

UNCLASSIFIED



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,

A handwritten signature in black ink, appearing to read 'Kevin Edward Moley', written over a printed name and title.

Kevin Edward Moley
Ambassador

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

UNCLASSIFIED

L0356

UNCLASSIFIED



THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

RELEASED IN FULL

October 21, 2005

LA2

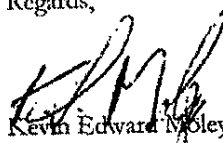
Ms. Christine Chanet
Chairman
Human Rights Committee
Office of the High Commissioner
for Human Rights
Palais Wilson
CH-1211 Geneva 10

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 130 of the U.S. report, I am enclosing, 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 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
DATE/CASE ID: 30 JUL 2009 200706444

UNCLASSIFIED

L0357

UNITED
NATIONS

A



General Assembly

Distr.
GENERAL

LA17

A/HRC/1/G/1
27 June 2006

Original: ENGLISH

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

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

UNCLASSIFIED

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

UNCLASSIFIED

- 3 -

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

UNCLASSIFIED

UNCLASSIFIED

- 4 -

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."

UNCLASSIFIED

UNCLASSIFIED

- 5 -

- 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.

UNCLASSIFIED

UNCLASSIFIED

- 6 -

- 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.

UNCLASSIFIED

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.

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.

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

LAZ4

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 deplures 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.

UNCLASSIFIED

UNCLASSIFIED

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.

UNCLASSIFIED

UNCLASSIFIED

HRC submission
on website

RELEASED IN FULL

L226

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.

UNCLASSIFIED

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."

UNCLASSIFIED

UNCLASSIFIED

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.**

UNCLASSIFIED

UNCLASSIFIED

Doc 26771

Drafted: L/HRR – Gilda Brancato

Cleared: IO/RHS – Thomas Johnson

DRL/MLA – Lynn Sicade

Mission Geneva -- Jeffrey Kovar

UNCLASSIFIED

L429

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

UNCLASSIFIED

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,

UNCLASSIFIED

UNCLASSIFIED

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 reserve 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.

UNCLASSIFIED

RELEASED IN FULL

L432

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

UNCLASSIFIED

RELEASED IN FULL



U.S. DEPARTMENT of STATE

L434

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.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

<http://www.state.gov/g/drl/rls/100736.htm>

UNCLASSIFIED

12/2/2008

UNCLASSIFIED

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

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 17 allegations 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 a correspondence 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.

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.

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 harassment 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 Danziger 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"

[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. 2800.

[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/ICCPRAAdvanceQ&A.pdf> (July 17, 2006).

UNCLASSIFIED

[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.

 [BACK TO TOP](#)

Published by the U.S. Department of State Website at <http://www.state.gov> maintained by the Bureau of Public Affairs.

RELEASED IN FULL



U.S. DEPARTMENT of STATE

LA35

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

<http://www.state.gov/g/drl/rls/68558.htm>

UNCLASSIFIED

12/2/2008

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.

 [BACK TO TOP](#)

Published by the U.S. Department of State Website at <http://www.state.gov> maintained by the Bureau of Public Affairs.

RELEASED IN FULL



U.S. DEPARTMENT of STATE

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

L436

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

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

<http://www.state.gov/g/drl/rls/68557.htm>

UNCLASSIFIED

12/2/2008

L0389

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.

[1] U.N. Doc. E/CN.4/1984, March 9, 1984.

 [BACK TO TOP](#)

Published by the U.S. Department of State Website at <http://www.state.gov> maintained by the Bureau of Public Affairs.

UNCLASSIFIED RELEASED IN FULL



U.S. DEPARTMENT of STATE

L437

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 intend to come back and look forward to hearing again from the Committee after we make our presentation.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

<http://www.state.gov/g/drl/rls/68562.htm>

UNCLASSIFIED

12/2/2008

UNCLASSIFIED

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.

UNCLASSIFIED

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

UNCLASSIFIED

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.

~~UNCLASSIFIED~~

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.

UNCLASSIFIED

- [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).

 [BACK TO TOP](#)

Published by the U.S. Department of State Website at <http://www.state.gov> maintained by the Bureau of Public Affairs.

UNCLASSIFIED RELEASED IN FULL



U.S. DEPARTMENT of STATE

L438

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

UNPUBLISHED BY THE U.S. DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 30 JUL 2009 200706444

<http://www.state.gov/g/drl/rls/68561.htm>

UNCLASSIFIED

12/2/2008

L0403

UNCLASSIFIED

- 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

UNCLASSIFIED

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 Qaeda 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.

UNCLASSIFIED

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

UNCLASSIFIED

- "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.

UNCLASSIFIED

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.

UNCLASSIFIED

[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

UNCLASSIFIED

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.

UNCLASSIFIED

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.

UNCLASSIFIED

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.

UNCLASSIFIED

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

UNCLASSIFIED

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

UNCLASSIFIED

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.

 [BACK TO TOP](#)

Published by the U.S. Department of State Website at <http://www.state.gov> maintained by the Bureau of Public Affairs.

L441A

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 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.

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL L442

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



Waxman



LEGAL-#10927-v2- LEGAL-#10992-v1-
CAT_ANNEX__FIN... CAT_Report_-_...



UNCLASSIFIED

RELEASED IN FULL

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

UNCLASSIFIED

2

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.

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

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, DOJ From: Gilda Brancato
Fax: 514-0080 Fax: (202)736-7028
Phone: 514-1436 Phone: (202) 647-4065 or x 72773
Pages: 7 Date: 1/10/05

SUBJECT: Forced Disappearances Draft Treat
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.

UNCLASSIFIED

RELEASED IN FULL

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

703 614-9789

To: Jim Burger DOD
 Fax: Brad Weymann NSE
 Phone: 456-9110
 Pages:

From: Gilda Brancato
 Fax: (202)736-7028
 Phone: (202) 647-4065 or x 72773
 Date:

SUBJECT: Reporting Cable on October Session
 COMMENTS: Forced Disappearances

Just received from Geneva.
 The upcoming session in Geneva
 begins Jan 31, 2005.
 There is no revised fax yet (if at all)

Gilda Brancato

*** SEND SUCCESSFUL ***

Job number	:	622
Status	:	OK
Pages sent	:	006
End time	:	Jan-07 06:56pm
Start time	:	Jan-07 06:55pm
Document pages	:	006
To	:	94569110
Date	:	Jan-07 06:55pm
Job number	:	622

Name
Tel line
Time

Jan-07-2005 06:56pm

LA4464

Confirmation Report - Memory Send

UNITED STATES DEPARTMENT OF STATE
 REVIEW AUTHORITY: ARCHIE M BOLSTER
 DATE/CASE ID: 30 JUL 2009 200706444

UNCLASSIFIED

DEPARTMENT OF STATE
OFFICE OF THE LEGAL ADVISER
HUMAN RIGHTS AND REFUGEES

LA46B

L/HRR, ROOM 3422
2201 C STREET, N.W.
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

RELEASED IN FULL

L446D

**International Instrument
for the Protection of all Persons
from Enforced Disappearances**

**Presidency proposal
11 February 2005**

UNCLASSIFIED

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.

UNCLASSIFIED

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.

UNCLASSIFIED

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.

UNCLASSIFIED

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~~

UNCLASSIFIED

~~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

UNCLASSIFIED

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.

UNCLASSIFIED

7

UNCLASSIFIED

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:

UNCLASSIFIED

- 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**

UNCLASSIFIED

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 ;

UNCLASSIFIED

- 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 obtain~~ **reparation and has an**

UNCLASSIFIED

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.**

L/CN.4/2007/WG.22/MISC.10/REV.1

UNCLASSIFIED

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)

UNCLASSIFIED

UNCLASSIFIED

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)

UNCLASSIFIED

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],
 - ~~e) 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)

UNCLASSIFIED

UNCLASSIFIED

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 20th instrument of ratification or accession.
3. For each State ratifying [this instrument] or acceding to it after the deposit of the 20th 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)

UNCLASSIFIED

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.

UNCLASSIFIED

RELEASED IN FULL

Opening Statement

L44BA

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

UNCLASSIFIED

2

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 in the Covenant extremely helpful as we consider how to redouble our efforts to advance and protect human rights within the United States.

2

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

4

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.

4

UNCLASSIFIED

UNCLASSIFIED

5

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

5

UNCLASSIFIED

UNCLASSIFIED

6

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

6

UNCLASSIFIED

UNCLASSIFIED

7

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

7

UNCLASSIFIED

UNCLASSIFIED

8

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.

8

UNCLASSIFIED

UNCLASSIFIED

9

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

9

UNCLASSIFIED

UNCLASSIFIED

10

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

10

UNCLASSIFIED

UNCLASSIFIED

11

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 oversees the important work of the Department of Justice in enforcing federal civil rights laws.

11

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN PART **LA3**

Harris, Robert K

B6

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: [redacted]; Witten, Samuel W; Kellner, Brian; Kellner, 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
B6
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 - Corrected - 16159 -
Core documen... Periodic R...

Hanny Gale



Letters from
ambassador Moley... Update to Annex
One of the Sec... Letter to
menendez.pdf (30 KB)

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"

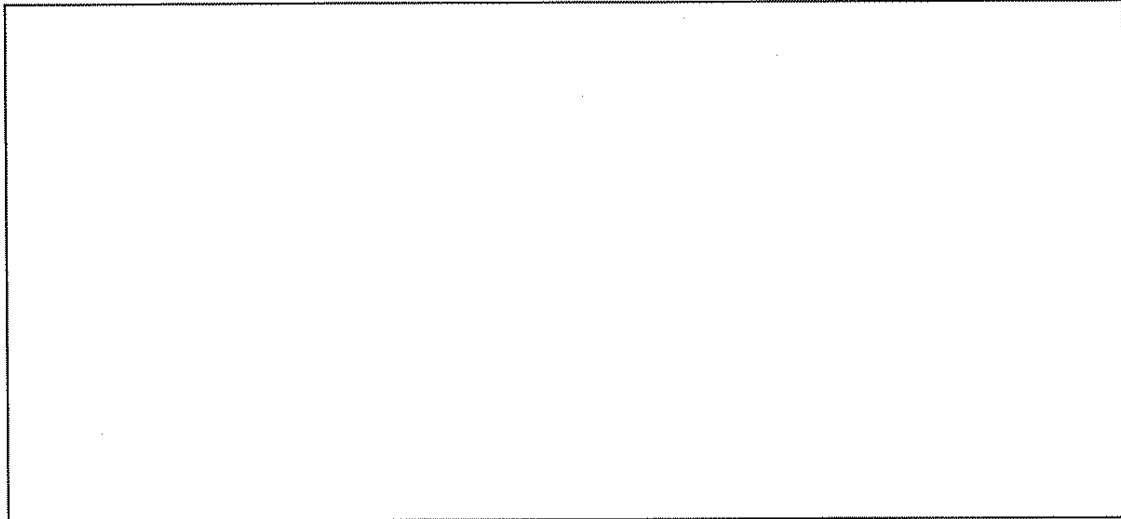
This e-mail in unclassified per E.O. 12958

UNITED STATES DEPARTMENT OF STATE
 REVIEW AUTHORITY: SHARON E AHMAD
 DATE/CASE ID: 13 AUG 2009 200706444

UNCLASSIFIED

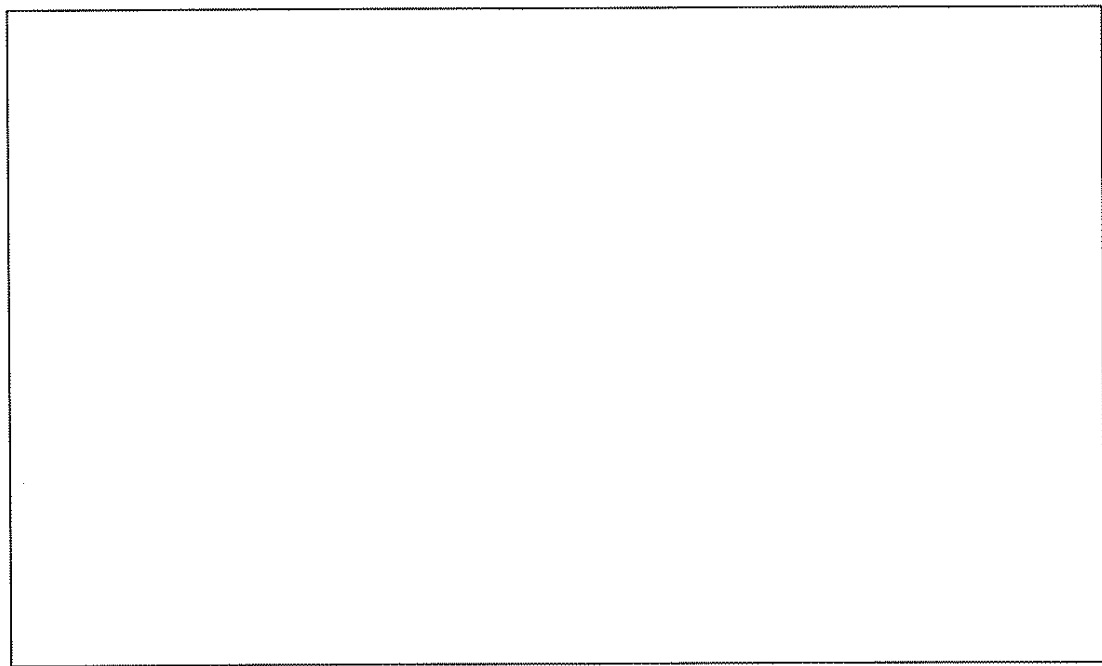
Enforced Disappearances Convention B5

LA18



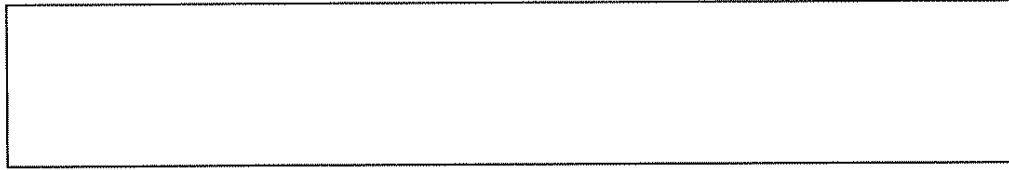
B5

- 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.



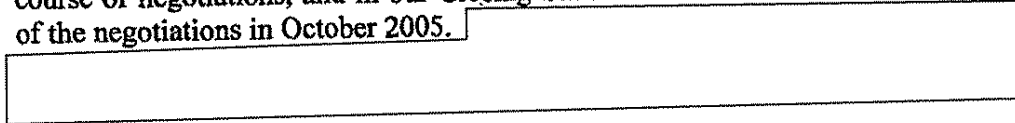
B5

UNCLASSIFIED



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.



B5

UNCLASSIFIED

"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, [redacted] B5

UNGA B5

"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

international instruments in the fields of human rights, humanitarian law and international criminal law,

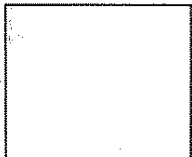
Recalling the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992,

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

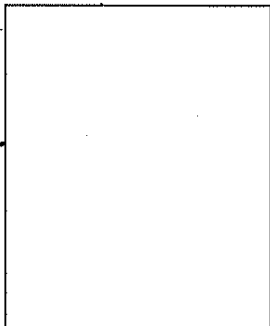
1. No one shall be subjected to enforced disappearance.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.



B5

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



B5

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.



B5

Article 4

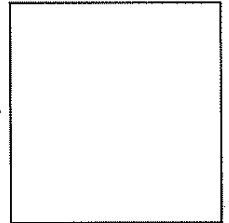
Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.



B5

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.



B5

Article 6

1. Each State Party shall take the necessary measures to hold criminally responsible at least:



B5

(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;

UNCLASSIFIED

- (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.

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;

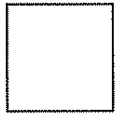
(b) Without prejudice to other criminal procedures, aggravating circumstances, in particular in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons.

Article 8

Without prejudice to article 5,

UNCLASSIFIED

B5



B5

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



B5

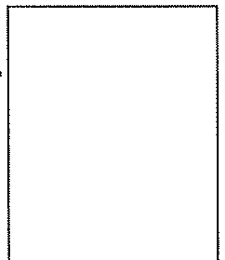
1. Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance:

(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.

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.



B5

3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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.

UNCLASSIFIED

UNCLASSIFIED

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,

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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;

UNCLASSIFIED

UNCLASSIFIED

- (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

UNCLASSIFIED

UNCLASSIFIED

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.

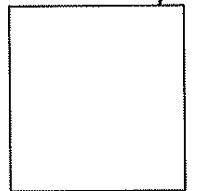
Article 21

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

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.



B5

UNCLASSIFIED

UNCLASSIFIED

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.

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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.

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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;

UNCLASSIFIED

UNCLASSIFIED

(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:

UNCLASSIFIED

UNCLASSIFIED

- (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

UNCLASSIFIED

UNCLASSIFIED

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.

UNCLASSIFIED

UNCLASSIFIED

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.

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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.



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.

UNCLASSIFIED

UNCLASSIFIED

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.

UNCLASSIFIED

UNCLASSIFIED Additional points

for JBB on the
~~RELEASED IN PART~~

B5

LAZ1

- 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

UNCLASSIFIED

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.

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN PART
B6

LA23

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

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 18 AUG 2009 200706444

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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."

UNCLASSIFIED

UNCLASSIFIED

- 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.

UNCLASSIFIED

UNCLASSIFIED

- 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.

UNCLASSIFIED

UNCLASSIFIED

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
 - ok
NSC/Legal – Him Das - ok

B6

UNCLASSIFIED

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]
 [redacted] laurence.Rothenberg@usdoj.gov; OSD-POLICY
Cc: [redacted] Julianna Bentes; Julieta Noyes; Baroukh, Nader; [redacted]
 [redacted] Thomas.Monheim@usdoj.gov; Schou, Nina E; Hill, Steven R;
Subject: DOJ:Brent.McIntosh@usdoj.gov
 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

B6
B6
B6
B6



LEGAL-#24782-v1-LEGAL-#24607-v1-r
Lowenkron_Open... evised_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 than 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]
 [redacted] laurence.Rothenberg@usdoj.gov; [redacted]
Cc: [redacted] Julianna Bentes; Julieta Noyes; Baroukh, Nader; [redacted]
 [redacted] Thomas.Monheim@usdoj.gov; Schou, Nina E; Hill, Steven R; DOJ:Brent.McIntosh@usdoj.gov
Subject: Need quick clearance on documents tomorrow.

B6
B6
B6
B6

<< 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.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: JOHN S BLODGETT
DATE/CASE ID: 18 AUG 2009 200706444

UNCLASSIFIED

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

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]
 Subject: Re: Question 1:

B6

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>

B6

[redacted] 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] DOJ:Brent.McIntosh@usdoj.gov; Thomas.Monheim@usdoj.gov; 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
 Subject: Question 1:

B6

B6

B6

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.

B5

[redacted]
 [redacted] It is time to

Thanks to all, particularly DOJ's Larry Rothenberg.

Bob

Schou, Nina E

From: Bentes, Julianna W
Sent: Saturday, May 06, 2006 8:02 AM
To: Bentes, Julianna W; [redacted] michael.edney@usdoj.gov; [redacted] 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'
Cc: TDY-Surena, Andre
Subject: Committee report
Attachments: committee report.doc

B6
B6

B6
B6

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'
Cc: TDY-Surena, Andre
Subject: Pizza's here!

B6

B6
B6
B6

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'
Cc: TDY-Surena, Andre
Subject: Pizza Info

B6
B6

B6
B6
B6

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

UNCLASSIFIED

[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.Monhelm@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

- **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

LA46C

PRELIMINARY COMPILATION OF PROPOSALS - 02/12/04

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,

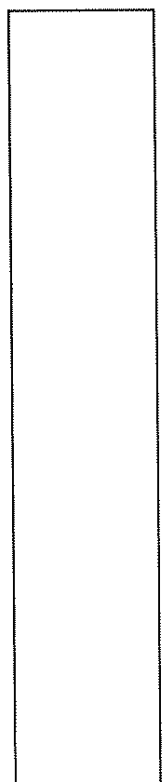
2. *Recalling* all other relevant instruments,

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:



B5

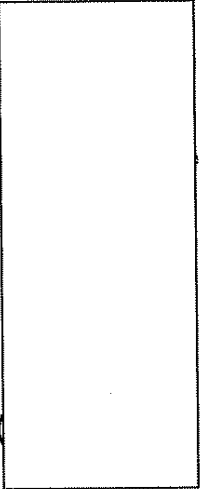
Article 1

 B5

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.



UNCLASSIFIED

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.

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.

~~UNCLASSIFIED~~

Article 4

1. Each State party shall make the offence of 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 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;



B5

(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.

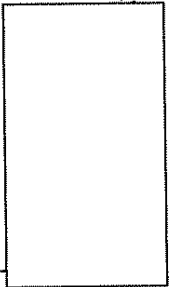
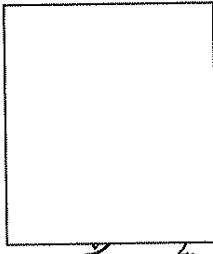
Article 5

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:

(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.

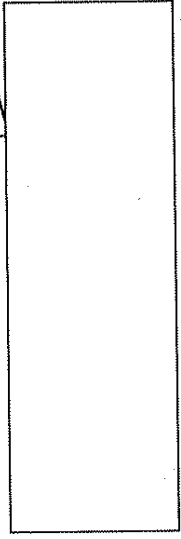


B5

B5

B5

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.



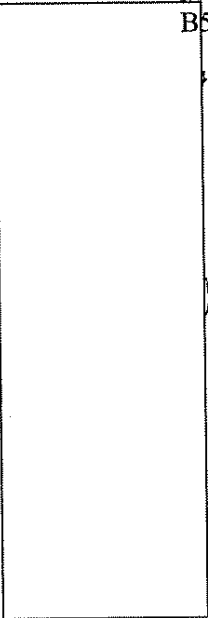
Article 9

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.



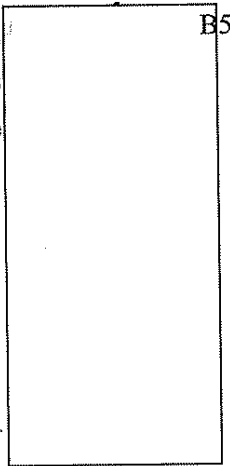
B5

Article 10

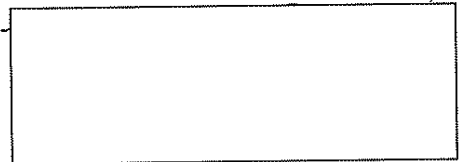
1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an offence of enforced disappearance is present shall take him or her into custody or take other legal measures to ensure 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



B5



B5

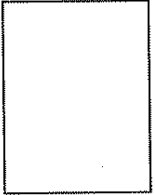
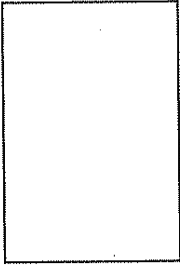
Article 11

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



UNCLASSIFIED

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~~ **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.**

UNCLASSIFIED

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.

UNCLASSIFIED

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.

UNCLASSIFIED

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.

UNCLASSIFIED

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.**

UNCLASSIFIED

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.

UNCLASSIFIED

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.

UNCLASSIFIED

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.*

UNCLASSIFIED

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)

UNCLASSIFIED

UNCLASSIFIED

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.

UNCLASSIFIED

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';
Subject: Opening Statement
Attachments: opening sun 1900.DOC

B6

Matt,

This draft incorporates the comments we've received, including your own and Bob's.

Steve



opening sun
1900.DOC (56 KB)

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]
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"

B6

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.



B5