensen

[redacted] B5, B1

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REVIEW AUTHORITY: JOHN S BLODGETT
CLASSIFICATION: CONFIDENTIAL REASON: 1.4(B), 1.4(D)
DECLASSIFY AFTER: 24 JAN 2016
DATE/CASE ID: 24 AUG 2009 200706444

From: Olson, Peter M
Sent: Monday, January 23, 2006 5:19 PM
To: Maher, John O
Cc: Middleton, Victoria S
Subject: Bellinger mtg w/ Danish legal adviser Taksoe-Jensen

John:

John Bellinger is meeting with T-J on Friday, Feb. 3, then having lunch with him. [redacted] FYI in the past year he has met three or four times with T-J, here and in Europe. B5

Thanks, Peter

L 0935

LQ83

Conklin, Maegan L

From: Dolan, JoAnn
Sent: Tuesday, March 08, 2005 8:34 PM
To: Filippatos, James
Cc: Dorosin, Joshua L; Deeks, Ashley S; Thessin, James H
Subject: FW: USNWR 6/26/04 Iraq's invisible man

RELEASED IN PART
B5

B5

6/28/04

Nation & World
Iraq's invisible man
A 'ghost' inmate's strange life behind bars
By Edward T. Pound

At a briefing last week, Defense Secretary Donald Rumsfeld was asked if there was a plan to hide a Middle Eastern terrorist, held secretly in a military jail in Iraq, from international Red Cross inspectors. Standing on the podium, he responded: "Not on my part." But a classified order, issued at his behest by the top military commander in Iraq, tells a different story: "Notification of the presence and or status of the detainee to the International Committee of the Red Cross, or any international or national aid organization, is prohibited pending further guidance."

The Pentagon and the CIA are the major players in the affair of the suspected terrorist known as "Triple X." Rumsfeld said he ordered that the man be held in secret, based on a request from CIA Director George Tenet. Triple X has been held in a guarded room at the High Value Detainee facility near Baghdad since November. In that time, his name was never entered in the official roster of detainees, meaning the Red Cross wouldn't have known he was there. The Geneva Conventions require the United States and other countries to give the Red Cross access to detainees, although restrictions are permissible for military reasons. Officials say the military is in the process of recording Triple X in the books. Rumsfeld says the prisoner "has been treated humanely."

The practice of hiding prisoners--so-called ghost detainees--was sharply criticized by Maj. Gen. Antonio Taguba in a recent report detailing Army abuses of prisoners at the Abu Ghraib prison near Baghdad. He described it as "deceptive, contrary to Army doctrine, and in violation of international law."

"No altar boy." Triple X's status as a ghost was first disclosed by U.S. News. Pentagon and intelligence officials identified him as a high-ranking member of Ansar al-Islam, an Iraqi terrorist group with links to Abu Musab Zarqawi, who is believed to be responsible for beheading American Nicholas Berg and for attacks on coalition forces.

The CIA has declined to say why Tenet wanted Triple X kept off the books. An American

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intelligence official says the man--identified by other sources as Hiwa Abdul Rahman Rashul--was arrested by the Kurdish military last summer. For months, the CIA interrogated Rashul at an undisclosed location, officials say, and he provided information on Ansar al-Islam's structure and training. "This guy was no altar boy," the intelligence official says. The man, he adds, was involved in planning terrorist attacks in Iraq and elsewhere.

Rashul was returned to Iraq on October 29. On November 18, Lt. Gen. Ricardo Sanchez, the top U.S. commander in Iraq, issued a classified order directing guards with the 800th Military Police Brigade to hide Rashul. The order was coded "Flash Red," meaning, says one military source, that it was "hot." It says that Sanchez's command "accepts custody and detains Hiwa Abdul Rahman Rashul, a high-ranking Ansar al-Islam member." The order required extraordinary secrecy. Rashul's name could not be disclosed to the Red Cross or to a foreign government. It prohibited the Army from entering Rashul's name in any electronic prisoner database.

Other requirements of the order include:

Rashul will "remain segregated and isolated from the remainder of the detainee population. Under no circumstances will his presence be made known to the detainee population . . . "

"Only military personnel and debriefers will have access to the detainee. . . . Knowledge of the presence of this detainee will be strictly limited on a need-to-know basis."

"Any reports from interrogations or debriefings will contain only the mininum amount of source information . . . . No source reference will be made to identify [Rashul's] status, membership in Ansar al-Islam, or other terrorist group."

Despite all this secrecy, Rashul has been interrogated only once--and then only briefly, a Pentagon official says. Even though her brigade was responsible for holding the man, Brig. Gen. Janis Karpinski says, she's puzzled by the way he was handled. "It was bizarre," she says. "He had been there a long time, and nobody was coming to see him, interrogate him." At one point, she asked Sanchez's legal staff for guidance "on what to do with him." But when her deployment ended and she returned to the States in February, Karpinski says, "he was still sitting there."