BEFORE THE AFRICAN COMMISSION FOR HUMAN & PEOPLES' RIGHTS

49th ORDINARY SESSION: APRIL-MAY 2011

COMMUNICATION NO. 383/2010

In the matter between:

MOHAMMED ABDULLAH SALEH AL-ASAD

and

DJIBOUTI

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

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FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT A

Parliamentary **Assembly**
Assemblée parlementaire

Parliamentary Assembly
Assemblée parlementaire
COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Doc. 10957
12 June 2006

Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Dick Marty, Switzerland, Alliance of Liberals and Democrats for Europe

Summary

Our analysis of the CIA 'rendition' programme has revealed a network that resembles a 'spider's web' spun across the globe. The analysis is based on official information provided by national and international air traffic control authorities, as well as on other information. This 'web' is composed of several landing points, which we have subdivided into different categories, and which are linked up among themselves by civilian planes used by the CIA or military aircraft.

Analysis of the network's functioning and of ten individual cases allows us to make a number of conclusions both about human rights violations – some of which continue – and about the responsibilities of some Council of Europe Member states, which are bound by the European Convention on Human Rights and the European Convention for the Prevention of Torture.

The United States, an observer state of our Organisation, actually created this reprehensible network, which we criticise in light of the values shared on both sides of the Atlantic. But we also believe having established that it is only through the intentional or grossly negligent collusion of the European partners that this "web" was able to spread also over Europe.

Whilst hard evidence, at least according to the strict meaning of the word, is still not forthcoming, a number of coherent and converging elements indicate that secret detention centres have indeed existed and unlawful inter-state transfers have taken place in Europe. It is not intended to pronounce that the authorities of these countries are 'guilty' for having tolerated secret detention sites, but rather it is to hold them 'responsible' for failing to comply with the positive obligation to diligently investigate any serious allegation of fundamental rights violations.

The draft resolution and recommendation propose different measures so that terrorism can be fought effectively whilst respecting human rights at the same time.

A. Draft resolution

1. The Council of Europe is both the point of reference and the guardian for human rights, democracy and respect for the rule of law in Europe. It draws its legal and moral authority from, *inter alia*, the common standards of human rights protection embodied in the European Convention on Human Rights (ECHR) and the European Convention on the Prevention of Torture (ECPT), to which all of its 46 member States subscribe.

2. The Parliamentary Assembly of the Council of Europe places human rights at the heart of its work. The Assembly must raise the alarm internationally whenever human rights are set aside, or when established standards of their application are undermined.

3. The Assembly reaffirms its absolute commitment to overcoming the threat of terrorism; but it must equally speak out in the strongest possible terms against the numerous and systematic human rights abuses committed in the pursuit of the so-called "war on terrorism". It considers that such violations play into the hands of the terrorists and ultimately serve to strengthen those who aim to destroy the established political, legal and social order.

4. The United States of America finds that neither the classic instruments of criminal law and procedure nor the framework of the laws of war (including respect for the Geneva Conventions) have been apt to address the terrorist threat. As a result, it has introduced new legal concepts, such as "enemy combatant" and "rendition", which were previously unheard of in international law and stand contrary to the basic legal principles that prevail on our continent.

5. Thus, across the world, the United States has progressively woven a clandestine "spider's web" of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture. Hundreds of persons have become entrapped in this web, in some cases merely suspected of sympathising with a presumed terrorist organisation.

6. The "spider's web" has been spun out with the collaboration or tolerance of many countries, including several Council of Europe member States. This co-operation, which took place in secret and without any democratic legitimacy, has spawned a system that is utterly incompatible with the fundamental principles of the Council of Europe.

7. The facts and information gathered to date, along with new factual patterns in the process of being uncovered, indicate that the key elements of this "spider's web" have notably included : a world-wide network of secret detentions on CIA "black sites" and in military or naval installations; the CIA's programme of "renditions", under which terrorist suspects are flown between States on civilian aircraft, outside of the scope of any legal protections, often to be handed over to States who customarily resort to degrading treatment and torture; and the use of military airbases and aircraft to transport detainees as human cargo to Guantanamo Bay in Cuba or to other detention centres.

8. The Assembly condemns the systematic exclusion of all forms of judicial protection and regrets that, by depriving hundreds of suspects of their basic rights, including the right to a fair trial, the United States has done a disservice to the cause of justice and has tarnished its own hard-won reputation as a beacon of the defence of civil liberties and human rights.

9. Some Council of Europe member States have knowingly colluded with the United States to carry out these unlawful operations; some others have tolerated them or simply turned a blind eye. They have also gone to great lengths to ensure that such operations remain secret and protected from effective national or international scrutiny.

10. This collusion with the United States of America by some Council of Europe member States has taken several different forms. Having carried out legal and factual analysis on a range of cases of alleged secret detentions and unlawful inter-state transfers, the Assembly has identified instances in which Council of Europe member States have acted in one or several of the following ways, wilfully or at least recklessly in violation of their international human rights obligations, as explained in the explanatory memorandum[1]:

10.1. secretly detaining a person on European territory for an indefinite period of time, whilst denying that person's basic human rights and failing to ensure procedural legal guarantees such as *habeas corpus*;

[1] See Doc …

10.2. capturing a person and handing the person over to the United States, in the knowledge that such a person would be unlawfully transferred into a US-administered detention facility;

10.3. permitting the unlawful transportation of detainees on civilian aircraft carrying out "renditions" operations, travelling through European airspace or across European territory;

10.4. passing on information or intelligence to the United States where it was foreseeable that such material would be relied upon directly to carry out a "rendition" operation or to hold a person in secret detention;

10.5. participating directly in interrogations of persons subjected to "rendition", or held in secret detention;

10.6. accepting or making use of information gathered in the course of detainee interrogations, before, during or after which the detainee in question was threatened or subjected to torture or other forms of human rights abuse;

10.7. making available civilian airports or military airfields as "staging points" or platforms for rendition or other unlawful detainee transfer operations, whereby an aircraft prepares for and takes off on its operation from such a point;

10.8. making available civilian airports or military airfields as "stopover points" for rendition operations, whereby an aircraft lands briefly at such a point on the outward or homeward flight, for example to refuel.

11. Attempts to expose the true nature and extent of these unlawful operations have invariably faced obstruction or dismissal, from the United States and its European partners alike. The authorities of most Council of Europe member States have denied their participation, in many cases without actually having carried out any inquiries or serious investigations.

12. In other instances such attempts have been thwarted on the grounds of national security or state secrecy. The Assembly takes the view that neither national security nor state secrecy can be invoked in such a sweeping, systematic fashion as to shield these unlawful operations from robust parliamentary and judicial scrutiny.

13. The Assembly highlights the widespread breach of the positive obligations of all Council of Europe member States to investigate such allegations in a full and thorough manner. It has now been demonstrated incontestably, by numerous well-documented and convergent facts, that secret detentions and unlawful inter-state transfers involving European countries have taken place, such as to require in-depth inquiries and urgent responses by the executive and legislative branches of all the countries concerned.

14. While the Assembly has been seized in this instance with looking into allegations concerning very specific facts, it cannot ignore other allegations surrounding the existence of other secret detention centres in Europe, apparently also set up in the context of the "war on terrorism". In particular, the Assembly expresses its deep concern at the continued reports of secret detentions in the North Caucasus. The European Committee for the Prevention of Torture issued a Public Statement on this subject in 2003, which was recently supplemented by new, detailed victim testimony and credible allegations from non-governmental organisations. Further serious investigation and analysis of secret detentions in the North Caucasus is clearly required.

15. The Assembly also regrets that detention centres in Kosovo were not accessible, until very recently, to the European Committee for the Prevention of Torture. The lack of access seems all the more unacceptable in light of the fact that the international community intervened in that region with the declared aim of restoring order, peace and the respect for human rights.

16. The Assembly's central objective is to prevent violations of the sort described in this resolution from occurring in the future.

17. The Assembly therefore commends the Secretary General of the Council of Europe for the swift and thorough use of his power of inquiry under Article 52 ECHR.

18. The Assembly calls upon the member States of the Council of Europe to:

18.1. undertake a critical review of the legal framework that regulates the intelligence services, with the dual objective of enhancing their efficiency and strengthening accountability mechanisms against abuse; clear regulations must also govern co-operation with foreign services and the activities of foreign services on national territory;

18.2. ensure that the laws governing state secrecy protect persons who disclose illegal activities of state organs (so-called “whistle-blowers”) from disciplinary or criminal sanctions;

18.3. undertake a review of bilateral agreements signed between Council of Europe member States and the United States, particularly those on the status of US forces stationed in Europe and on the use of military and other infrastructures, to ensure that these agreements conform fully to applicable international human rights norms;

18.4. urge the United States to dismantle its system of secret detentions and unlawful inter-state transfers and to co-operate more closely with the Council of Europe in establishing common means of overcoming the threat of terrorism in line with international human rights standards and respect for the rule of law.

19. The Assembly also calls on the United States of America, which is an Observer State to the Council of Europe and Europe’s long-standing ally in resisting tyranny and defending human rights and the rule of law, to:

19.1. send a strong message to the world by demonstrating that terrorism can be vanquished by lawful means, thereby proving the superiority of the democratic model founded on respect of human dignity;

19.2. co-operate more closely in identifying and employing the most effective means with which to prevent and suppress the terrorist threat in conformity with international human rights norms and the rule of law;

19.3. align its definitions of torture and other cruel, inhuman or degrading treatment with the definition used by the UN Committee Against Torture;

19.4. prohibit the transfer of persons suspected of involvement in terrorism to countries that practise torture and that fail to guarantee the right to a fair trial;

19.5. issue official apologies and award compensation to the victims of illegal detentions against whom no formal accusations, nor any court proceedings, have ever been brought;

19.6. refrain from prosecuting any officials, former officials or journalists who, by providing testimony or other information, have helped to bring to light the system of unlawful detentions and mistreatment.

20. The Assembly calls upon its Committee on Legal Affairs and Human Rights urgently to establish an ad hoc Sub-Committee to continue this inquiry into alleged secret detentions and unlawful inter-state transfers involving Council of Europe member States, in view of new facts that are still in the process of being uncovered.

21. The Assembly further urges its members to call for rigorous inquiries in their respective national parliaments, especially in those States from which no or insufficient information has been forthcoming.

22. The Assembly recognises, in the context of the present inquiry into secret detentions, that it lacks appropriate investigative powers akin to those provided to parliamentary inquiries in member States, including the powers to subpoena witnesses and compel disclosure of documents, and calls for consideration of this issue.

23. Finally, the Assembly expresses its appreciation to the relevant European Union institutions (European Commission, European Parliament and EU Satellite Centre), as well as to Eurocontrol, for their invaluable contributions to this inquiry, whilst reiterating the Council of Europe’s role as the guardian of human rights throughout Europe.

B. Draft recommendation

1. The Parliamentary Assembly refers to its Resolution ... (2006) on alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states.

2. The Assembly also recalls its Resolution 1433 (2005) and its recommendation on the legality of the detention of persons by the United States in Guantanamo Bay.

3. The Assembly urges the Committee of Ministers to draft a recommendation to Council of Europe member States containing:

common measures to guarantee more effectively the human rights of persons suspected of terrorist offences who are captured from, detained in or transported through Council of Europe member States; and

a set of minimum requirements for "human rights protection clauses", for inclusion in bilateral and multilateral agreements with third parties, especially those concerning the use of military installations on the territory of Council of Europe member States.

4. The Assembly urgently requests that:

4.1. an initiative be launched on an international level, expressly involving the United States, an Observer to the Council of Europe, to develop a common, truly global strategy to address the terrorist threat. The strategy should conform in all its elements with the fundamental principles of our common heritage in terms of democracy, human rights and respect for the rule of law;

4.2. a proposal be considered, in instances where States are unable or unwilling to prosecute persons accused of terrorist acts, to bring these persons within the jurisdiction of an international court that is competent to try them. One possibility worth considering would be to vest such a competence in the International Criminal Court, whilst renewing invitations to join the Court to the United States and other countries that have not yet done so.

5. The Assembly finally recommends that the Committee of Ministers should consider means of improving the Council of Europe's ability to react rapidly and effectively to allegations of systematic human rights abuse involving several member States.

C. Explanatory memorandum

by Mr Dick Marty, Rapporteur

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1. Are human rights little more than a fairweather option?

1.1. 11 September 2001

1. The tragedies that took place on 11 September 2001 undoubtedly marked the beginning of an important new chapter in the terrible, never-ending history of terrorism. It is a history of indiscriminate violence, instigated in order to create a climate of insecurity and fear with the intention of attacking the existing political and social system. For the first time, spectacular and extremely lethal acts struck highly symbolic targets at the very heart of the United States of America, the most powerful state in the world. Europe, for its part, already has a long and painful experience of terrorism, involving numerous victims and large-scale attacks, particularly in Italy[2], Germany, Spain, the United Kingdom, France and, more recently, Russia.

2. While the states of the Old World have dealt with these threats primarily by means of existing institutions and legal systems[3], the United States appears to have made a fundamentally different choice: considering that neither conventional judicial instruments nor those established under the framework of the laws of war could effectively counter the new forms of international terrorism, it decided to develop new legal concepts. The latter are based primarily on the *Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism* signed by President Bush on 13 November 2001[4]. It is significant that, to date, only one person has been summoned before the courts to answer for the 11 September attacks: a person, moreover, who was already in prison on that day, and had been in the hands of the justice system for several months[5]. By contrast, hundreds of other people are still deprived of their liberty, under American authority but outside the national territory, within an unclear normative framework. Their detention is, in any event, altogether contrary to the principles enshrined in all the international legal instruments dealing with respect for fundamental rights, including the domestic law of the United States (which explains the existence of such detention centres outside the country). The following headline appears to be an accurate summary of the current administration's approach: *No Trials for Key Players: Government prefers to interrogate bigger fish in terrorism cases rather than charge them*[6].

3. This legal approach is utterly alien to the European tradition and sensibility, and is clearly contrary to the European Convention on Human Rights and the Universal Declaration of Human Rights. Cicero's old adage, *inter arma silent leges*, appears to have left its mark even on international bodies supposed to ensure the rule of law and the fair administration of justice. It is frankly alarming to see the UN Security Council sacrificing essential principles pertaining to fundamental rights in the name of the fight against terrorism. The compilation of so-called "black lists" of individuals and companies suspected of maintaining connections with organisations considered terrorist and the application of the associated sanctions clearly breach every principle of the fundamental right to a fair trial: no specific charges, no right to be heard, no right of appeal, no established procedure for removing one's name from the list[7].

1.2. Guantanamo Bay

4. At Guantanamo Bay, on the island of Cuba, several hundred people are being detained without enjoying any of the guarantees provided for in the criminal procedure of a state governed by the rule of law or by the Geneva Conventions on the law of war. These people have been arrested in unknown circumstances, handed over by foreign authorities without any extradition procedure being followed, or

[2] More than 14 500 politically motivated acts of violence were recorded in Italy between 1969 and 1987, causing 419 deaths and 1181 casualties (Interior Ministry figures).

[3] We may recall the words of the former President of Italy, Sandro Pertini (albeit translated in paraphrased form): *"Italy can proudly say that it has defeated terrorism in the law courts, rather than resorting to "stadium justice".*

[4] Regarding the various decisions taken by the American administration following the 11 September attacks, I refer readers to the excellent report by Kevin McNamara, *Lawfulness of Detentions by the United States in Guantanamo Bay*, accompanying the resolution and recommendation adopted by the PACE on 26 April 2005 (Doc 10497).

[5] The person in question is Zacarias Moussaoui, a French citizen of Moroccan descent, sentenced to life imprisonment by a Virginia grand jury on 3 May 2006; the jurors did not impose the death penalty sought by the federal prosecutors (thereby avoiding the trap set by the defendant, who clearly wished to be sentenced to death so as to appear a martyr). According to an American government document, now declassified, six important Al-Qaeda members directly involved in the organisation and funding of the 11 September attacks have apparently been captured by the United States. Although more heavily involved than Moussaoui, they have not been summoned before the American courts to answer for their actions (see also *Le Monde* of 22 April 2006).

[6] Los Angeles Times of 4 May 2006.

[7] A motion raising the issue of the UN black lists (Doc 10856) has been referred to the PACE Committee on Legal Affairs and Human Rights, which will submit a report on the subject in the near future.

illegally abducted in various countries by United States special services. They are considered "enemy combatants", according to a new definition introduced by the American administration[8].

5. The Parliamentary Assembly of the Council of Europe (PACE) has strongly criticised this state of affairs: on 26 April 2005, it unanimously adopted Resolution 1433 (2005) and Recommendation 1699 (2005) in which it urges the United States Government to put a stop to this situation and to ensure respect for the principles of the rule of law and human rights. It also concludes that "*the United States has engaged in the unlawful practice of secret detention"*. In its reply of 17 June 2005 (Doc 10585), the Committee of Ministers expresses *"its full support to all such efforts and to all efforts to obtain a prompt release or fair trial of persons detained at Guantánamo Bay by an independent and impartial court. It urges the United States Government to ensure that the rights of all detainees are ensured and that the principle of the rule of law is fully respected. For its own part, it expresses the determination of the member States to ensure that the rights of persons released and returned to their jurisdiction are fully respected"*. The Committee of Ministers has conveyed a message in these terms to the Government of the United States of America[9]. To our knowledge, no reply has been received to date.

6. The UN Committee against Torture has also called for the closure of the Guantanamo Bay detention facility in recent times, criticising its secret character and the denial of access to the ICRC[10].

1.3. Secret CIA prisons in Europe?

7. This was the news item circulated in early November 2005 by the American NGO Human Rights Watch (HRW), the Washington Post and the ABC television channel. Whereas the Washington Post did not name specific countries hosting, or allegedly having hosted, such detention centres, simply referring generically to "eastern European democracies", HRW reported that the countries in question are Poland and Romania. On 5 December 2005, ABC News in turn reported the existence of secret detention centres in Poland and Romania, which had apparently been closed following the Washington Post's revelations. According to ABC, 11 suspects detained in these centres had been subjected to the harshest interrogation techniques (so-called "enhanced interrogation techniques') before being transferred to CIA facilities in North Africa.

8. It is interesting to recall that this ABC report, confirming the use of secret detention camps in Poland and Romania by the CIA, was available on the Internet for only a very short time before being withdrawn following the intervention of lawyers on behalf of the network's owners. The Washington Post subsequently admitted that it had been in possession of the names of the countries, but had refrained from naming them further to an agreement entered into with the authorities. It is thus established that considerable pressure was brought to bear to ensure that these countries were not named. It is unclear what arguments prevailed on the media outlets in question to convince them to comply. What is certain is that these are troubling developments that throw into question the principles of the freedom and independence of the press. In this light, it is worth noting that just before the publication of the original revelations by the reporter Dana Priest in early November 2005, the Executive Editor of the Washington Post was invited for an audience at the White House with President Bush[11].

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[8] Following an injunction by an American court, based on the provisions of press law, in April 2006 the Pentagon published, for the first time, a list of the names and nationalities of 558 people detained at Guantanamo. However, no details are given for some 140 people previously detained but no longer imprisoned at Guantanamo on that date. Furthermore, no outside body can confirm whether this list is actually comprehensive.

[9] The United States has enjoyed observer status with the Committee of Ministers since 10 January 1996.

[10] See Press Release of the United Nations Office at Geneva, *CAT Concludes Thirty-Sixth* Session, 19 May 2006: "The Committee was concerned by allegations that the State party had established secret detention facilities, which were not accessible to the International Committee of the Red Cross. The Committee recommended that the United States cease to detain any person at Guantánamo Bay and that it close that detention facility, permit access by the detainees to judicial process or release them as soon as possible, ensuring that they were not returned to any State where they could face a real risk of being tortured"; available at: http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/5FBB9C351B9E70EBC1257173004EB4CE?OpenDocument.

[11] This meeting, along with several similar instances, was reported in a column in the Washington Post at the end of 2005. Leonard Downie, the Executive Editor of the Washington Post, said: *"We met with them on more than one occasion… The meetings were off the record for the purpose of discussing national security issues in [Dana Priest's] story"*. See Howard Kurtz, "Bush Presses Editors on Security", *The Washington Post*, 26 December 2005; available at http://www.washingtonpost.com/wp-dyn/content/article/2005/12/25/AR2005122500665_pf.html.

1.4. The Council of Europe's response

9. The Council of Europe responded straight away. The President of the PACE immediately took a very firm position, and asked the Committee on Legal Affairs and Human Rights to look into the matter without delay. The latter did so at its meeting of 7 November 2005. The Secretary General of the Council, for his part, set in motion the procedure established by Article 52 of the European Convention on Human Rights (ECHR). The Committee on Legal Affairs and Human Rights also requested the Venice Commission to prepare an opinion on the international legal obligations and duties of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners. Cooperation was likewise established with the Council of Europe's Human Rights Commissioner.

10. The European Union Commission, via its Vice-President Franco Frattini, expressed its full support for the Council of Europe. The EU Commission's support proved invaluable in obtaining the necessary information from Eurocontrol and the European Union Satellite Centre. The reference to named European countries suddenly aroused huge media interest. Yet these incidents – secret detentions and "renditions" – had already been attracting condemnation for some time, both from the PACE itself, *inter alia* through the aforementioned resolution and recommendation concerning Guantanamo Bay, the re-reading of which I cannot recommend highly enough, and in extremely detailed reports by NGOs, university professors and journalists known for their very painstaking work[12]. These revelations had met with curious indifference from the media, governments and political circles in general.

1.5. European Parliament

11. Members of the European Parliament also became alarmed at the mounting evidence that European countries, or at least facilities located on European territory, had been the scene of systematic human rights violations. In early 2006, a 46-member Temporary Committee was set up and instructed to investigate the alleged existence of CIA prisons in Europe in which terrorist suspects had allegedly been detained and tortured[13].

12. I welcomed this initiative in my previous memorandum, considering it wholly consistent with the Council of Europe's desire to ascertain the truth. Co-operation with the Temporary Committee has been extremely satisfactory, both at the level of our respective secretariats and with its Chairman, Carlos Miguel Coelho, and rapporteur, Claudio Fava. I had the opportunity to address members of the European Parliament's committee during one of its first public hearings.

13. On 24 April 2006 the Temporary Committee presented its draft interim report, which confirmed strong indications of illegal actions carried out by the CIA in Europe. In its initial analysis, the report largely supported the observations we made in our own *Information Memorandum II* on 24 January 2006. The TDIP rapporteur Claudio Fava, in presenting his interim report, spoke of *"more than a thousand flights chartered by the CIA [that] have transited through Europe, often in order to carry out extraordinary renditions"*[14]. In a press conference, Mr Fava clarified that, according to information given to him in confidence by an intelligence source, "*30 to 50 people have been rendered by the CIA in Europe*" and that "*the CIA could not*

[12] These include the Human Rights Watch Breifing Paper of October 2004 entitled *The United States' 'Disappeared': The CIA's Long-Term Ghost Detainees*; and the Amnesty International report AMR 51/051/2006 of 5 April 2006, entitled *Below the radar: secret flights to torture and "disappearance",* as well as numerous articles describing in detail the new techniques for fighting terrorism, such as *extraordinary renditions;* for instance, the articles in the *Corriere della Sera* by Paolo Biondani and Guido Olimpio, which the latter has compiled and edited in a well-researched book (*Operazione Hotel California*, Feltrinelli, 2005), along with articles by Stephen Grey (*America's Gulag*, The New Statesman, 17 May 2004; *US Accused of Torture Flights*, The Sunday Times, 14 November 2004; *Les Etats-Unis inventent la délocalisation de la torture*, Le Monde Diplomatique, April 2005); Alfred McCoy (*Cruel Science: CIA Torture and U.S. Foreign Policy*, New England Journal of Public Policy, Boston, 2004, an article subsequently expanded and published in book form, and also published in German under the title *Foltern und foltern lassen*, Zweitauseneins, 2005; *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"*, report published in 2004 by the Committee on International Human Rights of the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice, New York University School of Law, the conclusions of which could not be clearer: "*Extraordinary Rendition is an illegal practice under both domestic and international law, and that, consistent with U.S. policy against torture, the U.S. government is duty bound to cease all acts of Extraordinary Rendition, to investigate Extraordinary Renditions that have already taken place, and to prosecute and punish those found to have engaged in acts that amount to crimes in connection with Extraordinary Rendition*."

[13] Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners (TDIP; http://www.europarl.eu.int/comparl/tempcom/tdip/default_en.htm).

[14] See *Le Monde*, 27 April 2006.

have carried out such renditions without the agreement of European states"[15]. The Temporary Committee proposes to continue its work[16].

1.6. Rapporteur or investigator?

14. I have often been described as an "investigator", or even a "special investigator". It might be helpful to point out, therefore, that I do not enjoy any specific investigatory powers and, in particular, am not entitled to use coercive methods or to require the release of specific documents. My work has consequently consisted primarily of interviews and analysis. I submitted a set of questions to governments via their national parliamentary delegations, and asked the latter to take the debate to the national level. Parliamentary questions were thereby tabled in many states with a view to obtaining information from the various governments. Special parliamentary commissions of inquiry were set up in some countries. The work undertaken by a number of NGOs has proven invaluable and even, in many cases, more detailed and reliable than the information supplied by governments. A significant contribution was also made by many journalists investigating on the ground, often for months on end. I also received information entrusted to me only on the assurance that I would keep it confidential and protect my sources. The information thus received clearly cannot be presented as evidence; it did, however, point my research in certain more specific directions, and enables me to state with certainty that the search for the truth about what really happened to terrorist suspects in Europe will not end with the present report.

15. I received considerable assistance in this task from the head of the secretariat of the Committee on Legal Affairs and Human Rights and one of his colleagues – both of whom were already very busy with other tasks connected with the committee's operation and work with other rapporteurs – as well as from another young colleague who, in the end, was temporarily assigned specifically to this investigation (and whose help proved invaluable). I am extremely grateful to them for their outstanding competence and exceptional readiness to assist.

16. I was formally designated as Rapporteur on 13 December 2005. Within the Council of Europe it was considered that the report should be presented as quickly as possible. Taking into account the breadth and complexity of the subject, as well as the extremely modest means put at my disposal, I have certainly not been able to present a complete overview of the different aspects of what has really occurred. Moreover, we are still far from knowing all the details of "extraordinary renditions" and the conditions in which abducted persons have been detained and interrogated in Europe. It is thus highly likely that the Council of Europe should remain seized on this subject matter. Elements presently in the public domain - which are supplemented with new information as every week goes by - not only justify, but require that member States finally decide to open serious inquiries on the extent to which they were directly or indirectly implicated in such activities.

17. As I stated in my previous memorandum, serious consideration must be given to whether the Assembly should equip itself with other resources for dealing with such complex matters. Where investigations relate to possible human rights violations that are not confined to individual cases (for which the European Court of Human Rights has jurisdiction) and transcend borders, thereby sidestepping national procedures, one is justified in questioning the effectiveness of existing instruments. Instead of appointing a single member as rapporteur with the support of the normal resources of the Committee's secretariat, which is already overwhelmed by other reports in preparation, we might seriously consider whether setting up a proper commission of inquiry, assisted by experts and enjoying genuine investigatory powers, might not be a better solution for dealing with these new and important challenges.

18. We have tackled this problem with determination and a constant concern for objectivity, mindful of both the enormity of the task entrusted to me and the frankly derisory resources available and the risk of being manipulated. My aim was by no means to amass evidence for the purpose of condemning or stigmatising. On the contrary, I was guided by a desire to ascertain the truth in order to reaffirm the values the Council of Europe has always striven to uphold, and to guard against the repetition of such incidents.

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[15] See *Le Monde*, 18 May 2006.

[16] The draft resolution of the European Parliament, produced as an annex to the interim report, can be consulted at: http://www.europarl.europa.eu/comparl/tempcom/tdip/interim_report_en.pdf. I should like to thank the Temporary Committee and its Rapporteur, Mr Fava, for having made it possible for a member of my team to join their visits to Macedonia and the United States.

1.7. Is this an Anti-American exercise?

19. I consider this reproach, made fairly frequently when criticisms are voiced about violations of fundamental rights committed in the context of the fight against terrorism, downright ridiculous and wholly inaccurate. It overlooks the fact that the initial criticisms, relating to the establishment of the detention centre at Guantanamo Bay as well as the use of *extraordinary renditions* and torture, were first forcefully expressed by American journalists, NGOs and politicians, often thanks to detailed information released by sources within the administration, and indeed the intelligence services themselves. The debate has been, and in my view still is, considerably more heated in the United States than in Europe, at least in certain circles and media.

20. Moreover, the United States Supreme Court itself pointed out, in an extraordinary June 2004 judgment, that *"at stake in this case is nothing less than the essence of a free society. (…) For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny"*[17]*.* This is a sharp reminder of the great democratic tradition of the United States and its exemplary commitment to human rights. The United States is, and remains, a deeply democratic country. Indeed, criticisms of some of the current administration's decisions also reflect a concern that a country which unquestionably serves as an example to the rest of the world is committing what we consider to be mistakes that not only violate fundamental principles, but also constitute a counterproductive anti-terrorism strategy.

1.8. Is there any evidence?

21. It is paradoxical to expect bodies without any real investigatory powers – the Council of Europe and the European Parliament – to adduce evidence in the legal sense. Indeed, these European bodies have been prompted to undertake such investigations owing to a lack of willingness and commitment on the part of national institutions that could, and should, have completely clarified these allegations which from the outset did not appear to be totally unfounded.

22. At this stage there is no formal evidence of the existence of secret CIA detention centres in Poland, Romania or other Council of Europe member States, even though serious indications continue to exist and grow stronger. Nevertheless, it is clear that an unspecified number of persons, deemed to be members or accomplices of terrorist movements, were arbitrarily and unlawfully arrested and/or detained and transported under the supervision of services acting in the name, or on behalf, of the American authorities. These incidents took place in airports and in European airspace, and were made possible either by seriously negligent monitoring or by the more or less active participation of one or more government departments of Council of Europe member States.

23. In the light of the silence and obvious reluctance on the part of the bodies that could have provided the necessary information, it is legitimate to assume that there are more such cases than can be proven at present. In effect, the facts as would appear to be established today – and as will be illustrated throughout the report – as well as the total absence of serious inquiries by the national authorities concerned, implies, in my view, the reversal of the burden of proof: in such a situation it is incumbent on the Polish and Romanian authorities to conduct an independent and in-depth inquiry and to make public not only its results but also the method and the different stages of the enquiry[18]. Even if proof, in the classical meaning of the term, is not as yet available, a number of coherent and converging elements indicate that such secret detention centres did indeed exist in Europe. Such an affirmation does not pretend to be a judgment of a criminal court, necessitating "proof beyond reasonable doubt" in the Anglo-Saxon meaning of the term; it rather reflects a conviction based on a careful balance of probabilities, as well as logical deductions from clearly established facts. The intention is not to determine that the authorities of these countries are "guilty" for having tolerated

[17] These are the words of Judge Sandra Day O'Connor in the case of José Padilla, judgement of the United States Supreme Court, 28 June 2004.

[18] Reversal of the burden of proof if the authorities concerned do not discharge their positive duty to investigate is not a new idea: Article 39 of the Rules of Procedure of the Inter-American Commission of Human Rights provides that *"The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion"*. At the Council of Europe, this idea was applied in the Independent Experts' report to the Secretary General (by Mr Alkema and Mr Trechsel) on political prisoners in Azerbaijan (doc. SG/Inf (2001) 34 Addendum I), in which it was stated that the cases concerned had been submitted to the authorities for comments and observations and that, in the absence of substantive observations by the authorities, the experts had had to base their findings on plausible allegations from other sources (idem, p. 20).

secret detention sites, but rather to hold them "responsible" for failing to comply with the positive obligation to investigate serious allegations.

2. The global "spider's web"[19]

24. The system of targeting, apprehending and detaining terrorist suspects, which forms the focus of this report, was not created overnight. Nor has it been built up from scratch in the wake of the terrorist attacks of 11 September 2001.

25. I have chosen to adopt the metaphor of a global "spider's web" as the *leitmotif* for my report. It is a web that has been spun out incrementally over several years, using tactics and techniques that have had to be developed in response to new theatres of war, new terms of engagement and an unpredictable threat.

26. The chief architect of the web, the United States of America, has long possessed the capacity to capture individual targets abroad and carry them to different parts of the world. Through its Central Intelligence Agency (CIA), the United States designed a programme known as "rendition" for this purpose in the mid-1990s. The CIA aimed to take terrorist suspects in foreign countries "off the streets" by transporting them back to other countries, usually their home countries, where they were wanted for trial, or for detention without any form of due process.

2.1. The evolution of the rendition programme

27. During a recent mission to the United States, a member of my team came into contact with several "insider sources" in the US intelligence community. The most prominent such witness was Mr Michael Scheuer, who designed the original rendition programme in the 1990s under the Clinton Administration and remained employed by the CIA until November 2004[20]. Excerpts of Mr Scheuer's testimony are reflected verbatim in this report and, to the extent possible, have been substantiated or corroborated by a range of other source material in the account below[21].

28. The strategic target of the CIA rendition programme has always been, and remains, the global terrorist network known as Al-Qaeda. In the conception of the United States, Al-Qaeda exists as a nebulous collection of "cells" in countries around the world, comprising "operatives" who perform various roles in the preparation of terrorist attacks. When the US National Security Council became alarmed, in 1995, at what appeared to be a serious prospect of Osama bin Laden acquiring weapons of mass destruction, it developed rendition, according to Scheuer and others, as a way of *"breaking down Al-Qaeda"*, *"taking down cells"* and *"incarcerating senior Al-Qaeda people"*.

29. Rendition was designed, at the outset of the programme at least, to fit within the United States' interpretation of its legal obligations[22]. The prerequisites for launching a rendition operation in the pre-9/11 period included:

- an "outstanding legal process" against the suspect, usually connected to terrorist offences in his country of origin;
- a CIA "dossier", or profile of the suspect, based on prior intelligence and in principle reviewed by lawyers;
- a "country willing to help" in the apprehension of the suspect on its territory; and
- "somewhere to take him after he was arrested".

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[19] This section should be read in conjunction with the graphic map annexed to this explanatory memorandum, entitled: *The global "spider's web" of secret detentions and unlawful inter-state transfers*

[20] Mr Michael Scheuer was Chief of the Bin Laden Unit in the CIA Counter-Terrorism Center for four years, from August 1995 to June 1999. He then served for a further three years, from September 2001 to November 2004, as Special Advisor to the Chief of the Bin Laden Unit. He is recognised as one of the most important authorities on the evolution of rendition. Mr Scheuer graciously granted my representative a three-hour personal interview in Washington, DC in May 2006. Unlike many intelligence sources with whom my team spoke, he agreed to go "on the record", talking extensively about his first-hand operational experience of the rendition programme. A transcript of the interview is on file with the Rapporteur. Excerpts are cited in this report as follows: "Michael Scheuer, former Chief of the Bin Laden Unit in the CIA Counter-Terrorism Center".

[21] I also wish to recognise the valuable work of various non-governmental organisations and academic institutions in researching the evolution of rendition and to thank them for meeting with my team to relay their insights first-hand. In particular, the following groups have produced papers that I have consulted extensively: The Center for Human Rights and Global Justice at New York University School of Law, Human Rights First, Amnesty International, Human Rights Watch and Cage Prisoners.

[22] For further detail on the United States' interpretation of its international legal obligations, see the section below entitled *The point of view of the United States*, at heading 10.1.

30. The receiving countries were, as a matter of policy, only asked to provide diplomatic assurances to the United States that they would "treat the suspects according to their own national laws". After the transfer, the United States made no effort to assess the manner in which the detainees were subsequently treated[23].

31. Intelligence gathering, according to Scheuer, was not considered to be a priority in the pre-9/11 programme:

> *"It was never intended to talk to any of these people. Success, at least as the Agency defined it, was to get someone, who was a danger to us or our allies, 'off the street' and, when we got him, to grab whatever documents he had with him. We knew that once he was captured he had been trained to either fabricate or to give us a great deal of information that we would chase for months and it would lead nowhere. So interrogations were always a very minor concern before 9/11."*[24]

32. Several current Council of Europe member States are known to have co-operated closely with the United States in the operation of its rendition programme under the Clinton Administration[25]. Indeed, the United Kingdom Government has indicated to the Council of Europe[26] that a system of prior notification existed in the 1990s, whereby even intended stopovers or overflights were reported by the United States in advance of each rendition operation[27].

33. The act of "rendition" may not *per se* constitute a breach of international human rights law. It is worth noting that other States have also asserted their right to apprehend a terrorist suspect on foreign territory in order to bring him to justice if the tool of international judicial assistance or cooperation did not attain the desired result[28].

34. The most prominent legal authorities in the United States, including its Supreme Court, have interpreted the object of the pre-9/11 rendition programme to be within the law[29]. Indeed, several human rights NGOs have assessed the original practice under the rubric of "rendition to justice", conceding that an inter-state transfer could be lawful if its object is to bring a suspect within a recognised judicial process respectful of human rights[30]. This indicator might in fact provide a legal benchmark against which unlawful inter-state transfers can be measured[31].

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[23] In my *Information Memorandum II* in January, I quoted several former CIA agents who indicate that the United States knew some of the treatment of detainees would flout minimum standards of protection in international law. Mr Scheuer simply told my representative: *"I check my moral qualms at the door"*.

[24] Michael Scheuer, former Chief of the Bin Laden Unit in the CIA Counter-Terrorism Center, interview carried out by the Rapporteur's representative, *supra* note 19.

[25] See Jane Mayer, *Outsourcing Torture: The secret history of America's "extraordinary rendition" program*, in The New Yorker, 14 and 21 February 2005. Mayer refers to well-documented cases of rendition in which Croatia (1995) and Albania (1998) collaborated with the United States in apprehending suspects; at pages 109-110. Mr Scheuer gave a further example involving Germany, in which a suspect named Mahmood Salim, alias Abu Hajer, was arrested by Bavarian police.

[26] See Jack Straw, Secretary of State for Foreign and Commonwealth Affairs, *Written Ministerial Statement – Enquiries in respect of rendition allegations*, appended to the Response of the United Kingdom Government to the Request of the Secretary-General for an explanation in accordance with Article 52 ECHR, available at: http://www.coe.int/T/E/Com/Files/Events/2006-cia/United-Kingdom.pdf.

[27] *Ibid*. Mr Straw states: "There were four cases in 1998 where the US requested permission to render one or more detainees through the UK or Overseas Territories. In two of these cases, records show the Government granted the request, and refused two others."

[28] See US Secretary of State Condoleeza Rice, *Remarks upon her departure for Europe*, Andrews Air Force Base, 5 December 2005. Ms Rice refers to France's actions in the case of "Carlos the Jackal": "A rendition by the French government brought him to justice in France, where he is now imprisoned."

[29] See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), in which the Supreme Court upheld the jurisdiction of a US court to try a man brought to the US from Mexico by means of abduction rather than extradition. Case law on this matter dates back to the 1886 case of *Ker v. Illinois*, 119 U.S. 436 (1886), in which the Supreme Court said: "There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."

[30] This concept of "rendition to justice" is discussed in greater detail in: Center for Human Rights and Global Justice, NYU School of Law, *Beyond Guantanamo: Transfers to Torture One Year after Rasul v. Bush*, 28 June 2005. I am also grateful to the staff of Human Rights First for their thorough explanations, in meetings, of the contemporary legal dilemmas faced in bringing terrorist suspects to justice.

[31] For a detailed analysis of the legal parameters of inter-state transfers, see Opinion No. 363/2005 of the European Commission for Democracy through Law (Venice Commission), available at: http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp. See also the section below on the point of view of the Council of Europe, at heading 10.2.1.

35. However, there has clearly been a critical deviation away from notions of justice in the rendition programme. In the wake of the 9/11 attacks, the United States transformed rendition into one of a range of instruments with which to pursue its so-called "war on terror". The attacks of 9/11 genuinely signalled something of a watershed in the United States approach to overcoming the terrorist threat[32]. This new "war on terrorism" was launched by the military intervention in Afghanistan in October 2001. At the same time new importance was attached to the collection of intelligence on persons suspected of terrorism. The CIA was put under pressure to play a more proactive role in the detention and interrogation of suspects rather than just putting them "behind bars". Without appropriate preparation, a global policy of arresting and detaining "the enemies" of the United States was – still according to Scheuer – improvised hastily. It was up to the lawyers to "legitimise" these operations, whilst the CIA and the American military became the principal supervisors and operators of the system[33].

36. Rendition operations have escalated in scale and changed in focus. The central effect of the post-9/11 rendition programme has been to place captured terrorist suspects outside the reach of any justice system and keep them there. The absence of human rights guarantees and the introduction of "enhanced interrogation techniques" have led, in several cases examined, as we shall see, to detainees being subjected to torture.

37. The reasons behind the transformation in the character of rendition are both political and operational. First, it is clear that the United States Government has set out to combat terrorism in an aggressive and urgent fashion. The executive has applied massive political pressure on all its agencies, particularly the CIA, to step up the intensity of their counter-terrorist activities. According to Scheuer, "after 9/11, we had nothing ready to go – the military had no plans, they had no response; so the Agency felt the brunt of the executive branch's desire to show the American people victories"[34].

38. Second, and more importantly, the key operational change has been the mandate given to the CIA to administer its own detention facilities. When it takes terrorist suspects into its custody, the CIA no longer uses rendition to transport them into the custody of countries where they are wanted. Instead, for the high-level suspects at least, rendition now leads to secret detention at the CIA's so-called "black sites"[35] in unspecified locations around the world. Rather than face any form of justice, suspects become entrapped in the spider's web.

2.2. Components of the spider's web

39. In addition to CIA "black sites", the spider's web also encompasses a wider network of detention facilities run by other branches of the United States Government. Examples reported in the public domain have included the US Naval Base at Guantanamo Bay and military prisons such as Bagram in Afghanistan and Abu Ghraib in Iraq. Although the existence of such facilities is known, there are many aspects of their operation that remain shrouded in secrecy too.

40. It should also be noted that "rendition" flights by the CIA are not the only means of transporting detainees between different points on the web. Particularly in the context of transfers to Guantanamo Bay, detainees have been moved extensively on military aircraft[36], including large cargo planes. Accordingly military flights have also fallen within the ambit of my inquiry.

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[32] See Cofer Black, former Head of the CIA Counter-Terrorism Center, testimony before the House and Senate Intelligence Committees, *Hearings on Pre-9/11 Intelligence Failures*, 26 September 2002: "All you need to know is that there was a 'before 9/11' and an 'after 9/11'. After 9/11, the gloves came off."

[33] General Nicolo Pollari, the Director of the Italian Intelligance and Security Services (SISMI), testified before the European Parliament's TDIP Temporary Committee on 6 March 2003 that "the rules of the game have changed" in terms of international co-operation in the intelligence sector: "many security activities are now carried out on the borderline of legality, albeit within the legal framework".

[34] Michael Scheuer, former Chief of the Bin Laden Unit in the CIA Counter-Terrorism Center, interview carried out by the Rapporteur's representative, *supra* note 19.

[35] For an impressive account of CIA "black sites", see: Center for Human Rights and Global Justice, NYU School of Law, *Fate and Whereabouts Unknown: Detainees in the "War on Terror"*, 17 December 2005. The term "black sites" came into the public debate largely as a result of Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Washington Post, 2 November 2005.

[36] See, *inter alia*, US Department of Defense documents released in response to a lawsuit under the *Freedom of Information Act* by Stephen H. Oleskey, Wilmer Hale LLP (copies of all disclosed documents on file with the Rapporteur). These materials shed light on the full extent to which military planes were used to transport detainees to Guantanamo Bay: in five consecutive missions in early January 2002 alone, nearly 150 detainees were transferred there (including out from European countries).

41. The graphic included in this report depicts only a small portion of the global spider's web. It consists of two main components.

42. First it illustrates the flights of both civilian and military aircraft, operated by the United States, which appear to be connected to secret detentions and unlawful inter-state transfers also involving Council of Europe member States. This inquiry is based on seven separate sets of data from Eurocontrol[37], combined with specific information from about twenty national aviation authorities in response to my requests. In this way, we have obtained a hitherto unique database[38].

43. Second, it distinguishes four categories of aircraft landing points, which indicate the different degrees of collusion on the part of the countries concerned. These landing points have been placed into their respective categories as follows on the basis of the preponderance of evidence gathered[39]:

Category A: "**Stopover points**"
(points at which aircraft land to refuel, mostly on the way home)

Prestwick
Shannon
Roma Ciampino
Athens
Santa Maria (Azores)
Bangor
Prague

Category B: "**Staging points**"
(points from which operations are often launched - planes and crews prepare there, or meet in clusters)

Washington
Frankfurt
Adana-Incirlik
Ramstein
Larnaca
Palma de Mallorca
Baku

Category C: "**One-off pick-up points**"
(points from which, according to our research, one detainee or one group of detainees was picked up for rendition or unlawful transfer, but not as part of a systematic occurrence)

Stockholm-Bromma
Banjul
Skopje
Aviano
Tuzla

Category D: "**Detainee transfer / Drop-off points**"
(places visited often, where flights tend to stop for just short periods, mostly far off the obvious route – either their location is close to a site of a known detention facility or a *prima facie* case can be made to indicate a detention facility in their vicinity)

Cairo
Amman
Islamabad
Rabat
Kabul

[37] Eurocontrol is the European Organisation for the Safety of Air Navigation. I am grateful to Eurocontrol's Director General, Mr Victor Aguado, and his staff for responding to my various enquires in such an efficient and collegial manner. See the section below, at heading 2.3

[38] I sent a round of letters to the Heads of National Parliamentary Delegations on 31 March 2006 in which I asked specifically for information from their respective national aviation authorities.

[39] In this regard we have gathered detainee testimonies, exhibits placed before judicial and parliamentary enquiries, information obtained under *Freedom of Information* legislation, interviews with legal representatives and insider sources, the accounts of investigative journalists and research conducted by non-governmental organisations.

Guantanamo Bay
Timisoara / Bucharest
Tashkent
Algiers
Baghdad
Szymany

2.3. Compiling a database of aircraft movements

44. As we began our work in November 2005, various organisations and individuals in the non-governmental sector, especially investigative journalists and NGOs, sent us lists of aircraft suspected either of belonging to the CIA or of being operated on the CIA's behalf by bogus "front companies". The lists contained details such as the type of aircraft, the registered owner and operator, and the "N-number" by which an aircraft is identified. These lists are the result of painstaking efforts to piece together information that is publicly available on certain Internet sites, observations by "planespotters" and testimony from former detainees. We subsequently received from Eurocontrol "flight plans" regarding these planes, at least in so far as the European air space is concerned, for the period between the end of 2001 and early 2005. The Eurocontrol data received in January and February 2006 include, on the one hand, the plans of flights foreseen (which can be changed even during a flight for different reasons) and, on the other hand, information that has been verified following a request for collection of route charges, and flight data obtained from aviation authorities in the United States and elsewhere.

45. The lists requested from Eurocontrol in our original correspondence were somewhat speculative, but knowingly so. It was important for the inquiry team, in conjunction with external experts and investigators familiar with the topic, to gain a sense of how CIA-related aircraft operate in relation to the thousands of other, non-CIA aircraft that use European airspace. In other words we sought to build a profile of the characteristics of CIA flights. Additionally we hoped that by casting our net widely, we would be able to identify planes never before connected to the CIA.

46. We subsequently reverted to Eurocontrol on several occasions to obtain additional flight records[40]. As our work has progressed, we have been able to narrow down the number of aircraft movements that are of interest to our work and develop our analysis into a more sophisticated, realistic measure of the extent of illegality in the CIA's clandestine flight operations.

47. Based on our initial analysis, we sent a series of one-off additional requests to certain national air traffic control bodies in order to obtain records of the flights actually made in their countries; we also asked for data on the movements of military aircraft, which are not covered by Eurocontrol.

48. I am happy to report that through this channel I received useful information from various state institutions in different Council of Europe member States, including from transport ministries, aeronautic authorities, airport operators and state airlines. In addition, I obtained official records from national parliaments directly, including papers lodged by ministries of defence in response to parliamentary questions[41]. All of these diverse sources have contributed to the database of aircraft movements relied upon in this report.

2.4. Operations of the spider's web

49. We believe that we have made a significant step towards a better comprehension of the system of "renditions" and secret detention centres. One observation must be made. We should not lose our sense of proportion. It would be exaggerated to talk of thousands of flights, let alone hundreds of renditions concerning Europe. On this point I share the views expressed by members of the US Department of State, who recently delivered a first-hand briefing in Washington, DC at which a member of my team was present[42]. We undermine our credibility and limit the possibility for serious discussion if we make allegations that are

[40] Notably, in February 2006, I met with the staff of Eurocontrol for a very constructive briefing session.
[41] See, *inter alia*, the letter of the Rt. Hon Adam Ingram, UK Minister of State for the Armed Forces, in response to parliamentary questions in the House of Commons about the use of UK military airfields by US registered aircraft, dated 2 March 2006.
[42] See John Bellinger, Chief Legal Advisor to the US Secretary of State, and Dan Fried, Assistant Secretary of State, Bureau of European and Eurasian Affairs; *Briefing to European Delegation during the visit of the TDIP Temporary Committee of the European Parliament to Washington, DC*, 11 May 2006 (transcript on file with the Rapporteur – hereinafter "Bellinger, *Briefing to European Delegation*" or "Fried, *Briefing to European Delegation*").

ambiguous, exaggerated or unsubstantiated[43]. Indeed, it is evident that not all flights of CIA aircraft participate in "renditions". As Mr John Bellinger pointed out:

> *"Intelligence flights are a manifestation of the co-operation that happens amongst us. They carry analysts to talk with one another, they carry evidence that has been collected… I'm sure the Director of Intelligence himself was personally on a number of those flights."*[44]

Mr Scheuer gave another explanation as to the purposes of such flights:

> *"There are lots of reasons other than moving prisoners to have aircrafts. It all depends on what you are doing. If you are in Afghanistan and you're supplying weapons to a commander that is working with Karzai's Government, then it could be a plane load of weapons. It could be food – the CIA is co-located with the US Military in bases around the country, so it could be rations.*
>
> *Also, we try to take care of our people as well as we can, so it's toiletries, it's magazines, it's video recorders, it's coffee makers. We even take up collections at Christmas, to make sure we can send out hundreds and hundreds of pounds of Starbucks Coffee. So out of a thousand flights, I would bet that 98% of those flights are about logistics!"*[45]

In fact it is precisely the remaining 2% that interests us.

50. In order to understand the notion of a "spider's web", what is important to bear in mind is not the overall numbers of flights[46]; but rather the nature and context of individual flights. Our research has covered ten case studies of alleged unlawful inter-state transfers, involving a total of seventeen individual detainees. In most of these cases it was possible to generate flight logs from the amalgamated official flight database referred to earlier. I have then matched those logs with the times, dates and places of the alleged transfer operations – according to victims themselves, lawyer's notes or other sources. Finally, where possible, I have corroborated this information with factual elements acquired from legal proceedings in Council of Europe member States or in the United States.

51. In translating these case studies into graphic representations, I resolved to trace each flight route not individually, but as part of a circuit. Each circuit begins and ends, where possible, at the aircraft's "home base" (very often Dulles Airport in Washington, DC) in the United States. Following these flight circuits helps to better understand the different categories of aircraft landings – simple stopovers for refuelling, staging points that host clusters of CIA aircraft or serve to launch operations, and detainee drop-off points. Despite being a fairly simple analytical technique, it has also helped discover some significant new information, which we present in the following sections.

2.5. Successive rendition operations and secret detentions

52. We believe we are in a position to state that successive CIA rendition operations have taken place in the course of the same, single flight circuit. Two of the rendition case studies examined in this report, both involving Council of Europe member States to differing degrees, belonged to the same clandestine circuit of abductions and renditions at different points of the spider's web. The information at our disposal indicates that the renditions of Binyam Mohamed and Khaled El-Masri were carried out by the same CIA-operated aircraft, within 48 hours of one another, in the course of the same 12-day tour in January 2004. This finding appears significant for a number of reasons. First, since neither man even knows of the other – Mr Mohamed is still detained at Guantanamo Bay and Mr El-Masri has returned to his home community near Ulm in the South of Germany – their respective stories can be used to lend credence to one another. My team has received direct or indirect testimony from each of them independently.

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[43] *Ibid*. According to Mr Bellinger: "We have been trying, from Secretary Rice down, to engage in a real dialogue with our different partners in Europe, be it the EU, be it the Council of Europe. We know your concerns and we are interested in talking to you directly, but on the basis of fact and not mere hyperbole." According to Mr Fried: "If the charges are absurd, it becomes difficult to deal with the real problems of the legal regime and the legal framework in which we have to conduct this struggle."

[44] Bellinger, *Briefing to European Delegation*, *supra* note 41.

[45] Michael Scheuer, former Chief of the Bin Laden Unit in the CIA Counter-Terrorism Center, interview conducted by the Rapporteur's representative, *supra* note 19.

[46] Bellinger, *Briefing to European Delegation*, *supra* note 41: "There really is not evidence of this. There is not evidence of a thousand detainees; there's not evidence of a hundred detainees; there's not even evidence of ten detainees."

53. As they both allege having been subjected to CIA rendition, the fact that the same aircraft - operated by a CIA-linked company – carried out two transfers in such quick succession allows us to speak of the existence of a “rendition circuit” within the "spider's web".

54. It is also possible to develop a hypothesis as to the nature of some other aircraft landings belonging to the same renditions circuit. Thus, for example, the landings which occurred directly before and directly after the El-Masri rendition bear the typical characteristics of rendition operations[47].

55. Our analysis of the rendition programme in the post-9/11 era allows us to infer that the transfer of other detainees on this rendition circuit must have entailed detainees being transferred out of Kabul to alternative detention facilities in different countries. Thus, drawing upon official flight data, the probable existence of secret detention facilities can be inferred in Algeria and, as we will see, in Romania.

2.6. Detention facilities in Romania and Poland

2.6.1 The case of Romania

56. Romania is thus far the only Council of Europe member State to be located on one of the rendition circuits we believe we have identified and which bears all the characteristics of a detainee transfer or drop-off point. The N313P rendition plane landed in Timisoara at 11.51 pm on 25 January 2004 and departed just 72 minutes later, at 1.03 am on 26 January 2004. I am grateful to the Romanian Civil Aeronautic Authority for confirming these flight movements[48].

57. It is known that detainee transport flights are customarily night flights, as is the case of the other rendition flights already documented. The only other points on this rendition circuit from which the plane took off at a similar hour of the morning were Rabat, Morocco (departure at 2.05 am) and Skopje, "the former Yugoslav Republic of Macedonia" (hereinafter "Macedonia") (departure at 1.30 am). In both of these cases, we possess sufficient indications to claim that when the plane left its destination, it was carrying a prisoner to a secret detention centre situated in Kabul.

58. We can likewise affirm that the plane was not carrying prisoners to further detention when it *left* Timisoara. Its next destination, after all, was Palma de Mallorca, a well-established “staging point”, also used for recuperation purposes in the midst of rendition circuits.

59. There is documentation in this instance that the passengers of the N313P plane, using US Government passports[49] and apparently false identities[50], stayed in a hotel in Palma de Mallorca for two nights before returning to the United States. One can deduce that these passengers, in addition to the crew of the plane, comprised a CIA rendition team, the same team performing all renditions on this circuit.

60. The N313P plane stayed on the runway at Timisoara on the night of 25 January 2004 for barely one hour. Based on analysis of the flight capacity of N313P, a Boeing 737 jet, in line with typical flight behaviours of CIA planes, it is highly unlikely that the purpose of heading to Romania was to refuel. The plane had the capacity to reach Palma de Mallorca, just over 7 hours away, directly from Kabul that night – twice previously on the same circuit, it had already flown longer distances of 7 hours 53 minutes (Rabat to Kabul) and 7 hours 45 minutes (Kabul to Algiers).

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[47] See *Flight logs related to the successive rendition operations of Binyam Mohamed and Khaled El-Masri in January 2004*, reproduced in this report in the Appendix to the present document. The landings in question are at Algiers (Algeria) and Timisoara (Romania).

[48] See *Information from the records of the Romanian Civil Aeronautic Authority and the Romanian Ministry of National Defence*, contained as Appenices to the letters sent to me by György Frunda, Chairman of the Romanian delegation to PACE, dated 24 February 2006 and 7 April 2006. I wish to thank my colleague Mr Frunda for his outstanding efforts in gathering information from various Romanian authorities on my behalf.

[49] See Andrew Manreas, *La investigación halla en los vuelos de la CIA decenas de ocupantes con estatus diplomatico*, in El Pais, Palma de Mallorca, 15 November 2005.

[50] See Matias Valles, journalist with Diario de Mallorca, *Testimony before theTDIP Temporary Committee of the European Parliament*, 20 April 2006. Valles researched a total of 42 names he had uncovered from the records of a hotel in Mallorca where the passengers of the N313P plane stayed. Many proved to be “false identities”, apparently created using the names of characters from Hollywood movies such as *Bladerunner* and *Alien*. Valles confirmed that at least some of the persons who arrived back in Palma de Mallora from Romania after the rendition circuit were the same persons who had stayed in the hotel at a previous point on the circuit – thus indicating that the “rendition team” remained on the plane throughout its trip.

61. It should be recalled that the rendition team stayed about 30 hours in Kabul after having "rendered" Khaled El-Masri. Then, it flew to Romania on the same plane. Having eliminated other explanations – including that of a simple logistics flight, as the trip is a part of a well-established renditions circuit – the most likely hypothesis is that the purpose of this flight was to transport one or several detainees from Kabul to Romania.

62. We consider that while all these factual elements do not provide definitive evidence of secret detention centres, they do justify on their own a positive obligation to carry out a serious investigation, which the Romanian authorities do not seem to have done to date.

2.6.2. The case of Poland

63. Poland was likewise singled out as a country which had harboured secret detention centres.

64. On the basis of information obtained from different sources we were able to determine that persons suspected of being high level terrorists were transferred out of a secret CIA detention facility in Kabul, Afghanistan in late September and October 2003[51]. During this period, my official database shows that the only arrival of CIA-linked aircraft from Kabul in Europe was at the Polish airport of Szymany. The flights in question, carried out by the well-known "rendition plane" N313P, bear all the hallmarks of a rendition circuit.

65. The plane arrived in Kabul, on 21 September 2003, from Tashkent, Uzbekistan. The axis between Tashkent and Kabul was well known for detainee transfers[52]. Still, according to information received, the most significant detainee movements at this time probably involved transfers *out of* Kabul. The explanation attributed by NGO sources and journalists who have investigated this period[53] is that the CIA required a more isolated, secure, controlled environment in which to hold its high-level detainees, due to the proliferation of both prison facilities and prisoners in Afghanistan arising from the escalating “war on terrorism”.

66. Thus, the circuit in question continued on 22 September 2003, when the plane flew from Kabul to Szymany airport in Poland. On the same grounds given above for the case of Romania, one may deduce that this flight was a CIA rendition, culminating in a “detainee drop-off” in Poland.

67. Szymany is described by the Chairman of the Polish delegation to PACE as a “former Defence Ministry airfield”, located near the rural town of Szczytno in the North of the country. It is close to a large facility used by the Polish intelligence services, known as the Stare Kiejkuty base. Both the airport and the nearby base were depicted on satellite images I obtained in January 2006[54].

68. It is noteworthy that the Polish authorities have been unable, despite repeated requests, to provide me with information from their own national aviation records to confirm any CIA-connected flights into Poland. In his letter of 9 May 2006, my colleague Karol Karski, the Chairman of the Polish delegation to PACE, explained:

> *"I addressed the Polish authorities competent in gathering the air traffic data, related to these aircraft numbers… I was informed that several numbers from your list were still not found in our flight logs'*

[51] My team has worked closely with Human Rights Watch to corroborate the available evidence of detainee movements out of Afghanistan. For an indication of the earlier analysis of this information, see *Human Rights Watch Statement on US Secret Detention Facilities in Europe*, 7 November 2005, available at: http://hrw.org/english/docs/2005/11/07/usint11995.htm.

[52] See Craig Murray, former United Kingdom Ambassador to Uzbekistan, *Exchange of views with the Committee on Legal Affairs and Human Rights (AS/Jur)*, Strasbourg, 24 January 2006. The minutes reflect that Mr Murray spoke of “evidence of the CIA chartering flights to Uzbekistan, between Kabul and Tashkent, and of the use of torture by Uzbek agents, as well as evidence that the American and British authorities were willing to receive and use information obtained under torture by foreign agencies, the relevant decision having been taken at a high level”. See also Don van Natta Jr, *Growing Evidence US Sending Prisoners to Torture Capital: Despite Bad Record on Human Rights, Uzbekistan is Ally*, New York Times, 1 May 2005, available at: www.nytimes.com/2005/05/01/international/01renditions.html?ex=1272600000&en=932280de7e0c1048&ei=5088&partner=rssnyt&emc=rss.

[53] For an excellent account of the motivations for moving detainees to secret locations, see James Risen, *State of War: The Secret History of the CIA and the Bush Administration*, Free Press, New York, 2006, at pages 29 to 31: “The CIA wanted secret locations where it could have complete control over the interrogations and debriefings, free from the prying eyes of the international media, free from monitoring by human rights groups, and, most important, far from the jurisdiction of the American legal system.”

[54] See European Union Satellite Centre, information provided to the Rapporteur on 23 January 2006. For further information see the section below at heading 4.1.

records. Being not aware about the source of your information connecting these flight numbers with Polish airspace, I am not able, [nor are] the Polish air traffic control authorities, to comment on the fact of missing them in our records."[55]

69. Mr. Karski also made the following statement, which reflects the position of the Polish Government on the question of CIA renditions:

"According to the information I have been provided with, none of the questioned flights was recorded in the traffic controlled by our competent authorities – in connection with Szymany or any other Polish airport."

70. The absence of flight records from a country such as Poland is unusual. A host of neighbouring countries, including Romania, Bulgaria and the Czech Republic have had no such problems in retrieving official data for the period since 2001. Indeed, the submissions of these countries, along with my data from Eurocontrol, confirm numerous flights into and out of Polish airports by the CIA-linked planes that are the subject of this report.

71. In this light, Poland cannot be considered to be outside the rendition circuits simply because it has failed to furnish information corroborating our data from other sources. I have thus presented in my graphic the suspected rendition circuit involving Szymany airport, in which the landing at Szymany is placed in the category of "detainee drop-off" points.

72. According to records in our possession, the N313P plane remained at Szymany airport on 22 September 2003 for just 64 minutes. I can also confirm that the plane then flew from Szymany to Romania, where it landed, after a change of course, at Bucharest Baneasa airport. Here, as in the case of Timisoara above, the aircraft landing in Romania fits the profile of a "detainee drop-off".

73. It is possible that several detainees may have been transported together on the flight out of Kabul, with some being left in Poland and some being left in Romania. This pattern would conform with information from other sources, which indicated the simultaneous existence of secret prisons in these two Council of Europe member States[56].

74. This suspected rendition circuit continued after Romania by landing in Rabat, Morocco, which several elements point to as a location that harbours a detention facility[57]. It is conceivable that this landing may even have constituted a third "detainee drop-off" in succession before the plane returned to the United States, via Guantanamo Bay.

75. As for Romania, I find that there is now a preponderance of indications, not to prove the existence of detention centres, but in any case to open a real in-depth and transparent inquiry. One can add that the sources at the origin of the publications by Human Rights Watch, The Washington Post and ABC News, referring to the existence of such centres in Romania and Poland, are multiple, concordant and particularly well informed, as they belong to the very services that have directed these operations.

2.7. The human impact of rendition and secret detention

76. Rendition is a degrading and dehumanising practice; certainly for its victims, but also for those who perform the operations. This simple realisation has become clear to me and my team as we have met with various people whose lives have been indelibly changed by rendition.

77. Therefore, while it is necessary to analyse the global system that rendition has become, we should never lose sight of the human dimension, as this is at the core of the abuses.

78. I have considered the human impact of rendition in two ways: first, the systematic CIA practice of preparing a detainee to be transported on a rendition aircraft; and second, the grave and long-lasting psychological damage that extraordinary rendition inflicts upon its victims.

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[55] Letter sent to me by Karol Karski, Chairman of the Polish delegation to PACE, dated 9 May 2006.

[56] See, *inter alia*, Brian Ross and Richard Esposito, *Sources Tell ABC News Top Al-Qaeda Figures Held in Secret CIA Prisons: 10 out of 11 Terror Leaders Subjected to "Enhanced Interrogation Techniques",* ABC News, 5 December 2005, available at: http://abcnews.go.com/WNT/Investigation/story?id=1375123.

[57] See the case study of Binyam Mohamed al Habashi at section 3.9 of this report.

2.7.1. CIA methodology – how a detainee is treated during a rendition

79. The descriptions of rendition operations in this report reflect many different individual cases. These cases entail a diverse range of victims, being captured in and transferred to numerous different countries, spanning a time period of several years. The stories are recounted by both first- and second-hand witnesses, speaking various languages in various public and private forums. Some of the people subjected to rendition have since been released, while others are still detained in the custody of the United States or another country. In short, the cases appear to have little or no connection to one another.

80. Yet on the contrary there are striking parallels between several of these renditions, particularly as they relate to the CIA's methodology. It seems that in each separate case, rendition was carried out in an almost identical manner. Collectively the cases in the report testify to the existence of an established *modus operandi* of rendition, put into practice by an elite, highly-trained and highly-disciplined group of CIA agents who travel around the world mistreating victim after victim in exactly the same fashion.

81. It falls to analyse this methodology through the lens of human rights, as they are enshrined in the European Convention on Human Rights (ECHR) and applied in the vast majority of the countries that share these values. Every individual, even those accused, or found guilty, of involvement in terrorism and other categories of serious crime, has the unqualified right not to be tortured or subjected to inhuman and degrading treatment or punishment. While state agents have the right to use force in carrying out their work, there are obviously strict limits on the extent to which restraining or coercive measures may be applied during the course of an arrest or transfer operation.

82. According to Michael Scheuer, the CIA intentionally puts security concerns ahead of the rights of the detainee during a rendition operation:

> *"Clearly your first priorities in those situations are to protect your officers. So the person would generally be shackled and restrained. And probably at least getting on to the plane and while it was on the ground, he was blindfolded.*
>
> *I would think that the locals who arrested him would probably be the ones who would handcuff and blindfold him. Then he would be put on the plane, prepared and tied into his seat, or however it happened, and be watched over by guards from the receiving country he was going back to."*[58]

83. I consider that no security measure justifies a massive and systematic violation of human rights and dignity. In the cases examined – whilst being conscious of dealing with possibly dangerous persons – the principle of proportionality was simply ignored and with it the dignity of the person. In several instances, the actions undertaken in the course of a "security check" were excessive in relation to security requirements[59] and may therefore constitute a violation of Article 3 ECHR[60]. While it does not appear to reach the threshold for torture[61], it may well be considered as inhuman or degrading, particularly in the extent to which it humiliates the person being rendered[62].

84. The "security check" used by the CIA to prepare a detainee for transport on a rendition plane was described to us by one source in the American intelligence community as a "twenty-minute takeout"[63]. His

[58] Michael Scheuer, former Chief of the Bin Laden Unit in the CIA Counter-Terrorism Center; interview carried out by Rapporteur's representative in Washington, DC, 12 May 2006 (transcript on file with the Rapporteur).

[59] Mr Scheuer appears to understate severity of the measures taken during a "security check". A further discrepancy with his description is that in most cases, as far as I can discern, American agents carry out the entire "security check" themselves. I have not received any account of European security police being directly involved in administering these coercive measures, although there was at least one Egyptian policeman involved in the transfer of Ahmed Agiza and Mohamed Alzery from Sweden.

[60] Article 3 ECHR states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[61] I agree with the assessment of Sweden's Parliamentary Ombudsman, Mats Melin, on the threshold for torture: "It is clear that torture is a concept reserved for cases involving the intentional infliction of severe pain or grave suffering intended, for example, to obtain information to punish or intimidate." See Mats Melin, Parliamentary Ombudsman (Sweden), *A review of the enforcement by the Security Police of a Government decision to expel two Egyptian citizens*, Adjudication No. 2169-2004, dated 22 March 2005. Melin cites the judgement of the European Court of Human Rights (ECtHR) in *Salman v. Turkey*, 27 June 2000.

[62] In determining whether the standard for degrading treatment is met, the ECtHR takes account of whether it has been expressly *intended* to humiliate the individual in question, along with its effect on the individual's personality. In the context of a deprivation of liberty, the treatment must be in excess of the humiliation inherent in arrest or detention. See the judgement of the ECtHR in *Öcalan v. Turkey*, 12 March 2003.

[63] Confidential interview with a source in the US intelligence community who wished to remain anonymous; interview carried out in the United States by the Rapporteur's representative.

explanation was that within a very short space of time, a detainee is transformed into a state of almost total immobility and sensory deprivation. *"The CIA can do three of these guys in an hour. In twenty minutes they're good to go."*[64] An investigating officer for the Swedish Ombudsman was struck by the *"fast and efficient procedure"* used by the American agents[65], while the Swedish interpreter who witnessed the CIA operation at Bromma Airport said simply: *"It surprised me how the heck they could have dressed him so fast"*[66].

85. The general characteristics of this "security check" can be established from a host of testimonies as follows[67]:

i. it generally takes place in a small room (a locker room, a police reception area) at the airport, or at a transit facility nearby.
ii. the man is sometimes already blindfolded when the operation begins, or will be blindfolded quickly and remain so throughout most of the operation.
iii. four to six CIA agents perform the operation in a highly-disciplined, consistent fashion – they are dressed in black (either civilian clothes or special "uniforms'), wearing black gloves, with their full faces covered. Testimonies speak, variously, of *"big people in black balaclavas"*[68], people *"dressed in black like ninjas"*[69], or people wearing *"ordinary clothes, but hooded"*[70].
iv. the CIA agents *"don't utter a word when they communicate with one another"*[71], using only hand signals or simply knowing their roles implicitly.
v. some men speak of being punched or shoved by the agents at the beginning of the operation in a rough or brutal fashion[72]; others talked about being gripped firmly from several sides
vi. the man's hands and feet are shackled.
vii. the man has all his clothes (including his underwear) cut from his body using knives or scissors in a careful, methodical fashion; an eye-witness described how *"someone was taking these clothes and feeling every part, you know, as if there was something inside the clothes, and then putting them in a bag"*[73].
viii. the man is subjected to a full-body cavity search, which also entails a close examination of his hair, ears, mouth and lips.
ix. the man is photographed with a flash camera, including when he is nearly[74] or totally naked[75]; in some instances, the man's blindfold may be removed for the purpose of a photograph in which his face is also identifiable[76].

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[64] *Ibid*.
[65] See Office of the Parliamentary Ombudsman (Sweden), *Interview conducted with state official X of the Security Police (Säpo)*, Case No. 2169-2004, 30 September 2004 (translated transcript on file with the Rapporteur – hereinafter "Interview with Swedish Säpo interpreter"); comment made at page 23.
[66] *Ibid*, observation made by the Säpo interpreter in answer to a question, at page 13.
[67] The person subjected to the "security check" is referred to generically as "the man", because we have not thus far heard of any cases in which it has happened to women. This overview contains aspects common to several renditions, while excerpts from individual testimonies are cited separately hereunder.
[68] See Bisher Al-Rawi, statement made to his lawyer during an interview at Guantanamo Bay (contained in unclassified attorney notes), submitted to the High Court of Justice in Case No. 2005/10470/05 through the *Witness Statement of Clive Stafford Smith* (hereinafter "Al-Rawi statement to lawyer"), at page 31.
[69] See Jamil El-Banna, statement made to his lawyer during an interview at Guantanamo Bay (contained in unclassified attorney notes), submitted to the High Court of Justice in Case No. 2005/10470/05 through the *Witness Statement of Clive Stafford Smith* (hereinafter "El-Banna statement to lawyer"), at page 40.
[70] See Interview with Swedish Säpo interpreter, *supra* note 85, at page 10.
[71] See Office of the Parliamentary Ombudsman (Sweden), *Interview conducted with Kjell Jönsson, Swedsh lawyer for Mohamed Alzery*, Case No. 2169-2004, September 2004 (translated transcript on file with the Rapporteur – hereinafter "Ombudsman's Interview with Swedish lawyer Jönsson"); at page 6.
[72] See Declaration of Khaled El-Masri in support of Plaintiff's Opposition to the United States' Motion to Dismiss, in *El-Masri v. Tenet et al,* Eastern District Court of Virginia in Alexandria, 6 April 2006 (hereinafter "El-Masri statement to US Court in Alexandria, 6 April 2006") at page 9: "As I was led into this room I felt two people violently grab my arms… They bent both my arms backwards. This violent motion caused me a lot of pain. I was beaten severely from all sides."
[73] See Interview with Swedish Säpo interpreter, *supra* note 65, at page 13.
[74] See Interview with Swedish Säpo interpreter, *supra* note 65, at page 13: "he wasn't naked, he had his underpants on; the upper body was undressed and then his picture was taken."
[75] See Binyam Mohamed Al-Habashi, statement made to his lawyer during an interview at Guantanamo Bay, contained in unclassified attorney notes of Clive A. Stafford Smith, dated 1 August 2005 (document on file with the Rapporteur – hereinafter "Binyam Mohamed statements to lawyer at Guantanamo"), at page 19: "there was a white female with glasses… One of them held my penis and she took digital pictures."
[76] See El-Masri statement to US Court in Alexandria, 6 April 2006, *supra* note 71, at page 9: "They took off my blindfold… As soon as it was removed, a very bright flashlight went off and I was temporarily blinded. I believe from the sounds that they had taken photographs of me throughout."

x. some accounts speak of a foreign object being forcibly inserted into the man's anus; some accounts speak more specifically of a tranquiliser or suppository being administered *per rectum*[77] - in each description this practice has been perceived as a grossly violating act that affronts the man's dignity.
xi. the man is then dressed in a nappy or incontinence pad and a loose-fitting "*jump-suit*" or set of overalls; "*they put diapers on him and then there is some handling with these handcuffs and foot chains, because first they put them on and then they are supposed to put him in overalls, so then they have to alternately unlock and relock them*"[78].
xii. the man has his ears muffled, sometimes being made to wear a pair of "*headphones*"[79]
xiii. finally a cloth bag is placed over the man's head, with no holes through which to breathe or detect light; they "*put a blindfold on him and after that a hood that apparently reaches far down on his body*"[80].
xiv. the man is typically forced aboard a waiting aeroplane, where he may be "*placed on a stretcher, shackled*"[81], or strapped to a mattress or seat, or "*laid down on the floor of the plane and they bind him up in a very uncomfortable position that makes him hurt from moving*"[82].
xv. in some cases the man is drugged and experiences little or nothing of the actual rendition flight[83]; in other cases, factors such as the pain of the shackles or the refusal to allow him to drink water or use the toilet make the flight unbearable: "*this was the hardest moment in my life*"[84].
xvi. in most cases, the man has no notion of where he is going, nor the fate that awaits him upon arrival.

86. This manner of treating detainees has been heavily criticised by the lawyers of many of the persons subjected to rendition. In his testimony to the Swedish Ombudsman, Kjell Jönsson, the Swedish lawyer for Mohamed Alzery[85], stated his concern that the measures taken before the rendition were disproportionate to the security needs: "from Alzery's point of view it would have been perfectly enough to ask him to co-operate and he would have done that just like he always has done before"[86].

87. Perhaps the most troubling aspect of this systematic practice, however, is that it appears to be intended to humiliate. Many accounts speak of these measures being taken despite "strong resistance", both physical and verbal, on the part of the detainee. The nudity, forced shackling "like an animal'[87] and being forced to wear nappies appear offensive to the notions of dignity held by the detainees. In my view it is simply not acceptable in Council of Europe member States for security services, whether European or foreign, to treat people in a manner that amounts to such "extreme humiliation"[88].

2.7.2. The effects of rendition and secret detention on individuals and families

88. In compiling this report, members of my team and I have met directly with several victims of renditions and secret detentions, or with their families. In addition, we have obtained access to further first-hand accounts from victims who remain detained, in the form of their letters or diaries, unclassified notes from their discussions with lawyers, and official accounts of visits from Embassy officials.

89. Personal accounts of this type of human rights abuse speak of utter demoralisation. Of course, the despair is greatest in cases where the abuse persists – where a person remains in secret detention, without knowing the basis on which he is being held, and where nobody apart from his captors knows about his

[77] See Ombudsman's Interview with Swedish lawyer Jönsson, *supra* note 70, at page 6: "they bend him forward and he can feel that something is being pushed up his rectum… after that he felt calmer and felt a muscle relaxation in all his body, but he was wide awake, so he was not sedated".
[78] See Ombudsman's Interview with Swedish lawyer Jönsson, *supra* note 70, at page 6.
[79] See El-Masri statement to US Court in Alexandria, 6 April 2006, *supra* note 71, at page 9. Also see reference to "earmuffs" in Al-Rawi statement to lawyer, *supra* note 67, at page 31; and reference to "earphones" in Binyam Mohamed statements to lawyer at Guantanamo, at page 5.
[80] See Ombudsman's Interview with Swedish lawyer Jönsson, *supra* note 70, at page 6.
[81] See Al-Rawi statement to lawyer, *supra* note 67, at page 31.
[82] See Ombudsman's Interview with Swedish lawyer Jönsson, *supra* note 70, at page 6.
[83] See El-Masri statement to US Court in Alexandria, 6 April 2006, *supra* note 71, at page 10: "They put something over my nose. I think it was some kind of anaesthaesia. It felt like the trip took about four hours, but I don't really remember. I was mostly unconscious for the duration".
[84] See Al-Rawi statement to lawyer, *supra* note 67, at page 31.
[85] For more detail on the cases of Ahmed Agiza and Mohamed Alzery, please refer to the case study in the following section.
[86] See Ombudsman's Interview with Swedish lawyer Jönsson, *supra* note 70, at page 8.
[87] The detainee who made this statement asked that he remain anonymous.
[88] The words "extreme humiliation" are used in the Ombudsman's Interview with Swedish lawyer Jönsson, *supra* note 70, at page 8. In El-Masri statement to US Court in Alexandria, 6 April 2006, *supra* note 71, at page 9, he talks of "degrading and shameful" acts that left him feeling "terrified and utterly humiliated".

exact whereabouts or wellbeing. The uncertainty that defines rendition and secret detention is torturous, both for those detained and those for whom they are "disappeared"[89].

90. Yet the ordeal continues long after a detainee is located, or even released and able to return home. Victims have described to us how they suffer from flashbacks and panic attacks, an inability to lead normal relationships and a permanent fear of death. Families have been torn apart. On a personal level, deep psychological scars persist; and on a daily basis, stigma and suspicion seem to haunt anybody branded as "suspect" in the "war on terror". In short, links with normal society appear practically impossible to restore.

91. I salute the remarkable courage and resilience of those who have been held in secret detention and subsequently released, like Khaled El-Masri and Maher Arar. Both these men have spoken eloquently to us about what moves them to recount their experiences despite the obvious pain and trauma of doing so. From these words we must draw our own resolve to uncover the secret abuses of the spider's web and ensure that they never again be allowed to occur. From Mr El-Masri, "all I want is to know the truth about what happened to me and to have the American Government apologise for what it did"[90]; from Mr Arar, "the main purpose of talking about my torture is to prevent the same treatment from ever happening to another human being"[91].

3. Specific examples of documented renditions

3.1. Khaled El-Masri

92. We spoke for many hours with Khaled El-Masri, who also testified publicly before the Temporary Committee of the European Parliament, and we find credible his account of detention in Macedonia and Afghanistan for nearly five months.

3.1.1. The individual account of Mr El-Masri

93. A summary of the unprecedented suffering endured by Mr El-Masri reads as follows:

94. [A]ccording to the statement of facts presented to the US District Court[92], Khaled El-Masri, a German citizen of Lebanese descent, travelled by bus from his home near Neu Ulm, Germany, to Skopje, Macedonia, in the final days of 2003. After passing through several international border crossings without incident, Mr El-Masri was detained at the Serbian-Macedonian border because of alleged irregularities with his passport. He was interrogated by Macedonian border officials, then transported to a hotel in Skopje. Subsequent to his release in May, 2004, Mr El-Masri was able to identify the hotel from website photographs as the Skopski Merak, and to identify photos of the room where he was held and of a waiter who served him food. Over the course of three weeks, Mr El-Masri was repeatedly interrogated about alleged contacts with Islamic extremists, and was denied any contact with the German Embassy, an attorney, or his family. He was told that if he confessed to Al-Qaeda membership, he would be returned to Germany. On the thirteenth day of confinement, Mr El-Masri commenced a hunger strike, which continued until his departure from Macedonia. After 23 days of detention, Mr El-Masri was videotaped, blindfolded, and transported by vehicle to an airport.

95. There, he was beaten, stripped naked, and thrown to the ground. A hard object was forced into his anus. When his blindfold was removed, he saw seven or eight men, dressed in black and hooded. He was placed in a diaper and sweatsuit, blindfolded, shackled, and hurried to a plane, where he was chained spreadeagled to the floor. He was injected with drugs and flown to Baghdad, then on to Kabul, Afghanistan, an itinerary that is confirmed by public flight records. At some point prior to his departure, an exit stamp was placed in his passport, confirming that he left Macedonia on January 23, 2004.

96. Upon arrival in Kabul, Mr El-Masri was kicked and beaten and left in a filthy cell. There he would be detained for more than four months. He was interrogated several times in Arabic about his alleged ties to 9/11 conspirators Muhammed Atta and Ramzi Bin Al-Shibh and to other alleged extremists based in

[89] See Louise Arbour, United Nations High Commissioner for Human Rights, *Human Rights: A casualty of the war on terror?*; interview for UN World Chronicle No. 996, 7 December 2005 (transcript provided by UN Television, on file with the rapporteer): "Secret detention under these extreme conditions is an unacceptable treatment, both of the person detained and I would certainly suggest of members of their families [for whom], for all purposes, these people have disappeared."

[90] Khaled El-Masri made this statement to me during our meeting in Strasbourg in April 2006.

[91] Maher Arar made this statement to my representative during their meeting in Brussels in March 2006.

[92] See El-Masri statement to US Court in Alexandria, 6 April 2006, *supra* note 71.

Germany. American officials participated in his interrogations. All of his requests to meet with a representative of the German government were refused.

97. In March, Mr El-Masri and several other inmates commenced a hunger strike. After nearly four weeks without food, Mr El-Masri was brought to meet with two American officials. One of the Americans confirmed Mr El-Masri's innocence, but insisted that only officials in Washington, D.C. could authorize his release. Subsequent media reports confirm that senior officials in Washington, including the CIA Director Tenet, were informed long before Mr El-Masri's release that the United States had detained an innocent man. Mr El-Masri continued his hunger strike. On the evening of April 10, Mr El-Masri was dragged from his room by hooded men and force-fed through a nasal tube.

98. At around this time, Mr El-Masri felt what he believed to be a minor earthquake. Geological records confirm that in February and April, there were two minor earthquakes in the vicinity of Kabul.

99. On May 16, Mr El-Masri was visited by a uniformed German speaker who identified himself as "Sam". "Sam" refused to say whether he had been sent by the German government, or whether the government knew about Mr El-Masri's whereabouts. Subsequent to his release, Mr El-Masri identified "Sam" in a photograph and a police lineup as Gerhard Lehmann, a German intelligence officer.

100. On May 28, 2004, Mr El-Masri, accompanied by "Sam," was flown from Kabul to a country in Europe other than Germany. He was placed, blindfolded, into a truck and driven for several hours through mountainous terrain. He was given his belongings and told to walk down a path without turning back. Soon thereafter, he was confronted by armed men who told him he was in Albania and transported him to Mother Theresa Airport in Tirana. There, he was accompanied through customs and immigration controls and placed on a flight to Frankfurt.

101. Upon his return to Germany, Mr El-Masri contacted an attorney and related his story. The attorney promptly reported Mr El-Masri's allegations to the German government, thereby initiating a formal investigation by public prosecutors. Pursuant to their investigation, German prosecutors obtained and tested a sample of Mr El-Masri's hair, which proved consistent with his account of detention in a South-Asian country and deprivation of food for an extended period. That investigation, as well as a German parliamentary investigation of Mr El-Masri's allegations, is ongoing.

3.1.2. Elements of corroboration for Mr El-Masri's account

102. Mr El-Masri's account is borne out by numerous items of evidence, some of which cannot yet be made public because they have been declared secret[93], or because they are covered by the confidentiality of the investigation underway in the office of the Munich prosecuting authorities following Mr El-Masri's complaint of abduction.

103. The items already in the public domain are cited in the afore-mentioned memorandum[94] submitted to the Virginia court in which Mr El-Masri lodged his complaint:

- Passport stamps confirming Mr El-Masri's entry to and exit from Macedonia, as well as exit from Albania, on the dates in question;
- Scientific testing of Mr El-Masri's hair follicles, conducted pursuant to a German criminal investigation, that is consistent with Mr El-Masri's account that he spent time in a South-Asian country and was deprived of food for an extended period of time;
- Other physical evidence, including Mr El-Masri's passport, the two t-shirts he was given by his American captors on departing from Afghanistan, his boarding pass from Tirana to Frankfurt, and a number of keys that Mr El-Masri possessed during his ordeal, all of which have been turned over to German prosecutors;
- Aviation logs confirming that a Boeing business jet owned and operated by defendants in this case, then registered by the FAA as N313P, took off from Palma, Majorca, Spain on January 23, 2004; landed at the Skopje airport at 8:51 p.m. that evening; and left Skopje more than three hours later, flying to Baghdad and then on to Kabul, the Afghan capital;

[93] The information in question appears in the report of the German Federal Government to the parliamentary committee monitoring the secret services (PKG) ; I was able to obtain from the chairman of that committee a "public" version of the report, which contains no particulars of individual cases. A version classified "confidential - for official use only" was handed to me by a journalist. This information enabled me to form a judgment as to the credibility of Mr El-Masri's account, but I have chosen to preserve the confidentiality of that report although, to be frank, I believe that the public should have access to this kind of information. To my knowledge, there is an even fuller version classified "secret", which I declined to obtain out of respect for German parliamentary procedure.

[94] See El-Masri statement to US Court in Alexandria, 6 April 2006, *supra* note 71.

- Witness accounts from other passengers on the bus from Germany to Macedonia, which confirm Mr El-Masri's account of his detention at the border;
- Photographs of the hotel in Skopje where Mr El-Masri was detained for 23 days, from which Mr El-Masri has identified both his actual room and a staff member who served him food;
- Geological records that confirm Mr El-Masri's recollection of minor earthquakes during his detention in Afghanistan;
- Evidence of the identity of "Sam," whom Mr El-Masri has positively identified from photographs and a police line-up, and who media reports confirm is a German intelligence officer with links to foreign intelligence services;
- Sketches that Mr El-Masri drew of the layout of the Afghan prison, which were immediately recognizable to another rendition victim who was detained by the U.S. in Afghanistan;
- Photographs taken immediately upon Mr El-Masri's return to Germany that are consistent with his account of weight loss and unkempt grooming.

Numerous government inquiries, including the German prosecutors' investigation, a German parliamentary investigation, and various intergovernmental human rights inquiries, are almost certain to produce additional corroborating evidence.

3.1.3. The role of "the former Yugoslav Republic of Macedonia"

104. The role of "the former Yugoslav Republic of Macedonia" in the rendition of Khaled El-Masri has yet to be fully understood. The information collected on site by a member of my team appears to show a certain ambiguity in the Macedonian position. In effect, the Government of Macedonia has adopted an "official line" of complete negation, repeated in a rigid and stereotyped fashion.

105. I am indebted to the delegation from the European Parliament for arranging and administering an excellent programme of meetings with the highest-level representatives of the Macedonian Government and Parliament[95]. I share many of the reflections of my colleagues from the European Parliament in their review of these meetings, not least the sense of discomfort that in many areas the Macedonian authorities fell short of genuine transparency[96].

3.1.3.1. The position of the authorities

106. The "official line" of the Macedonian Government was first contained in a letter from the Minister of Interior, Ljubomir Mihajlovski, to the Ambassador of the European Commission, Erwan Fouere, dated 27 December 2005. In its simplest form, it essentially contains four items of information "*according to police records*": first, Mr El-Masri arrived by bus at the Macedonian border crossing of Tabanovce at 4 pm on 31 December 2003; second, he was interviewed by "*authorised police officials*" who suspected "*possession of a falsified travel document*"; third, approximately five hours later, Mr El-Masri "*was allowed entrance*" into Macedonia, apparently freely; and fourth, on 23 January 2004, he left Macedonia over the border crossing of Blace into Kosovo.

107. Mr Mihajlovski restated exactly the same Government position in response to a parliamentary question in the Sobranie on 26 January 2006[97]. He cited "*official evidence of the Ministry of Interior*" and went on to describe the allegations as "*speculative and unfounded*".

108. The President of the Republic, Branko Crvenkovski, set out a firm stance in the very first meeting with the European Parliament delegation, providing a strong disincentive to any official who may have wished to break ranks by expressing an independent viewpoint: "*Up to this moment, I would like to assure you that I have not come across any reason not to believe the official position of our Ministry of Interior. I have no additional comments or facts, from any side, to convince me that what has been established in the official report of our Ministry is not the truth.*"

[95] The programme of meetings took place between 27 and 29 April 2006.

[96] President Branko Crvnekovski said in his opening remarks on 27 April 2006: *"Macedonia is completely determined and open for co-operation with you. What I want to repeat is that we're completely prepared to establish the truth… Our joint task is to find out the truth and not to respond to the current public opinion or the positions of the media"*; Siljan Avramovski, the former Head of the UBK, Macedonia's counter-intelligence service stated on 28 April: *"We will provide maximum transparency and openness in our discussions"*. These were fairly typical of the sentiments expressed by all the officials who met with the delegation.

[97] Mr Slobodan Casule, a prominent opposition politician who met with the European delegation on 27 April 2006, posed the question. He said he sought clarification about the El-Masri case because he believes that "*such issues should be opened and closed within the Parliament*".

109. On Friday 28 April the official position was presented in far greater detail during a meeting with Siljan Avramovski, who was Head of the UBK[98], Macedonia's main intelligence service, at the time of the El-Masri case. Avramovski stated that the UBK's "Department for Control and Professional Standards" had undertaken an investigation into the case and traced official records of all Mr El-Masri's contact with the Macedonian authorities. The further details as presented by Mr Avramovski[99] are summarized as follows:

> Mr El-Masri arrived on the Macedonian border on 31 December 2003, New Year's Eve. The Ministry of Interior had intensified security for the festive period and was operating a higher state of alert around the possible criminal activity. In line with these more intense activities, bus passengers were being subjected to a thorough security check, including an examination of their identity documents.
>
> Upon examining Mr El-Masri's passport, the Macedonian border police developed certain suspicions and decided to "*detain him*". In order not to make the other passengers wait at the border, the bus was at this point allowed to continue its journey.
>
> The objective of holding Mr El-Masri was to conduct an interview with him, which (according to Avramovski) was carried out in accordance with all applicable European standards. Members of the UBK, the security and counter-intelligence service, are present at all border points in Macedonia as part of what is described as "Integrated Border Management and Security". UBK officials participated in the interview of Mr El-Masri.
>
> The officials enquired into Mr El-Masri's reasons for travelling into the country, where he intended to stay and whether he was carrying sufficient amounts of money. Avramovski explained: "I think these were all standard questions that are asked in the context of such a routine procedure – I don't think I need to go into further details".
>
> At the same time, Macedonian officials undertook a preliminary visual examination of Mr El-Masri's travel documents. They suspected that the passport might be faked or forged – noting in particular that Mr El-Masri was born in Kuwait, yet claimed to possess German citizenship.
>
> A further passport check was carried out against an Interpol database. The border point at Tabanovce is not linked to Interpol's network, so the information had to be transmitted to Skopje, from where an electronic request was made to the central Interpol database in Lyon. A UBK official in the Analytical Department apparently made this request using an electronic code, so the Macedonian authorities can produce no record of it. Mr El-Masri was made to wait on the border point while the Interpol search was carried out.
>
> When it was established that there existed no Interpol warrant against Mr El-Masri and no further grounds on which to hold him[100], he was released. He then left the border point at Tabanovce, although Macedonian officials were not able to describe how. Asked directly about this point in a separate meeting, the Minister of Interior, Mr Mihajlovski said: "*we're not able to tell you exactly what happened to him after he was released because it is not in our interest; after the person leaves the border crossing, we're not in a position to know how he traveled further*"[101].
>
> The Ministry of Interior subsequently established, according to Avramovski, that Mr El-Masri had stayed at a hotel in Skopje called the "Skopski Merak". Mr El-Masri is said to have checked in on the evening of 31 December 2003 and registered in the Guest Book. He stayed for 23 nights, including daily breakfast, and checked out on 23 January 2004.
>
> The Ministry then conducted a further check on all border crossings and discovered that on the same day, 23 January 2004, in the evening, Mr El-Masri left the territory of Macedonia over the border crossing at Blace, into the territory of Kosovo. When asked whether Mr El-Masri had received a stamp to indicate his departure by this means, Avramovski answered: "*Normally there should be a*

[98] Uprava za Bezbednosti i Kontrarazuznavanje, or the Security and Counter-Intelligence Service.

[99] Meeting with Siljan Avramovski, now Deputy Director of UBK in the Ministry of Interior, 28 April 2006, transcript on file with the Rapporteur.

[100] Avramovski stated that Macedonian border police decided for themselves that Mr El-Masri's passport was genuine, after an unspecified process or length of examination "*At our border points, expert members of the border police are qualified to assess whether a passport is counterfeit or not. When they decided that it was genuine, they took no further action. They did not inform the German Embassy; they didn't feel the need to request any documents against which to compare the passport*."

[101] Meeting with Ljubomir Mihajlovski, Minister of Interior, 28 April 2006, transcript on file with the Rapporteur.

stamp on the passport as you cross the border out of Macedonia, but I can't be sure. UNMIK is also present on the Kosovo border and is in charge of the protocol on that side… My UBK colleague has just informed me that he has crossed the border at Blace twice in recent times and didn't receive a stamp on either occasion."

Avramovski concluded his summary with the words: "*This is the truth of the case that has been exploited by the media – the so-called El-Masri case.*"

110. In a separate meeting directly following Avramovski's briefing, Minister Mihajlovski retained the position and added very few further details. Both officials were keen to talk about the case as if it were a routine matter, one which only came to their attention when it was reported in the local and international press. They referred repeatedly to the media "prejudice" and "pressure" against Macedonia. Mihajlovski even implied that there was a conspiracy theory at play, designed to discredit the country: "*Who is really behind all of this? This case is making so much damage to the country. If you can get a reason why it is happening, please send us a message; tell us.*"

111. It seems clear that the Macedonian public has reacted negatively to the El-Masri affair. Most Macedonians feel aggrieved that their country has been given such a bad press and is associated with what is often portrayed as a manipulative operation. Many regard the international media interest as a thinly veiled attempt to discredit Macedonia's prospects for European integration. In reality, it seems that the Macedonian Government is itself responsible for this situation. More transparency, and a greater degree of preparedness genuinely to seek the truth, rather than locking themselves into a pre-established, dogmatic scheme, would have certainly avoided much criticism and suspicion.

3.1.3.2. Further elements

112. The Government's official line is based on what Mr Avramovski called "*a reconstruction after the fact, based on information we established through documents and discussions*" with, *inter alia*, "*employees of the hotel*". There is no doubt in my mind that the Ministry of Interior has put together a very thorough reconstruction of the case; just not an accurate one. Equally I accept that the Ministry has undertaken "*discussions*" with witnesses, including hotel employees; but I regard these as efforts to harmonise the official line, not to establish the truth.

113. One could, with sufficient application, begin to tease out discrepancies in the official line. For example, the Ministry of Interior stated that "*the hotel owner should have the record of Mr El-Masri's bill*", while the hotel owner responded to several inquiries, by telephone and in person, by saying that the record had been handed over to the Ministry of Interior.

114. Contacts we were able to make with sources close to the administration and to the intelligence services have enabled us to obtain much more credible information, in order to better understand what really happened. We can consequently present a more coherent analysis of this case. For obvious reasons, the sources contacted locally wish to stay anonymous, at least for the time being.

115. The Government's public portrayal seems at first glance perfectly plausible. However, it ceases to be credible when it asserts that El-Masri was allowed to proceed freely from Tabanovce on the evening of 31 December 2003. In reality, that evening signalled the beginning of his five-month ordeal in secret detention ordered by the CIA.

116. What is not said in the official version is the fact that the Macedonian UBK routinely consults with the CIA on such matters (which, on a certain level, is quite comprehensible and logical). According to confidential information we received (of which we know the source), a full description of Mr El-Masri was transmitted to the CIA via its Bureau Chief in Skopje for an analysis similar to the one Avramovski says was undertaken by Interpol: did the person in question have contact with terrorist movements, in particular with Al Qaida? Based on the intelligence material about Khaled El-Masri in its possession – the content of which is not known to us – the CIA answered in the affirmative. The UBK, as the local partner organisation, was requested to assist in securing and detaining Mr El-Masri until he could be handed over to the CIA for transfer.

117. The UBK has an excellent reputation for its professionalism. It is well practiced in the conduct of clandestine surveillance and detention operations, having exploited its own network of "secret apartments"

for decades[102]. Information obtained from our internal sources indicates that the UBK is equally skilled in working on behalf of the CIA. – we even learned of one previous collaborative operation between these services in the past, targeted at apprehending suspected Islamic terrorists. In the El-Masri case, according to our understanding, this co-operation was particularly efficient and the Macedonian services fulfilled the expectations of the CIA.

118. The choice of the Skopski Merak hotel as a detention site warrants comment. The Macedonian authorities have categorically denied that this hotel could have served as a place for detention, considering such a possibility as downright ridiculous. Avramovski said he could "*absolutely*" rule out the prospect of Mr El-Masri's being held there:

> "*Look, I can state this very specifically and decisively. The 31 December is New Year's Eve – that period is a holiday, there are always a lot of guests, many of them tourists, in the hotel to celebrate the New Year. There is not even a theoretical possibility [laughing] that a person could be detained in an open hotel, where there's a constant flow of people coming and going. There were many guests there at the time, including foreign nationals – it's a well-known, open hotel with a fine reputation in this city!*"

In fact, a busy place with this hotel's features lends itself very well to a clandestine operation, given that a top-floor room facing away from the street was used.

119. Whilst the operation was driven and directed by CIA agents, the Americans kept a very low profile throughout the operation in Macedonia. The CIA transmitted to UBK the questions to ask the suspect, without ever taking part in any interrogation.

120. Several of our interviewees told us – with varying degrees of knowledge – that German intelligence was informed of the fact that Mr El-Masri was in Macedonian custody in the days immediately following the arrest, but not about the operational details. Intelligence material from Germany was added to the dossier from which questions were later asked, both in Macedonia and in Afghanistan, by interrogators of various nationalities.

121. According to our insider sources in the intelligence community, whom we consider serious and well-informed, approximately 20 officials were involved overall on the Macedonian side, including "four or five" politically responsible persons in Government. Three teams of three agents rotated in the task of guarding and surveillance. Technicians and analysts helped to compile the record of the operation, which was a running log rather than a cumulative written report. An operational commander and a deputy marshalled the Macedonian agents and took responsibility for reporting to their liaisons in the CIA.

122. The period for which the Macedonians held Mr El-Masri in advance of his rendition – 23 days – was abnormally long for any operation involving the CIA. Partner agencies and CIA officials alike prefer to keep the time between the initial arrest and the transfer to a CIA detention centre as short as possible[103].

123. The delay in this case appears to have been caused by logistical reasons, in particular related to the availability of an aircraft. A flight on an unusual route, from Skopje into the Middle East, had to be incorporated into an existing schedule for that month, which, as established above in the description of the newly-discovered rendition circuit, included other detainee transfers.

124. According to further eye-witness accounts from persons in the civil aviation sector, who described the presence and movements of the suspect rendition plane at Skopje airport that evening, the aircraft thought to have taken Mr El-Masri on board did not follow regular procedures. The manner in which the plane registered with ground staff and paid its "route charge" fees was highly unusual – as the Ministry of Interior himself confirmed, no passengers even left the plane to enter the terminal building and thus cross officially onto Macedonian territory. Instead the plane taxied into position at the far end of the runway, more than a kilometer from the terminal. A detail of armed Macedonian security police formed a lookout nearby,

[102] The Macedonian Helsinki Committee for Human Rights has researched questions of secret detention and produced a variety of credible reports (copies of which are on file with the Rapporteur). In many cases, people are held in secret apartments to get them "out of the system" for an indefinite period of time, for the UBK to interrogate them and elicit confessions. Further still, in the notorious "Rastanski Lozja" case of March 2002, Macedonian police were said to have shot dead "seven members of a terrorist group" in what seemed like an act of summary exection. The Helsinki Committee wrote in its Annual Report of 2002: "the largest number of human rights violations was perpetrated by officers of the special units at the Ministry of Interior".

[103] See, for example, Michael Scheuer, former Chief of the Bin Laden Unit in the CIA Counter-Terrorism Center, interview carried out by the Rapporteur's representative, *supra* note 19.

under strict instructions to face away from the plane itself. Asked whether such a measure was conventional for foreign aircraft, Minister of Interior Mihajlovski answered:

> "*No, no. Not at all. The plane is not Macedonian territory; if Spain sends us a plane, it's the territory of Spain. If there's a bomb on board we must come inside; but otherwise it's like a ship, a diplomatic territory*".

125. All these factual elements indicate that the CIA carried out a "rendition" of Khaled El-Masri. The plane in question had finished transferring another detainee just two days earlier and the plane was still on the same "rendition circuit". The plane and its crew had spent the interim period at Palma de Mallorca, a popular CIA staging point. The physical and moral degradation to which Mr El-Masri was subjected before being forced aboard the plane in Macedonia corresponds with the CIA's systematic "rendition methodology" described earlier in this report. The destination of the flight carrying Mr El-Masri, Kabul, forms a hub of CIA secret detentions in our graphic representation of the "spider's web".

126. All the indications are that the Macedonian authorities have decided to deny their part in the abduction of El-Masri, admitting only what has already been clearly proven and trying to conceal the rest. It is regrettable that the will is lacking to perform a true inquiry and that Parliament has not shown the initiative to take up the issue (as the German *Bundestag* has done in the same case). To this must be added the further accusations of the Macedonian Helsinki Committee for Human Rights. According to reports produced by this NGO, suspects were and still are interrogated and sometimes imprisoned and ill-treated for several days, outside the normal arrest and custody system[104], specifically in the "apartments" that had been widely used by the previous regime.

127. It is worth repeating that the analysis of all facts concerning this case points in favour of the credibility of El-Masri. Everything points in the direction that he was the victim of abduction and ill-treatment amounting to torture within the meaning of the term established by the case-law of the United Nations Committee against Torture. In addition, numerous indications support the conclusion that German services participated in a manner that still remains to be precisely established (not excluding the fact that the same services were in the end instrumental in El-Masri's release; the latter told me that he considered "Sam" as his guardian angel, a kind of "life insurance')[105].

128. The detailed information with which El-Masri was confronted during his interrogations in Skopje and in Afghanistan included details of his private life in Neu-Ulm. It is hard to imagine that such information could have been obtained by foreign services without help from their German counterparts. For example, the interrogators in Afghanistan knew that El-Masri had met a certain Reda Seyam[106] at the *Multikulturhaus* and had agreed to get a car, which Seyam had just bought with his help and had registered in the name of El-Masri's wife in order to save on the cost of insurance. El-Masri assured me that he had shared this information only with Seyam and his wife. In addition, the same interrogators confronted him with bank details of money transfers between his bank in Neu-Ulm and an account in Norway[107]. Such bank details are not normally accessible to foreign services.

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[104] My representative who travelled to Macedonia was able to see former "secret apartments", which are now closely supervised by NGOs defending human rights.

[105] In a recent development, the BND was forced to admit that one of its agents had indeed heard about El-Masri's detention at the hands of the Macedonian services and his hand-over to the Americans as early as January 2004 in a civil service canteen in Skopje (see Spiegel-Online of 31 May and 1 June 2006). The German Minister of the Interior tried to play down the importance of this revelation by calling it a mere breakdown of communications, as the higher echelons of the BND had not been informed. Nonetheless it is interesting to note that the truthfulness of the content of this conversation was never called into question.

[106] According to a German source, Mr Seyam, a German national of Indonesian origin, had returned in an unbelievable manner from a stay in that country. He had allegedly been arrested by the Indonesian authorities who suspected him of involvement in the Bali bombing. He had been released for lack of evidence, and taken back to Germany by German agents, who had been sent in order to prevent Mr Seyam being "handed over" to the Americans, who were apparently already waiting. Mr Seyam then allegedly went to Neu-Ulm at the instigation of his German "rescuers", who recommended that he go to the *Multikulturhaus*. The latter, according to the source, was under observation by both the *Baden-Württemberg* services (who had "planted" an informer there in the person of Dr Yousif, an Islamic preacher at the centre and an old acquaintance of Mr Seyam) and those of neighbouring Bavaria who – not knowing that Yousif was working for *Baden-Württemberg* – regarded him as a "preacher of hate". It was in this Islamic cultural centre frequented by Mr El-Masri that the latter came to know Mr Seyam (against whom a judicial investigation had also been opened in Germany, and closed shortly afterwards for lack of evidence). The two men, both looking for housing for their large families, became friends.

[107] According to Mr El Hasri, these were money transfers relating to Norwegian customers in connection with his car sales activity.

129. In my opinion, this detailed knowledge of Mr El-Masri's – real – life also rules out the theory that Mr El-Masri was the victim of mere mistaken identity[108], being confused with a person of the same (or similar) name, whose name appeared in the American Congressional report on the 11 September attacks[109] as having travelled by train in Germany together with members of the "Hamburg cell" of the terrorists of 11 September, including one of the murderous pilots, Muhammad Atta[110].

130. As regards the identity of "Sam", who came and interrogated Mr El-Masri in Afghanistan and accompanied him back on the return flight to Europe, speaking German with a Northern accent, Mr El-Masri remains convinced that this is Mr Lehmann, an agent of the German *Bundeskriminalamt*. He had identified him with "100%" certainty on photographs and a videotape, and with "90%" certainty at a surprise police lineup on 22 February 2006[111].

131. Mr El-Masri has also been the victim of a defamatory campaign. The press service of the Baden-Württemberg Ministry of the Interior had indicated that El-Masri was a member of "Al Tawid", implying "Al Tawid al Jihad", a group belonging to Al Quaida and headed by Abu Musab al-Zarkawi. According to Mr Gnjidic, the confusion was deliberate: El-Masri did belong to a militant anti-Syrian party (a nationalist party of the left also including Islamist elements) called "Al Tawid", founded in 1982 and wound up in 1985 after the Syrian invasion. Whereas certain members were captured by the Syrians, El-Masri fled and sought political asylum in Germany, for precisely that reason. That group allegedly had absolutely nothing in common (except part of the name, which means "all-powerful god") with the terrorist group headed by al-Zarkawi. Mr El-Masri was again faced with this confusion at his hearing by the Temporary Committee of the European Parliament, where at least one EP deputy asked him to what other terrorist groups he belonged. As Mr El-Masri was still in a fragile psychological state, I find it particularly odious that he was also the subject of an article, with a photograph, in the local press[112] once again insinuating his links with terrorist circles without any evidence whatsoever. He told us that he now hardly dares to leave his home.

132. The case of Khaled El-Masri is exemplary. Some aspects still require further investigation and it is for that reason that inquiries are ongoing in the *Bundestag'*s Committee of Inquiry and by the Munich prosecutors. The story of El-Masri is the dramatic story of a person who is evidently innocent – or at least against whom not the slightest accusation could ever be made - who has been through a real nightmare in the CIA's "spider's web", merely because of a supposed friendship with a person suspected at some point in time of maintaining contacts with terrorist groups. El-Masri is still waiting for the truth to be established, and for an apology. His application to a court in the United States has been rejected, at least in the first instance: not because it seemed unfounded, but because the Government brought to bear so-called "national security" and "state secrecy" interests. This speaks for itself.

3.2. "The Algerian Six"

133. Six Bosnians of Algerian origin – four Bosnian citizens and two longstanding residents[113] were arrested in October 2001 by order of the Supreme Court of the Federation of Bosnia and Herzegovina and

[108] This appears to be the argument of the German government, in the context of the talks between Federal Chancellor Angela Merkel and American Secretary of State Condoleezza Rice (cf. the link to the record of the joint press conference by Mrs Merkel and Mrs Rice on 6 December 2005 [http://www.state.gov/secretary/rm/2005/57672;htm]. Mrs Merkel confirmed that she had spoken to Mrs Rice about the El-Masri case and said that the American government, the American administration, had admitted that the man had been taken by mistake and that the American administration did not deny in principle that this had occurred).

[109] Page 165.

[110] Mr El Masri stated in our talks that he had not even been questioned about this train journey mentioned in the report on 11 September. In his written deposition to the Virginia court (Declaration of Khaled El-Masri in support of plaintiff's opposition to the United States' motion to dismiss […] dated 6 April 2006, p. 13), he said that he was interrogated in Afghanistan also about his alleged association with important terrorists such as Muhammad Atta, Ramzi Bin Al-Shibh and other presumed extremists based in Germany.

[111] To the surprise of El-Masri and his lawyer, Mr Gnjidic, the prosecutor's office immediately announced to the press that the identification of "Sam" had failed. Subsequently the magazine "Stern" unearthed a CIA agent of German origin, Thomas V., who spoke German with the "north German" accent detected in "Sam" by El-Masri, who had been posted in 2000 to the United States Consulate General in Hamburg and who might be "Sam"[111]. The Munich prosecutor in charge of the case, Mr Hofmann, now rules out the possibility of "Sam" being the same person as the federal agent Lehmann, believing that it is now almost fully established that he was present at the *Bundeskriminalamt* office in Berlin throughout May 2004. But Mr El-Masri and his German lawyer Gnjidic remain convinced that "Sam" is indeed Lehmann, and that the Thomas V. trail was intended mainly to exonerate the German services.

[112] See Neu Ulmer Zeitug, *Islamisten zieht es nach Ulm; Multi-Kultur-Leute treffen sich jetzt im Donautal – Welche Rolle spielt Khaled El-Masri?* 15 March 2006.

[113] Mustafa Ait Idir, Hadz Boudella, Lakhdar Boumediene, Saber Lahmar and Mohammed Nechle and Belkacem Bensayah.

detained on remand. They were suspected of having planned bomb attacks on the American and British embassies.

134. The investigation, between October 2001 and January 2002, did not reveal any evidence linking these men to a terrorist plot. On 17 January 2002, the office of the federal prosecutor informed the investigating magistrate at the supreme court that he had no reason to keep the men in custody any longer. On that same day at about 3pm the investigating magistrate ordered the immediate release of the six men.

135. Again on the same day, at about 5pm, the Human Rights Chamber of Bosnia and Herzegovina issued an interim order, following an application lodged by four of the men[114]. The order, which had statutory force in Bosnia according to the Dayton peace accords, required the Government of Bosnia and Herzegovina to take all necessary steps to prevent the forcible deportation of the applicants from Bosnia and Herzegovina.

136. However, on the evening of 17 January 2002 the six men were arrested by Bosnian police officers, and handed over to members of the United States military forces stationed in Bosnia and Herzegovina on the morning of 18 January. This is recorded as an established fact in a judgment of the Human Rights Chamber for Bosnia and Herzegovina of 4 April 2003[115]. The Chamber refers to a document of the Council of Ministers dated 4 February 2002, according to which members of the police forces of the Federation under the authority of the Federal Minister of the Interior and of forces of the Minister of the Interior of the Canton of Sarajevo handed the applicants over to the American forces at the Butmir base on 18 January at 6am.

137. According to the victims' evidence, transmitted by their lawyers[116], the six victims were handcuffed in uncomfortable positions and hooded so that they could not see the aircraft which they were forced to board, at a given time on 18 or 19 January 2002. According to the lawyers, official documents obtained in the course of the judicial proceedings in progress show that two aircraft were assigned to this operation[117], and that the aircraft which the six men were made to board was at the Tuzla military base. After a flight of several hours, the aircraft landed and the six men were made to disembark, at a place which they describe as very cold[118]. During the flights the men were beaten and tied up in uncomfortable positions. At the stopover – probably Incirlik – they were joined by other detainees, some of whom said they came from Afghanistan. The human cargo arrived at Guantanamo on 20 January 2002.

138. The six men have been prisoners at Guantanamo until the present time, that is to say for over four years.

139. The illegal nature of these detentions was recognised by the Human Rights Chamber for Bosnia[119]. In the three decisions, the Chamber invited the Government of Bosnia to assist the six men, including recourse to diplomatic and judicial means. In the decision of 4 April 2003 concerning Mr Ait Idir, the Chamber even ordered the Government of Bosnia to take all possible steps to secure the release of the applicant and his return home[120].

140. The Bosnian government has recognised its legal obligations but not complied with them.

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[114] cf. Boudella, Boumediene, Nechle and Lahmar v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, Human Rights Chamber for Bosnia and Herzegovina, cases nos. CH/02/8679, CH/02/8690, CH/O2/8691, Order for Provisional Measures and on the Organization of the Proceedings, 17 January 2001.

[115] Case no. CH/O2/9499, Bekasem Bensayah against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina (cf. in particular paras. 50 et 164).

[116] The international law firm Wilmer Hale, which supplied written documentation and oral testimony (Mrs Karin Matussek on 11 April 2006 to our committee, and Mr Steven Oleskey to the temporary committee of the European Parliament, on 25 April 2006.) My representative also met with four WilmerHale attorneys working on this case at their offices in Boston, USA in May 2006. I am grateful to this firm for its excellent cooperation.

[117] Two C-130 cargo planes bearing serial numbers UJM166301019 and UQU09Z10L019, one of which also used the American base at Ramstein in Germany for the purposes of this operation. The documents in question also show that the aircraft transporting the six men stopped over at the American base at Incirlik in Turkey.

[118] The six men think it might have been in Turkey, on the basis of what little they were able to see and hear.

[119] Afore-mentioned judgment of 4 April 2003 concerning Mr Bensayah and Mr Ait Idir; in a judgment of 11 October 2002, the Chamber had already decided the cases of the other four men (Boudellaa, Boumediene, Nechle and Lahmar against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, cases nos. CH/02/8679, CH/02/8689, CH/02/8690, CH02/8691, decision of 11 October 2002).

[120] Idem, para. 168.

141. In the Council of Ministers document cited by the Human Rights Chamber[121], the Government of Bosnia and Herzegovina admitted that the six men had been "handed over" to the American forces by the Bosnian authorities without extradition formalities being observed[122].

142. On 21 April 2004, the Human Rights Committee of the Parliament of Bosnia and Herzegovina exhorted the Bosnian executive to execute the decision of the Human Rights Chamber and start proceedings with the United States for the repatriation of the detainees. Its report was endorsed by the parliament chamber on 11 May 2004.

143. On 11 March 2005, the Minister of Justice confirmed that the Bosnian government had sent a letter to the American government requesting the return of the six men.

144. On 21 June 2005, the Bosnian Prime Minister Mr Adnan Terzic confirmed before the Parliamentary Assembly of the Council of Europe[123] the importance of this case as an indicator of democratic progress in Bosnia, and declared his willingness to identify the best way of ensuring the release of the six Bosnian citizens and former residents from Guantanamo, in accordance with Parliamentary Assembly Resolution 1433 (2005).

145. Lastly, on 16 September 2005, the Bosnian parliament adopted a resolution inviting the Council of Ministers of Bosnia and Herzegovina to make contact with the American government in order to resolve the problem of the six men as rapidly as possible.

146. It is all the more surprising that, in spite of all these promising declarations, including that of the Prime Minister to the Parliamentary Assembly of the Council of Europe, there has been no government initiative aimed at the release of the six men.

147. According to their lawyers[124], the American government has declared on several occasions that it is willing to enter into bilateral discussions with the governments of countries whose citizens are detained at Guantanamo in order to arrange their repatriation, subject to adequate security conditions. In the case of the six men in question, such measures would be unnecessary anyway, since the charges against them have already been investigated by the competent authorities and those investigations have shown that they are innocent. Nonetheless, the Bosnian government has apparently made no credible move to initiate negotiations in that direction[125].

148. The innocence of the men in question – which is in any event presumed, and is in no sense a condition for treating the suspects in accordance with legal rules – has just been strengthened by a report drawn up by the German military. This report, produced in decidedly unusual circumstances[126], which also

[121] Note 115 above.

[122] The Human Rights Chamber, in the above-mentioned Bensayah judgment (note 114), explains in a relevant manner that the "handing over" of the applicant can in no way be deemed to constitute extradition. In particular, the note dated 17 January 2002 from the US embassy cannot be regarded as a request for extradition by the United States. In that note, the US embassy in Sarajevo informs the Government of Bosnia and Herzegovina that it is willing to take charge of the six Algerian citizens in question and offers to arrange for the physical transfer of these persons at a time and place suitable to both parties.

[123] In reply to a question from our former colleague Kevin McNamara, following Resolution 1433 (2005) adopted by the Parliamentary Assembly on 26 April 2005, calling on all Council of Europe member States, including Bosnia and Herzegovina, to protect the rights of their citizens or residents detained at Guantanamo and to have them released and repatriated.

[124] Memorandum of 12 April 2006, addressed to the Temporary Committee of the European Parliament.

[125] See Matthew A. Reynolds, Acting Assistant Secretary, Legislative Affairs, US Department of State, letter to Senator James M. Jeffords, response to a requeset for information (copy on file with the Rapporteur), 15 June 2005: *"Although the Government of Bosnia and Herzegovina has made several inquiries regarding the condition of each detainee and has asked for their release, it has not indicated that it is prepared or willing to accept responsibility for them upon transfer."*

[126] German military personnel posed as journalists in order to conduct an interview with Mr Bensayah's wife, Mrs Anela Kobilica, on 17 June 2003. The report subsequently drawn up by the German military concluded that the grounds on which the six men were arrested and deported were *"highly dubious"* and that documents examined gave rise to the suspicion that at least some of the six had been *"subjected to an injustice"*.

aroused the interest of the German media and parliamentarians[127], concluded *inter alia* that the reasons for arresting the six men were "highly dubious"[128].

149. In my opinion, the case of the "Bosnian six" is another well documented example of the abduction of European citizens and residents by the American authorities with the active collusion of the authorities of a Council of Europe member state. The government of Bosnia and Herzegovina has the merit of no longer denying the fact that it handed over the six men to the American forces. According to information I have received[129], the Bosnian authorities acted under extraordinary pressure from the American embassy in Sarajevo, but the fact remains that they acted in violation of clear decisions by the Supreme Court and the Human Rights Chamber ordering the release of these men. If the damage to the good human rights reputation of Bosnia and Herzegovina is to be repaired, official recognition of the facts is an important step in the right direction, but it must be followed as swiftly as possible with credible diplomatic intervention vis-à-vis the American government in order to secure the rapid repatriation of these six men, who have now been festering in Guantanamo Bay for over four years.

3.3. Ahmed Agiza and Mohammed Alzery (El Zari)

150. The case of the two Egyptian asylum-seekers "handed over" by the Swedish authorities to American agents who took them to Egypt, where they were tortured in spite of diplomatic assurances given to Sweden, is another very well documented case. It led to Sweden's being condemned by the United Nations Committee against Torture (UN-CAT)[130]. The Swedish authorities were also criticised for having attempted to conceal the facts from UN-CAT[131].

151. The affair was brought to public notice mainly by the "Kalla Fakta"[132] television programme, and research by the Swedish investigative journalists blew open the secret system of CIA aircraft transporting clandestine prisoners in the "war against terrorism". The aircraft used for this operation – a Gulfstream, number N379P – has become one of the most notorious "rendition" aircraft[133].

152. The behaviour of the Swedish secret police (Säpo) gave rise to a detailed investigation by the Swedish parliamentary ombudsman, Mats Melin[134]. The judicial authorities also examined the case and concluded that there were no grounds for a criminal prosecution against either the Swedish agents involved, or the pilot of the aircraft, or other American agents who were part of the team responsible for transporting Mr Agiza and Mr Alzery to Egypt[135].

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[127] See, for example, http://www.tagesschau.de/aktuell/meldungen/0,1185,OID5072374,00.html. Journalists' associations protested vehemently at methods of investigation that involved intelligence agents masquerading as journalists, as this exposed real journalists to suspicion and possible reprisals.

[128] From a confidential source, I received a copy of this report, which, it was claimed, was deleted from the German military archives and never received by the German embassy in Sarajevo, to which it was said originally to have been addressed. See *Supplementary Intelligence Report*, 16 July 2003 (copy on file with the Rapporteur).

[129] See for example the Wilmer Hale memorandum of 12 April 2006, at page 3, supported by a wealth of documents given to us by Wilmer Hale, copies of which are all on file with the Rapporteur.

[130] United Nations Committee against Torture, decision of 20 May 2005, CAT/C/34/D/233/2003; see also United Nations Committee against Torture, Conclusions and recommendations of the Committee against Torture: Sweden. 06/06/2002, CAT/C/CR/28/6 (Concluding Observations/Comments), and the Swedish reply (Comments by the Government of Sweden on the Concluding Observations of the Human Rights Committee (CCPR/CO/74/SWE) of 14 May 2003. In that reply (para. 16), the Swedish government said that in its opinion, the "assurances" given by Egypt were being and would continue to be fully respected, and that the government had received no information to cast doubt on that conclusion.

[131] See "Kalla Fakta" (note 131 below), page 10 : the Swedish reply to the final observations (note 129 above) seems to be contradicted by the first report of the Swedish Ambassador in Egypt, according to which Mr Agiza had spoken to him about the abuse and violence which he and Mr Alzery had suffered. According to "Kalla Fakta", the Swedish government had filed this information and refused to hand it to the United Nations. In its decision of 20 May 2005 (note 129 above, para. 13.10), UN-CAT notes that Sweden has not fulfilled its obligation to co-operate fully with the Committee, and has not made all the relevant and necessary information for resolving the case available to the Committee.

[132] Translation of the title of the programme: "Cold facts"; a transcript of the broadcast of 22 November 2004 was provided to me by TV4.

[133] Kalla Fakta has given an account of its research into the owner of N379P, Premier Executive Transport Services. Posing as potential clients, journalists satisfied themselves as to the governmental, clandestine nature of this firm (cf. transcript, note 131 above, pages 4-5).

[134] See Mats Melin, Parliamentary Ombudsman (Sweden), *A review of the enforcement by the Security Police of a Government decision to expel two Egyptian citizens*, Adjudication No. 2169-2004, dated 22 March 2005. (Translated copy on file with the Rapporteur.)

[135] *Ibid*, at page 3.

153. In short, the facts occurred in the following manner: on 18 December 2001, Mr Agiza and Mr Alzery, Egyptian citizens seeking asylum in Sweden, were the subject of a decision dismissing the asylum application and ordering their deportation on grounds of security, taken in the framework of a special procedure at ministerial level. In order to ensure that this decision could be executed that same day, the Swedish authorities accepted an American offer to place at their disposal an aircraft which enjoyed special overflight authorisations[136]. Following their arrest by the Swedish police, the two men were taken to Bromma airport where they were subjected, with Swedish agreement, to a "security check" by hooded American agents.

154. The account of this "*check*" is especially interesting, as it corresponds in detail to the account given independently by other victims of "rendition", including Mr El-Masri. The procedure adopted by the American team, described in this case by the Swedish police officers present at the scene[137], was evidently well rehearsed: the agents communicated with each other by gestures, not words. Acting very quickly, the agents cut Agiza's and Alzery's clothes off them using scissors, dressed them in tracksuits, examined every bodily aperture and hair minutely, handcuffed them and shackled their feet, and walked them to the aircraft barefoot.

155. The ombudsman condemns as degrading the way in which the detainees were treated from the time when they were taken charge of by the American agents until the end of the operation when the two men were handed to the Egyptian authorities. He does not consider that it constitutes torture for the purposes of Article 3 of the European Convention on Human Rights, but asks the question – though he does not answer it – whether the execution of the deportation order nonetheless violates Article 3. In any event, he finds that the operation was carried out in an inhuman and therefore unacceptable manner[138].

156. According to the ombudsman's findings, the Swedish officers, who were poorly led, lost control of the operation from the start of the American team's intervention. They ought to have intervened to put an end to the degrading treatment of the detainees, which was not justified on security grounds since the Swedish police had already carried out a body search on the detainees at the time of arrest.

157. Prior to deportation of the two men to Egypt, Sweden sought and obtained "diplomatic assurances" that they would not be subjected to treatment contrary to the anti-torture convention, would have fair trials and would not be subjected to the death penalty. The "assurances" were even backed up by a monitoring mechanism, regular visits by the Swedish Ambassador and participation by Swedish observers at the trial.

158. Developments in the case show that these "assurances" were not honoured. Mr Alzery's lawyer, Kjell Jonsson[139], states that extremely grave acts of torture took place[140]. Although Mr Alzery was released from prison in October 2003, he is not allowed to leave his village without permission from the authorities. Mr Agiza was sentenced to 25 years imprisonment by a military court in a trial from which the Swedish observers were excluded for the first two days out of a total of four. Despite the fact that Mr Agiza complained of torture during his detention, which lasted over two years after his forced return to Egypt, and despite the fact that the prison doctor's report did record physical injuries sustained in prison, the military court did not act on the defence request for an independent medical examination[141].

159. The UN-CAT decision shows that the "diplomatic assurances", even with follow-up clauses attached, are not such as to prevent the risk of torture[142]. The deporting state therefore still bears responsibility.

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[136] An internal Säpo report seems to indicate that the American involvement was approved by the Ministry of Foreign Affairs; persons who attended the meeting with the minister and were questioned by the ombudsman have no recollection that this was mentioned.

[137] Owing to lack of space in the room made available to the Americans, the Swedish police were not able to observe everything. In particular, they did not see that (tranquillising) suppositories were administered and that diapers were affixed, as the detainees maintain, and as was done in other "renditions". See the earlier section of this report on the "Human Impact of Renditions and Secret Detentions".

[138] See the report by Mats Melin, *supra* note 134, page 23.

[139] Mr Jonsson testified before the Temporary Committee of the European Parliament on 23 March 2005; he spoke at great length with a member of my team during his visit to Brussels.

[140] Electric shock torture was used, with electrodes fixed to the most sensitive parts of the body, in the presence of a doctor who assesses what electrical charge the prisoner can survive. In order to prevent marks, the places affected are treated specially at the end of each torture session.

[141] A representative of Human Rights Watch observed the entire trial ; the observed violations of the rights of the defence are listed in a HRW communiqué of 5 May 2005 (Sweden Implicated in Egypt's abuse of Suspected Militant – Egypt violated diplomatic promises of fair trial and no torture for terrorism suspect (http://hrw.org/english/docs/2004/05/05/egypt8530_txt.htm).

[142] Diplomatic assurances are not the focus of my mandate; here, nevertheless, are two very pertinent reports on the subject: Amnesty International, *"Diplomatic Assurances" – no protection against torture or ill-treatment*, report No. ACT

160. All things considered, the Swedish case of Agiza and Alzery cannot be classed as "abduction" by the CIA. The two men were the subject of a Swedish deportation procedure following dismissal of the asylum application; that procedure was severely criticised by UN-CAT, and rightly so: the immediate execution of the decision deprived the two men of any possibility of appeal, including under the United Nations Convention against Torture – an appeal which moreover would have stood a good chance of success, in view of the risk of torture they faced in Egypt. Other criticisms directed at Sweden are the "slack" implementation of the follow-up clause relating to the assurances obtained prior to extradition[143], and above all the fact that Sweden did not send UN-CAT all the relevant information[144]. On the other hand, with regard to the ill-treatment of the prisoners at Bromma airport and in the aircraft, the reproach is aimed primarily at the United States. I share Mats Melin's view that such degrading and humiliating treatment is unacceptable.

161. Nonetheless, in my opinion it is for Sweden to clarify further the reasons and responsibilities: how was it that the Swedish officers present on the scene allowed their American counterparts to do as they wished, letting them take control of this operation while still on Swedish soil?

3.4. Abu Omar

162. At midday on 17 June 2003, Hassam Osama Mustafa Nasr, known as Abu Omar, an Egyptian citizen, was abducted in the middle of Milan. Thanks to an outstanding and tenacious investigation by the Milan judiciary and the DIGOS police services, Abu Omar's is undoubtedly one of the best-known and best-documented cases of "extraordinary rendition"[145]. Via the military airbases at Aviano (Italy) and Ramstein (Germany), Abu Omar was flown to Egypt, where he was tortured before being released and re-arrested. To my knowledge, no proceedings were brought against Abu Omar in Egypt. The Italian judicial investigation established beyond all reasonable doubt that the operation was carried out by the CIA (which has not issued any denials). The Italian investigators likewise established that the presumed leader of the abduction operation – who had also worked as the American consul in Milan – was in Egypt for two weeks immediately after Abu Omar was handed over to the Egyptian authorities. It may safely be inferred that he contributed, in one way or another, to Abu Omar's interrogation. The proceedings instituted in Milan concern 25 American agents, against 22 of whom the Italian judicial authorities have issued arrest warrants. Abu Omar was a political refugee. Suspected of Islamic militancy, he had been under surveillance by the Milan police and judicial authorities. As a result of the surveillance operation, the Italian police were probably on the verge of uncovering an activist network operating in northern Italy. Abu Omar's abduction, as the Milan judicial authorities expressly point out, sabotaged the Italian surveillance operation and thereby dealt a blow to the fight against terrorism. Is it conceivable or possible that an operation of this kind, with a deployment of resources on this scale in a friendly country that was an ally (being a member of the coalition in Iraq), was carried out without the Italian authorities – or at least the corresponding Italian officials – being informed? The Italian Government has denied having been informed. There has recently been a significant new development in the investigation by the Milan prosecuting authorities, however: an agent belonging to an elite *Carabinieri* unit has admitted taking part in Abu Omar's abduction as part of an operation co-ordinated by the military intelligence services (SISMI)[146]. But General Pollari, head of SISMI, had formally denied any SISMI participation in the abduction; he had even affirmed that he had only been informed of this episode after the abduction itself[147].

40/021/2005, 1 December 2005; and Human Rights Watch, *Still at Risk: "Diplomatic Assurances" No Safeguard against Torture*, Report No. 17, Vol. 3D, 17 April 2005.

[143] See the afore-mentioned HRW communiqué of 5 May 2005: the first visit Mr Agiza received from a Swedish diplomat was only five weeks after his arrival in Egypt, despite the fact that experience shows that torture and ill-treatment take place during the first days of detention. Furthermore, the Swedish diplomats, who were not trained to recognise signs of torture, apparently gave several days' notice of their visits, and all conversations were apparently monitored by the Egyptian warders.

[144] Sweden justifies the fact that it did not send its ambassador's first visit report, in which Mr Alzery's complaints of ill-treatment are recorded, for fear of reprisals against the detainees, given doubts about respect for confidentiality within UN-CAT. But in any case those complaints were known to the Egyptian authorities, who were represented during the ambassador's visit.

[145] I met the prosecutor heading the investigation, Armando Spataro, and was able to obtain as full information as confidentiality and procedural requirements permitted. The Abu Omar case is likewise described in the aforementioned book by Guido Olimpio, *Operazione Hotel California*, Feltrinelli, October 2005. The main documents in the judicial investigation have been collected and reproduced in a book by Guido Ruotolo and Vincenza Vasile: *Milano-Cairo. Viaggio senza ritorno. L'iman rapito in Italia dalla CIA*, Tullio Pironti Editore, 2005.

[146] See *Corriere della Sera* and *La Repubblica* of 11 May 2006.

[147] Statement of General Pollari at the meeting of the TDIP on 6 March 2006.

3.5. Bisher Al-Rawi and Jamil El-Banna

163. This case, which concerns two British permanent residents arrested in Gambia in November 2002 and transferred first to Afghanistan and from there to Guantanamo (where they still are), is an example of (ill-conceived) cooperation between the services of a European country (the British MI5) and the CIA in abducting persons against whom there is no evidence justifying their continued detention in prison and whose principal crime is to be on social terms with a leading Islamist, namely Abu Qatada.

164. The information made public to date[148] shows that the abduction of Messrs Al-Rawi and El-Banna was indeed motivated by information – partly erroneous – supplied by MI5.

165. Bisher Al-Rawi and Jamil El-Banna were arrested in Gambia on 8 November 2002. They intended to join Mr Al-Rawi's brother Wahab, a British citizen, and help him set up a mobile peanut processing plant. The British authorities were well aware of this business trip[149]. On 1 November, Messrs Al-Rawi and El-Banna left on their trip, but did not get very far. At Gatwick airport they were arrested by reason of a suspect item in Mr Al-Rawi's hand luggage.

166. On the same day, a first telegram from MI5 informed the CIA that the two men had been arrested under the 2000 anti-terrorist act. That telegram contained false information, including the statement that Mr Al-Rawi was an Islamist extremist, and that the search of his luggage had revealed that he was carrying a sort of improvised electronic device which could be used, according to preliminary investigations, as a component of a home-made bomb[150].

167. The two men spent 48 hours in police custody, until the police decided that the "suspicious device" was nothing other than a battery charger on sale in several electronic goods shops (Dixons, Argos, Maplins). Mr Al-Rawi explained this when he was arrested, but it had to be checked. The conclusion to the charger episode – that it was indeed a "harmless device" – was communicated to the Ministry of Foreign Affairs by MI5 in a telegram of 11 November 2002. Unfortunately, there is no evidence that this information was ever conveyed to the CIA. The allegations concerning this "device" reappeared in their "trial" before the CSRT (Combatant Status Review Tribunal)[151] as "evidence" that they were "enemy combatants".

168. Messrs Al-Rawi and El-Banna returned home on 4 November 2002 and reorganised their trip to Gambia for 8 November. Meanwhile, several telegrams were sent by MI5 to the Americans concerning the two men, informing them that they knew Abu Qatada and that Mr El-Banna was the latter's "financier". It is true that the two men knew Abu Qatada[152]. On the other hand, according to the lawyers, Mr Al-Rawi had helped MI5 to prepare the non-violent arrest of Abu Qatada, and British agents had even thanked him for doing so[153].

169. On 8 November 2002, the day when the two men flew to Gambia, MI5 sent another telegram giving the flight details, including the departure of the delayed flight and the estimated arrival time. The telegram states that "*this message should be read in the light of earlier communications*". In addition, the telegram of 8

[148] I wish to thank in particular my British colleague Andrew Tyrie, Chairman of the House of Commons All-Party Parliamentary Group (APPG) on renditions, who helped to arrange for two members of our committee secretariat to attend an APPG hearing withMr Al-Rawi and Mr El Banna's lawyers and family. This hearing took place on 28 March 2006. I also thank the two men's American and British lawyers, Mr Brent Mickum and Ms Gareth Peirce, along with Mr Clive Stafford-Smith, the legal director of REPRIEVE, for the detailed information they provided for my inquiries.

[149] Mr El-Banna informed his lawyer that two MI5 agents had come to his home and told him that they knew all about his planned trip. In reply to his question as to whether everything was in order, they said yes and wished him good luck. Mr El-Banna's wife confirmed this visit at the APPG hearing on 28 March 2006.

[150] Telegram of 1 November 2002, made public on 27 March 2006, with other telegrams dated 4, 8 and 11 November and 6 December 2002 ; these documents are normally classified secret, but came into the public domain after being cited on 22 and 23 March 2006 at a public hearing in the Queens Bench Division of the High Court in London, before Lord Justice Latham and Mr Justice Tugendhat. The telegrams were also the subject of the APPG hearing on 27 March 2006. It is clear to their lawyers that not everything is said in the telegrams, which moreover refer to other communications, including telephone calls.

[151] See US Department of Defense, unclassified Combatant Status Review Tribunal (CSRT) transcripts disclosed in the matter of *El-Banna et al v. Bush*, in the US District Court of Columbia (copies of all transcripts on file with the Rapporteur), October 2004.

[152] At the APPG hearing on 27 March 2006, Mr El-Banna's wife explained that their "social" relations derived from the fact that the three men had family ties with Jordan.

[153] Al-Rawi's cooperation with MI5 is said also to be the reason for several visits by MI5 agents to Guantanamo. The lawyers presented details of these conversations in public as recounted by their clients (copy in file). MI5 has not officially recognised this cooperation, which Al-Rawi also claimed in his depositions to the CSRT.

November does not mention, as the earlier telegrams do, that this information "*must not be used as the basis of overt, covert or executive action*".

170. At Banjul airport, Al-Rawi and El-Banna, accompanied by a collaborator, Mr El Janoudi, met Bisher Al-Rawi's brother Wahab, who had gone to Gambia one week before the others, and all four were arrested by Gambian agents. They were taken to a house outside Banjul. Mr Janoudi managed to telephone his wife in London, and another brother of Mr Al-Rawi, Numann, went to see his MP, Edward Davey, who informed the Foreign Ministry.

171. During the following days, according to Wahab's account, American agents were very present, but the detainees never saw a British official despite the fact that they asked to see a consular representative. Wahab stated at the APPG hearing that the CIA and Gambian officials repeatedly alluded to the fact that *"it is the British who have told us to arrest you"*. Mr El-Banna says he has continually been told the same thing during his subsequent detention at Guantanamo Bay:

> "*My interrogator asked me 'Why are you so angry at America? It is your Government, Britain, the MI5, who called the CIA and told them that you and Bisher were in The Gambia and to come and get you. Britain gave everything to us. Britain sold you out to the CIA*'"[154].

172. On 5 December 2002, after 27 days, Wahab was released and returned to the United Kingdom. Some days afterwards, on a Sunday, Bisher Al-Rawi and Jamil El-Banna were flown to Afghanistan in a military jet with over 40 seats. There were at least 7 or 8 American agents on board, including a female doctor. Through their lawyers, the two men gave a detailed account of their degrading and humiliating treatment, many details of which echo the treatment suffered by other victims of "renditions'[155].

173. At Kabul, they were taken in less than 15 minutes to the prison identified as the "Dark Prison". The description of the inhuman detention conditions in this prison[156], an important link in the CIA "spider's web", corresponds in many details to that given by other victims of "renditions" who were brought there. After two weeks in this sinister prison, the two men were transferred to Bagram by helicopter. At Bagram they were imprisoned and ill-treated for a further two months. The American interrogators allegedly offered Mr El-Banna large sums of money in exchange for false witness against Abu Qatada. When these offers failed to produce the expected result, the interrogators allegedly threatened to send him back for a year to the "Dark Prison", followed by 5 or 10 years in Cuba, and made shameful threats against his family living in London[157].

174. Finally, the two men were transported to Guantanamo, where they were again subject to inhuman treatment. Mr Al-Rawi says he received many visits from MI5 agents, the first of them in early autumn 2003, and that he was interrogated by ten or so different CIA agents. One of the MI5 agents, he says, even apologised to him. In January 2004, two British agents ("Martin" and "Mathew") asked him whether he would be willing to work for MI5 again. Mr Al-Rawi replied that he would, provided that this would serve the cause of peace. Several months later, a certain "Alex" with whom Mr Al-Rawi had worked in London came to see him at Guantanamo, accompanied by an "attractive female agent". However, at the time of his "trial" before the CSRT, the British authorities refused to send to Guantanamo the witnesses he named or simply to confirm his links with MI5, thereby condemning him to continuous detention – detention which continues to this day, having lasted almost four years in all.

175. The families of Messrs Al-Rawi and El-Banna and their lawyers at the London firm Birnberg, Peirce & Partners brought an action to oblige the British government to make representations to the United States through diplomatic channels in order to secure the release and repatriation of the two men as soon as possible. According to the latest information, the British government has acted along those lines with regard to Mr Al-Rawi, but not with regard to Mr El-Banna. The judgment at first instance, given in May 2006, dismissed the families' complaints.

176. In view of these highly disturbing facts, I find that the British authorities must shed light on this case in full. I welcome the fact that our colleague, Andrew Tyrie, has devoted much energy to this matter in order for truth to be established in this disturbing case. Meanwhile, the United Kingdom, even if it has no

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[154] See El-Banna's statement to his lawyer, *supra* note 68.

[155] They were dressed in diapers, wore hoods without eye-holes, had their ears blocked up, their legs shackled and their hands painfully handcuffed behind their backs, and were denied access to toilets.

[156] *"Diabolically"* loud music round the clock, total absence of light, rotten food, no possibility to wash or use a toilet, uncomfortable handcuffing and leg shackling, cold cells, inadequate clothing, and the frequent beating and trampling of prisoners.

[157] I prefer not to quote this extremely upsetting testimony.

recognised legal obligation, must make good the consequences of the apparently very imprecise communication between the MI5 and the American services. There is indeed little doubt that the arrest of the two men was largely triggered or at least influenced by the messages of November 2002, only part of which (the afore-mentioned telegrams) is public knowledge.

3.6. Maher Arar

177. Maher Arar, a Canadian citizen of Syrian origin, came to testify in public before the Temporary Committee of the European Parliament[158]. During a stopover on return from holiday in Tunisia, in September 2002, he was arrested at JFK airport in New York by American agents. After being detained in a high-security prison and interrogated for two weeks by the New York police, the FBI and the American immigration service, he was allegedly transported from New Jersey airport via Washington, Rome and Amman to a prison belonging to Syrian military intelligence[159]. He spent more than ten months there, during which he says he was tortured, abused and forced to make false confessions. During his stay in Syria, he says, he also heard the voice of a German prisoner being tortured. After a tenacious campaign by his wife, Mr Arar was able to have irregular contacts with Canadian diplomats posted in Syria. He says he has never been the subject of criminal charges in any country. Mr Arar stills suffers from post-traumatic stress syndrome following his terrible experience.

178. The American Government considers the "rendition" of Arar as a legitimate procedure in conformity with its immigration rules[160].

179. According to Mr Arar, the agents on board the aircraft never identified themselves, but he heard that they belonged to a *"special removal unit"*. In this specific case, the transfer of Mr Arar to Syria seems to be a well established example of the "outsourcing of torture", a practice mentioned publicly by certain American officials[161].

180. The question which interests us more particularly, in view of our mandate, is whether and if so, to what extent, the European states concerned (in particular Italy and Greece) were aware of the illegal transport of Mr Arar and perhaps even gave logistical support[162].

181. Another question is the role of the Canadian authorities in the matter. This question is the subject of a very thorough investigation by a special commission[163].

182. The initial report of the investigator Stephen J. Toope was published on 14 October 2005[164]. Mr Toope, who has lengthy experience in working with torture victims, has convincingly established the truthfulness of Mr Arar's depositions, which he has compared with those of other former Syrian prisoners held in the same prison run by Syrian military intelligence (Far Falestin). His report, which also mentions the findings of specialist doctors whom Mr Arar consulted on his return, describes in detail Mr Arar's treatment in Syria, which he unhesitatingly regards as torture within the meaning of the United Nations Convention against Torture. However, that report does not cover the part played by the Canadian authorities in the matter. This point will be covered in the final report of the Commission, which is expected to be published by the end of the summer of 2006[165]. It is thus premature to draw any conclusions at this stage[166].

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[158] Accompanied by his lawyer, he also had exhaustive talks with a member of the Committee's secretariat.

[159] This journey was retraced by a British investigative journalist, whose research is corroborated by data obtained by us from Eurocontrol and national air traffic control authorities. See *Flight logs related to the rendition of Maher Arar*, in the Appendix to this report.

[160] See Bellinger, *Briefing to European Delegation*, *supra* note XX: "With respect to Maher Arar, I can't comment on his case either. But I do know his case has gotten added to the list of so-called renditions, when in fact his removal was dealt with as an immigration matter, which is what all countries do when they find someone in their country and they don't want to prosecute them inside their countries. So he was expelled from the United States by order of an Immigration Court. I think that's a different situation. So this is not the same situation as these other cases."

[161] See the quotations reproduced in my information report of 22 January 2006.

[162] See *Flight logs related to the rendition of Maher Arar*, in the Appendix to this report.

[163] Commission of inquiry into the action of Canadian officials in relation to Maher Arar, set up on 5 February 2004 *"to throw light on the actions of the Canadian authorities concerning the deportation and detention of Maher Arar"*. The commissioner heading the inquiry is the Honourable Dennis R. O'Connor, deputy chief judge of Ontario.

[164] Available on the commission's website : www.commissionarar.ca; the reports of experts/witnesses, the rules of procedure and – albeit greatly truncated – summaries of the hearings in camera are among other items also published on this website.

[165] See the communiqué of 11 April 2006, indicating that the delay (five months after the date originally planned) is "*largely attributable to the process that was adopted to analyse reports in regard to the government's requests designed to protect certain information on grounds of confidentiality in connection with national security (CLSN)*". The communiqué

183. The working methods of this commission, a genuine commission of inquiry with real powers of investigation, empowered to take cognisance of classified information, strike me as very interesting. However, Mr Paul Cavalluzo, principal lawyer to the Commissioner, the Honourable Dennis O'Connor, has reportedly deplored the tendency of the Canadian authorities to use national security confidentiality; Mr Arar's lawyers, Lorne Waldman et Marlys Edwardh, have accused the Government to "hide behind" official secrecy considerations.

3.7. Muhammad Bashmila and Salah Ali Qaru

184. The cases of Mr Bashmila and Mr Ali Qaru are described in an Amnesty International report[167] based on inquiries made on the spot and intensive discussions with the victims. It is likely that they owe their recent release to Amnesty's commitment. The two men, who have never been accused of the slightest terrorist crimes, were arrested in Jordan and disappeared, as far as their families were concerned, into the American "spider's web" in October 2003[168]. According to AI's investigations, they were held in at least four secret American detention centres, probably in three different countries. The former detainees themselves say that they spent time in Djibouti, Afghanistan and - of particular interest to us - "*somewhere in eastern Europe*". The exact location of the place where they spent the final 13 months from the end of April 2004 onwards remains unknown. The men gave a precise description of their place of detention, which has not yet been published in full[169], and of the route along which they were taken. Particularly intriguing is their return flight to Yemen on 5 May 2005, reportedly a non-stop flight lasting approximately seven hours. I wrote to the Yemeni authorities and asked where the plane had come from, and the arrival of the aircraft on that date with the two men on board was officially confirmed to me. Unfortunately, although I wrote again, I have not yet received the specific information requested. Since the aircraft concerned was probably a military one, the information obtained from Eurocontrol has also been unable to clarify this matter. We have been unable to locate a site corresponding to the description provided.

3.8. Mohammed Zammar

185. Mr Zammar, a German of Syrian origin, was suspected of having been involved in the "Hamburg cell" of Al Qaeda and had been under police surveillance for several years in Germany. After 11 September 2001, he had been the subject of a criminal investigation for "support for a terrorist organisation", but there was insufficient evidence to keep him in prison.

186. On 27 October 2001, he is reported to have left Germany for Morocco, where he spent several weeks. When he attempted to return to Germany, he was allegedly arrested by Moroccan officials at Casablanca airport early in December, and to have been questioned by Moroccan and American officials for over two weeks. Towards the end of December 2001, he is said to have been flown to Damascus, Syria, on a CIA-linked aircraft[170].

187. The case has received extensive press coverage[171], and there have been allegations that Mr Zammar's arrest in Morocco was facilitated through the provision of information by German services, that he was tortured by Syrian services and that he was questioned in Syria by German officials.

188. A detailed German government report to the *Bundestag*, a copy of which I have obtained[172], gives a balanced version of this affair.

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describes in detail the procedures followed where the government invokes CLSN, disputes on the matter being settled in the last resort by the federal court.

[166] See the "summaries of hearings in camera" (note 163 above), in particular para. 12 pp and 33. Given the provisional and incomplete nature of these summaries, I prefer not to comment in greater detail.

[167] Below the radar: secret flights to torture and "disappearance", 5 April 2006, AI Index: AMR 51/051/2006. My particular thanks go to Mrs Anne Fitzgerald for her co-operation with our committee's secretariat on this subject.

[168] AI's report (pp 9-16) gives a precise description of the sufferings of the victims and their families.

[169] Cf AI report (pp 13 and 14). One particularly interesting piece of information is a geographical deduction based on the prayer times provided, which were taken from an Internet site (islamicfinder.org). The time of the sunset prayer ranged from 4.30 to 8.45 pm (allowing for the change to summer time, which the whole of Europe uses, but not Afghanistan, Jordan or Pakistan). This corresponds to a location north of the 41st parallel, so well to the north of the Middle East, and very probably within a Council of Europe member state.

[170] The Eurocontrol data available to us does not enable us to confirm this flight, which took place between two non-European airports.

[171] Examples are the items published in the Washington Post on 12 and 19 June 2002 and 31 January 2003, in *Der Spiegel* in July 2002 and November 2005, and in Focus of 20 September 2002, and shown on *Kalla Fakta* (the fourth Swedish TV channel) on 22 November 2004.

189. Mr Zammar's arrest in Morocco was objectively facilitated by exchanges of information between the German services and their Dutch, Moroccan and also American counterparts. These exchanges of information about the travel plans of a person suspected of terrorist activities (the German government's report contains detailed information which seem to justify such suspicion) are part of normal international co-operation in the fight against terrorism. It cannot be deduced from the fact that the German services informed their colleagues of the dates on which Mr Zammar had flight reservations that it was their intention - or even that they suspected - that he would be arrested and held in violation of normal procedures. The facts date back to December 2001, well before the public revelations about the illegal practice of "rendition flights".

190. The German Ministry for Foreign Affairs and the Damascus and Rabat Embassies intervened several times, firstly to establish Mr Zammar's whereabouts, then to give him consular assistance during his detention in Syria. Syria refused any kind of consular intervention, on the basis of its non-recognition of his renunciation of Syrian nationality when he underwent naturalisation in Germany, a policy applied generally by Syria.

191. German officials did indeed question Mr Zammar in Syria. While Mr Zammar is said to have told his German interrogators that he had been beaten both in Morocco and in the early stages of his detention in Syria, but nothing supports the conclusion that this mistreatment related to the presence and intervention of the German agents. The German officials are reported to have found him in a good physical and psychological condition, although he had lost a considerable amount of weight. Relations between Mr Zammar and his Syrian guards did not seem tense, although the German visitors did note a somewhat authoritarian relationship.

192. As indicated above, a *Bundestag* committee of inquiry is looking into the matter, and it is appropriate to await its results.

3.9. Binyam Mohamed al Habashi

193. Binyam Mohamed al Habashi is an Ethiopian citizen who has held resident status in the United Kingdom since 1994. While many of his family members emigrated to the United States and became naturalised citizens there, Binyam moved to the UK as a teenager and claimed asylum. He spent seven years pursuing his education in London while his asylum application was considered in a protracted, ultimately unresolved process. He had problems with drugs and converted to Islam at the age of twenty.

194. Binyam is now detained at Guantanamo Bay and has been selected as one of the first group of ten prisoners to appear before a special United States Military Commission, probably later in 2006. We were able to view Binyam's diary, an account of the last five years of his life, and a series of letters he has written from Guantanamo. A member of my team was also able to hear first-hand testimony from members of his family and his legal representatives in the United Kingdom.

195. In treating Binyam's case in my report I shall avoid any reference to the charges he is likely to face before the Military Commission. Suffice to say that I regard such commissions generally as a flawed basis on which to prosecute allegations of the most serious nature, since the defendant's due process rights are severely impaired[173]. I do not consider these commissions to be fair hearings and I reiterate my position that the global effort to bring terrorist suspects to justice should depend primarily upon judicial remedies.

196. Of greatest concern in Binyam's case are the accounts of torture and other serious human rights violations which he says he has suffered. He speaks of being wounded all over his body with a scalpel and a razor blade, beaten unconscious and hung from the walls in shackles. He suffered gross physical injuries, including broken bones. He was constantly threatened with death, rape and electrocution.

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[172] Following my request to the Chair of the *Bundestag* committee responsible for monitoring the special services, I received a copy of the public version of this report. I also received from an anonymous source a version classified "confidential/for official use only", of which I made responsible use, in the spirit of the decision taken by the Legal Affairs Committee at its meeting of 13 March 2006 on the receipt of confidential information. I was also offered a copy of an even more detailed version classified "secret", which I opted not to accept for ethical reasons. I place my trust in the members of the *Bundestag* to whom this document was addressed to take the necessary action on the basis thereof, including appropriate action to alert me to any fact reported in this version directly related to my terms of reference as rapporteur.

[173] Reference to the Executive Order that established Military Commissions for Guantanamo detainees, signed by President Bush in Oct / Nov 2001.

197. It is difficult to say whether this account actually reflects reality. Let us just recall that some of these acts are included in what has been called "enhanced interrogation techniques", which have been developed by the United States in the "war on terror"[174]. Furthermore many of the abuses described by Binyam bear striking similarities to the allegations of other detainees who have been held in the same detention facilities at various points over the last few years[175].

198. Binyam's case is an example for the very numerous detainees – most of whose names and whereabouts we do not know – who have become trapped in the United States' spider's web during the course of the "war on terror". Binyam has been subjected to two CIA renditions, a US military transfer to Guantanamo Bay and several other clandestine transfers by plane and helicopter. He has been held in at least two secret detention facilities, in addition to military prisons. During his illegal interrogations, he has been confronted with allegations that could only have arisen from intelligence provided by the United Kingdom.

199. Binyam's family told my representative that he disappeared in the summer of 2001. His close-knit family subsequently endured several years of desperate uncertainty about his whereabouts and well-being, only partially clarified by their first visit from FBI agents three years later, in 2004. Although they have received a handful of letters from him in Guantanamo, none of the family has been able to see or speak to Binyam for five years.

200. According to his testimony, Binyam travelled voluntarily to Afghanistan in 2001[176] and spent some time there, probably several months, before crossing into Pakistan and seeking to return to the UK. He was arrested by Pakistani officials at Karachi Airport on 10 April 2002 for attempting to travel on a false passport. Within ten days of his arrest, he was interrogated by American officials. Upon asserting his right to a lawyer, and later upon refusing to answer questions, American officers are alleged to have told him: "*The law has been changed. There are no lawyers. You can co-operate with us the easy way, or the hard way. If you don't talk to us, you're going to Jordan. We can't do what we want here, the Pakistanis can't do exactly what we want them to do. The Arabs will deal with you."*

201. The initial interrogations in Karachi involved Pakistani, American and British agents. Binyam was never accused of a particular crime and was told by MI6 agents that "*they checked out my story and said they knew I was a nobody*". When he was discharged from Pakistani custody, however, he was not released. Instead, the Pakistani security services took him to a military airport in Islamabad and handed him over to the United States.

202. Binyam testifies that he underwent his first rendition on 21 July 2002. He was set upon by unidentified people "*dressed in black, with masks, wearing what looked like Timberland boots*". He describes how they "*stripped [him] naked, took photos, put fingers up [his] anus and dressed [him] in a tracksuit. [He] was shackled, with earphones, and blindfolded*", before being forced onto an aircraft and flown to Morocco. Official flight records obtained by this inquiry show that the known rendition plane, N379P, took off from Islamabad on 21 July 2002 and flew to Rabat, Morocco.

203. Binyam has described various secret detention facilities in which he was held in Morocco, including one prison that was submerged "*almost underground*" and one more sanitary place in which he was apparently placed to recover from injuries sustained from his torture. Between July 2002 and January 2004 Binyam was tortured on numerous occasions by a team of interrogators and other officials, most of whom were Moroccan. Some of the officials wore masks, while others did not; at least one interrogator, who identified herself as a Canadian, is thought to have been an American CIA agent.

204. It appears that the object of the torture was to break Binyam's resistance, or to destroy him physically and psychologically, in order to extract confessions from him as to his involvement in terrorist activities. In addition to the sustained abuse and threats, the torturers used information, apparently obtained from intelligence sources, to indicate to Binyam that they knew a lot about him. Much of the personal information – including details of his education, his friendships in London and even his kickboxing trainer – could only have originated from collusion in this interrogation process by UK intelligence services.

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[174] Reference to some of the many documents on interrogation techniques obtained by the ACLU in its series of applications under the Freedom of Information Act.

[175] In this regard, see the Human Rights Watch reports on Temara in Morocco, plus a range of NGO and detainee accounts from the Dark Prison in Kabul.

[176] Binyam told his lawyer that he wanted to travel to Afghanistan to see the Taliban with his own eyes and decide *"whether it was a good Islamic country or not"*. He also wanted to get away from a social life in London that revolved around drug use.

205. Binyam has described his ill-treatment in Morocco to his lawyer in several phases: an initial "softening up"; a routine "circle of torture"; and eventually a "heavy" abuse involving mental torment and the infliction of physical injury. In the first few weeks of his detention he was repeatedly suspended from the walls or ceilings, or otherwise shackled, and brutally beaten: "*They came in and cuffed my hands behind my back. Then three men came in with black ski masks that only showed their eyes… One stood on each of my shoulders and the third punched me in the stomach. The first punch… turned everything inside me upside down. I felt I was going to vomit. I was meant to stand, but I was in so much pain I'd fall to my knees. They'd pull me back up and hit me again. They'd kick me in the thighs as I got up. They just beat me up that night… I collapsed and they left. I stayed on the ground for a long time before I lapsed into unconsciousness. My legs were dead. I could not move. I'd vomited and pissed on myself.*"

206. At its worst, the torture involved stripping Binyam naked and using a doctor's scalpel to make incisions all over his chest and other parts of his body: "*One of them took my penis in his hand and began to make cuts. He did it once and they stood for a minute, watching my reaction. I was in agony, crying, trying desperately to suppress myself, but I was screaming. They must have done this 20 to 30 times, in maybe two hours. There was blood all over. They cut all over my private parts. One of them said it would be better just to cut it off, as I would only breed terrorists.*"

207. Eventually Binyam began to co-operate in his interrogation sessions in an effort to prevent being tortured: "*They said if you say this story as we read it, you will just go to court as a witness and all this torture will stop. I could not take any more… and I eventually repeated what they read out to me. They told me to say I was with bin Laden five or six times. Of course that was false. They continued with two or three interrogations a month. They weren't really interrogations – more like trainings, training me what to say.*"

208. Binyam says he was subjected to a second rendition on the night from 21 to 22 January 2004. After being cuffed, blindfolded and driven for about 30 minutes in a van, he was offloaded at what he believes was an airport. Again, Binyam's description matches the "methodology" of rendition described earlier in this report: "*They did not talk to me. They cut off my clothes. There was a white female with glasses – she took the pictures. One of them held my penis and she took digital pictures. When she saw the injuries I had, she gasped. She said: 'Oh my God, look at that'.*"

209. The second rendition of Binyam Mohamed took place within the "rendition circuit" that I have identified in this inquiry. The aircraft N313P, operated on behalf of the CIA, is shown in my official data to have flown from Rabat to Kabul in the early hours of 22 January 2004. Two days later, as part of the same circuit, the same plane flew back to Europe and was used in the rendition of Khaled El-Masri[177].

210. Binyam Mohamed's ordeal continued in Kabul, Afghanistan, where he was held in the facility he refers to as "The Prison of Darkness"[178] for four months. Detention conditions in this prison amount to inhuman and degrading treatment. In addition, forcing prisoners to remain in painful positions, sleep alteration, sensory deprivation and other recognised "enhanced interrogation techniques"[179] are known to be deployed there routinely by the United States military and its partners. At various times, Binyam was chained to the floor with his arms suspended above his head, had his head knocked against the wall and describes "*torture by music"*, involving the sounds of loud rap and heavy metal, thunder, planes taking off, cackling laughter and horror sounds that amounted to a *"perpetual nightmare"*.

211. Up until his transfer by helicopter to Bagram at the end of May 2004, Binyam was not allowed to see daylight. He was persistently interrogated and told about terrorist plots and activities in which he was accused of involvement. He was subjected to irregular eating patterns and "*weird*" sessions with psychiatrists.

212. In a detention facility at Bagram Air Base, Afghanistan, Binyam was forced to write out a lengthy statement prepared by the Americans. The content of the statement is unknown to us. Binyam has told his lawyers that he wrote and signed this document in a state of complete mental disarray: "*I don't really remember [what I wrote], because by then I just did what they told me. Of course, by the time I was in Bagram I was telling them whatever they wanted to hear.*"

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[177] References to the sections on rendition circuits and the individual case of El-Masri.
[178] Many other accounts in the file of the Rapporteur refer to this facility as the "Dark Prison" or the "Disco Prison".
[179] These so-called "enhanced interrogation techniques", which are considered acceptable in the context of some interrogations by the Americans, were exposed by the ACLU in its application under the *Freedom of Information Act*. In particular, these techniques are enumerated in a document from the FBI, available at www.aclu.org.

213. The case of Binyam Mohamed is sufficient grounds for an urgent and decisive change of course in the international effort to overcome terrorism. The Council of Europe is duty-bound to ensure that secret detentions, unlawful inter-state transfers and the use of torture are absolutely prohibited and never resorted to again.

214. It remains to be seen whether a Military Commission process will decide for or against Binyam Mohamed. The only certain legacy of this case is the deeply disturbing recognition that a human being has, in his own words, been completely dehumanised: "*I'm sorry I have no emotion when talking about the past, 'cause I have closed. You have to figure out all the emotional part; I'm kind of dead in the head.*"

4. Secret places of detention

215. After the publication of allegations by the Washington Post and Human Rights Watch[180], we centred our search on certain sites in Poland and Romania.

4.1. Satellite photographs

216. We obtained from the European Union Satellite Centre (EUSC) in Torrejón a number of satellite photographs of the sites concerned[181], some taken at different times. We studied these with the assistance of an independent expert.

217. These photographs do not constitute conclusive evidence. With the expert's help, we were able to identify several specific locations at a civil airport and a secret services base (in Poland) and at military airfields (in Romania) which would be very suitable for the secret detention of persons flown in from abroad. There are however hundreds of equally favourable locations throughout Europe. As the EUSC did not have available, for most of the places concerned, sequences of photographs which would have shown whether physical structures (huts, fences, watchtowers, and so on) had been altered (added or dismantled) at certain relevant times, the satellite photographs do not enable us to reach any conclusions with a high degree of certainty.

218. On the other hand, they did enable us to request certain clarifications from the Polish and Romanian delegations. All the replies we received, in my opinion, show a lack of transparency and genuine willingness to co-operate in the authorities concerned[182].

4.2. Documented aircraft movements

219. As we showed above, the information received from Eurocontrol and certain national air traffic control authorities, confirmed by witnesses' accounts, makes it possible to be sure that certain flights were made between known detention centres and the suspected places in Poland and Romania. The geographical position of these places making them unlikely to be used for refuelling, the period spent on the ground in these places by these aircraft, and in particular the fact that the landings in question belong to well-established "rendition circuits'[183], allow us to suspect that they are or were places of detention which form part of the "spider's web" referred to above.

4.3. Witnesses' accounts

220. Accounts given by witnesses to Amnesty International[184] make it look very likely that a relatively large place of detention had to be located in a European country, without any more detail.

221. A journalist working for German television[185] interviewed a young Afghan in Kabul who said that he had been held in Romania. This witness, very frightened and unwilling to give direct evidence to a member

[180] See para. 7 above.
[181] The following sites were captured in the satellite photographs: Cataloi, Fetesti and Mihail Kogalniceanu in Romania; and Szczytno / Szymany in Poland.
[182] In Poland's case, we detected, at an airfield said not to have been used for military purposes since the end of World War II, a very well-maintained double fence around a structure identified as containing munitions bunkers. Our question as to the reason for keeping this double fence in perfect condition did not receive a convincing reply. Where Romania is concerned, the authorities first stated that the construction works at the airbases concerned were merely being carried out to maintain existing infrastructure; only when the question was raised again, backed up by the only single-site photo sequence available to us, clearly showing the building of a new hangar and an extension of the aircraft parking area, did the Romanian authorities confirm that some new building had also been done.
[183] See para. 52 above.
[184] See para. 184 above, the case of Mr Bashmila and Mr Ali Qaru.

of my team, was reported to have been told by a guard to whom he had complained about his conditions of detention that he was lucky in fact to be in Romania.

222. Let us recall also – as mentioned in my note of January 2006[186] - that according to a fax sent by the Egyptian Ministry for European Affairs to the Egyptian Embassy in London and intercepted by Swiss intelligence services, such centres had existed in Romania, Bulgaria, Macedonia, Kosovo and in Ukraine.

223. Both sources from inside the CIA referred to by the Washington Post, ABC and HRW are said to have named Poland and Romania, but without indicating specific places[187].

4.4. Evaluation

224. Whilst to date no evidence, in the formal sense of the term, has come to light, many coherent and convergent elements provide a basis for stating that these secret CIA detention centres have indeed existed in Europe, and we have seen that several indicators point at these two countries. As explained above, even if these elements do not constitute evidence, they are sufficiently serious to reverse the burden of proof: it is now for the countries in question to address their "positive obligations" to investigate, in order to avoid endangering the credibility of their denials.

5. Secret detentions in the Chechen Republic

225. Although massive violations of human rights in Chechnya began and were denounced long before the American "spider's web" was woven, it is regrettable and worrisome to observe that the two principal world powers cite the fight against terrorism as a reason to abandon the principle of respect for fundamental rights. This creates a mechanism of "reciprocal justification" and sets a deplorable example for other states.

226. It is hardly possible to speak of secret detention centres in Council of Europe member States without mentioning Chechnya. Mr Rudolf Bindig's very recent report also notes not only numerous cases of forced disappearance and torture, but also the existence of secret places of detention.

5.1. The work of the European Committee for the Prevention of Torture (CPT)

227. The situation in Chechnya, where unofficial places of detention are concerned, has already been roundly criticised by the CPT in two public declarations to which I referred in my memoranda of December 2005 and January 2006[188]. The positions expressed therein could not be clearer, but the Committee of Ministers of the Council of Europe has not yet given them the attention they deserve. During a very recent visit to the region, in May 2006, a CPT delegation again had grounds to believe that locations which might serve as unofficial places of detention were in the region[189].

5.2. Damning recent accounts by witnesses

228. Aaron Rhodes, Executive Director of the International Helsinki Federation for Human Rights (IHF), sent me an open letter dated 12 May 2006[190] accompanied by a report compiled by the IHF, with the help of Russian non-governmental organisations active in the region, containing damning accounts by the victims of secret detention and torture, often followed by enforced disappearance, in the North Caucasus region. Many of these cases were attributed to the *Kadyrovtsi*, the militia under the direct command of the current Prime Minister of the Chechen Republic, Ramzan Kadyrov. According to several of these accounts, some places used as unofficial places of detention were in Tsentoroy, the village where the Kadyrov family originated[191].

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[185] Ashwin Raman, one of the makers of an ARD documentary shown on the ARD channel on 1 March and on SWF on 8 March 2006.
[186] Information note dated 22 January 2006, para. 5 and 52.
[187] *Ibid*, see para. 7.
[188] See the two Public Declarations concerning the Chechen Republic, CPT/Inf (2001) 15 and CPT/Inf (2003) 33, available at: http://www.cpt.coe.int/documents/rus/2001-07-10-eng.htm
and http://www.cpt.coe.int/documents/rus/2003-33-inf-eng.htm
[189] Cf. CPT press release: http://www.cpt.coe.int/documents/rus/2006-05-09-eng.htm. Exceptionally, a CPT visit was interrupted when access to the village of Tsentoroy (Khosi-Yurt), south-east of Gudermes, was denied on 1 May 2006; the visit resumed the next day, when the delegation gained access to the village early in the afternoon.
[190] See the letter entitled: "*Secret prisons in Europe should be of concern to the Council of Europe*", authored by Aaron Rhodes, IHF; 12 May 2006; http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4249.
[191] See note 82 above.

229. Concern about our Organisation's credibility means that these allegations deserve to be investigated in the same way as the violations committed by American services, especially as the Chechen Republic is on the territory of a member state of the Council of Europe.

6. Attitude of governments

230. It has to be said that most governments did not seem particularly eager to establish the alleged facts. The body of information gathered makes it unlikely that European states were completely unaware of what, in the context of the fight against international terrorism, was happening at some of their airports, in their airspace or at American bases located on their territory. Insofar as they did not know, they did not want to know. It is inconceivable that certain operations conducted by American services could have taken place without the active participation, or at least the collusion, of national intelligence services. If this were the case, one would be justified in seriously questioning the effectiveness, and therefore the legitimacy, of such services. The main concern of some governments was clearly to avoid disturbing their relationships with the United States, a crucial partner and ally. Other governments apparently work on the assumption that any information learned via their intelligence services is not supposed to be known[192].

231. The most disturbing case – because it is the best documented – is probably that of Italy. As we have seen, the Milan prosecuting authorities and police have been able, thanks to a remarkably competent and independent investigation, to reconstruct in detail the *extraordinary rendition* of the imam Abu Omar, abducted on 17 February 2003 and transferred to the Egyptian authorities. The prosecuting authorities have identified 25 persons responsible for this operation mounted by the CIA, and have issued arrest warrants against 22 of them. The then Justice Minister in fact used his powers to impede the judicial authorities' work: as well as delaying forwarding requests for judicial assistance to the American authorities, he categorically refused to forward the arrest warrants issued against 22 American citizens[193]. Worse still: the same Justice Minister publicly accused the Milan judiciary of attacking the terrorist hunters rather than the terrorists themselves[194]. Furthermore, the Italian Government did not even consider it necessary to ask the American authorities for explanations regarding the operation carried out by American agents on its own national territory, or to complain about the fact that Abu Omar's abduction ruined an important anti-terrorism operation being undertaken by the Milan judiciary and police. As I stated in my January 2006 memorandum, it is unlikely that the Italian authorities were not aware of this large-scale CIA operation. As mentioned in chapter 3.4 above, the investigation in progress shows that Italian officials directly took part in Abu Omar's abduction and that the intelligence services were involved.

232. In an effort to be impartial, I shall also discuss the example of my own country, Switzerland. As we shall see, a number of aircraft described as suspect and mentioned in the questionnaires sent to the member States landed in Geneva (and Zurich, as Amnesty International investigations subsequently showed). The United States did not respond to the Swiss authorities' requests for explanations for several months. A few hours before the annual clearance for aircraft flying on behalf of the American Government to overfly Swiss territory was due to expire, an American official apparently gave a Swiss Embassy representative in Washington verbal assurances that the United States had respected Switzerland's sovereignty and had not transported prisoners through Swiss airspace, thus simply reiterating the statement made by Ms Rice in Brussels on 5 December 2005. This assurance was very belated and, above all, not particularly credible in the light of the established facts: the Italian judicial authorities have established, on the basis of some very convincing evidence, that Abu Omar, abducted in Milan on 17 February 2003, was flown the same day from the Aviano base to the base at Ramstein in Germany, passing through Swiss airspace; this flight has been confirmed, moreover, by Swiss air traffic controllers. The Italian investigation also established that the head of the Milan operation stayed in Switzerland. The Swiss Government deliberately ignored these allegations[195] – despite their detailed and clearly serious nature – and settled for that vague, somewhat informal response from an official. It has taken a formalistic position, claiming that it did not have any evidence and, under international law, had to rely on the principle of trust. It clearly wished to renew the overflight clearance, which it quickly did without asking any further questions. The Confederal Prosecutor's Office has nevertheless opened a preliminary investigation to establish whether there have been violations of the law under Swiss jurisdiction in the Abu Omar case. At the same time, the Military Prosecutor's Office has begun an investigation aimed at identifying and punishing the perpetrator(s) of the leak which allowed the

[192] Some states' legislation expressly prohibits them from using or releasing information gathered by their intelligence services. This is the case in Hungary, for example.
[193] Article 4 of the extradition treaty between the United States and Italy also provides for the extradition of each country's own nationals. It should be added, however, that warrants issued by the Italian judiciary are enforceable in EU countries, as European arrest warrants do not have to be forwarded by the Ministry via diplomatic channels.
[194] ANSA agency, 27 February 2006, widely published in the Italian press.
[195] The Swiss federal prosecuting authorities have, however, instituted a preliminary investigation into these allegations.

publication of the Egyptian fax intercepted by the intelligence services. The journalists who published this are also being prosecuted, on the basis of rules whose compatibility with the principles of the freedom of the press in a democratic system seems highly doubtful. A revelation made these days rekindles the criticism directed at the authorities accused of servile obedience towards the United States: according to press reports, based on apparently well-informed sources, the Swiss authorities are said to have deliberately failed to execute an international arrest warrant brought by the Italian judicial authorities following the abduction of Abu Omar in February 2003. Robert Lady, the head of the detail wanted by the police, who was at the time in charge of the CIA in Milan holding the title and status of Consul of the United States, is said to have stayed in Geneva very recently; the police had been ordered to merely carry out discrete surveillance.

233. The principle of trust has also been invoked by other governments. This is the case with Ireland, for example: the government has stated that there was no reason to investigate the presence of American aircraft, since the United States had given assurances[196]. In Germany, the government and the ruling parties opposed – ultimately in vain – the establishment of a parliamentary commission of inquiry, despite the significant questions being raised about the role of the intelligence services, particularly in the case of the abduction of El-Masri. Lastly, in November 2005 I sent a request for information to the United States Ambassador (an observer to the Council of Europe). The Ambassador responded by sending me the public statement made by the American Secretary of State on 5 December 2005. In particular, the latter stated that the United States had not violated the sovereignty of European states, that "renditions" had saved human lives and that no prisoners had been transported for the purpose of torture[197]. European ministers, meeting in the framework of NATO, hastened to declare themselves satisfied with these assurances[198]. Or almost[199].

234. It should be pointed out that some governments have deliberately assisted in "renditions". This is especially well established with regard to Bosnia and Herzegovina, which has rendered six persons to the American forces outside of any legal procedure, as established by the national judicial authorities, as we have noted above. This certainly deserves to be stressed and welcomed. It is true that the Government of Bosnia and Herzegovina was regrettably not particularly determined, but it should not be forgotten that this young republic had been strongly pressured by a great power present on its territory. We have already criticised the Macedonian authorities, which have locked themselves up in categorical denial without having carried out any serious enquiry. Sweden has also rendered two asylum seekers to American operatives for "rendition" to the Egyptian authorities, as formally condemned by the UN Committee against Torture. The Swedish authorities, despite this international condemnation and parliamentary requests to this effect have yet to commence a proper inquiry into these facts[200].

235. When the previous memoranda, which set out interim summaries, were published, criticisms were voiced that the evidence referred primarily to NGO reports and accounts related in the press. It should be pointed that without the work undertaken by these organisations and the investigations of competent and tenacious journalists, we would not today be talking about this affair – which, nobody can now dispute, has some basis in fact. Indeed, governments did not spontaneously or autonomously take any real action to seek evidence for the allegations, despite their serious and detailed nature. Critics included those who, given their existing or previous positions and responsibilities, could have helped to establish the truth. Furthermore, it is shocking that some countries put pressure on journalists not to publish certain news items (I have mentioned the cases of the ABC and the *Washington Post*) or prosecuted them for publishing documents deemed confidential[201]. Such zeal would have been better employed in seeking to ascertain the truth – a fundamental requirement in a democracy – and prosecuting those guilty of perpetrating or tolerating any kind of abuse, such as illegal abductions or other acts contrary to human dignity.

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[196] *We would not see any reason to because we have received categorical assurances from the US that they are not using Shannon in this way* (Irish Examiner, 22 February 2006).

[197] *The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture* (statement of 5 December 2005).

[198] The German Foreign Minister, Mr Steinmeier, emphasised the need for such clarification, because, he said, *we should not diverge from one another on the interpretation of international law* (AP 8 December 2005).

[199] *Only Bernard Bot, the Dutch Foreign Affairs Minister, considered the American explanations "inadequate"; Scandinavian diplomats also protested against the American services' use of "methods on the edge of legality". On the whole, however, the Europeans, headed by Britain's Jack Straw, kept a low profile so as not to offend the "iron lady" of American diplomacy.* (Le Figaro of 8 December 2005).

[200] As condemned by the Council of Europe's Commissioner for Human Rights in his statement on "fight against terrorism by legal means" published on the Council of Europe's website on 3 April 2006.

[201] In particular, this is what happened to the two Swiss journalists who, in early January 2006, published the content of the Egyptian fax, intercepted by Swiss intelligence services, mentioning the existence of detention centres in Eastern Europe. The two journalists have published a book outlining the circumstances by which they came into possession of the document: Sandro Brotz, Beat Jost, *CIA-Gefängnisse in Europa – Die Fax-Affäre und ihre Folgen*, Orell Füssli, 2006.

236. The American administration's attitude to the questions being raised in Europe about the CIA's actions was, once again, clearly illustrated during the fact-finding visit to the United States by a delegation from the European Parliament's Temporary Committee (TDIP): no or few replies were given to the numerous questions. I have already discussed the response to my request from the United States Ambassador to the Council of Europe (3.1.4). It is obvious that if the American authorities did not constantly raise the objection of secrecy for national security reasons, it would be far easier to establish the truth. We find that today, this secrecy is no longer justified. In a free and democratic society, it is far more important to establish the truth on numerous allegations of serious human rights violations, many of which are proven to a large extent.

7. Individual cases: judicial proceedings in progress

7.1. A positive example: the Milan public prosecutor's office (Abu Omar case)

237. In this case, the Italian judicial authorities and police have shown great competence and remarkable independence in the face of political pressures. Their competence and independence was already proven during the tragic years stained with blood by terrorism. The Milan public prosecutor's office was able to reconstitute in detail a clear case of "rendition" and a regrettable example of the lack of international cooperation in the fight against terrorism[202]. As I have already said[203], the Italian judicial authorities have brought international arrest warrants against 22 American officials. In addition, the ongoing investigation seems to be in the process of showing that operatives belonging to the Italian services have participated in the operation.

7.2. A matter requiring further attention: the Munich (El-Masri case) and Zweibrücken (Abu Omar case) public prosecutors' offices

238. The German justice system gave its attention to the Abu Omar and El-Masri cases in terms of criminal proceedings for abduction against persons unknown. In the first-named case, normal co-operation took place with the Milan public prosecutor's office. As I have already stated, in my memorandum of January 2006, the Zweibrücken public prosecutor's office came up against a total lack of co-operation by the American authorities, who refused to provide any information on what had happened at the Ramstein base.

239. Where the second case is concerned, I have already[204] given some information showing that certain serious investigative measures have already been taken and that more remains to be done, especially in relation to the witnesses named by El-Masri and to clarification of the possible role played by the various German intelligence services.

7.3. Another matter requiring further attention: the Al Rawi and El Banna case

240. Where the case of Al Rawi and El Banna is concerned, the British justice system has had to deal with an application by the families of the persons concerned attempting to force the UK government to intercede with the US government to obtain the release of both men, who are still held at Guantánamo Bay. It was in the framework of this procedure that the telegrams proving that the MI5 was involved in the two men's arrest in Gambia came into the public domain. After proceedings had begun, the UK authorities agreed to intercede on Mr Al Rawi's behalf, but not on that of his fellow detainee, Mr El Banna, although he had been arrested for the same reasons with the assistance of the UK services. In May 2006, the action was dismissed by the court of first instance.

241. In view of the circumstances which have led up to the arrest of these two men, one may think that the UK government is under at least a moral and political obligation to do everything in its power to actively intercede to secure their release from Guantanamo so that they can return to the country.

7.4. Sweden: what next in the Agiza and Alzery case?

242. Sweden was condemned by the UN Committee against Torture in respect of the case of Mr Agiza and Mr Alzery, which led to an investigation by the parliamentary ombudsman, Mr Mats Melin. He noted that a preliminary investigation by the judicial authorities had culminated in the termination of the proceedings[205].

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[202] I talked to Chief Prosecutor Mr Spataro for several hours and I wish to thank him for being so generous with his time.
[203] In para. 162
[204] In para. 103
[205] See above, para. 152

243. According to some criticisms, which do not appear unfounded, different aspects of the case need further investigation. This disguised extradition, without any possibility of appeal and judicial scrutiny, and the ill-treatment at Bromma airport, still on the ground, under the eyes of Swedish officials, as well as the incomplete information provided to UN-CAT are serious matters which require that the whole truth be exposed.

7.5. Spain

244. The Palma de Mallorca public prosecutor's office has begun an investigation following the transmission of a *Guardia Civil* file containing the names of the passengers on the aircraft which took off from the local airport bound for Skopje, where they were most likely joined by Mr El-Masri and flown on to Afghanistan[206].

7.6. Mr El-Masri's complaint in the United States

245. With the assistance of the American Civil Liberties Union[207], Mr El-Masri has taken judicial action in Alexandria, in Virginia, seeking compensation from the CIA. On 19 May 2006, his complaint was rejected by the court of first instance, without a ruling on the merits of his application, as the court accepted the US government's argument that continuation of the proceedings would have jeopardised national security. In the course of the trial, the CIA's secret methods would indeed become the subject of discussions before the court.

8. Parliamentary investigations

246. As long ago as January, I called on national parliaments to put questions to their governments and to begin inquiries, where appropriate, to clarify the role of European governments in this affair. A large number of questions were indeed raised in the parliaments of numerous Council of Europe member States, which is very gratifying. Unfortunately, the government replies were almost without exception vague and inconclusive. The German and UK parliaments were particularly active, whereas parliamentary reactions in three of the main countries concerned by the allegations that are the subject of this report (Poland, Romania and "the former Yugoslav Republic of Macedonia") were particularly feeble, if not inexistent.

8.1. Germany

247. Opposition MPs in Germany, although few in number since the recent elections, have put numerous questions to their government[208]. The replies were very general in every case[209]. The government systematically hid behind the responsibility of the parliamentary monitoring committee (*parlamentarisches Kontrollgremium*, known as the PKG) for dealing with matters relating to the activities of the secret services. A number of questions relating to the subject of this report have effectively been discussed within the PKG, but the government's detailed report to this very select group, which works in very carefully maintained secrecy, was classified "secret". The chair of the committee, Mr Röttgen (CDU), in response to my request, sent me the "public" version of this report, which is, frankly, not very informative and does not mention the individual cases raised by the media. The government attempted to avoid setting up a committee of inquiry by sending all members of the *Bundestag* a more informative version, classified "confidential", which contains some information about some of the aforementioned individual cases[210]. At the insistence of the three opposition parties, a committee of inquiry has nevertheless been set up, and it started work in May[211]. Its mandate includes investigation of the allegations of collusion between the German authorities and the CIA in the case of Mr El-Masri. In short, the *Bundestag* has been highly active, urged on by the opposition parties in particular.

[206] I have in my possession a copy of this list, but I have no information on the states concerned.
[207] I should like to thank the ACLU for making detailed documentation about this case available to me.
[208] I should like to thank not only our Committee colleague Sabine Leutheusser-Schnarrenberger (Liberal), but also Mr Stroebele (Green party), for the information they have regularly supplied to me on this subject.
[209] The same is true of the replies given by other governments questioned by members of their parliaments, such as those of Belgium, the United Kingdom, Sweden and Ireland.
[210] The names of persons were represented by initials. See note 92 above in respect of my approach to the "confidential" and "secret" versions of this report.
[211] I have been invited to address this committee in the near future.

8.2 The United Kingdom

248. Our work regarding the United Kingdom benefited greatly from the efforts of a variety of interlocutors, whom I should like to salute in this report[212]. The United Kingdom parliament has not yet established a formal inquiry into possible British participation in abuses committed by the United States in the course of the "war on terror", but there have been several noteworthy parliamentary initiatives designed to broaden the public debate and encourage greater openness.

249. Late last year, one of the UK Parliament's standing committees, the Joint Committee on Human Rights (JCHR), launched an inquiry into UK Compliance with the United Nations Convention against Torture. As part of its mandate the Committee examined several issues of relevance to this inquiry, including the use of diplomatic assurances and the practice of "extraordinary rendition".

250. The JCHR held a series of evidentiary sessions, featuring Ministers of the United Kingdom Government[213] as well as representatives of non-governmental organisations[214]. Members of my team, on a visit to London in March 2006, met with a Committee Specialist of the JCHR and attended its evidentiary session with the UK Minister of State for the Armed Forces, Rt. Hon. Adam Ingram. In its report on UK Compliance with UNCAT published on 26 May 2006[215], the JCHR recognised the "*growing calls for an independent public inquiry*" in the UK, but ultimately decided that such an inquiry would be "*premature*" until the Government's own inquiries have been given a chance to publish the "*detailed information required*".

251. In the meantime an ad-hoc body known as the "All-Party Parliamentary Group (APPG) on Extraordinary Renditions" has engaged Members of the UK Parliament belonging to all political parties. On Tuesday 28 March, members of my team attended the APPG's information session on the cases of Bisher Al-Rawi and Jamil El-Banna[216], which featured testimony from both men's legal representatives, MPs and family members. This session stimulated considerable media interest in the case and coincided with the public release of government telegrams passed on to the CIA in advance of the men's rendition. I wish to thank the Chairman of the APPG, Mr Andrew Tyrie MP, along with his dedicated staff, for their valuable support.

8.3. Poland: a parliamentary inquiry, carried out in secret

252. A parliamentary inquiry into the allegations that a "secret prison" exists in the country has been conducted behind closed doors in Poland. Promises made beforehand notwithstanding, its work has never been made public, except at a press conference announcing that the inquiry had not found anything untoward. In my opinion, this exercise was insufficient in terms of the positive obligation to conduct a credible investigation of credible allegations of serious human rights violations.

8.4. Romania and "the former Yugoslav Republic of Macedonia": no parliamentary inquiry

253. To my knowledge, no parliamentary inquiry whatsoever has taken place in either country, despite the particularly serious and concrete nature of the allegations made against both. What is more, the committee which supervises the secret services in "the former Yugoslav Republic of Macedonia" ceased operations three years ago[217], and this is particularly worrying in a country where the secret services not so very long ago played a particularly important and controversial role.

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[212] In this regard, I should like to make particular mention of the London-based non-governmental organisation REPRIEVE, which has supported my team by providing contacts, research insights and materials relating to the cases they work on.

[213] For example, on 6 March 2006 the JCHR heard evidence from the Solicitor General and Minister of State in the Department for Constitutional Affairs, Harriet Harman, along with other officials from her department. An uncorrected transcript of the session is available online at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/uc701-iii/uc70102.htm

[214] On 21 November 2005 the JCHR heard evidence from Human Rights Watch, Amnesty International and REDRESS. An uncorrected transcript of the session is available online at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/uc701-i/uc70102.htm

[215] The full report is available online at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/18502.htm; a full record of oral and written evidence was published in a separate volume, available at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-ii.pdf.

[216] See to the section of the report that treats these cases, at 3.5 above.

[217] Response of the Parliament of the former Yugoslav Republic of Macedonia (Sobranie) to the questionnaire of the TDIP Temporary Committee of the European Parliament. Available at: www.statewatch.org/'rendition.

9. Commitment to combating terrorism

9.1. Fight against terrorism: an absolute necessity

254. The fight against terrorism is unquestionably a priority for every government and, above all, for the international community as a whole. The use of terror, previously employed primarily as a weapon against individual governments, has increasingly become a means of attacking a political and social model, and indeed a lifestyle and civilisation represented by large parts of the planet. Terrorism has taken on a clear international connotation in recent years, and it too has taken advantage of the tremendous technological progress made in the fields of arms, telecommunication and mobility. It is consequently vital to co-ordinate the fight against terrorism at the international level.

255. It has to be said, however, that there are still significant deficiencies in such co-ordination, and that it too often depends on the goodwill, but also the arbitrary nature, of intelligence services. An understanding of this phenomenon, its structures, the resources at its disposal and its leaders is essential in order to deal with the terrorist threat successfully. Intelligence services consequently play an important and irreplaceable role. That role must, however, be specified and delimited within a well-defined institutional framework consistent with the principles of the rule of law and democratic legitimacy. This also calls for effective supervisory mechanisms; the evidence under consideration has highlighted alarming flaws in such mechanisms. It is a well-known fact that the various American and European intelligence services have set up working groups and exchanged information. This initiative can only be welcomed. The events of recent years show, however, that international co-ordination is still seriously inadequate. The Milan imam's abduction is emblematic in this regard: the operation by CIA agents ruined the efforts of the Italian judiciary and police, who were involved in a major anti-terrorism investigation targeting precisely the Milan mosque[218].

256. The governments' very replies and especially their silence are a telling indication that intelligence services appear increasingly to work outside the scope of proper supervisory mechanisms. The way in which American services were able to operate in Europe, carrying out several hundred flights and transporting illegally arrested persons without any scrutiny, can only point to the participation or collusion of several European services – or, alternatively, incredible incompetence, a scenario which, frankly, is difficult to envisage. Indeed, everything seems to indicate that the American services were given considerable latitude and allowed to act as they saw fit, even though it would have been impossible not to be aware that their methods were incompatible with national legal systems and European standards relating to respect for human rights[219]. Such passivity on the part of European governments and administrative departments is disturbing, and such a careless, laissez-faire attitude unworthy.

257. The Council of Europe has already had the opportunity to voice clearly its concern *about certain practices that have been adopted, particularly in the fight against terrorism, such as the indefinite imprisonment of foreign nationals on no precise charge and without access to an independent tribunal, degrading treatment during interrogations, the interception of private communications without subsequently informing those concerned, extradition to countries likely to apply the death penalty or the use of torture, and detention or assault on the grounds of political or religious activism, which are contrary to the European Convention on Human Rights (ETS n° 5) and the protocols thereto, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS n° 126), and the Framework Decision of the Council of the European Union*[220].

9.2. The strength of unity and of the law

258. The Parliamentary Assembly has already expressed its views very clearly: it unreservedly shares *the United States' determination to combat international terrorism and fully endorses the importance of detecting and preventing terrorist crimes, prosecuting and punishing terrorists and protecting human lives*[221]. This determination must also be shared by all of Europe. Back in 1986, the Assembly regretted *the procrastination of European states in reacting multilaterally to the terrorist threat, and the absence up to the present time of a coherent and binding set of co-ordinated measures adopted by common consent*[222].

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[218] This fact was expressly confirmed by Milan's Deputy Public Prosecutor, during his hearing before the European Parliament's Temporary Committee in Brussels on 23 February 2006.

[219] In an interview with the German magazine *Die Zeit* on 29 December 2005, Mr Michael Scheuer, former head of the CIA's "Bin Laden" unit and one of the architects of the "rendition" system further developed during Bill Clinton's presidency and with his agreement, stated that the CIA was within its rights to break all laws except American law. See also Michael Scheuer, former Chief of the Bin Laden Unit in the CIA Counter-Terrorist Centre, *supra* note 19.

[220] Recommendation 1713 (2005) of the PACE on *Democratic oversight of the security sector in member States*.

[221] Resolution 1433 (2005), on *Lawfulness of detentions by the United States in Guantánamo Bay*, § 1.

[222] Resolution 863 (1986) on the European response to international terrorism, § 3.

Despite the intervening years and the spectacular development of this threat, no significant progress has really been made. It is more necessary than ever to extend this *coherent and binding set of co-ordinated measures* to Europe and to other parts of the world, starting with the United States. The approach of simply leaving the United States to it and pretending not to know what is happening, in many cases even on one's own territory, is unacceptable. Only the adoption of a joint strategy by all the countries concerned can successfully counter the new threats, such as terrorism and organised crime. If, as the United States believes, existing legal instruments are no longer adequate to counter the new threats, the situation must be analysed and discussed on a joint basis.

259. It is highly likely that existing resources and arrangements will have to be adapted in order to combat international terrorism effectively. This is the view held by the United States Government, in particular[223]. Police investigation tools and the rules of criminal procedure clearly need to take into account the development of more serious forms of crime. However, such adaptation calls for multilateral consultation, presupposing dialogue, debate or even a frank and open confrontation, which clearly have yet to take place. On the contrary, the states of the European Union have just issued a particularly negative signal: giving in to what appears to be a nationalist reflex, in late April 2006 they turned down a Commission proposal to step up judicial and police co-operation under the Schengen Agreement[224].

260. Efforts to combat impunity are undoubtedly a crucial element in the fight against terrorism. It is unfortunate that the American administration has systematically opposed the establishment of a universal jurisdiction, refusing to ratify the Rome agreement on the establishment of the International Criminal Court[225]. Handing over terrorist suspects (without, moreover, any verification of the substance of the accusations by a judicial authority) to states one knows, or must presume, will not respect fundamental rights, is unacceptable. Relying on the principle of trust and on diplomatic assurances given by undemocratic states known not to respect human rights is simply cowardly and hypocritical.

261. The American administration states that *rendition* is a vital tool in the fight against international terrorism[226]. We consider that *renditions* may be acceptable, and indeed desirable, only if they satisfy a number of very specific requirements (which, with a few exceptions[227], has not been the case in any of the known *renditions* to date). If a state is unable, or does not wish, to prosecute a suspect, it should be possible to apply the following principle: no person genuinely suspected of a serious act of terrorism should feel safe anywhere in the world. In such cases, however, the person in question may be handed over only to a state able to provide all the guarantees of a fair trial, or – even better – to an international jurisdiction, which in my view should be established as a matter of urgency.

262. The UN High Commissioner for Human Rights, Louise Arbour, has publicly criticised the practice of handing over detainees – outside the scope of the justice system – to countries known to use torture, while demanding assurances that these prisoners will not be ill treated. She added that secret detention was a form of torture[228].

263. Abandoning or relativising human dignity and fundamental human rights is utterly inconceivable. All of history shows that arbitrary decisions, contempt for human values and torture have never been effective, have failed to resolve anything and, ultimately, have led only to a subsequent exacerbation of violence and brutality. In the end, such abuses have served only to confer a sense and appearance of legitimacy on those who attack institutions. In fact, giving in to this temptation concedes a major initial victory to the very people attacking our values. Furthermore, attempting to focus solely on security aspects, as is the case at present – with an outcome that is more than questionable – plays into the hands of the terror lords. It is imperative for a global anti-terrorism strategy to consider political and social aspects. Above all, we must be mindful of the strength of the values of the society for which we are fighting[229]. Benjamin Franklin inevitably comes to mind,

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[223] *The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have had to adapt.* (Ms Rice, statement of 5 December 2005).

[224] See, for instance, Le Figaro of 28 April 2006.

[225] See, for example, Resolution 1336 (2003) on *Threats to the International Criminal Court*.

[226] *Rendition is a vital tool in combating transnational terrorism* (Ms Rice, in her statement of 5 December 2005).

[227] In particular, this applies to the case of the terrorist Carlos, which was mentioned by Ms Rice. She appears to forget, however, that Carlos was abducted in Sudan, where he enjoyed total impunity and was transported to France, where he was judged according to a procedure consistent with the European Convention on Human Rights.

[228] Le Monde of 9 December 2005.

[229] A judgment of the Israeli Supreme Court, called to rule on an alleged breach of the principle of equality following the distribution of gas masks on the West Bank during the Gulf War, contains the following remarkable passage written by the President of the Court, Aaron Barak, himself a survivor of the Kovnus ghetto in Lithuania: "*When the guns speak, the Muses fall silent. But when the guns speak, military commands must comply with the law. A society that wishes to be able to confront its enemies must above all be mindful that it is fighting for values worth protecting. The rule of law is one*

and his approach seems more relevant than ever: *they that can give up essential liberty to attain a little temporary security deserve neither liberty nor safety*[230].

264. Legality and fairness by no means preclude firmness, but confer genuine legitimacy and credibility on a state's inevitable preventive actions. In this respect, some of the international community's attitudes are disturbing. I have already mentioned the unacceptable practice involving the application of UN Security Council sanctions on the basis of black lists. Another example is the situation in Kosovo, where the international community intervened to restore peace, justice and democracy: the inhabitants of this region are still the only people in Europe – with the exception of Belarus – not to have access to the European Court of Human Rights; its prisons are a virtual black hole, not open for inspections or monitoring by the Committee for the Prevention of Torture. In the name of what legitimacy, and with what credibility, is this same international community entitled to lecture Serbia? *Examples are more effective than threats* (Corneille).

10. Legal perspectives

10.1. The point of view of the United States

265. In May 2006 the United States sent its first state delegation to the United Nations Committee against Torture (UN CAT) since the Bush Administration came to power. The delegation was headed by the Chief Legal Advisor to the Department of State, Mr John Bellinger.

266. Mr Bellinger oversaw the presentation of a 184-page submission to UN CAT, in which the United States set out its "exhaustive written responses" to most of the Committee's list of issues. The United States should certainly be commended for this level of engagement, notwithstanding that its policy regarding secret detentions and intelligence activities remained, for the most part, at a firm "*no comment*"[231].

267. There can have been few more opportune times at which to engage Mr Bellinger on discussion of pertinent legal issues than in the week of his return from the UN CAT to Washington, DC. In a briefing lasting about one hour[232], Mr Bellinger and his colleague Dan Fried, Assistant Secretary of State for European Affairs, provided us with a range of valuable perspectives, which I think it worthwhile to indicate in this report as the best contemporary first-hand portrayal of the US legal position.

268. Mr Bellinger made clear on several occasions that a programme of renditions remains a key strand of United States' foreign policy: "*As Secretary Rice has said, we do conduct renditions, we have conducted renditions and we will not rule out conducting renditions in the future.*"

269. He was very decisive, however, in drawing a distinction between the original meaning of rendition and the popular, media-driven notion of Extraordinary Rendition:

> "*To the extent that extraordinary rendition – as I have seen it defined – means the intentional transfer of an individual to a country, expecting or intending that they will be mistreated, then the United States does not do extraordinary renditions to begin with. The United States does not render people to other countries for the purpose of being tortured, or in the expectation that they will be tortured.*"

270. Dan Fried used the briefing to explain some of the underlying considerations for the United States in pursuit of its "war on terror":

> "*We are attempting to keep our people safe; we are attempting to fight dangerous terrorist groups who are active and who mean what they say about destroying us. We are trying to do so in a way consistent with our values and our international legal obligations. Doing all of those things in practice is not easy, partly because – as we've discovered as we've gotten into it – the struggle we are in does not fit neatly either into the criminal legal framework, or neatly into the law of war framework.*"

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of those values"; in: Aaron Barak, *Democrazia, Terrorismo e Corti di giustizia*, Giurisprudenza Costituzionale, 2002, 5, p. 3385.

[230] Quoted just recently by Heinrich Koller, *Kampf gegen Terrorismus – Rechstaatlichen Grundlagen und Schranken*, conference held in Zurich on 19 January 2006 before the *Schweizeriche Helsinki Vereinigung für Demokratie, Rechtsstaat und Menschenrechte.*

[231] See the CAT submission of the United States and the newly-published comments of the Committee (at page 4) on secret detentions, available at www.usmission.ch.

[232] Detailed notes of the meeting with Mr Bellinger and transcripted comments are on file with the Rapporteur.

271. With regard to the question of fitting into legal frameworks, I find it particularly noteworthy that the United States does not see itself bound to satisfy anyone's interpretation of international law but its own. Mr Bellinger continually expressed this view: *"We have to comply with our legal obligations. None of this can be done in an illegal way. We think from our point of view that we comply with all the legal obligations we have."*

272. Similarly, in one of his longer explanations, Mr Bellinger defended the United States' record in the eyes of its European partners:

> "*For those who say we're not following our international obligations in certain cases, I have to say that sometimes it comes down to a disagreement on what the obligation is.*
>
> *With regard to Article 3 of CAT, this is a technical issue. The obligation under Article 3 of the Convention Against Torture requires a country not to return, expel or refouler an individual. For more than a decade, the position of the US Government, and our courts, has been that all of those terms refer to returns from, or transfers out from the United States.*
>
> *So we think that Article 3 of the CAT is legally binding upon us with respect to transfers of anyone from the United States; but we don't think it is legally binding outside the United States.*
>
> *Similarly the Senate of the United States and our courts for more than ten years have taken a position that the words 'substantial grounds' means 'more likely than not'. If we transfer a person from one point outside the United States to another point outside the United States then, as a policy matter, if we think there are substantial grounds to believe that the individual will be tortured or mistreated, we follow the same rules. I think it is a reasonable position for our courts to have set – that 'substantial grounds' means 'more likely than not'.*
>
> *What I can say, though, is that there are different legal regimes between the European Court of Human Rights and our courts, and you can't 'beat up' our courts and our Senate based on some things that they said ten years ago as how they interpret the law.*
>
> *You may wish that the ECtHR interpretation of the CAT was the same position that we have here, but it is not. We do, though, take our legal obligations seriously. And there needs to be a recognition that there may be different interpretation of the terms, but nonetheless the United States still takes our legal obligations seriously – and we do that.*"

Mr Bellinger's interpretation also serves to explain why a detention facility like Camp Delta is situated at Guantanamo Bay, in Cuba, and not in the desert of Arizona. The United States' formalistic and positivist approach shocks the legal sensibilities of Europeans, who are rather influenced by "teleological" considerations. In other words, the European approach is to opt for an interpretation that affords maximum protection to the values on which the legal rule is based.

273. Mr Bellinger was predictably reluctant to discuss the legal issues surrounding any of the cases of rendition that are alleged to have occurred, including the case studies treated in this report. He cited a considered policy on the part of the US Government to refrain from commenting:

> "*We have thought seriously about whether we can answer specific questions publicly and say that there were one, two, or three renditions and where they went through. But we have concluded that, due to the nature of intelligence activities, we simply cannot get into the business of confirming or denying specific questions – as much as we would like to. I'm not going to confirm or deny whether there have been any renditions that have gone through Europe at all.*"

274. The United States Government is always prepared, however, to explain the "hard choices" it feels it has to make to protect its citizens[233]. Mr Bellinger, for his part, described a hypothetical "*policy dilemma*" based loosely on a real-life scenario, where a member of Al-Qaeda is captured at the Kenyan border, "*trying to enter the country but the Kenyans don't want him there".* The captive is known to be wanted by *"some other country such as Egypt, Pakistan or Jordan*" and the United States has an aircraft it could use to render him back. Mr Bellinger concluded his briefing by characterising the choice:

> "*If the choice is between letting a person go who's suspected of involvement in terrorism, or taking them back to their country of nationality, or some other country where they're wanted – then that's*

[233] See Secretary Rice's remarks upon her departure for Europe, Andrews Air Base, 5 December 2005: "*Protecting citizens is the first and oldest duty of any government. Sometimes these efforts are misunderstood. I want to help all of you understand the hard choices involved, and some of the responsibilities that go with them*."

your choice, because there's no extradition treaty and you obviously don't want us to put more people in Guantanamo.

If the choice is whether the person will disappear and be let go, or the country of his nationality or some other country wants him back, and the US is able to provide that – what should be done? That's your choice.

The United States says there are cases where in fact rendition might make sense."

10.2. The point of view of the Council of Europe

10.2.1. The European Commission for Democracy through Law (Venice Commission)

275. The legal issues raised by the facts examined in this report, from the point of view of the Council of Europe, have been set out clearly and precisely by the Venice Commission, whom the Committee on Legal Affairs and Human Rights had asked for a legal opinion in December 2005[234].

276. In its conclusion, the Venice Commission stresses the responsibility of the Council of Europe's member States to ensure that all persons within their jurisdiction enjoy internationally agreed upon fundamental rights (including the right to security of the person, freedom from torture and the right to life), even in the case of persons who are aboard an aircraft that is simply transiting through its airspace[235]. The Venice Commission also confirms that the obligations arising out of the numerous bilateral and multilateral treaties in different fields such as collective self-defence, international civil aviation and military bases, "*do not prevent States from complying with their human rights obligations*"[236].

277. In reply to the specific questions asked by the Committee on Legal Affairs and Human Rights, the Venice Commission has drawn the following conclusions:

"As regards arrest and secret detention

a) *Any form of involvement of a Council of Europe member State or receipt of information prior to an arrest within its jurisdiction by foreign agents entails accountability under Articles 1 and 5 of the European Convention on Human Rights (and possibly Article 3 in respect of the modalities of the arrest). A State must thus prevent the arrest from taking place. If the arrest is effected by foreign authorities in the exercise of their jurisdiction under the terms of an applicable Status of Forces Agreement (SOFA), the Council of Europe member State concerned may remain accountable under the European Convention on Human Rights, as it is obliged to give priority to its jus cogens obligations, such as they ensue from Article 3.*

b) *Active and passive co-operation by a Council of Europe member State in imposing and executing secret detentions engages its responsibility under the European Convention on Human Rights. While no such responsibility applies if the detention is carried out by foreign authorities without the territorial State actually knowing it, the latter must take effective measures to safeguard against the risk of disappearance and must conduct a prompt and effective investigation into a substantiated claim that a person has been taken into unacknowledged custody.*

c) *The Council of Europe member State's responsibility is engaged also in the case where its agents (police, security forces etc.) co-operate with the foreign authorities or do not prevent an arrest or unacknowledged detention without government knowledge, acting ultra vires. The Statute of the Council of Europe and the European Convention on Human Rights require respect for the rule of law, which in turn requires accountability for all form of exercise of public power. Regardless of how a State chooses to regulate political control over security and intelligence agencies, in any event effective oversight and control mechanisms must exist.*

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[234] Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006) on the basis of comments by Mssrs Iain Cameron (Substitute Member, Sweden), Pieter van Dijk (Member, the Netherlands), Olivier Dutheillet de Lamothe (Member, France), Jan Helgesen (Member, Norway), Giorgio Malinverni (Member, Switzerland) and Georg Nolte (Substitute Member, Germany) – opinion no. 363/2005, CDL-AD(2006)009.

[235] cf. Opinion cited above, paras. 143-146.

[236] ibid., para. 156. See EU Network of Independent Experts on Fundamental Rights, Opinion No. 3-2006 on "*The Human Responsibilities of the EU Member States in the Context of the CIA Activities in Europe ('Extraordinary Renditions')*", 25 May 2006, at page 7. The Network reaches the same conclusion on the basis of Article 6(1) EU.

d) If a State is informed or has reasonable suspicions that any persons are held incommunicado at foreign military bases on its territory, its responsibility under the European Convention on Human Rights is engaged, unless it takes all measures which are within its power in order for this irregular situation to end.

e) Council of Europe member States which have ratified the European Convention for the Prevention of Torture must inform the European Committee for the Prevention of Torture of any detention facility on their territory and must allow it to access such facilities. Insofar as international humanitarian law may be applicable, States must grant the International Committee of the Red Cross permission to visit these facilities.

As regards inter-state transfers of prisoners

f) There are only four legal ways for Council of Europe member States to transfer a prisoner to foreign authorities: deportation, extradition, transit and transfer of sentenced persons for the purpose of their serving the sentence in another country. Extradition and deportation proceedings must be defined by the applicable law, and the prisoners must be provided appropriate legal guarantees and access to competent authorities. The prohibition to extradite or deport to a country where there exists a risk of torture or ill-treatment must be respected.

g) Diplomatic assurances must be legally binding on the issuing State and must be unequivocal in terms; when there is substantial evidence that a country practices or permits torture in respect of certain categories of prisoners, Council of Europe member States must refuse the assurances in cases of requests for extradition of prisoners belonging to those categories.

h) The prohibition to transfer to a country where there exists a risk of torture or ill-treatment also applies in respect of the transit of prisoners through the territory of Council of Europe member States: they must therefore refuse to allow transit of prisoners in circumstances where there is such a risk.

As regards overflight

i) If a Council of Europe member State has serious reasons to believe that an airplane crossing its airspace carries prisoners with the intention of transferring them to countries where they would face ill-treatment in violation of Article 3 of the European Convention on Human Rights, it must take all the necessary measures in order to prevent this from taking place.

j) If the state airplane in question has presented itself as a civil plane, that is to say it has not duly sought prior authorisation pursuant to Article 3 c) of the Chicago Convention, the territorial State must require landing and must search it. In addition, it must protest through appropriate diplomatic channels.

k) If the plane has presented itself as a state plane and has obtained overflight permission without however disclosing its mission, the territorial State cannot search it unless the captain consents. However, the territorial State can refuse further overflight clearances in favour of the flag State or impose, as a condition therefor, the duty to submit to searches; if the overflight permission derives from a bilateral treaty or a Status of Forces Agreement or a military base agreement, the terms of such a treaty should be questioned if and to the extent that they do not allow for any control in order to ensure respect for human rights.

l) In granting foreign state aircraft authorisation for overflight, Council of Europe member States must secure respect for their human rights obligations. This means that they may have to consider whether it is necessary to insert new clauses, including the right to search, as a condition for diplomatic clearances in favour of State planes carrying prisoners. If there are reasonable grounds to believe that, in certain categories of cases, the human rights of certain passengers risk being violated, States must indeed make overflight permission conditional upon respect of express human rights clauses. Compliance with the procedures for obtaining diplomatic clearance must be strictly monitored; requests for overflight authorisation should provide sufficient information as to allow effective monitoring (for example, the identity and status (voluntary or involuntary passenger) of all persons on board and the destination of the flight as well as the final destination of each passenger). Whenever necessary, the right to search civil planes must be exercised.

m) With a view to discouraging repetition of abuse, any violations of civil aviation principles in relation to irregular transport of prisoners should be denounced, and brought to the attention of the competent

authorities and eventually of the public. Council of Europe member States could bring possible breaches of the Chicago Convention before the Council of the International Civil Aviation Organisation pursuant to Article 54 of the Chicago Convention.

n) *As regards the treaty obligations of Council of Europe member States, the Commission considers that there is no international obligation for them to allow irregular transfers of prisoners or to grant unconditional overflight rights, for the purposes of combating terrorism. The Commission recalls that if the breach of a treaty obligation is determined by the need to comply with a peremptory norm (jus cogens), it does not give rise to an internationally wrongful act, and the prohibition of torture is a peremptory norm. In the Commission's opinion, therefore, States must interpret and perform their treaty obligations, including those deriving from the NATO treaty and from military base agreements and Status of Forces Agreements, in a manner compatible with their human rights obligations."*

10.2.2 The Secretary General of the Council of Europe (Article 52 ECHR)

278. The Secretary General has made use of his power of enquiry under Article 52 ECHR as rapidly and as completely as possible. In his report dated 28 February 2006[237], the Secretary General takes a clear position as regards member States' responsibilities:

> "*The activities of foreign agencies cannot be attributed directly to States Parties. Their responsibility may nevertheless be engaged on account of either their duty to refrain from aid or assistance in the commission of wrongful conduct, acquiescence and connivance in such conduct, or, more generally, their positive obligations under the Convention.*[5] *In accordance with the generally recognised rules on State responsibility, States may be held responsible of aiding or assisting another State in the commission of an internationally wrongful act.*[6] *There can be little doubt that aid and assistance by agents of a State Party in the commission of human rights abuses by agents of another State acting within the former's jurisdiction would constitute a violation of the Convention. Even acquiescence and connivance of the authorities in the acts of foreign agents affecting Convention rights might engage the State Party's responsibility under the Convention. Of course, any such vicarious responsibility presupposes that the authorities of States Parties had knowledge of the said activities.*"[238]

As regards the result of the Secretary General's request for information, the report of 28 February concludes in a preliminary fashion that "*all forms of deprivation of liberty outside the regular legal framework need to be defined as criminal offences in all States Parties and be effectively enforced. Offences should include aiding and assisting in such illegal acts, as well as acts of omission (being aware but not reporting), and strong criminal sanctions should be provided for intelligence staff or other public officials involved in such cases. However, the most significant problems and loopholes revealed by the replies concern the ability of competent authorities to detect any such illegal activities and take resolute action against them. Four main areas are identified where further measures should be taken at national, European and international levels:*

- the rules governing activities of secret services appear inadequate in many States; better controls are necessary, in particular as regards activities of foreign secret services on their territory;

- the current international regulations for air traffic do not give adequate safeguards against abuse. There is a need for States to be given the possibility to check whether transiting aircraft are being used for illegal purposes. But even within the current legal framework, States should equip themselves with stronger control tools;

- international rules on State immunity often prevent States from effectively prosecuting foreign officials who commit crimes on their territory. Immunity must not lead to impunity where serious human rights violations are at stake. Work should start at European and international levels to establish clear human rights exceptions to traditional rules on immunity;

- mere assurances by foreign States that their agents abroad comply with international and national law are not enough. Formal guarantees and enforcement mechanisms need to be set out in agreements and national law in order to protect ECHR rights."[239]

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[237] SG/Inf (2006)5, available at the Council of Europe's website (http://www.coe.int).

[238] ibid., para. 23 ; see also the excellent analysis of the case law of the European Court of Human Rights regarding member States' "positive obligations" in paras. 24-30

[239] *Ibid*., p. 1 (non-official executive summary)

279. In this context, the Secretary General, referring to my memorandum of 21 January 2006, was worried about the fact that some countries have not replied, or have not replied completely, to his question concerning the involvement of any public official in such deprivation of liberty or transport of detainees, and whether any official investigation is under way or has been completed. Consequently, the Secretary General has asked additional questions to some countries. The replies are not yet in the public domain.

11. Conclusion

280. Our analysis of the CIA "rendition" programme has revealed a network that resembles a "spider's web" spun across the globe. The analysis is based on official information provided by national and international air traffic control authorities, as well as other information including from sources inside intelligence agencies, in particular the American. This "web", shown in the graphic[240], is composed of several landing points, which we have subdivided into different categories, and which are linked up among themselves by civilian planes used by the CIA or military aircraft.

281. These landing points are used for various purposes that range from aircraft stopovers to refuel during a mission to staging points used for the connection of different "rendition circuits" that we have identified and where "rendition units" can rest and prepare missions. We have also marked the points where there are known detention centres (Guantanamo Bay, Kabul and Baghdad…) as well as points where we believe we have been able to establish that pick-ups of rendition victims took place.

282. In two European countries only (Romania and Poland), there are two other landing points that remain to be explained. Whilst these do not fall into any of the categories described above, several indications lead us to believe that they are likely to form part of the "rendition circuits'[241]. These landings therefore do not form part of the 98% of CIA flights that are used solely for logistical purposes[242], but rather belong to the 2% of flights that concern us the most. These corroborated facts strengthen the presumption – already based on other elements - that these landings are detainee drop-off points that are near to secret detention centres.

283. Analysis of the network's functioning and of ten individual cases allows us to make a number of conclusions both about human rights violations – some of which continue – and about the responsibilities of some Council of Europe member States.

284. It must be emphasised that this report is indeed addressed to the Council of Europe Member states. The United States, an observer state of our Organisation, actually created this reprehensible network, which we criticise in light of the values shared on both sides of the Atlantic. But we also believe to have established that it is only through the intentional or grossly negligent collusion of the European partners that this "web" was able to spread also over Europe.

285. The impression which some Governments tried to create at the beginning of this debate – that Europe was a victim of secret CIA plots – does not seem to correspond to reality. It is now clear – although we are still far from having established the whole truth - that authorities in several European countries actively participated with the CIA in these unlawful activities. Other countries ignored them knowingly, or did not want to know.

286. In the draft resolution, which sums up this report's conclusions, I have not directly named the countries responsible simply because there is not enough room in such a text to adequately develop the nuances of each individual case. In addition, we only know part of the truth so far, and other countries may still turn out to be implicated in light of future research or revelations. This explanatory note, however, explains the discovered facts in far greater detail. Finally, the purpose of this report is not to attribute "grades" to different member States, but to try to understand what really happened throughout Europe and to stop certain violations shown from reoccurring in future. I would add that a key element seems to be the urgent need to improve the international response to the threat of terrorism. This response presently appears today as largely inadequate and insufficiently coordinated.

287. Whilst hard evidence, at least according to the strict meaning of the word, is still not forthcoming, a number of coherent and converging elements indicate that secret detention centres have indeed existed and unlawful inter-state transfers have taken place in Europe. I do not set myself up to act as a criminal court, because this would require evidence beyond reasonable doubt. My assessment rather reflects a conviction

[240] See graphic annex to this report: "The global "spider's web" of secret detentions and unlawful inter-state transfers"
[241] See paragraph 51 above.
[242] See paragraph 49 above (quoting Michael Scheuer, architect of the rendition programme).

based upon careful examination of balance of probabilities, as well as upon logical deductions from clearly established facts. It is not intended to pronounce that the authorities of these countries are "guilty" for having tolerated secret detention sites, but rather it is to hold them "responsible" for failing to comply with the positive obligation to diligently investigate any serious allegation of fundamental rights violations.

288. In this sense, it must be stated that to date, the following member States could be held responsible, to varying degrees, which are not always settled definitively, for violations of the rights of specific persons identified below (respecting the chronological order as far as possible):

- Sweden, in the cases of Ahmed Agiza and Mohamed Alzery ;
- Bosnia-Herzegovina, in the cases of Lakhdar Boumediene, Mohamed Nechle, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idir and Saber Lahmar (the “Algerian six“) ;
- The United Kingdom in the cases of Bisher Al-Rawi, Jamil El-Banna and Binyam Mohamed ;
- Italy, in the cases of Abu Omar and Maher Arar ;
- “The former Yugoslav Republic of Macedonia“, in the case of Khaled El-Masri ;
- Germany, in the cases of Abu Omar, of the “Algerian six”, and Khaled El-Masri ;
- Turkey, in the case of the “Algerian six”.

289. Some of these above mentioned states, and others, could be held responsible for collusion – active or passive (in the sense of having tolerated or having been negligent in fulfilling the duty to supervise) - involving secret detention and unlawful inter-state transfers of a non specified number of persons whose identity so far remains unknown:

- Poland and Romania, concerning the running of secret detention centres;
- Germany, Turkey, Spain and Cyprus for being "staging points" for flights involving the unlawful transfer of detainees;
- Ireland, the United Kingdom, Portugal, Greece and Italy for being "stopovers" for flights involving the unlawful transfer of detainees.

290. Other States should still show greater willingness and zeal in the quest for truth, as serious indications show that their territory or their airspace might have been used, even unbeknownst, for illegal operations (the example of Switzerland was cited in this context).

291. The international community is finally urged to create more transparency in the places of detention in Kosovo, which to date qualify as "black holes" that cannot even be accessed by the CPT. This is frankly intolerable, considering that the international intervention in this region was meant to restore order and lawfulness.

292. With regards to these extremely serious allegations, it is urgent – that is the principal aim of this report – that all Council of Europe member States concerned finally comply with their positive obligation under the ECHR to investigate. It is also crucial that the proposals in the draft resolution and recommendation are implemented so that terrorism can be fought effectively whilst respecting human rights at the same time.

ANNEX


The global "spider's web" of secret detentions and unlawful inter-state transfers
Rapporteur: Dick Marty, Switzerland, ALDE
Committee on Legal Affairs and Human Rights
Parliamentary Assembly
Assemblée parlementaire
COUNCIL OF EUROPE
CONSEIL DE L'EUROPE
STOCKHOLM
PRESTWICK
SZYMANY
SHANNON
FRANKFURT
RAMSTEIN
PRAGUE
BANGOR
AVIANO
TUZLA
TIMISOARA
BUCHAREST
ROME
SKOPJE
TASHKENT
BAKU
PALMA DE MALLORCA
ATHENS
INCIRLIK
WASHINGTON
SANTA MARIA
ALGIERS
BAGHDAD
LARNACA
KABUL
RABAT
AMMAN
CAIRO
ISLAMABAD
GUANTANAMO
BANJUL
AIRPORT KEY
Stopover points
Staging points
Pick-up points
Detainee transfer / drop-off points
Annex to AS/Jur (2006) 16 Part II
Graphic design by Once Were Farmers

ANNEX

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10748 and Reference No 3153 of 25 November 2005

Draft resolution and draft recommendation unanimously adopted by the Committee on 7 June 2006

Members of the Committee : Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr Eduard Lintner, Mr Adrien Severin (Vice-Chairpersons), Mrs Birgitta Alhqvist, Mr Athanasios Alevras, Mr Rafis Aliti, Mr Alexander Arabadjiev, Mr Miguel Arias, Mr Birgir Ármannsson, Mr José Luis Arnaut, Mr Abdülkadir Ateş, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bemelmans-Videc**, Mr Giorgi Bokeria, Mrs Olena Bondarenko, Mr Erol Aslan Cebeci, Mrs Pia Christmas-Møller, Mr Boriss **Cilevičs**, Mr Domenico Contestabile, Mr András Csáky, Mrs Herta **Däubler-Gmelin**, Mr Marcello Dell'Utri, Mrs Lydie Err, Mr Jan Ertsborn, Mr Václav **Exner**, Mr Valeriy Fedorov, Mr György **Frunda**, Mr Jean-Charles Gardetto, Mr József Gedei, Mr Stef Goris, Mr Valery **Grebennikov**, Mrs Gultakin Hajiyeva, Mrs Karin Hakl, Mr Nick Harvey, Mr Michel **Hunault**, Mr Rafael **Huseynov**, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Sergei Ivanov, Mr Tomáš Jirsa, Mr Antti Kaikkonen (alternate: Mr Kimmo **Sasi**), Mr Uyriy Karmazin, Mr Karol Karski, Mr Hans Kaufmann (alternate: Mr Andreas **Gross**), Mr Nikolay Kovalev, Mr Jean-Pierre Kucheida, Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony Lloyd, Mr Humfrey Malins, Mr Andrea Manzella, Mr Alberto Martins, Mr Tito Masi, Mr Andrew McIntosh, Mr Murat Mercan, Mr Philippe Monfils, Mr Philippe Nachbar, Mr Tomislav Nikolić, Ms Ann Ormonde, Mr Rino Piscitello, Mrs Maria Postoico, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando, Mr Martin Raguž, Mr François Rochebloine, Mr Armen Rustamyan, Mr Michael Spindelegger, Mrs Rodica Mihaela Stănoiu, Mr Christoph Strasser, Mr Petro Symonenko, Mr Vojtech **Tkáč**, Mr Øyvind **Vaksdal**, Mr Egidijus **Vareikis**, Mr Miltiadis Varvitsiotis (alternate: Mrs Elsa **Papadimitriou**), Mrs Renate Wohlwend, Mr Krysztof Zaremba, Mr Vladimir Zhirinovsky, Mr Zoran Žižić, Mr Miomir **Žužul**

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Drzemczewski, Mr Schirmer, Ms Heurtin, Mr Simpson

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT B

Parliamentary **Assembly**
Assemblée parlementaire

Parliamentary Assembly
Assemblée parlementaire
COUNCIL OF EUROPE CONSEIL DE L'EUROPE

7 June 2007

Committee on Legal Affairs and Human Rights

Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report

Explanatory memorandum*

Rapporteur: Mr Dick Marty, Switzerland, ALDE

Summary

Introductory remarks - an overview

* The Rapporteur, the secretariat and the translators had to work in extremely difficult conditions because of the lack of time due to the delays in receiving certain information. This explains why there may be some linguistic mistakes and imprecision. The Rapporteur wishes to apologise for this.

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Introductory remarks – an overview

1. What was previously just a set of allegations is now proven: large numbers of people have been abducted from various locations across the world and transferred to countries where they have been persecuted and where it is known that torture is common practice. Others have been held in arbitrary detention, without any precise charges levelled against them and without any judicial oversight – denied the possibility of defending themselves. Still others have simply disappeared for indefinite periods and have been held in secret prisons, including in member states of the Council of Europe, the existence and operations of which have been concealed ever since.

2. Some individuals were kept in secret detention centres for periods of several years, where they were subjected to degrading treatment and so-called "enhanced interrogation techniques" (essentially a euphemism for a kind of torture), in the name of gathering information, however unsound, which the United States claims has protected our common security. Elsewhere, others have been transferred thousands of miles into prisons whose locations they may never know, interrogated ceaselessly, physically and psychologically abused, before being released because they were plainly not the people being sought. After the suffering they went through, they were released without a word of apology or any compensation – with one remarkable exception owing to the ethical and responsible approach of the Canadian authorities – and also have to put up with the opprobrium of doubts surrounding their innocence and, right here in Europe, racist harassment fuelled by certain media outlets. These are the terrible consequences of what in some quarters is called the "war on terror."

3. While the strategy in question was devised and put in place by the current United States administration to deal with the threat of global terrorism, it has only been made possible by the collaboration at various institutional levels of America's many partner countries. As was already shown in my report of 12 June 2006 (PACE Doc 10957), these partners have included several Council of Europe member states. Only exceptionally have any of them acknowledged their responsibility – as in the case of Bosnia and Herzegovina, for instance – while the majority have done nothing to seek out the truth. Indeed many governments have done everything to disguise the true nature and extent of their activities and are persistent in their unco-operative attitude. Moreover, only very few countries have responded favourably to the proposals made by the Secretary General of the Council of Europe at the end of the procedure initiated under Article 52 of the European Convention of Human Rights ("ECHR") (see document SG(2006)01).

4. The rendition, abduction and detention of terrorist suspects have always taken place outside the territory of the United States, where such actions would no doubt have been ruled unlawful and unconstitutional. Obviously, these actions are also unacceptable under the laws of European countries, who nonetheless tolerated them or colluded actively in carrying them out. This export of illegal activities overseas is all the more shocking in that it shows fundamental contempt for the countries on whose territories it was decided to commit the relevant acts. The fact that the measures only apply to non-American citizens is just as disturbing: it reflects a kind of "legal apartheid" and an exaggerated sense of superiority. Once again, the blame does not lie solely with the Americans but also, above all, with European political leaders who have knowingly acquiesced in this state of affairs.

5. Some European governments have obstructed the search for the truth and are continuing to do so by invoking the concept of "state secrets". Secrecy is invoked so as not to provide explanations to parliamentary bodies or to prevent judicial authorities from establishing the facts and prosecuting those guilty of offences. This criticism applies to Germany and Italy, in particular. It is striking to note that state secrets are invoked on grounds almost identical to those advanced by the authorities in the Russian Federation in its crackdown on scientists, journalists and lawyers, many of whom have been prosecuted and sentenced for alleged acts of espionage. The same approach led the authorities of "the former Yugoslav Republic of Macedonia" to hide the truth and give an obviously false account of the actions of its own national agencies and the CIA in carrying out the secret detention and rendition of Khaled El-Masri.

6. Invoking state secrets in such a way that they apply even years after the event is unacceptable in a democratic state based on the rule of law. It is frankly all the more shocking when the very body invoking such secrets attempts to define their concept and scope, as a means of shirking responsibility. The invocation of state secrets should not be permitted when it is used to conceal human rights violations and it should, in any case, be subject to rigorous oversight. Here again, Canada seems to demonstrate the right approach, as will be seen later in this report.

7. There is now enough evidence to state that secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland and Romania. These two countries were already named in connection with secret detentions by Human Rights Watch in November 2005. At the explicit request of the American government, the Washington Post simply referred generically to "eastern European democracies", although it was aware of the countries actually concerned. It should be noted that ABC did also name Poland and Romania in an item on its website, but their names were removed very quickly in circumstances which were explained in our previous report. We have also had clear and detailed confirmation from our own sources, in both the American intelligence services and the countries concerned, that the two countries did host secret detention centres under a special CIA programme established by the American administration in the aftermath of 11 September 2001 to “kill, capture and detain” terrorist suspects deemed to be of “high value”. Our findings are further corroborated by flight data of which Poland, in particular, claims to be unaware and which we have been able to verify using various other documentary sources.

8. The secret detention facilities in Europe were run directly and exclusively by the CIA. To our knowledge, the local staff had no meaningful contact with the prisoners and performed purely logistical duties such as securing the outer perimeter. The local authorities were not supposed to be aware of the exact number or the identities of the prisoners who passed through the facilities – this was information they did not “need to know.” While it is likely that very few people in the countries concerned, including in the governments themselves, knew of the existence of the centres, we have sufficient grounds to declare that the highest state authorities were aware of the CIA’s illegal activities on their territories.

9. We are not an investigating authority: we have neither the powers nor the resources. It is not therefore our aim to pass judgments, still less to hand down sentences. However, our task is clear: to assess, as far as possible, allegations of serious violations of human rights committed on the territory of Council of Europe member states, which therefore involve violations of the European Convention on Human Rights. We believe we have shown that the CIA committed a whole series of illegal acts in Europe by abducting individuals, detaining them in secret locations and subjecting them to interrogation techniques tantamount to torture.

10. In most cases, the acts took place with the requisite permissions, protections or active assistance of government agencies. We believe that the framework for such assistance was developed around NATO authorisations agreed on 4 October 2001, some of which are public and some of which remain secret. According to several concurring sources, these authorisations served as a platform for bilateral agreements, which – of course – also remain secret.

11. In our view, the countries implicated in these programmes have failed in their duty to establish the truth: the evidence of the existence of violations of fundamental human rights is concrete, reliable and corroborative. At the very least, it is such as to require the authorities concerned at last to order proper independent and thorough inquiries and stop obstructing the efforts under way in judicial and parliamentary bodies to establish the truth. International organisations, in particular the Council of Europe, the European Union and NATO, must give serious consideration to ways of avoiding similar abuses in future and ensuring compliance with the formal and binding commitments which states have entered into in terms of the protection of human rights and human dignity.

12. Without investigative powers or the necessary resources, our investigations were based solely on astute use of existing materials – for instance, the analysis of thousands of international flight records – and a network of sources established in numerous countries. With very modest means, we had to do real “intelligence” work. We were able to establish contacts with people who had worked or still worked for the relevant authorities, in particular intelligence agencies. We have never based our conclusions on single statements and we have only used information that is confirmed by other, totally independent sources. Where possible we have cross-checked our information both in the European countries concerned and on the other side of the Atlantic or through objective documents or data. Clearly, our individual sources were only willing to talk to us on the condition of absolute anonymity. At the start of our investigations, the Committee on Legal Affairs and Human Rights authorised us to guarantee our contacts strict confidentiality where necessary. This willingness to grant confidentiality to potential “whistleblowers” was also communicated to Mr Franco Frattini, Vice-President of the European Commission with responsibility for the area of freedom, security and justice, so that he could also notify the relevant ministers in EU countries. Guarantees of confidentiality undoubtedly contributed to a climate of trust and made it possible for many sources to agree to talk to us. The individuals concerned are not prepared at present to testify in public, but some of them may be in the future if the circumstances were to change.

13. The Polish authorities recently criticised us for not travelling to their country to visit the facility suspected of having housed a detention centre. However, we see no point in visiting the site: we are not forensic science experts and we have no doubts about the capability of those who would have removed any traces of the prisoners' presence. Moreover, a meeting at the site would only have been worthwhile if the Polish authorities had first replied to the questions we put to them on numerous occasions and to which we are still awaiting replies.

14. We are fully aware of the seriousness of the terrorist threat and the danger it poses to our societies. However, we believe that the end does not justify the means in this area either. The fight against terrorism must not serve as an excuse for systematic recourse to illegal acts, massive violation of fundamental human rights and contempt for the rule of law. I hold this view not only because methods of this nature conflict with the constitutional order of all civilised countries and are ethically unacceptable, but also because they are not effective from the perspective of a genuine long-term response to terrorism.

15. We have said it before and others have said it much more forcefully, but we must repeat it here: having recourse to abuse and illegal acts actually amounts to a resounding failure of our system and plays right into the hands of the criminals who seek to destroy our societies through terror. Moreover, in the process, we give these criminals a degree of legitimacy – that of fighting an unfair system – and also generate sympathy for their cause, which cannot but serve as an encouragement to them and their supporters.

16. The fact is that there is no real international strategy against terrorism, and Europe seems to have been tragically passive in this regard. The refusal to establish and recognise a functioning international judicial and prosecution system is also a major weakness in our efforts to combat international terrorism. We also agree with the view expressed by Amnesty International in its recent annual report: governments are taking advantage of the fear generated by the terrorist threat to impose arbitrary restrictions on fundamental freedoms. At the same time, they are paying no attention to developments in other areas that claim many more lives, or they display a disconcerting degree of passivity. We need only cast our minds to human trafficking or the arms trade: how is it possible, for example, that aeroplanes full of weapons continue to land regularly in Darfur, where a human tragedy with tens of thousands of victims is unfolding?

17. In our view, it is also necessary to draw attention to an aspect we believe to be very dangerous: the legitimate fight against terrorism must not serve as a pretext for provoking racist and Islamophobic reactions among the public. The Council of Europe has rightly recognised the fundamental importance of intercultural and interfaith dialogue. The member states and observers really should carry these efforts forward and maintain the utmost of vigilance on the issue. Any excesses in this respect could have disastrous consequences in terms of an expanded future terrorist threat.

18. In the course of our investigations and through various specific circumstances, we have become aware of certain special mechanisms, many of them covert, employed by intelligence services in their counter-terrorist activities. It is not for us to judge these methods, although in this area, too, great liberties appear to be taken with lawfulness. Many of these methods give rise to chain reactions of blackmail and lies between different agencies and institutions in individual states, as well as between states. Therein may lie at least a partial explanation for certain governments' fierce opposition to revealing the truth. We cannot go into the details of this phenomenon without putting human lives at risk. Let me reiterate that we are fully convinced of the strategic importance of the work of intelligence services in combating terrorism. However, we believe equally strongly that the relevant agencies need to be subject to codes of conduct, accompanied by robust and thorough supervision.

19. With the mandate assigned to us, we believe that the Assembly has reached the limits of its possibilities. The resources at our disposal to address the issues presented to us are totally inadequate for the task. The Council of Europe should give serious consideration to equipping itself with more effective and more binding instruments for dealing with such grave instances of massive and systematic violations of human rights. This is more necessary now than ever before, since it is clear that we are facing a worrying process of the erosion of fundamental freedoms and rights.

20. We must condemn the attitude of the many countries that did not deem it necessary to reply to the questionnaire we sent them through their national delegations. Similarly, NATO has never replied to our correspondence.

21. In presenting this report, the Rapporteur expresses his gratitude to the staff of the Committee's secretariat for their outstanding commitment and dedication. Very special thanks and acknowledgment go to the young staff member who was specifically assigned to this investigation: he has displayed absolutely amazing analytical skills and tenacity.

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I. The "dynamics of truth"

i. How President Bush's disclosure of the Central Intelligence Agency (CIA) secret detention programme has accelerated the "dynamics of truth"

22. When President Bush decided on 6 September 2006 to reveal the existence of the covert programme implemented by the CIA to arrest, detain and interrogate overseas high-value terrorist suspects [1], he simply glossed over the most delicate aspects, such as the implementation means chosen and (not) obtaining the prior support from the United States Congress for his Administration's "war against terrorism".

23. President Bush's disclosure was carefully worded so as to provide very little factual insight that was genuinely new or unknown. It was instead couched in imperative terms that portrayed the President as a strong Commander-in-Chief trying to prevent threats to the United States by methods - such as the CIA's interrogation techniques - which were *"tough… safe, and lawful, and necessary"*.

24. The end was portrayed as paramount – *"we're getting vital information necessary to do our jobs, and that's to protect the American people and our allies"*; the means of getting there inconsequential – "*I cannot describe the specific methods used – I think you understand why*".

25. Just under six weeks later, the US Congress responded to President Bush's clarion call[2] by passing the Military Commissions Act 2006 into law. As President Bush had expressly requested, the legislation draws distinctions between United States citizens and non-citizens, strips away the time-honoured right of detainees to challenge the basis for their detention (*habeas corpus*), and insulates US service personnel from prosecution for violations of Common Article 3 of the four Geneva Conventions. The process that lay ahead for captured terrorist suspects was thereby mapped out, whilst the Administration tried to cover the tracks that had led them there.

26. The "limited disclosures" of 6 September 2006, afforded a fresh focus to the mandate of my inquiry. One thing was now certain, personally acknowledged by the President of the United States: the existence of secret detention centres, which I had already confirmed in my June 2006 report. We are, however, faced with unresolved allegations that Council of Europe member States have colluded with the United States in serious human rights violations such as enforced disappearances, incommunicado (secret) detentions, and torture or cruel, inhuman and degrading treatment. President Bush's assertion that Europeans too had benefited from the programme[3] - which has not been substantiated by any evidence – must be put into its proper perspective if it were shown that we had forsaken our democratic values and the rule of law in order to share in those benefits.

27. In my view the protection of fundamental human rights is every bit as important as the preservation of national security cited by President Bush; indeed I hold these two objectives to be complementary, mutually reinforcing and in no way contradictory.

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[1] The White House, Office of the Press Secretary, "Remarks by the President on the Global War on Terror" (*War against terrorism is a struggle for freedom and liberty, Bush says*), speech delivered in the East Room of the White House, 06.09.2006; hereinafter "Remarks by President Bush, 06.09.2006".

[2] *Ibidem*. The transcript shows that President Bush struck a chord with his White House audience, which included relatives of victims of the 9/11 attacks: "*Congress is in session just for a few more weeks, and passing this legislation ought to be the top priority. (Applause.)… For the sake of our security, Congress needs to act, and update our laws to meet the threats of this new era. And I know they will.*"

[3] *Ibid*. "*Information from the terrorists questioned in this program helped unravel plots and terrorist cells in Europe and other places. It's helped our allies to protect their people from deadly enemies.*"

28. If we are to understand clearly the relationship between human rights and national security imperatives for the future, then we cannot content ourselves with partial truths about how the policies in question have been developed and implemented in the past. It is therefore our duty to get right to the bottom of the CIA's secret detention programme in all its systemic components. The programme must not simply pass into history as a policy that seemed to breach our supposedly inviolable human rights, but about which we never learned the truth and for which we never exercised political and legal accountability. We have a right and the duty to know the truth and to analyse critically the means and methods being used in our name towards the stated goal of enhancing our common security. It is therefore indispensable to clarify the precise operational and legal basis of the CIA's covert programme, and in particular to establish the extent to which Council of Europe member states were involved.

29. Building upon the June 2006 interim report[4], I have now concentrated on placing the CIA programme properly within the "global spider's web" – the image I used to describe the system of secret detentions and detainee transfers spun out around the world by the US Government and its allies. In this context, our interest has been concentrated on the role played by the member States of the Council of Europe that acted as "hosts" for CIA secret detentions.

30. As this report will make clear, the HVD programme has depended on extraordinary authorisations – unprecedented in nature and scope – at both national and international levels. The secret of its very existence was successfully guarded for several years, and until today, very little detail has been published about the terms used to refer to it, the way the system has operated, the underlying authorisations and arrangements that have sustained it, or even the reasons as to why it has so successfully been covered up.

31. Questions such as where the detention sites have been located and what conditions the detainees have been kept in were declared last year by President Bush to be too sensitive for him to answer officially, on the grounds that "*doing so would provide our enemies with information they could use to take retribution*".[5]

32. Indeed, even when the revelations of secret detentions in "several democracies in Eastern Europe" first emerged in November 2005,[6] the publication responsible for breaking the story, *The Washington Post*, made a decision not to publish the names of the states which had hosted CIA "black sites", although it was aware of this information. *The Post*'s decision followed a meeting at the White House and an explicit appeal from the US Government to refrain from naming the countries involved.[7] *The Post*'s Staff Writer Dana Priest, who wrote the article in question, explained the rationale behind the newspaper's decision in the following terms:

> "*Political embarrassment was not a consideration; it really turned on the safety and co-operation questions. We did not publish the names of the countries involved because those countries were co-operating on other efforts that were not controversial, some of which the Post knew about from independent sources and which we considered to be valuable. Knowing those efforts to be vital to our international programmes, we thought that those efforts might stop if the countries' names were published, and that this would not be good.*"[8]

[4] See Dick Marty, Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, "Alleged secret detentions and unlawful inter-state transfers of detainees involving CoE member States", Doc. 10957, 12.06.2006, available at http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10957.htm (hereinafter "Marty Report 2006, Council of Europe Doc. 10957").

[5] Remarks by President Bush, 06.09.2006, *supra* note 3.

[6] See Dana Priest, "CIA Holds Terror Suspects in Secret Prisons – Debate is Growing within Agency about Legality and Morality of Overseas System set up after 9/11", *The Washington Post*, 02.11.2005.

[7] See Howard Kurtz, "Bush Presses Editors on Security", *The Washington Post*, 26.12.2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/12/25/AR2005122500665_pf.html. For further commentary, see also Marty Report 2006, section 1.3, at p. 9.

[8] Dana Priest, speaking at the seminar entitled "Secrecy and Government: America Faces the Future", hosted by the Center on Law and Security, NYU School of Law, New York, 12.04.2007.

33. While one might understand this decision, I have chosen to adopt a different position from that of *The Washington Post* on this issue, whilst maintaining a strict policy of confidentiality with regard to my individual sources. It should also be borne in mind that the very earnest American NGO Human rights Watch had explicitly cited Poland and Romania among the countries in which there had been secret detention centres. Moreover, it is difficult to accept that the reasons given at the time by the *Washington Post* are still valid today.

ii. The responsibility to provide a truthful account and the importance of confidential sources

34. Especially in light of its unparalleled pedigree for protecting and promoting human rights on our continent, the Council of Europe holds a unique responsibility in providing a truthful account. It has been said that the paradigm of US detainee treatment in the course of the "war on terrorism" has been to carry out its most odious acts extra-territorially – including in Europe – because it knows that such acts would not be permissible at home under the laws and Constitution of the United States. This is a paradigm of political expediency. But how not to see in it a form of contempt towards other countries, notably Cuba (Guantanamo!) and Europe: what is not good enough for the United States is for others!

35. In direct response, the paradigm of this report is one based on principles and values. We assert that in order to retain the moral authority necessary to defeat the global terrorist threat, we must ensure that every detainee in our custody – notwithstanding the acts of which he is accused, or whether he is held in Europe or elsewhere – is accorded the same fundamental human rights we would expect to be accorded ourselves and which, moreover, we uphold for even the worst criminals. Not even war authorises conduct of any sort; for example, the Geneva Conventions, the cornerstone of international humanitarian law laying down the limits to the barbarity of war, also prohibit secret detention centres.

36. From the outset of my mandate as Rapporteur on this issue, I have argued that transparency and accountability would in fact prove to be healthy for all the member States of the Council of Europe, not least for the countries which have hosted CIA "black sites".

37. The perpetual cycle of allegations and unsubstantiated rumours since November 2005 has merely served to fuel mutual suspicion and distrust between our Governments and peoples. The uncertainty has disrupted open political debate and provided an unwelcome distraction from the most urgent task of developing more viable democratic strategies to combat the growing terrorist threat in accordance with the rule of law.

38. Thus my decision to name the countries concerned should not be construed as an attempt to single out scapegoats or to drive a wedge between members of the European family. On the contrary, my investigations demonstrate clearly that responsibility is broadly shared on both sides of the Atlantic and on our continent.

39. From the very beginnings of the "war on terror" advocated by the United States, European governments could not ignore its true nature ; all the members and partners of NATO signed up to the same "permissive" – not to say illegal – terms that allowed CIA operations to permeate throughout the European continent and beyond; all knew that CIA practices for the detention, transfer and treatment of terrorist suspects left open considerable scope for abuses and unlawful measures; yet all remained silent and kept the operations, the practices, their agreements and their participation secret.

40. Now it is time for the member States of the Council of Europe to muster a similar collective spirit in acknowledging the truth about the past and regrouping to face the considerable challenges to be faced in the future. The methods used not only proved to be of questionable usefulness, but above all they also gave a semblance of legitimacy to terrorist movements and even gave rise to some feeling of sympathy for them.

41. As Council of Europe Rapporteur I have talked persistently about my belief in the "dynamics of truth" – that each drop of truth will lead forward to another drop of truth, and that a steady trickle will ultimately develop into an irreversible flow. Seen in this regard, my report of June 2006, which mapped out the "global spider's web" and exposed CIA "rendition circuits" for the first time, was but a small contribution to a pool of outstanding investigative work by journalists[9] and non-governmental organisations[10] that continues to grow to the present day.

42. Yet while the momentum was gathering last year, we were perfectly aware that we would still have to overcome formidable obstacles in order to get to the truth about the CIA programme of secret detentions in Europe. State secrecy has been systematically invoked at national level in several instances both to deny us access to classified documents and to thwart action taken by the competent judicial and parliamentary authorities.[11] Moreover, as I demonstrate later in this report,[12] the secrecy and security of information policies adopted by states in the framework of the North Atlantic Treaty Organisation (NATO) are just as impenetrable when applied as barriers to transparency as they have proven since they were selected to act as coverage for CIA clandestine operations.

43. To encourage even a minor departure from strict adherence to these regimes of silence, secrecy and cover-up would require a rare convergence of factors. The first signs of cracks would have to appear in alliances that had hitherto been absolutely watertight. The motivation for insiders on one or both sides of the Atlantic to talk to us would surely derive only from their fear of betrayal – either by their colleagues, their political masters or their transatlantic partners.

44. The catalyst for those involved in the HVD programme to talk candidly to our team appears ultimately to have come from the American side – albeit that a degree of ambiguity about who was "allowed" to say what appears to have worked in our favour. My representative, who was on-the-spot in Washington, DC when President Bush disclosed the existence of the CIA's covert overseas detention and interrogation programme, received an off-the-record briefing.

45. Thereafter, one of the most challenging aspects of our investigation has been our effort to access the structures where the information is held within the different European states. Towards this end our team has undertaken visits and developed sources in both the political and intelligence spheres in various countries, sometimes pursuing multiple contacts over a period of months.

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[9] In particular, I wish to recognise the following journalistic contributions, which depended on original investigative work to bring to light original facts and new dimensions to the global system of secret detentions and detainee transfers: Stephen Grey on extraordinary renditions (see "America's Gulag," in *The New Statesman*, 17.05.2004; "US Accused of Torture Flights," in *The Sunday Times*, 14.11.2004; and "Les Etats-Unis inventent la delocalisation de la torture,: in *Le Monde Diplomatique*, April 2005); Dana Priest on CIA programmes, including secret detentions in Europe ("CIA Holds Terror Suspects in Secret Prisons – Debate is Growing within Agency about Legality and Morality of Overseas System set up after 9/11," in *The Washington Post*, 2.11.2005; and "Foreign Network at Front of CIA's Terror Fight – Joint Facilities in Two Dozen Countries account for bulk of Agency's post-9/11 successes," in *The Washington Post*, 18.11.2005); Jane Mayer on rendition policies, interrogation techniques and torture memos ("Outsourcing Torture: The secret history of America's 'extraordinary rendition' programme," in *The New Yorker*, 14 and 21.02.2005; "A Deadly Interrogation – Can the CIA legally kill a prisoner?" in *The New Yorker*, 14.11.2005; and "The Memo – How an internal effort to ban the abuse and torture of detainees was thwarted," in *The New Yorker*, 27.02.2006) ; Brian Ross and Richard Esposito on enhanced interrogations and the clear-out of European sites ("CIA's Harsh Interrogation Techniques Described – Sources Say Agency's Tactics lead to Questionable Confessions, Sometimes to Death", *ABC News*, 18.11.2005; and "Sources Tell ABC News Top Al-Qaeda Figures held in Secret CIA Prisons: 10 out of 11 Terror Leaders subjected to "Enhanced Interrogation Techniques," *ABC News*, 5.12.2005); Don Van Natta Jr. and Souad Mekhennet on the El-Masri case ("German's Claim of Kidnapping brings Investigation of US link," in *The New York Times*, 9.01.2005); Nick Hawton on the cover-up regarding secret flights into Poland ("Chasing Shadows," *BBC Radio 4*, 2.01.2007); and *The Chicago Tribune* on undeclared flights in both Poland and Romania (John Crewdson, "Elusive jet may hold clue to secret prisons – Mystery Gulfstream landed in Romania," in *The Chicago Tribune*, 13.09.2006; and Tom Hundley, "Remote Polish airstrip holds clues to secret CIA flights," 06.02.2007).

[10] I am deeply grateful to all our allies in the non-governmental field, whose dedication to the cause and tireless support for my inquiry – much of it behind the scenes – has proven invaluable. For their professional approach throughout the last two years and for their reporting, research and representations too extensive to enumerate individually here, I wish to thank in particular: the American Civil Liberties Union, Amnesty International, the Brennan Centre for Justice at NYU School of Law, the Centre for Human Rights and Global Justice at NYU School of Law, the Centre for Constitutional Rights, Human Rights First, Human Rights Watch, the International Commission of Jurists, REPRIEVE, Statewatch and the Swedish Helsinki Committee for Human Rights. I salute your work and that of the many other NGOs active in the field who have supported me anonymously or whose names I have inadvertently failed to mention.

[11] Pertinent examples of the invocation of state secrecy in at least two different jurisdictions are provided in the section entitled "A case study of Khaled El-Masri," at section VI.i later in this report.

[12] See section entitled "Preserving Secrecy and the NATO Security Policy," at section II.iii. later in this report.

46. Consequently, all of the conclusions drawn in this report rely upon multiple sources, which validate and corroborate one another. Indeed, in the course of my inquiry, our team has spoken – and in many cases conducted interviews – with over 30 one-time members (serving, retired or having carried out contract work) of intelligence services in the United States and Europe.

47. However, by necessity, the majority of these conversations have taken place under conditions of strict confidentiality, in order to enable the individuals concerned to be able to speak freely and without fear of consequence.

48. It is my firm conviction that what I publish here poses no threat to the individual or collective safety of any of my sources, some of whom have taken considerable personal risks to speak to us. Thus I do not identify by name the sources of many specific quotes and other items of information, nor do I attribute them too specifically to the office held by the speaker, such that no reader is able to identify the individuals who spoke in confidence to us and whose anonymity, at least for the moment, must be preserved.

49. These rules on confidentiality, imposed upon us because of the lack of collaboration from the states concerned, cannot and should not prevent me from naming individual office-holders who occupied key positions of power at the relevant times and who thus answer for the decisions they took on behalf of their states.

50. In the sections that follow, I have therefore drawn upon multiple sources in the US and European intelligence communities in an attempt to lay bare the anatomy of this controversial programme. In so doing, I believe that I have been able to provide the most in-depth account to date of the conceptual development of the HVD programme, the NATO framework so vital to the programme's operations, details of the bilateral arrangements for its operations, and important strands of evidence that belie the repeated denials of high-ranking officials – including several Presidents and Prime Ministers – about what took place and what they knew. Certainly we are far from knowing the whole truth. The information we have gathered is, however, sufficiently concrete – and worrying – to encourage states at last to do all they can to get to the bottom of what took place in their countries and within certain of their institutions.

iii. The concept: the development of the "High-Value Detainee" (HVD) Programme operated by the Central Intelligence Agency (CIA)

51. For the sake of clarity reference should be made to the CIA's covert programme using the correct terminology: among well-informed quarters, the programme is known as the "High-Value Detainee" programme, or simply the "HVD Programme".

52. The HVD programme has formed a very specific, narrow and unique strand of the United States' counter-terrorist operations in the period since 11 September 2001. Indeed, one reason why it has been so successfully covered up is that one can easily lose sight of this programme among the sizeable and still growing tally of people detained in the course of the "war on terror".

53. There have been scores of sites in which thousands of prisoners have been held for varying periods of time either by one or more agencies of the US Government, or on its behalf by foreign allies.

54. Among the most highly-populated and well-known of these detention sites – and indeed, hosts to CIA detainees at one time or another – have been the various internment "Camps" on the US Naval Base at Guantanamo Bay, the Bagram Airfield in Kabul, Afghanistan and the Abu Ghraib facility in Baghdad, Iraq. The public has been able to get some sort of picture of these sites, not from transparent information provided by the competent authorities but rather from leaks, statements from former inmates and secretly filmed images of detainee abuse.

55. Even in this context, the HVD programme is different. One senior source in the CIA Counterterrorism Centre told us: "If a guy is captured on the battlefield and sent to [Guantanamo], that's got nothing to do with it. But I think there is a tendency in the media, in Europe and in America, to blend together what the FBI is doing, what the military is doing and what the CIA is doing – to attribute it all to the same programme. And frankly, you can't do that. The HVD programme is a very structured, very rigorous programme."

56. In my understanding, the narrative of the HVD programme has played out largely over a five-year period, from September 2001 to September 2006. CIA insiders told us that there was widespread surprise that it operated and remained secret quite as long as it did. From 2004 onwards, the President was being strongly advised to place a time limit on the programme because it was regarded as having been somewhat improvisational in its nature and therefore could not be sustained: "every period in history has its bookends".

57. The conception of the HVD programme can be traced to the days immediately after 11 September 2001, when senior CIA officials (including CIA Director George Tenet) worked with the political principals of the Bush Administration (including President Bush himself) to conceive, debate and formulate strategies to "give some extra potency" to America's "frontline officials" in combating and countering the global terrorist threat.

58. On 17 September 2001 President Bush signed a classified Presidential Finding[13] as a means of granting the CIA important new competences relating to its covert actions: new choices it could make and new ways it could respond if confronted with Al-Qaeda targets in the field. On the day this document was signed – the Sunday after the 11 September attacks – senior members of the CIA's Counter-Terrorism Center (CTC) and selected foreign counterparts were made familiar with its contents in a meeting in Washington, DC.[14]

59. Our team has spoken with several American officials who have seen the text of the Presidential Finding and participated in the operations that put it into action. Two particularly striking observations have emerged from these discussions. First, by putting "*a lot of stock in Special Activities*"[15] the Finding "*redefined the role of the Agency*", even in the eyes of some of its own, more conservative senior officials. Second, the "*really broad, not specific*" scope of the covert actions authorised in the Finding meant that the CIA was instantly granted enough room for manoeuvre to design a secret detentions programme overseas[16].

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[13] The US Government finally conceded the existence of this classified Presidential Finding in response to a Freedom of Information Act (FoIA) litigation brought by the American Civil Liberties Union (ACLU) in 2006. Nonetheless, the precise scope and contents of the Finding remain unknown and, according to Congressional staffers, even senior members of the relevant House and Senate Select Committees have not been allowed to access it. See ACLU Press Release, "CIA Finally Acknowledges Existence of Presidential Order on Detention Facilities Abroad", 14.11.2006, available at http://www.aclu.org/safefree/torture/27382prs20061114.html; see also US Senator Patrick Leahy, "Comments of Senator Patrick Leahy (D-Vt.), Incoming Chairman, Senate Judiciary Committee, on Department of Justice's Response to Request for Documents relating to Bush Administration's Interrogation Policies", 2.01.2007, available at http://leahy.senate.gov/press/200701/010207.html.

[14] The former Chief of CIA Clandestine Operations in Europe, Tyler Drumheller, recounts the meeting of 17.09.2001 in his memoirs: "*Cofer [Black, then Chief of the CTC] presented a new Presidential authorisation that broadened our options for dealing with terrorist targets – one of the few times such a thing had happened since the CIA was officially banned from carrying out assassinations in 1976. It was clear that the Administration saw this as a war that would largely be fought by intelligence assets. This required a new way of operating*". See Tyler Drumheller, *On the Brink: An Insider's Account of How the White House Compromised American Intelligence*, Carroll & Graf, New York, 2006 (hereinafter "Tyler Drumheller, *On the Brink*"); at p. 35.

[15] The Special Activities Division is akin to a paramilitary wing of the CIA; the kinds of "activities" referred to here include renditions and, in exceptional circumstances, assassinations of suspected Al-Qaeda members.

[16] I am certain that the HVD programme has its *general* origins in the 17.09.2001 Finding, because our sources were unanimous on the question of the latitude this document afforded to the CIA. However we were also told separately of the existence of further classified documents (thought to have been signed in 2002) that actually use the term "black sites" in relation to *specific* facilities.

60. One senior former CTC official said the broad scope and enhanced paramilitary powers for the CIA were negotiated into the terms of the Finding with "*revenge for the 9/11 attacks*" in mind. Another former CTC official with direct responsibility for geographical areas in which Al Qaeda was operating told us: "This Administration needed some public successes, so they put a lot more pressure on us to find these people, and they decided to hold these people themselves. I think those are the two major changes post-9/11."

61. Thus, there had emerged a category of terrorist suspects whom the CIA considered of high value and to whose capture, detention, transfer and interrogation it would ultimately dedicate an entire covert programme. The men in this category had mostly been picked out already as "High-Value Targets", or HVTs,[17] and once in the custody of the CIA they would become "High-Value Detainees", or HVDs.[18]

62. The profile of the HVTs was that of orchestrators, planners, leading operatives and providers of logistics for some of the most devastating terrorist plots attributed to Al-Qaeda and to its associates. In our discussions, current and former CIA officials have been keen to emphasise, even in hindsight, that their targets span only a very limited range. One asserted: "if you look down the list of the people we've picked up since 9/11, the Agency has maintained a very high level of pertinence in terms of our targets." Another confirmed: "we didn't want the insurgents; we wanted the leadership."

63. CIA dossiers compiled on these men were comprehensive and constantly being updated. As my representative was told by Michael Scheuer, former Chief of the Bin Laden Unit: "the one problem we never had was lack of information."[19] Intelligence on the HVTs was replete with references to their involvement in the 9/11 attacks and the evolution of its feeder cells, or in other major events in the global escalation of terrorism, such as the dual attack on US Embassies in East Africa, the assault on the US Navy ship USS Cole, or the Bali nightclub bombings.

64. Just as the CIA rendition programme - instigated in the 1990s and escalated in the post-9/11 years - maintained its "safety net" of having obtained legal approval for every operation it launched,[20] the CIA's post-9/11 HVD programme was designed and vetted in consultation with various lawyers in the Justice Department, the CIA and in the Presidential Administration. All three of these sets of lawyers, as our sources confirmed, have approved so-called "Kill, Capture or Detain" orders, or "K-C-D orders", for high-value targets with whom the CIA came into contact.

65. The template for the High-Value Detainee programme was not drawn out of the KCD's Detain (or "D") category, since this was said to be a more general responsibility (shared with the military and local counterparts) for those persons picked up in the course of counter-terrorist activities about whose intelligence value the CIA unit on the ground was less certain:

> *"D was like our default option: Detain. Like if we pick up some guy in a raid where we also got one of the HVTs, like [Ramzi] bin Al-Shibh, and maybe we've got nothing on this guy, but obviously we're still gonna hold him."*

[17] Public citations of the acronym "HVT" have become more common in the course of the "war on terror". It is commonly used, for example, among members of the US Armed Forces, particularly those who have been deployed to track down prominent Baath'ists and insurgents in Iraq, such as Uday and Qu'say Hussein, or Abu Musab al-Zarqawi. See Defense Technical Information Center, "Loss of High-Value Targets" available at http://www.dtic.mil/doctrine/jel/doddict/data/h/02467.html.

[18] The acronym "HVD" has also now been adopted in public citations used by the Office of the Director of National Intelligence (DNI) and the Department of Defense (DoD). See, for example, Office of the Director of National Intelligence (DNI), "Summary of the High-Value Terrorist Detainee Program", 06.09.2006, available at: http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf.

[19] Michael Scheuer, former Chief of the Bin Laden Unit in the CIA's Counterterrorism Center, interview carried out by the Rapporteur's representative in Washington, DC, May 2006. Scheuer told us: "We had built up dossiers on all the important people in Al Qaeda within six months after we started the rendition programme. So it was just a matter of keeping those files updated. The approval of the senior levels of the Government and the lawyers' approval, if you pushed them, could be gotten very quickly because everything was ready."

[20] For my comprehensive account of "The evolution of the rendition programme", including its legal and operational considerations, see The Marty Report 2006, *supra* note 6.

66. According to our sources, the tailor-made HVD programme actually grew out of the KCD's Capture (or "C") category, which comprised targets whom the CIA set out expressly to capture, sometimes offering multi-million dollar US Government rewards for decisive tip-offs. The design of a special HVD programme helped to address a key "what next?" question, as one well-placed source explained:

> *"We knew that we would have some successes when we went out to get these guys, with the resources we were throwing at it and the support of our friends in the Pakistani Services[21]. So the real question was "what are we gonna do with them when we got them?"*

67. The CIA ruled out the prospect of having its HVTs handed over to or shared with the US military or the FBI, let alone foreign services – "these high-value targets are not moved between agencies or nations" – believing that the security and integrity of the resultant interrogations, in particular, could not be guaranteed. On the same grounds Guantanamo Bay "offered nothing" akin to the secrecy and isolation that the CIA demanded: "Guantanamo was a real mess. The interrogators there were FBI and military… [who] thought they knew what they were looking for, but they didn't know who they were talking to. The United States had a laboratory at Guantanamo, for the first time, to understand the insurgent arm of Al Qaeda… [but] we screwed it up!"

68. Hence the concept of "black sites", a handful of facilities of limited size and capacity in different parts of the world, where the CIA exclusively would be the jailer.

iv. The evolution of specific "black sites" in the HVD programme

69. A significant breakthrough, which became the trigger for the operations of the HVD programme, was the CIA's capture of Abu Zubaydah in March 2002. Mr Zubaydah's peculiar importance from the US Government's perspective has been well documented – not least in President Bush's speech of 6 September 2006 – in which he was mentioned 12 times, including to acknowledge that an "*alternative set of procedures*"[22] was introduced specifically for his interrogation. In the ensuing period of approximately two-and-a-half years, information garnered from HVD interrogations using these procedures is said to have proved crucial in combating Al-Qaeda's worldwide terrorist operations.[23]

70. There are two more specific locations to be considered as "black sites" and about which we have received information sufficiently serious to demand further investigation; we are however not in a position to carry out adequate analysis in order to reach definitive conclusions in this report. First we have received concurring confirmations that United States agencies have used the island territory of **Diego Garcia**, which is the international legal responsibility of the United Kingdom, in the "processing" of high-value detainees. It is true that the UK Government has readily accepted "assurances"[24] from US authorities to the contrary, without ever independently or transparently inquiring into the allegations itself, or accounting to the public in a sufficiently thorough manner. Second we have been told that **Thailand** hosted the first CIA "black site," and that Abu Zubaydah was held there after his capture in 2002. CIA sources indicated to us that Thailand was used because of the ready availability of the network of local knowledge and bilateral relationships that dated back to the Vietnam War.[25] In line

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[21] The phrase used here is understood to be a reference to the Inter Services Intelligence Agency, or ISI, which is Pakistan's military intelligence branch and is renowned for its close co-operation with the CIA.

[22] This phrase is understood to be a reference to the regime of CIA "enhanced interrogation techniques", which were subsequently used to interrogate several other HVDs. For a description of these techniques and the (operational and legal) implications of resorting to them, please see section V. and VIII. later in this report.

[23] As President Bush has presented it, when all the leads yielded from these interrogations are taken together ("corroborated by intelligence … that helped us to connect the dots"), then the cumulative product has "played a role in the capture or questioning of nearly every senior Al-Qaeda member or associate detained by the US and its allies since this programme began". See also Office of the Director of National Intelligence (DNI), "Summary of the High-Value Terrorist Detainee Program", 06.09.2006, available at http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf.

[24] See, for example, United Kingdom Parliament, Publications and Records; "Written Answers for 21.06.2004", in *House of Commons Hansard*; point 13, column 1222W, Questions to the Rt. Hon. Jack Straw, UK Foreign Secretary, available at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040621/text/40621w13.htm#40621w13.html_wqn9. Mr. Straw said: "The United States authorities have repeatedly assured us that no detainees have at any time passed in transit through Diego Garcia or its territorial waters or have disembarked there and that the allegations to that effect are totally without foundation. The Government are satisfied that their assurances are correct.

[25] One CIA source told us: "in Thailand, it was a case of 'you stick with what you know';" however, since the allegations pertaining to Thailand were not the direct focus of our inquiry, we did not elaborate further on these references in our discussions. The specific location of the "black site" in Thailand has been publicly alleged to be a facility in Udon Thani, near to the Udon Royal Thai Air Force Base in the north-east of the country. This base does have long-standing connections to

with the approach of most US partner countries, the Thai Government has denied these allegations outright.[26]

71. The HVD programme has, to a certain extent, grown out of an assertion of *independence* on the part of the CIA in the exercise of "exclusive custody" over its high-value detainees for as long as it continues to question them. However, as my findings in the following sections demonstrate, the CIA's clandestine operations in Europe – including its transfers and secret detentions of HVDs - were sustained and kept secret only through their operational *dependence* on alliances and partnerships in what is more traditionally the military sphere.

II. Secret detentions in Council of Europe member states

i. The framework

a. Securing CIA clandestine operations overseas on the platform of the North Atlantic Treaty Organisation (NATO)

72. By enacting an extraordinary authorisation for CIA covert action through a Presidential Finding within national law, the Bush Administration furnished the Agency with the first half of the operational framework it required to spearhead the United States' "global war on terror."[27] To recap, the key elements of this authorisation were permissions that were as broad as possible, and protections (from interference and oversight) that were as robust as possible.

73. The second half of the equation was then to identify the means by which to integrate the key elements of US national policy into an international, intergovernmental approach.

74. According to our sources, the CIA simply could not embark upon sensitive covert action to dismantle terrorist networks and kill, capture or detain their members overseas without the express knowledge and approval of key US allies – particularly European allies: "we wouldn't have even dreamed of it."[28] On the contrary, the CIA depended on the US Government to secure equally broad permissions and equally robust protections from its foreign allies and their respective intelligence agencies as the ones that had been granted at home.

American defence and intelligence activities overseas: during the Vietnam War it served as both a deployment base for the US Air Force and the Asian headquarters of the CIA-linked aviation enterprise, Air America.

[26] See, for example, *The Bangkok Post*, "Thaksin denies Thailand had 'CIA secret prison'," 5.11.2005, available at http://www.bangkokpost.com/breaking_news/breakingnews.php?id=59604.

[27] At this point I shall leave aside my discomfort with the phrase "war on terror" as a characterisation of the broad spectrum of counterterrorist policies pursued by the United States in recent years – it was the phrase accepted in all quarters in the immediate post-9/11 period. In this regard I agree with Anderson and Massimino, the authors of an excellent policy study recently released in the US: "The very idea of a 'global war on terror' is today seen as the policy of a particular presidential administration in a way that it was not immediately following September 11"; see Kenneth Anderson and Elisa Massimino, "The Cost of Confusion: Resolving Ambiguities in Detainee Treatment", part of the series entitled *Bridging the Foreign Policy Divide*, The Stanley Foundation, March 2007; hereinafter "Anderson and Massimino, "Resolving Ambiguities in Detainee Treatment". My conclusion that President Bush put the CIA at the forefront of his "war machinery" is corroborated by numerous CIA insiders; see, for example, Tyler Drumheller, *On the Brink*, *supra* note 16, at p. 35: "It was clear that the administration saw this as a war that would largely be fought by intelligence assets". See also, Michael Scheuer, interview with the Rapporteur's representative, *supra* note 21: "The Agency felt the brunt of the executive branch's desire to show the American people victories."

[28] Our sources have continually emphasised to us how keenly the United States has sought to observe the "sovereignty" of its allies, particularly those in Europe. From an intelligence perspective, the notion of "unilateral actions on European turf" has been characterised to us as "counter-productive" and "a surefire way of destroying the trust". More importantly, from a political perspective, the art of "coalition-building" is just as important for covert action as for large-scale military operations. It affords the US Government the opportunity, as one official described it to us, "to cover our backs by saying 'hey, we're not the only ones'". In this regard, it is relevant to consider the policy statements made by members of the Bush administration to defend its detention and rendition practices after the fact: see, in particular, Secretary Condoleezza Rice, US Secretary of State, "Remarks Upon Her Departure for Europe", Andrews Air Force Base, 5 December 2005: "The intelligence so gathered has stopped terrorist attacks and saved innocent lives – in Europe as well as in the United States and other countries. The United States has fully respected the sovereignty of other countries that co-operate in these matters."

75. The need for unprecedented permissions, according to our sources, arose directly from the CIA's resolve to lay greater emphasis on the **paramilitary activities** of its Counterterrorism Center in the pursuit of high-value targets, or HVTs. The US Government therefore had to seek means of forging **intergovernmental partnerships with well-developed military components**, rather than simply relying upon the existing liaison networks through which CIA agents had been working for decades.

76. One former senior CIA official told us that administration officials approached multilateral negotiations "like they wanted to raise [the CIA]'s status up to a kind of super military-civilian Agency". Specifically the US Government set out to achieve permissions "from as many allied countries as possible" that would allow CIA agents to collaborate directly with foreign military officials, operate "on a no-questions-asked basis" at military installations, and travel free from inspection in military or civilian vehicles and aircraft.

77. In relation to the last point, as I discussed in my report last year,[29] the lines between civilian and military classifications in the aviation world were about to become incredibly blurred. Conventional legal understandings of civilian and state flights[30] were about to be fundamentally challenged, or at least the latitude in those definitions exploited to its maximum potential.

78. The US Government's post-9/11 detainee transfer operations would frequently make use of practices that were previously considered "anomalies,"[31] such as: civilian aircraft landing on state duty at military airfields; military cargo planes registered under civilian operators; and civilian agents and contractors travelling on military travel orders. The CIA's expanding and evolving "rendition" programme, which would ultimately also be used for the transportation of High-Value Detainees, required cover that would encompass all of these anomalies and more.

79. In terms of protections, the US Government insisted on the most stringent levels of **physical security for its personnel**, as well as **secrecy and security of information** during the operations the CIA would carry out in other countries.

80. Reflecting on what our sources have described in this regard, I consider that the stated US policy has, in fact, on the pretext of guaranteeing security, intentionally created a framework enabling it to evade all accountability. We have been told that the US Government sought a means of "insulating" the CIA's activities (and those of its partner intelligence agencies) from conventional democratic controls in the foreign countries it operated in, not to mention from what it saw as any "unsavoury disputes over jurisdictional issues."

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[29] For my discussion of means of transporting detainees between points on the "global spider's web", see The Marty Report 2006, *supra* note 6, at sections 2.2 to 2.4, pages 15 to 18.

[30] For an authoritative analysis of the applicable general principles of aviation law, see the Opinion on the International Legal Obligations of CoE Member States in respect of Secret Detention Facilities and Inter-state Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session, 17.03.2006; Opinion No. 363/2005, CDL-AD(2006)009, available at http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp (hereinafter "Venice Commission Opinion, 17.03.2006"); at §§ 86-104.

[31] An aviation expert whom we consulted confidentially used the phrase "anomalies" to describe the practices I refer to here. There are numerous examples of each of these "anomalies" in the comprehensive database of aircraft movements I have compiled since the outset of my inquiry (database held confidentially by the Rapporteur). In this regard I am especially grateful to Eurocontrol, the European Organisation for the Safety of Air Navigation, for having provided me with extensive records in various formats in response to my requests for information. I have been able to supplement and verify Eurocontrol records with information from multiple sources, including from the US Federal Aviation Authority (FAA) and state institutions in different CoE member States, such as transport ministries, aviation authorities, airport operators and state airlines. Hereinafter my database of aircraft movements is referred to simply as "The Marty Database".

81. Yet in my view, checks and balances through national parliamentary and judicial oversight, as well as accepted international laws governing territorial sovereignty, are the very foundations upon which our systems of democratic accountability are built. In times of crisis, such as the immediate aftermath of the 9/11 attacks, these foundations must be strengthened by demonstrations of collective resolve, not weakened by acts of unilateral brinkmanship.

82. It is now clear to me that as they went to their international allies with their proposals, the United States insisted – non-officially but explicitly – upon a clear set of unilateral prerogatives: only American officials would choose exactly who they wanted to work with; only US policies would define exactly the terms of the relationship; and only US interpretations of the applicable law (including whether or not it applied) would be held to bind its actions overseas.

83. Based upon my investigations, confirmed by multiple sources in the governmental and intelligence sectors of several countries, I consider that I can assert that the means to cater to the CIA's key operational needs on a multilateral level were developed under the framework of the **North Atlantic Treaty Organisation (NATO)**.

b. Invocation of Article V of the North Atlantic Treaty

84. It should be recalled that the United States turned to the international community at an unprecedented moment in history. As a prominent US Congressman remarked recently, "in the wake of the horrific attack on the United States on September 11th [2001], we were moved by the extraordinary support and the outpouring of sympathy from across the globe."[32] These sentiments manifested themselves in a unique and almost universally shared conviction that the United States should be granted strong support for its international counter-terrorist efforts, including for the use of military force.

85. This conviction was most pronounced within the NATO Alliance. On 12 September 2001, NATO thereby invoked the principle of collective defence according to Article 5 of the North Atlantic Treaty,[33] and this for the first time in its 52-year existence. Initially, the invocation was considered provisional because it began with a conditional clause:

> *"If it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty."*[34]

86. During the weeks that followed, several of the most senior officials in the Bush Administration delivered "a series of classified briefings for the NATO members presenting evidence that Al Qaeda had planned and executed the attacks"[35] and outlining their intended response. There is evidence in the following excerpt from an account by a then NATO Assistant Secretary-General that some of the United States' "unilateral prerogatives" described by our sources were articulated in quite explicit terms during these briefings:

> *"I was present in the [North Atlantic] Council two weeks after NATO invoked Article 5 when then US Deputy Secretary of Defence Paul Wolfowitz set out his post-9/11 doctrine to the effect that the mission determines the coalition. This was, in my opinion, a fundamental*

[32] Representative William Delahunt (D-Ma), Chairman of the International Organisations, Human Rights and Oversight Sub-Committee of the House Foreign Affairs Committee, opening remarks on the subject "Extraordinary Rendition in US Counterterrorism Policy: The Impact on Transatlantic Relations", 17.04.2007. Mr Delahunt also said: "I shall never forget the headline from the French newspaper *Le Monde* that proclaimed, 'Today, we are all Americans.' Sadly, that support has eroded dramatically… World opinion has turned against the United States in recent years [and]… this reality, this trend of opinion against the United States has profound negative consequences for our national interests."

[33] Article 5 of the North Atlantic Treaty provides as follows: "*The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.*"

[34] See NATO Press Release (2001) 124, "Statement by the North Atlantic Council", 12.09.2001.

[35] See Nora Bensahel, *Counterterror Coalitions: Co-operation with Europe, NATO and the European Union*, The Rand Corporation, USA, 2003 (hereinafter "Bensahel, *Counterterror Coalitions*"); at pp. 6-7. According to Bensahel, the US policy-makers who briefed NATO included Deputy Secretary of State Richard Armitage, Deputy Secretary of Defence, Paul Wolfowitz and State Department Co-ordinator for Counterterrorism, Frank Taylor.

misjudgement about the nature of the Alliance that devalued the importance of strategic solidarity."[36]

87. The US Administration's briefings had their desired effect of lifting the conditional clause in the North Atlantic Council's original statement. On 2 October 2001, the NATO Allies declared their unanimous assessment that the 9/11 attacks had been directed against the United States from abroad and that Article 5 was therefore activated.[37]

88. Collective measures in the context of a military intervention in Afghanistan were widely anticipated – indeed, as one study noted, "many NATO members hoped that invoking Article 5 would lead the United States to conduct any military response against Al Qaeda under the NATO flag, or at least co-ordinate its actions with the integrated military structure and political institutions."[38]

89. However, the expected mobilisation of NATO forces for a multilateral action in Afghanistan never materialised. In fact, NATO support in the conventional military sense was neither an automatic consequence in the invocation of Article 5[39] nor, as our sources have confirmed, what the US Government was looking for.[40] It is precisely upon this unexpected dynamic that my finding regarding the development of CIA clandestine operations under the NATO framework hinges.

90. There was a **critical, almost paradoxical policy choice** in the US Government's stance towards the NATO alliance in early October 2001. The invocation of Article 5 could have been developed[41] as a basis upon which to conduct a military campaign of a conventional nature, deploying Army, Navy and Air Force troops in a joint NATO operation. Instead it became a **platform from which the United States obtained the essential permissions and protections it required to launch CIA covert action in the "war on terror"**.

c. NATO authorisations for US operations in the "war on terror"

91. The key date in terms of the NATO framework is **4 October 2001**, when the NATO Allies met in a session of the North Atlantic Council to consider a set of concrete proposals from the United States. In a press statement after the session,[42] NATO Secretary-General Lord Robertson announced that the Allies had "agreed today – at the request of the United States – to take eight measures, individually and collectively, to expand the options available in the campaign against terrorism."[43] The eight specific measures agreed to[44] were as follows:

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[36] See Edgar Buckley, former NATO Assistant Secretary-General for Defence Planning and Operations (from 1999 to 2003), "Invoking Article 5", in *NATO Review*, Summer 2006, available at http://www.nato.int/docu/review/2006/issue2/english/art2.html (hereinafter "Buckley, "Invoking Article 5"").

[37] See NATO Press Release of 02.10.2001, "Statement by NATO Secretary-General Lord Robertson".

[38] See Bensahel, *Counterterror Coalitions*, *supra* note 37, at p. 7.

[39] Article 5 refers to "such action as [each Party] deems necessary" and does not limit this action to the use of military force. It should be noted that France and Germany emphasised the fact that the obligation to assist under Article 5 did not automatically incur a duty to take part in US-led military action. In this regard, see Tom Lansford, *All for One: Terrorism, NATO and the United States*, Ashgate, UK, 2003, at p. 88; and Martin Reichard, *The EU-NATO Relationship: A Legal and Political Perspective*, 2006, at p. 190.

[40] See also Philip Gordon, "NATO After 11 September", in *Survival*, Vol. 43, No. 4, Winter 2001 – 2002, at p. 92. A senior US official stated: "I think it's safe to say that we won't be asking SACEUR [the NATO Supreme Allied Commander for Europe] to put together a battle plan for Afghanistan." Further, see Nicholas Fiorenza, "Alliance Solidarity", *Armed Forces Journal International*, December 2001, at p. 22. A military official asked rhetorically: "If you were the US, would you want 18 other nations watering down your military planning". Both cited in Bensahel, *Counterterror Coalitions*, *supra* note 37, at pp. 7 and 16.

[41] For a perspective on how the invocation of Article 5 did not unfold entirely as NATO had expected, see, for example, Buckley, "Invoking Article 5", *supra* note 38: "In the intervening years, I have heard frequent criticism of the decision to invoke Article 5. I have, for example, heard people say that we were unwise to commit ourselves to a course of action which was not fully implemented and which turned out to be unwanted by the United States… I share the frustration of those who believe that the United States could have done more to engage the Alliance in its efforts against the Taliban and Al Qaeda."

[42] See NATO, "Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty following the 11 September Attacks against the United States", Brussels, 04.10.2001, available at http://www.nato.int/docu/speech/2001/s011004b.htm (hereinafter referred to as "Statement to the Press by NATO Secretary General, Lord Robertson, 4.10.2001").

[43] *Ibidem*. Note the similarity in the language of "options" used to describe the intergovernmental NATO authorisation and likewise (ref. Tyler Drumheller, *supra* note 16) the US domestic covert action authority in the Presidential Finding of 17.09.2001: "broadened our options for dealing with terrorist targets."

[44] Some of the descriptions of the measures have been shortened or paraphrased here in order to present them more simply. For the original language in which they were presented to the public, see the Statement to the Press by NATO Secretary General, Lord Robertson, 04.10.2001, *supra* note 44.

- Enhance intelligence-sharing and co-operation, both bilaterally and in the appropriate NATO bodies, relating to the threats posed by terrorism and the actions to be taken against it
- Assist states subject to increased terrorist threats as a result of their support for the campaign against terrorism
- Provide increased security for US and other allied facilities on NATO territory
- Backfill selected Allied assets in NATO's area of responsibility that are redeployed in support of counterterrorism operations
- Provide blanket overflight clearances for the United States' and other Allies' aircraft for military flights related to operations against terrorism
- Provide access to ports and airfields on NATO territory, including for refuelling, for United States and other Allies for operations against terrorism
- Deploy elements of the NATO Standing Naval Forces to the eastern Mediterranean, if called upon
- Deploy elements of NATO Airborne Early Warning Force to support operations against terrorism, if called upon.

92. The first criterion on which these measures were extraordinary was in the nature of their conception. According to a former senior NATO official, "in contrast to many other international organisations, responsibility for drafting documents and resolutions in NATO lies with the International Staff."[45] Yet as Lord Robertson reiterated in his statement, "these measures were requested by the United States following the determination that the 11 September attack was directed from abroad."[46] Indeed, as our American sources told us, even the exact language in which the actual measures were formulated and agreed upon was conceived, drafted, re-drafted and put forward unilaterally by the United States.

93. Second and most significant, these measures do not constitute an agreement to undertake collective self-defence.[47] In my analysis these measures more closely comprise the very permissions and protections the United States had sought for itself as it embarked on its own military, paramilitary and intelligence-led counterterrorism operations.[48] Just as President Bush had done on 17 September 2001, the NATO Allies, on 4 October 2001, afforded the CIA a mandate to pursue its "war on terror", without a published text.

94. Council of Europe officials attempted to obtain a copy of the "agreement" of 4 October 2001 from NATO Legal Services on several occasions.[49] In a response dated 6 April 2006,[50] NATO's Legal Advisor, Mr Baldwin De Vidts, submitted that the "agreement" in question was actually more properly characterised as a set of "decisions taken by the North Atlantic Council on that date"; he explained:

> *"It is to be noted that your request does not relate to a formal document signed by the member States but to an internal decision noted in a corresponding decision sheet drawn up by the International Secretariat to reflect the decisions as taken by the Council on that date.*"

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[45] See Buckley, "Invoking Article 5", *supra* note 38.

[46] See Statement to the Press by NATO Secretary General, Lord Robertson, 04.10.2001, *supra* note 44.

[47] I take the view that only the last two measures could be considered as responses in the category of "classic" collective self-defence. In recognising this point, one observer has argued that a broad approach to military and non-military measures was consistent with the US approach to counterterrorism: see Reichard, *supra* note 41, at p. 188. I would add, however, these measures are somewhat ceremonial in character; both of them begin with a phrase "that the Alliance is ready to deploy", and the first of them states that the purpose of such a deployment would be "to provide a NATO presence and demonstrate resolve." The "classic" self-defence provisions therefore stop short of any genuine commitment to military action. The real practical substance of these measures is to be found in the other clauses.

[48] In its published material, NATO makes clear that the period after the invocation of Article 5 accommodates a range of individual and collective policy choices: "Any collective action by NATO will be decided by the North Atlantic Council. The United States can also carry out independent actions, consistent with its rights and obligations under the UN charter. Allies can provide any form of assistance they deem necessary to respond to the situation." See NATO, *What is Article 5?*, available at http://www.nato.int/terrorism/five.htm.

[49] I refer here to various individual items of correspondence sent to Mr Baldwin De Vidts, NATO Legal Advisor, by both Mr G. Buquicchio, Secretary of the European Commission for Democracy through Law (Venice Commission), and Mr A. Drzemczewski, Head of Secretariat of the PACE Committee on Legal Affairs and Human Rights (AS/Jur). Copies of all correspondence on file with the Rapporteur.

[50] Letter to Mr G. Buquicchio, Secretary of the Venice Commission, from Mr Baldwin De Vidts, NATO Legal Advisor, Reference CJ(2006)0230, dated 06.04.2006. Regrettably this response came three weeks after the issue of the Venice Commission's opinion on the matter, dated 17.03.2006. See the reference to this correspondence in the Opinion on the International Legal Obligations of CoE Member States in respect of Secret Detention Facilities and Inter-state Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session, 17.03.2006; Opinion No. 363/2005, CDL-AD(2006)009 (hereinafter "Venice Commission Opinion, 17.03.2006"), at § 4.

95. In the same letter, Mr De Vidts stated that "in principle, such documents are not made public, which is certainly the case if they are classified."[51] In a subsequent follow-up letter sent on my behalf, I indicated to NATO Legal Services, in accordance with my authorisation as AS/Jur Rapporteur, that I would be prepared to treat the document in a confidential manner.[52] However, Mr De Vidts replied in the following terms:

> *"I can only but confirm that the decision sheet of the North Atlantic Council dated 4 October 2001 is a classified document. I have to state that in order to have access to NATO classified information, such person should have an appropriate security clearance."*[53]

96. Notwithstanding this general rule, which I understand to be a reflection of broader issues around transparency within NATO,[54] there was a further noteworthy feature of the 4 October 2001 measures to emerge from our correspondence with NATO Legal Services. Qualifying his earlier point, Mr De Vidts stated:

> *"However, with regard to certain decisions separate communications to the public in general are made. This has also been the case for some of the decisions taken on 4 October 2001 by the North Atlantic Council"* (emphasis added)

97. The clear indication here is that the public record[55] is not a complete reflection of the measures agreed by the NATO Allies and the considerations underpinning them. It is my conclusion, again confirmed by my American sources, that there were **additional components to the NATO authorisation of 4 October 2001 that have remained secret**.

98. In the course of my inquiry, I have made repeated requests for information regarding the full scope of the NATO authorisation, specific elements of its practical application, and whether its provisions remain in force to the present day. Regrettably, NATO itself has been largely unresponsive to my requests.[56]

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[51] Letter to Mr G. Buquicchio, Secretary of the Venice Commission, dated 06.04.2006, *Ibidem*.

[52] Letter to Mr De Vidts from Mr Drzemczewski, Head of the Secretariat, PACE Committee on Legal Affairs and Human Rights (AS/Jur), dated 24.03.2006.

[53] Letter in reply to Mr Drzemczewski's letter of 24.03.2006 from Mr De Vidts, NATO Legal Advisor, Reference CJ(2006)0330, dated 13.04.2006. It should be noted that NATO is accustomed to rejecting requests for "NATO information". Even unclassified information remains for the most part inaccessible, based on the following principle: "NATO unclassified information… can only be used *for official purposes*. Only individuals, bodies or organisations that require it for official NATO purposes may have access to it… NATO information marked in this manner is subject to release via agreement from its originators and subject to recognised storage procedures for its protection" – see letter from Wayne Rychak, Director, NATO Office of Security, to Jacob Visscher, General Secretariat of the Council of the European Union 6.02.2002 (emphasis in original); cited in Alasdair Roberts, "Entangling Alliances: NATO's Security of Information Policy and the Entrenchment of State Secrecy", Cornell International Law Journal, 36.2 (November 2003): 329 – 360, at page 9 in the text.

[54] For insight into the NATO secrecy and security of information regime and its negative impact on transparency in general, I have found the work of the Canadian specialist on transparency issues, Professor Alasdair Roberts, very informative. Specific articles can be found at www.aroberts.us/reseach.html.

[55] The only public record of the 4.10.2001 meeting of the North Atlantic Council is the Statement to the Press by NATO Secretary General, Lord Robertson, 4.10.2001, *supra* note 4. Mr De Vidts attached a print-out of this statement from the NATO website to his letter of 13.04.2006.

[56] Regrettably, NATO itself has been largely unresponsive to our repeated requests for information regarding the full scope of the authorisation, elements of its practical application, and whether its provisions remain in force to the present day. We have sent five separate items of correspondence to Mr De Vidts: letters from Mr Drzemczewski, Head of the Secretariat, PACE Committee on Legal Affairs and Human Rights (AS/Jur) dated 24.03.2006 and 26.04.2006; e-mails of 27.09.2006 and 09.11.2006; and fax of 09.11.2006, receipt of which was confirmed in a telephone conversation with Mr De Vidts' office on 05.12.2006. We have thus far received only a single, incomplete reply: letter from Mr De Vidts, dated 13.04.2006; the reply was incomplete because Mr De Vidts said that one of our questions "is under consideration and at our earliest convenience I will contact you about these issues". On 27.03.2007 I wrote to Mr Jaap de Hoop Scheffer, Secretary-General of NATO, requesting clarification on the outstanding questions. I have yet to receive any response to my letter.

99. Nevertheless, my further analysis of the NATO framework has shown that the authorisations of 4 October 2001 were vital in paving the way for the United States to develop its most important partnerships in the context of the "war on terror". In particular, the CIA would exploit both the blanket overflight clearances and the access to airfields to carry out its clandestine operations through the airspace and on the territory of a broad range of foreign states.

100. The **blanket overflight clearances** granted in this regard were especially significant. In the NATO public statement, the clearances were said to apply to "*military flights related to operations against terrorism*" but, even without sight of the classified parts of the authorisation, this characterisation is misleadingly narrow.

101. "Military flights" is a term relating to the *function* of the flight, not the type of aircraft used. In international aviation law, the status of an aircraft is determined by the function it is performing at any given time[57] - and flights performing "military" functions would necessarily fall into the category of "state aircraft."[58]

102. "State aircraft" enjoy precisely the type of immunity from the jurisdiction of other states that the US Government sought to achieve for aircraft operating on behalf of the CIA: "*they cannot be boarded, searched or inspected by foreign authorities, including host State's authorities*."[59] The conventional constraint on "state aircraft" is that they are usually "*not permitted to fly over or land in foreign sovereign territory otherwise than with express authorisation of the State concerned*."[60] However, with "blanket overflight clearances" under the NATO framework this constraint could be conveniently circumvented.[61]

103. Similarly, the provision of **access to airfields** for operations against terrorism secured landing rights at military bases and dual military-civilian airfields for aircraft operating on behalf of the CIA under a NATO "cover".[62]

104. Accordingly there would be two prerequisites for CIA clandestine operations to fulfil in order to remain within the NATO framework. The first would be to ensure that the aircraft used in such operations were, in their function, designated as "military flights" or "state flights". The second would depend on the state whose airspace or territory was at issue having agreed to the terms of the "blanket" NATO authorisations of 4 October 2001.

105. It is therefore all the more pertinent to note that the range of countries who agreed to these authorisations in the context of the US "war on terror" extended well beyond the NATO member states, into a total of as many as 40 countries.[63] One year after the NATO authorisations, the United States Government declared: "*Our Allies have delivered on that [Article 5] obligation with concrete actions, both individually and collectively: all 18 NATO Allies*[64] *and the 9 NATO 'aspirants'*[65] *have*

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[57] See the Venice Commission Opinion, 17.03.2006, *supra* note 52, at § 91.

[58] The Venice Commission notes that "*as a general rule, 'aircraft are recognised as state aircraft when they are under the control of the State and used exclusively by the State for state intended purposes'*," citing Diederiks-Verschoor, Introduction to air law, Kluwer, p. 30, § 12. "Military flights," as defined by the NATO Allies in the context of this authorisation, cannot be interpreted to be anything other than "for state intended purposes." See the Venice Commission Opinion, 17.03.2006, *Ibidem*, at § 91.

[59] See the Venice Commission Opinion, 17.03.2006, *Ibidem*, at § 93.

[60] Article 3(c) of the Chicago Convention on International Civil Aviation, 1944, as cited in the Venice Commission Opinion, 17.03.2006, *Ibidem*, at § 93.

[61] For another in-depth analysis of the law applicable to civil and state aircraft, including the applicable permissions / immunities and selected references to NATO, see Center for Human Rights and Global Justice, *Enabling Torture: International Law Applicable to State Participation in the Unlawful Activites of Other States*, NYU School of Law, 2006, available at http://www.chrgj.org.

[62] See the reference in Lansford, *supra* note 41, at p. 112: this agreement "allowed for more streamlined planning and the formulation of missions, especially the transfer of assets from one theater to another." Further references to the terminology of "theaters" in the "war on terror" – specifically relating to the transfer of detainees – were used frequently in our discussions with sources concerning secret detentions in Romania.

[63] See Lansford, *supra* note 41, at p. 112: "when the American-led attacks began, some 40 nations gave the coalition permission to use their airspace for operations."

[64] At the time of this statement, the United States' 18 NATO Allies were: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom. All of them except Canada were then and are now also member States of the Council of Europe.

[65] At the time of this statement, the 9 NATO "aspirants" (or candidates for accession) were: Albania, Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, Slovenia and "the former Yugoslav Republic of Macedonia". All of them were then and are now also member States of the Council of Europe.

provided blanket overflight rights, ports / bases access, refuelling assistance, and increased law-enforcement co-operation."[66]

d. The wider NATO system and the "war on terror"

106. Aside from the specific authorisations detailed above, the wider NATO system comprises further important elements that have been developed as part of the post-9/11 framework for CIA clandestine operations – including the High-Value Detainee Programme. I intend to examine these elements in the following section as they have been applied to specific countries with which the United States has agreed bilateral arrangements in the course of the "war on terror". For now it suffices to acknowledge the general NATO multilateral treaties or policies on which those arrangements are based.

107. First is the system of NATO "SOFAs" (Status of Forces Agreements), which define the legal status of one state's armed forces on the territory of another state. The general rules of such relationships are set out in the multilateral SOFA for all NATO members,[67] the provisions of which also apply to "aspirant" states through their participation in the "Partnership for Peace"[68].

108. A state does not abandon its sovereignty when it signs a SOFA; on the contrary, SOFAs usually reflect different sets of legal rights and responsibilities that accrue for both the sending state and the host state.[69] The majority of SOFAs are agreed on the bilateral level and are sometimes complemented by further, more finite defence agreements that cover foreign forces stationed at particular bases or facilities. Several CoE member states have acknowledged the applicability of SOFA-type agreements to their relationships with the United States in the context of the "war on terror."[70]

109. An additional relevant element of the wider NATO system is its **secrecy and security-of-information regime**. The NATO Security Policy[71] and its supporting Directive on the Security of Information[72] are among the most formidable barriers to disclosure of information that one might ever

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[66] See US Department of State, "NATO: Coalition Contributions to the War on Terrorism", Fact Sheet of 31.10.2002, available at http://www.state.gov/p/eur/rls/fs/14627.htm. Indeed, within days of the authorisations, US Secretary of State Colin Powell made special mention of "*all the NATO nations making commitments under the Article 5 invocation to give us overflight rights and other things that have proven so helpful to our efforts*." See US Department of State, "Colin Powell Holds Media Availability with NATO Secretary General George Robertson, 10.10.2001, available at http://transcripts.cnn.com/TRANSCRIPTS/0110/10/se.16.html.

[67] See NATO Status of Forces Agreement (SOFA) of 19.06.1951, "Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces", available at http://www.nato.int/docu/basictxt/b510619a.htm.

[68] See NATO Partnership for Peace SOFA (PfP-SOFA) of 1995, ""Agreement among the State Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace Regarding the Status of their Forces", available at http://www.nato.int/docu/basictxt/b950619a.htm. It is important to note that, since it came into force in 1995, this PfP-SOFA has entitled signatories to the Partnership for Peace (PfP) that are not yet members of NATO to nevertheless sign so-called "SOFA Supplementals" with NATO member States. Signatories to the PfP are available at http://www.nato.int/pfp/sig-date.htm.

[69] See the Venice Commission Opinion, 17.03.2006, *supra* note 52, at §§ 106 and 107. For a general overview, see also the EU Network of Independent Experts on Fundamental Rights, "The Human Rights Responsibilities of the EU Member States in the context of the CIA activities in Europe," 25.05.2006, available at: http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2006_3_en.pdf.

[70] In this regard, it should be noted that nine different CoE member States made reference to NATO, SOFAs or defence agreements with the United States in their replies to the Secretary General of the Council of Europe in the context of his enquiry under Article 52 ECHR. For copies of all member States' replies and the SG's report on his findings, SG/Inf(2006)5, see the Special File at http://www.coe.int/T/E/Com/Files/Events/2006-cia/. In particular, Germany, the Netherlands, Poland and Romania made reference to Article 7 of the NATO SOFA as a provision that determines their potential jurisdiction over foreign forces operating on their territories. Article 7 of the multilateral NATO SOFA provides: "The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences related to the security of that State, punishable by its law but not by the law of the sending State."

[71] NATO's comprehensive Security Policy was modified and updated through a Fundamental Review by the NATO Security Committee (NSC), which concluded in early 2002. The policy is now contained in two documents approved by the North Atlantic Council: C-M(2002)49, "Security within the North Atlantic Treaty Organisation (NATO)'; and C-M(2002)50, "Protection Measures for NATO Civil and Military Bodies, deployed NATO Forces and Installations (Assets) against Terrorist Threats". The first of these documents, C-M(2002)49, which entered into force on 17.06.2002, contains the applicable rules on classification, handling and protection of sensitive information, as well as rules on establishment of and access to NATO Security Areas, and rules relating to NATO personnel. C-M(2002)49 was released on 01.08.2006 by the Hungarian National Security Superintendence in response to a freedom of information request by the Hungarian Civil Liberties Union (HCLU); copy on file with the Rapporteur. C-M(2002)49 is hereinafter referred to as "NATO, Security within the North Atlantic Treaty Organisation, 17.06.2002".

[72] NATO Security Committee, "Directive on the Security of Information", Document AC/35-D/2002, Second Revision, issued 04.02.2005. AC/35-D/2002-REV2 was released in October 2006 by the Hungarian National Security Superintendence in response to a freedom of information request by the Hungarian Civil Liberties Union (HCLU); copy on file with the Rapporteur. AC/35-D/2002-REV2 is hereinafter referred to as "NATO Security Committee, Directive on the Security of Information, 04.02.2005".

come across. It is easy to understand why an institution or state agency wishing to carry out clandestine operations would opt to bring them under the protections of the NATO model.

110. In addition to its own rules, NATO insists that strict regimes protecting classified information exist on a national level. The Membership Action Plan of 1999 implored the NATO "aspirants" – specifically, nine countries in Central and Eastern Europe – to introduce "*sufficient safeguards and procedures to ensure the security of the most sensitive information as laid down in the NATO security policy*."[73] Indeed commentators have rightly raised concern around the stringent rules on state secrecy that several countries have introduced as part of their accession to NATO[74] and, particularly, "*whether NATO's requirements are unduly biased against transparency… [and] tilted toward secrecy to an unwarranted degree*."[75] It seems natural that such a security of information regime suited the purposes of the CIA.

111. Finally, with regard to the particular scope of my inquiry, it is apt to point out that NATO Allies and Partners have also developed various forms of co-operation in the realms of Air Defence and Air Traffic Management.[76] Inevitably these initiatives have developed new dimensions and complexities in the worlds of civil and military aviation, some of which may not yet be properly regulated and may permit unlawful clandestine operations using aircraft to pass "under the radar." In the course of analysing my database of aircraft movements, I have also noted that NATO has established a co-operation with Eurocontrol, which aims at "*developing civil-military air traffic procedures in the light of the new security environment*."[77]

ii. Bilateral arrangements

a. Securing agreements with certain countries to host "black sites" for HVDs

112. Despite the importance of the multilateral NATO framework in creating the broad authorisation for US counter-terrorism operations, it is important to emphasise that the key arrangements for CIA clandestine operations in Europe were secured on a **bilateral level**.

113. According to US sources, such bilateral arrangements (referred to simply as "bilaterals") exist under many different forms in Europe alone. For example, at the lower end of the range, bilaterals can institute ad hoc collaboration on a single operation to capture, detain or transfer a particular target. The well-documented cases of Abu Omar's abduction in Milan[78] and Khaled El-Masri's 23-day ordeal in a hotel in Skopje before being handed over to a rendition team[79] are instances in which the CIA worked with partner intelligence services in Italy[80] and the "former Yugoslav Republic of Macedonia",[81] respectively, in this manner.

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[73] See NATO, "Membership Action Plan", Press Release NAC-S(99) 66, Brussels, 24.04.1999.

[74] For insight into the NATO secrecy and security of information regime and its negative impact on transparency in general, I have drawn from the work of the Canadian specialist on transparency issues, Professor Alasdair Roberts, who is based at the Maxwell School of Syracuse University in the United States. For specific articles, refer to Professor Roberts' website at www.aroberts.us/reseach.html.

[75] See Alasdair Roberts, "NATO, Secrecy and the Right to Information", *East European Constitutional Review*, (Fall / Winter 2003) 86, at p. 87.

[76] See NATO Partnership Action Plan against Terrorism, 22.11.2002, available at http://www.nato.int/docu/basictxt/b021122e.htm; at § 16.2.3.

[77] See Report on the Partnership Action Plan against Terrorism, 23.06.2004, available at http://www.nato.int/docu/basictxt/b040623be.htm; at § 7.4.

[78] For a detailed account of the abduction of the Egyptian citizen Hassan Osama Mustafa Nasr (known as Abu Omar) in Milan, see the Marty Report 2006, *supra* note 6, at p. 37, § 162. For an analysis of this case based on extensive contact with insider sources in the CIA, see the recent article by Matthew Cole, "Blowback", *GQ Magazine*, March 2007, available at http://www.matthewacole.com/pdfs/Blowback-GQ.pdf.

[79] For a detailed account of the ordeal experienced by the German citizen Khaled El-Masri in Macedonia and Afghanistan, see the Marty Report 2006, *supra* note 6, at pages 25 to 32, paragraphs 93 to 132. For new details of this case, refer to section VI.i in the present report entitled "A case study of Khaled El-Masri."

[80] Reference to the particular service involved – SISMI – based on material from the prosecution case documents compiled by Armando Spataro.

[81] In "the former Yugoslav Republic of Macedonia" , as I described last year, the partner service with which the CIA collaborated to detain and transfer Khaled El-Masri was the UBK – Uprava za Bezbednosti i Kontrarazuznavanje, or the Security and Counter-Intelligence Service. See the Marty Report 2006, *supra* note 6, in particular at pp. 29 to 30, §§ 116 to 119.

114. In the middle of this range, bilateral agreements signed pursuant to the multilateral NATO framework, and in conformity with NATO standards, have often encompassed elements of intelligence co-operation. Alternatively they have granted "civilian" components – a phrase often used loosely for those operating on behalf of the CIA – the same privileges and permissions that would normally be reserved for members of the military forces. Romania's "SOFA supplemental" agreement with the United States on 31 October 2001, analysed later in this section, appears to be a good example of such a middle-range "bilateral". It also demonstrates the potential for partnership and co-operation to intensify over a period of several years.

115. The bilaterals at the top of this range are classified, highly guarded mandates for "deep" forms of co-operation that afford – for example – "infrastructure", "material support" and / or "operational security" to the CIA's covert programmes. This high-end category has been described to us as the intelligence sector equivalent of "host nation" defence agreements – whereby one country is conducting operations it perceives as being vital to its own national security on another country's territory.

116. The classified "host nation" arrangements made to accommodate CIA "black sites" in Council of Europe member states fall into the last of these categories.

117. The CIA brokered "operating agreements" with the Governments of Poland and Romania to hold its High-Value Detainees (HVDs) in secret detention facilities on their respective territories. Poland and Romania agreed to provide the premises in which these facilities were established, the highest degrees of physical security and secrecy, and steadfast guarantees of non-interference.

118. We have not seen the text of any specific agreement that refers to the holding of High-Value Detainees in Poland or Romania. Indeed it is practically impossible to lay eyes on the classified documents in question or read the precise agreed language because of the rigours of the security-of-information regime, itself kept secret, by which these materials are protected.

119. However, we have spoken about the High-Value Detainee programme with multiple well-placed sources in the governments and intelligence services of several countries, including the United States, Poland and Romania. Several of these persons occupied positions of direct involvement in and/ or influence over the negotiations that led to these bilateral arrangements being agreed upon. Several of them have knowledge at different levels of the operations of the HVD programme in Europe.

120. These persons spoke to us upon strict assurances of confidentiality, extended to them under the terms of the special authorisation I received from my Committee last year.[82] For this reason, in the interests of protecting my sources and preserving the integrity of my investigations, I will not divulge individual names. Yet I can state unambiguously that their testimonies – insofar as they corroborate and validate one another – count as credible, plausible and authoritative.

121. I am convinced that these individuals who were or still are in highly-placed positions within the system spoke the truth to us. This was not always simply because they valued truth. In most cases they did so because, to paraphrase one high-ranking politician we interviewed, they did not want the truth to come out *on somebody else's terms*.

[82] Reference to the written record of the meeting of the PACE Committee on Legal Affairs and Human Rights (AS/Jur) in Paris on 13.03.2006 (Synopsis No 2006/25), by which the Committee authorised my inquiry to treat information in confidence. Based upon this authorisation, I engaged in an exchange of letters with European Commissioner Franco Frattini. Copies of this correspondence as well as the above-mentioned synopsis are held on file with the Rapporteur. The assurance of absolute confidentiality with which I have provided my sources, scrupulously observed by the team members who attended the interviews, has proven to be an important, if not decisive, asset to progress in our inquiry.

122. In short, we used our considerable network of contacts in Poland, Romania, the United States and elsewhere, along with our own form of "intelligence work", to ensure that in our discussions with our sources, the "dynamics of truth" were also at play.

b. The United States' choice of European partners

123. It is interesting to note that the United States chose, in the case of Poland and Romania, to form special partnerships with countries that were economically vulnerable, emerging from difficult transitional periods in their history, and dependent on American support for their strategic development.

124. In terms of both political and intelligence considerations, several sources confirmed that much of the Eastern European "bloc" was considered "out of bounds" for the CIA in contemplating sites for its covert HVD programme. A long-serving CIA officer shared the following analysis with us:

> "*In a lot of those countries, there is still a mindset formed during the Cold War that we are not always on their side. There's a certain tendency to be less than open to our advances. You have to remember most of the East European services are KGB services and that doesn't change overnight.*
>
> *I think Poland is the main exception; we have an extraordinary relationship with Poland. My experience is that if the Poles can help us they will. Whether it's intelligence, or economics, or politics or diplomacy – they are our allies. I guess if there is a special relationship outside of the "four eyes"[83] group, then it is the Americans and the Poles*."

125. In Poland's case, a specific strategic incentive tied in with the NATO framework was the United States' staunch support for the establishment in Poland of the lucrative "NATINADS" programme – the NATO Integrated Air Defence System. Poland participated in the US-led military coalitions in both Afghanistan and Iraq, notably contributing significant Special Forces deployments to Operation Enduring Freedom,[84] and later assuming control of one of the "zones" of allied control in Iraq. An ongoing process of realignment and reform of intelligence structures is dedicated primarily to purging the secret services of so-called "communist remnants".

126. The United States negotiated its agreement with Poland to detain CIA High-Value Detainees on Polish territory in 2002 and early 2003. We have established that the first HVDs were transferred to Poland in the first half of 2003. In accordance with the operational arrangements described below, Poland housed what the CIA's Counterterrorism Centre considered its "most sensitive HVDs," a category which included several of the men whose transfer to Guantanamo Bay was announced by President Bush on 6 September 2006.

127. We received confirmations – each name from more than one source – of eight names of HVDs who were held in Poland between 2003 and 2005[85]. Specifically, our sources in the CIA named Poland as the "black site" where both Abu Zubaydah and Khalid Sheikh Mohamed (KSM) were held and questioned using "enhanced interrogation techniques." The information known about these interrogations has formed the basis of heated debate in the United States and the wider international community, leading, in Zubaydah's case[86], to high-level political and legislative manoeuvres and, in KSM's case, to the admission of some troubling judicial precedents[87].

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[83] The "four eyes" group is this CIA officer's reference to the very strong four-way co-operation on intelligence matters between the secret services of the United States, Canada, the United Kingdom and Australia: "it's just a whole different degree of trust between those four."

[84] See Bensahel, *Counterterror Coalitions*, *supra* note 37, at p. 10; Table 2.1, "Summary of European and Canadian Contributions to Operation Enduring Freedom".

[85] In addition to these sources, a single CIA source told us that there were "up to a dozen" HVDs in Poland in 2005, but we were unable to confirm this number. Among the eight names repeated to us from several sources were Ramzi bin al-Shibh, Tawfiq bin Attash and Ahmed Khalfan [al-]Ghailani.

[86] The individual circumstances of Abu Zubaydah's interrogations remain largely unknown, but the introduction of "enhanced interrogation techniques" for the CIA's use on him has sparked the debate to which I refer. For an insightful early account of CIA interrogation practices, see Jane Mayer, "A Deadly Interrogation – Can the CIA legally kill a prisoner?" in *The New Yorker*, 14.11.2005, available at http://www.newyorker.com/archive/2005/11/14/051114fa_fact.

[87] Specifically I refer to the admission into evidence of the "Substitution for the Testimony of Khalid Sheikh Mohamed" in the context of the trial of Zacarius Moussaoui; as well as the well-founded reservations that the testimony in question had been procured under torture or other forms of ill-treatment, it is worth mentioning the troubling preamble transmitted to the jury introducing KSM's testimony : "Although you do not have the ability to see the witness' demeanour as he testifies, you must approach these statements with the understanding that they were made under circumstances designed to elicit truthful

128. For reasons of both security and capacity, the CIA determined that the Polish strand of the HVD programme should remain limited in size. Thus a "second European site" was sought to which the CIA could transfer its detainees with "no major logistical overhaul". Romania, used extensively by United States forces during Operation Iraqi Freedom in early 2003, had distinct benefits in this regard: as a member of the CIA's Counterterrorist Centre remarked about the location of the proposed detention facility, "our guys were familiar with the area".

129. Our sources on both sides of the agreement – in Romania and the United States – emphasised the importance of both trust and national interest as factors underpinning their negotiations. Military assistance – reflected since in the Agreement of December 2005[88] – also significantly influenced the decision to provide facilities and resources, as one American source reflected:

> *"The bilateral arrangements were built on two things: personal relationships and material investment. If your men on the ground have a very good personal relationship with the men in the partner service; that means a lot. And it also means a lot if the Romanians are gonna get their runways improved, new barracks built and new military hardware; that means a lot."*

130. Romania was developed into a site to which more detainees were transferred only as the HVD programme expanded. I understand that the Romanian "black site" was incorporated into the programme in 2003, attained its greatest significance in 2004 and operated until the second half of 2005. The detainees who were held in Romania belonged to a category of HVDs whose intelligence value had been assessed as lower but in respect of whom the Agency still considered it worthwhile pursuing further investigations.

131. Asked to provide names of those held in Romania, a senior official in the CIA's Counterterrorism Centre, who was directly involved in operating the programme, said: "*Look we don't talk about names, okay. We've got a target range that we know less about. We're acting on their intell[igence] value when we're less certain*."

132. Our sources told us that some of the targets in this "lower" HVD category had in fact been identified, and sometimes even apprehended, by a foreign intelligence service before they were made available to the CIA. Upon our strict assurance of anonymity, one CIA case officer was willing to describe limited details of a scenario in which a detainee had been "*offered to us by our liaisons*" and was later transferred to Romania. The detainee was of Afghan nationality.

133. Examples of the profile of those held in Romania were provided to us by two separate American sources. We understand that the profile fits categories such as:

- associates and suspected operatives of key Taliban leaders like Mullah Omar;
- foreign fighters suspected of having performed roles for the Taliban in Afghanistan, including provision of logistics;
- leaders of branches of suspected "support networks" for the insurgencies in Iraq and Afghanistan; or
- suspected leaders of terrorist factions in the Middle East.

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statements from the witness." For the full testimony, and other materials related to the Moussaoui trial, see Reporters Committee for Freedom of the Press, "Moussaoui Trial exhibits and documents," available at http://www.rcfp.org/moussaoui/.

[88] For detailed discussion of the Agreement between Romania and the United States of December, dated 6 December 2005, refer to section II.iii.b entitled "Application of the NATO framework in Romania."

134. The majority of the detainees brought to Romania were, according to our sources, extracted "*out of [the] theater of conflict*". This phrase is understood as a reference to detainee transfers originating from Afghanistan and, later, Iraq.

135. More specifically, the description of an "out-of-theater" detention facility presents the mirror image of the kinds of prisons operated "in-theater," which are customarily referred to by United States Forces as "Theater Internment Facilities" – one notable example being the "Bagram Theater Internment Facility."[89] CIA detainees are known to have been held at facilities such as Bagram both before[90] and after[91] having been subjected to rendition, and to secret detention in other countries.

iii. Responsible political authorities and preservation of secrecy in Poland and Romania

136. To reveal the means by which bilateral arrangements were put in place for CIA detentions in Poland and Romania, we must trace a trajectory of deepening co-operation with the United States that spans over several years. During the immediate post-9/11 period, when America was identifying its key strategic partnerships for the "war on terror," both Poland and Romania were in the midst of their own processes of "strategic realignment", eager to secure their positions as indispensable members of the NATO Alliance and friends of the United States.

137. In the course of a lengthy discussion with us about the CIA's choice of partner countries in Eastern Europe, one high-ranking Eastern European politician involved in the programme said to us:

> *"Poland and Romania; you don't know why? [It is] because we are the only two countries who are truly pro-Western. But now we are in danger of being seen as an experiment… It is most unfortunate."*

138. When America began developing its strategy for the "war on terror" under the NATO framework, Poland was already a member of the NATO Alliance, while Romania was a NATO "aspirant", or accession candidate. This difference in status proved to be of little consequence, however, as both countries followed remarkably similar paths in terms of harmonising their laws and structures with the NATO framework. The role of the United States was crucial to the reform processes in both countries, particularly in terms of the intelligence services and oversight structures that monitor them.

a. Application of the NATO framework in Poland

139. Poland became a member of NATO on 12 March 1999 and the multilateral NATO SOFA agreement entered into force in Poland in 2000.[92] In the five years directly preceding its NATO accession, Poland had signed several noteworthy agreements with the United States[93] in the realms

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[89] For example, official documents refer extensively to the "Bagram Theater Internment Facility" (or "BTIF") as the name given to the detention facility operated by the US Department of Defense at the Bagram Airfield in Afghanistan. See, *inter alia*, Declaration of Colonel Rose M. Miller, Commander of Detention Operations, CJTF-76, in *Ruzatullah et al v. Rumsfeld*, before the US District Court for the District of Columbia, 19.11.2006; at § 3.

[90] I have information in my possession relating to at least three different detainees who were held at Bagram *before* being transferred out to secret detention in another country. I have undertaken to treat this information in confidence, so I shall not refer here to names or precise periods in which they were detained.

[91] I reported last year on the case of Binyam Mohamed al-Habashi, an Ethiopian citizen and former UK resident, who was detained at Bagram between May and September 2004 *after* having been held in CIA custody in Pakistan, Morocco and the "Dark Prison" in Kabul, and subjected to two separate renditions. See the Marty Report 2006, *supra* note 6, at section 3.9, pp. 42 to 45.

[92] See Stefan Meller, Minister of Foreign Affairs of the Republic of Poland, Response of the Republic of Poland to Questions addressed by the Secretary-General of the Council of Europe with regard to Article 52 ECHR, dated 17.02.2006 (hereinafter "Response of Poland to CoE Secretary General under Article 52 ECHR"), available at http://www.coe.int/T/E/Com/Files/Events/2006-cia/Poland.pdf, at p. 5. The Polish authorities pointed out that: "The [NATO SOFA] Agreement, however, does not confer jurisdictional immunity on members of foreign armed forces, but elaborates the rules of determining jurisdiction with regard to prohibited acts on the territory of the host State. In particular, the Agreement grants the sending State the primary right to exercise jurisdiction over a member of its forces or of their civilian component in relation to offences arising out of any act or omission done in the performance of official duty [SOFA, Article 7(2),(II)]. It should also be underlined that in the light of the NATO SOFA, all members of the armed forces of a foreign State staying on the territory of the Republic of Poland are obliged to respect Polish law."

[93] For a full record of (unclassified) bilateral treaties between the United States and Poland, see US Department of State, *Treaties in Force – A list of Treaties and other International Agreements of the United States in Force on January 1, 2006*, "Poland", at pp. 263-266.

of defence,[94] aviation,[95] extradition[96] and judicial assistance,[97] which paved the way for a very close co-operation both within and outside the NATO Alliance.

140. Poland told the Council of Europe that, in addition to its obligations under multilateral treaties, it has concluded an unspecified number of "agreements governing special forms of co-operation."[98] Whilst we do not know the precise scope of these agreements, the one example given by the Polish authorities – that of "trans-frontier surveillance" – confirms that in at least some of their thematic coverage they pertain directly to the work of the intelligence services. We have been unable to obtain copies of Poland's "bilaterals" with the United States, which it is safe to assume fall under this bracket, because they are classified.

141. Poland's Classified Information Act, which entered into force in March 1999,[99] is part of a fairly typical apparatus among new NATO members[100] for dealing with sensitive information in accordance with the NATO Security Policy. For example, the Act's restrictive procedures for granting or denying "security clearance"[101] to individuals wishing to access classified information were challenged as unconstitutional by the Polish ombudsman.[102] However these provisions were compulsory for NATO membership and – of no small coincidence – would transpire to be vital to the preservation of secrecy around the operations of the CIA's HVD programme in Poland.

b. Application of the NATO framework in Romania

142. In the case of Romania, the processes of acceding to NATO and developing a bilateral framework with the United States, under which the CIA could operate on Romanian territory, proceeded almost simultaneously.

143. According to our sources, the statement of President Ion Iliescu[103] in response to the attacks of 11 September 2001 was Romania's "critical turning point." In that statement, President Iliescu signalled Romania's intention "to act as a *de facto* member of the NATO alliance," setting a clear tone at a time when fellow former Eastern-bloc countries were likewise scrambling to demonstrate their loyalty to the United States.

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[94] See, for example, *Acquisition and Cross-Servicing Agreement*, with annexes, signed at Warsaw, 22.11.1996; entered into force 22.11.1996, TIAS.
[95] See, for example, *Memorandum of Agreement concerning Assistance in developing and modernising Poland's Civil Aviation Structure*, signed at Washington and Warsaw, 5 and 14.01.1998; entered into force 14.01.1998, TIAS.
[96] See *Extradition Treaty between the United States and the Republic of Poland*, signed at Washington, 10.07.1996; entered into force 17.09.1999, TIAS.
[97] See *Treaty on Judicial Assistance with Criminal Matters*, with forms. Done at Washington, 10.07.1996; entered into force 17.09.1999, TIAS.
[98] See Response of Poland to CoE Secretary General under Article 52 ECHR, *supra* note 94, at p. 3.
[99] See *Classified Information Act*, Polish Journal of Laws, No. 11, item 95; copy available from the Helsinki Foundation for Human Rights and the Helsinki Committee for Human Rights in Poland.
[100] On this point, see Alasdair Roberts, "NATO, Secrecy and the Right to Information", *supra* note 56.
[101] For commentary on the security clearance procedures by a local journalist, see Pawel Wronski, "Przeswietl sie i dowiedz sie. Z tajemnicami do NATO" (Submitting to clearance and getting to know. Our secrets and NATO), in *Gazeta Wyborcza*, No. 7, 9-10.01.1999.
[102] See International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region: Report 2000 (Events of 1999)*, "Annual Report on Poland", available at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=1784, at p. 286.
[103] See Xinhua News Agency, "Romanian President Firmly Condems Terrorism", Bucharest, Romania, 11.09.2001; excerpt available as part of a compilation entitled "NATO Aspirant Countries condemn the terrorist attacks on the USA", at http://stoianov.president.bol.bg/nato_summit/en/condemnation.html. Just over a year later, in a statement during President Bush's visit to Bucharest on 23.11.2002, President Iliescu declared that the United States and Romania had "identical positions on the way to address the great challenges that the international community is facing, including the threat of terrorism."

144. Indeed, Romania could be said to have outdone even many NATO members in the immediacy of its demonstrations of support for the "war on terror." In its session of 19 September 2001, the Romanian Parliament gave its "formal approval" to President Iliescu's stated position and "approved basing and overflight permission for all US and coalition partners"[104] – thus pre-empting the North Atlantic Council's multilateral authorisations of 4 October 2001 by more than two weeks. A source involved in drafting this permission confirmed to us that its scope was deliberately designed to cover aircraft operated by or on behalf of the CIA.

145. Furthermore the most important domestic implication of the Romanian Parliament's approval for President Iliescu's pro-American stance was that, in the process, it effectively mandated the President, working through his Office of National Security, to sign NATO-type agreements and bilateral operational orders with the United States.

146. In exercise of this mandate, President Iliescu negotiated and signed what the Romanian authorities describe as a "SOFA Supplemental"[105] – the *Agreement between Romania and the United States of America regarding the Status of US Forces in Romania*[106] - on 30 October 2001. Along with the multilateral NATO SOFA, this agreement is said by the Romanian authorities *generally* to "settle the jurisdiction, the legal responsibilities and other aspects regarding the status of one party's armed forces personnel… and of contractors of those armed forces when acting on the other party's territory".[107] In reality, however, they are *specifically* one-way arrangements, legislating for an increased size and scope of US activity on Romanian soil.

147. When examined with hindsight, the 2001 agreement reveals a **permissive attitude on the part of the Romanian authorities**, broadly towards US military and quasi-military operations on Romanian territory, and in particular towards the actions of American service personnel. The "SOFA Supplemental" created a "special regime of access on national territory",[108] which it extended not only to "members of the military forces"[109] in a conventional sense, but also to "members of the civilian airline companies"[110] and anyone else who is "declared by the American authorities to be part of the US armed forces, and can present a travel order issued by the US Military". The breadth of the designation used here represented the perfect opening for the CIA to conduct its clandestine operations in the country.[111]

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[104] See US Department of Defence, Fact Sheet of 7.06.2002, "International Contributions to the War against Terrorism", available at http://www.defenselink.mil/news/Jun2002/d20020607contributions.pdf.

[105] "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20.01.2006; at p. 1. This agreement is said to be supplementary to the NATO SOFA of 1951, of which Romania only became a party when it joined NATO on 29.03.2004. It should be noted that in 2001, when Romania was not a party to the 1951 Agreement, it at the time relied upon its signature of the PfP SOFA of 1995 as the basis for its supplemental. See the section II.i. earlier in this report on the the wider NATO system and the 'war on terror', and the accompanying references, *supra* notes 42.

[106] See the *Agreement between Romania and the United States of America regarding the Status of US Forces in Romania*, signed at Washington, DC on 30.10.2001; entered into force on 10.06.2002, TIAS (hereinafter referred to as "Romanian SOFA Supplemental"). For a full record of (unclassified) bilateral treaties between the United States and Romania, see US Department of State, *Treaties in Force – A list of Treaties and other International Agreements of the United States in Force on January 1, 2006*, "Romania", at pp. 270 to 272.

[107] "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20.01.2006; at p. 1.

[108] This phrase is understood to describe the permission given to "enter, exit and move freely within the territory", with a US military travel order sufficing as identification.

[109] See Romanian SOFA Supplemental, 30.10.2001, *supra* note 108, at Article II(2).

[110] It is unclear whether this reference to "the civilian airline companies" indicates that there is a specific numbered or named list of US-registered companies whose members fall under the "special regime of access" referred to. However, in a comparable scenario, it has in the past been disclosed in documents released by the US Department of Defence under a Freedom of Information Act request that specific US aviation companies (including several of those known to be involved in detainee transfer operations) have been awarded "classified contracts" by certain units of the US armed forces. See Seth Hettena, The Associated Press, "Navy contracted planes used in CIA missions", 24.09.2005, available at http://www.usatoday.com/news/washington/2005-09-24-navy-cia_x.htm

[111] In addition, it is known that the meanings of important "cover" designations often used by the CIA are set forth in the 2001 SOFA Supplemental. These include the terms "civilian component", "dependent" and "United States contractor" – all of which categories were also granted the same permissions and protections as conventional military officers. Unfortunately, I have not as yet been able to obtain the sections of the agreement in which the meanings of those terms are defined.

148. It is my conclusion that under the October 2001 bilateral agreement, along with any additional classified annexes agreed at that time or subsequently, personnel brought into the country under the banner of the United States military **have in practice operated on Romanian territory with complete freedom from scrutiny or interference by their national counterparts** ever since.

149. In this context it is important to consider a more recent "access agreement" between Romania and the United States, signed on 6 December 2005, which deals primarily with the activities of US forces based at a selected number of Romanian military facilities.[112]

150. Under this new agreement, US forces – including their "civilian component" – enjoy extraordinarily free use of certain Romanian airbases and other facilities for "training, transit… refuelling of aircraft, accommodation of personnel, communications, staging and deploying of forces and material … and for other such purposes as the Parties or their Designated Authorities may agree."[113]

151. In terms of permissions, all US Government aircraft and vehicles are "free from inspection." In addition, an apparently blanket authorisation to "over-fly, conduct aerial refuelling, land and takeoff in the territory of Romania" is granted to both US Government aircraft and "civil aircraft … operating exclusively under contract to the United States Department of Defense."[114] Indeed, an equally permissive approach is applied to almost every aspect of the agreement, from the "construction activities" undertaken by US forces[115] to the apparently unquestioning acceptance as "valid" of "all professional licences."[116]

152. In terms of protections, Romania's key obligations seem to be to give "due regard to United States' operational and security concerns,"[117] and to "take all reasonable measures within its power to ensure the protection, safety and security of United States forces property."[118]

153. I have viewed the Romanian Access Agreement in sharpest focus, however, when I consider it in the light of testimony received from Romanian and American officials about the bilateral "operating agreements" that prevailed previously. Sources on both sides confirmed to me that the provisions of the December 2005 Access Agreement are best understood as arrangements that have prevailed for several years but have only latterly been formalised.

154. This incremental method of formalising such "bilaterals" has in fact been used by the US in other countries in which its forces have been undertaking important detention operations in the context of the "war on terror." The most conspicuous example is Afghanistan, where last year's Accommodation and Consignment Agreement for Lands and Facilities at Bagram Airfield[119] (signed on 28 September 2006) represents the furthest extension of the US model of permissions and protections that I have yet to encounter.[120] It was described in testimony before a US court as being an agreement

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[112] See *Agreement between the United States of America and Romania regarding the activities of United States Forces located on the territory of Romania*, done at Bucharest, 6.12.2005; (hereinafter "Romanian Access Agreement"); copy on file, submitted officially to the Rapporteur in May 2006 after its adoption by the Romanian Parliament. It is worth pointing out that the references to "Implementing Arrangements" in this text afford the Parties a considerable degree of latitude as to how they put the agreement into practice: "The technical details regarding the agreed facilities and areas shall be in accordance with Implementing Arrangements to be concluded for each facility and area" [at Article II(1)]; and "As appropriate, the Parties or their Designated Authorities may enter into Implementing Arrangements to carry out the provisions of this Agreement" [at Article XI].

[113] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article II(1). It is relevant to note that the "Designated Authorities" in question are the Ministry of National Defence of Romania and the Department of Defense of the United States of America, respectively.

[114] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article VII. In the final clause, the fact that the exempted civil aircraft have to be under exclusive contract to the Department of Defense (rather than the US Government more generally) is a clear indication of the military nature of the arrangements.

[115] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article II(4).

[116] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article IX.

[117] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article II(3).

[118] See Romanian Access Agreement, 6.12.2005, *Ibidem*, at Article VI(1).

[119] See the *Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield between the Islamic Republic of Afghanistan (represented by HE General Abdul Rahim Wardak, Minister of Defense) and the United States of America*, made and entered into by the Host Nation and the Lessee on 28.09.2006 (hereinafter referred to as the "Bagram Agreement"); copy on file with the Rapporteur.

[120] See, for example, the Bagram Agreement, 28.09.2006, *Ibidem*, at § 9: "The Host Nation [Afghanistan] covenants and warrants that the United States shall have exclusive, peaceable, undisturbed and uninterrupted possession of the Premises during the existence of this agreement. The United States shall hold and enjoy the Premises during the period of the agreement without any interruption whatsoever by the Host Nation or its agents." As is clearly stated in § 13, the Bagram Agreement of 2006 "supersedes all previous agreements between the United States and Host Nation for the use of Bagram Airfield" – implicitly meaning that any formal or informal arrangements that had prevailed prior to September 2006 had finally been brought

that "follows similar such arrangements dating back to at least 2003".[121] Indeed, I am aware of an earlier document referred to as "Note No. 202",[122] which indicates that the initial bilateral arrangements in Afghanistan – in strikingly similar terms to the situation in Romania – were agreed upon essentially by members of the executive[123] without reference to parliamentary oversight mechanisms.

155. The Romanian authorities have indicated to us on two occasions that the NATO framework described here has been the basis for the operations of the CIA in Romania. The first reference came in response to my question about whether the Government is "systematically informed of the activities of foreign secret services (in particular the CIA) on national territory."[124] Romania replied[125] by citing the NATO framework's *Agreement on Classified Information* and a bilateral *military* instrument, the *Agreement on the Protection of Military Classified Information*,[126] thus making clear that CIA activities now fall unambiguously under the secrecy regime instituted under the NATO Security Policy. As in several other Eastern European countries who adopted more stringent secrecy policies as part of their NATO accession, Romania's legislation on classified information was expedited through Parliament[127] and criticised by civil society for being unbalanced.[128]

156. The second reference was part of an apparent acceptance, in principle, that United States agencies and personnel have carried out detainee transfer operations in Romania in the context of the NATO framework. The following statement was delivered by the Chairperson of the Romanian Delegation to PACE, Mr Gyorgy Frunda, during the PACE Plenary Debate on my report in June 2006:

> "*Concerning the transfer of prisoners, from the first moment we said that* ***Romania collaborated with the United States and with other members of NATO. Aircraft landed in Romania and transported persons****. We did not and do not know who the persons are because, do not forget, the aircraft are under the authority of the countries where they are registered.* ***The countries in which the airports are located do not have legal instruments to see what happens on board****. That is why United States authorities have to answer not only political but juridical questions about whether persons were harassed or wrongly treated… on the airplanes.*"[129]

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into one coherent written text. A similar situation can surely be said to apply in Romania with the signature of the Access Agreement of December 2005.

[121] See Declaration of Colonel Rose M. Miller, Commander of Detention Operations, CJTF-76, in *Ruzatullah et al v. Rumsfeld*, before the US District Court for the District of Columbia, 19.11.2006; at § 5. Also note Colonel Miller's statements that "each nation separately controls access to its respective compound on the Airfield" and that "the US does not have complete, plenary jurisdiction".

[122] Note No. 202, dated 26.09.2002, is reproduced in a translated document obtained by Amnesty International, which transmits the concurrence of the Afghanistan Ministry of Foreign Affairs with this note to the US Embassy in Kabul; see Document No. 93 of the Ministry of Foreign Affairs (America and Canada Political Affairs Division), dated 28.05.2003.

[123] Note No. 202 was signed by the Minister of Foreign Affairs of the Transitional Islamic State of Afghanistan, Doctor Abdullah, on behalf of the transitional government. No reference is made to any pursuant procedure for approval of this document, nor am I aware of one having taken place. Furthermore, in the final paragraph, "the parties waive any and all claims against each other for damage to or loss or destruction of property owned by either party, or death or injury to any military or civilian personnel of the armed forces of either party, as a result of activities in Afghanistan under this agreement."

[124] See my letter of 19.12.2005 to Chairpersons of National Delegations to PACE, which contained "Questions which members of the Parliamentary Assembly might put to their respective governments in their national parliaments," reproduced as Appendix II to *Information Memorandum II*, 22.01.2006.

[125] "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20.01.2006; at p. 1.

[126] See the *Agreement between Romania and the United States of America on the Protection of Military Classified Information*, done in Washington, 21.06.1995, entered into force 2003; cited *Ibidem*.

[127] Alasdair Roberts cites a revealing news report about the passage of the Romanian legislation in April 2002: "[On 3 April] a certain Colonel Constantin Raicu [of the Romanian Intelligence Service], who is in charge of the protection of state secrets, came down like a storm on the members of the Senate Juridical Commission, telling them: 'This morning we have received signals from [NATO in] Brussels indicating that if the bill on classified information is not passed before 16 April, they cannot exclude adopting a critical attitude regarding Romania. We agree with any form – the colonel added – but please, pass it as soon as possible, or we will be facing huge problems.' The Senators… grasped the situation very quickly, and they approved the draft bill in the form passed by the Chamber of Deputies." See *Bucharest Ziua*, "NATO used as a Scarecrow to pass Law on Secrets," 08.04.2002, www.ziua.ro, cited in Alasdair Roberts, "NATO, Secrecy and the Right to Information", *supra* note 56, at p. 87.

[128] See International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region: Report 2002 (Events of 2001)*, "Annual Report on Romania", available at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=1782, at p. 257.

[129] Contribution of Mr Gyorgy Frunda, Chairperson of the Delegation of Romania to PACE, at the 17th Sitting of the Plenary of the Parliamentary Assembly during its 2006 Session, Strasbourg, 27.06.2006.

157. Our continuing investigations since June 2006 have allowed us to put this statement into context. Romania is right to state that the NATO framework on the multilateral level did enable detainee transfers through many Council of Europe member states, including larger nations like Germany mentioned in my report last year. Romania, like Poland, went beyond the multilateral framework, however, when it expanded the scope and purpose of the authorisations it granted the United States. According to one of our sources involved in making the key bilateral arrangements, Romania "knew what the United States needed from its allies and in what areas we could assist them." It was therefore perceived to be in the national interest to extend a further level of support: "[having] worked on the secret flights… we worked directly with associates of the CIA on establishing prisons here."

c. Preserving secrecy through military intelligence partnerships

158. In the course of our discussions with intelligence officials in the United States, a senior member of the CIA Counterterrorist Center made the following remarks to our team:

> "Many European countries have multiple security services. And in most countries the Agency deals with all of them: with the police, with the anti-terrorism police, with foreign intelligence, with other units – and of course with military intelligence … But for the HVD programme we worked strictly in line with 'need-to-know'."

159. There are two essential items of information in this statement, both of which have ultimately proved indispensable to our understanding of how the HVD programme worked in Europe. One item – military intelligence partnerships – goes to the heart of how the CIA formed its relationships; the other – preservation of secrecy – reveals important structural considerations. I shall deal with the structural considerations first.

d. Preserving secrecy and NATO Security Policy

160. Our source's use of the expression "need-to-know" encapsulates one of the means used to keep the HVD programme in Europe secret.[130] Through discussion with several other sources we have established that classified information about the bilateral arrangements between the CIA and its partner services in Poland and Romania was **treated according to a strict security of information regime drawn from the terms of NATO's Security Policy**.

161. Under the terms of the NATO Security Policy,[131] "individuals in NATO nations … shall only have access to NATO classified information for which they have a need-to-know. No individual is entitled solely by virtue of rank or appointment or PSC [Personnel Security Clearance] to have access to NATO classified information."[132] In the context of the HVD programme, according to a senior CIA official, the CIA classified its operational information into "tiny little pieces," each of which would be assessed separately under the "need-to-know" principle in order to prevent any single foreign official from seeing the "bigger picture" of what was actually happening:

> "The Agency could be bringing UBL [Usama bin Laden] himself from an airplane into a prison in your country, but on every tiny little piece of the classified operational information, if we figure you don't need to know that information then frankly, as an individual, you will never know it."

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[130] We initially probed into the means used to keep the HVD programme secret because of a tip-off from an insider source. The source had indicated that the NATO framework "holds the key" to understanding the European dimension of the programme, in terms of both "physical security and security of information."

[131] See NATO, Security within the North Atlantic Treaty Organisation, 17.06.2002, *supra* note 73. The policy is designed to ensure that a "common degree of protection" is applied both to NATO's own information and to information exchanged among NATO members on a bilateral level. Both categories of information are referred to as "NATO classified information" in the context of this policy.

[132] *Ibidem*, in Enclosure "C" – Personnel Security, at the section entitled "Application of the 'Need-to-Know' Principle," p. 2, § 6. In a handbook accompanying an earlier version of the policy, this "fundamental principle" was reiterated to mean that information should be limited in its distribution for *work purposes only*, and not "merely because a person occupies a particular position, however senior." See NATO Security Committee, *A Short Guide to the Handling of Classified Information*, Document AC/35-WP/14:4, Brussels, 22.08.1958.

162. The body that generates any piece of classified information retains what is known as "originator control,"[133] an undisputed right to set parameters as to which individuals receive the information, how they are briefed, what they are allowed to do with the information, and whether the information will ever be declassified, or have its classification reduced.[134] It is generally accepted that "the principle of originator control trumps the need-to-know principle;"[135] otherwise put, based on this principle, the CIA was able to exclude from the information loop even those individuals (specifically, some politicians) whom it might have perceived to have a genuine need to know the "bigger picture."

163. Finally, the CIA's choice of its "point men" in Poland and Romania – key individuals in each country who vouched for absolute, unwavering adherence to the rules by their own national services – reflected the same considerations of "loyalty, trustworthiness and reliability"[136] integral to NATO rules on personnel security. When discussing the kinds of people as their liaisons, our CIA sources referred to relationships of "trust developed over decades" and interpretations of national security issues that were "99% in harmony with one another".

164. By preserving the secrecy of the covert HVD programme on a NATO-compliant basis, the CIA achieved several of its central objectives: it hand-picked the services and the "point men" it would work with in the countries in question; it limited to an absolute minimum the number of Polish and Romanian counterparts who knew about even "tiny little pieces" of these operations in their own countries; and it ruled out any distribution whatsoever of the classified information beyond these small circles, unless expressly approved by the US Government itself.

165. Yet none of these restrictive rules mitigates the fact that Poland and Romania, as host countries, were knowingly complicit in the CIA's secret detention programme. When we sought confirmation from one of our sources in the CIA that these were bilateral (rather than unilateral) arrangements, and that every programme was carried out with the express authorisation of the relevant partner state, we received this emphatic response:

> "One of the great enduring legacies of the Cold War, which has carried into these alliances, is that NATO countries don't run unilateral operations in other NATO countries. It's a tradition that is almost sacrosanct. We [the CIA] just don't go trampling on other people's turf, especially not in Europe."

166. Hence the importance of our source's affirmation that the CIA forms important intelligence partnerships **not just with civilian counterparts but also in the *military sphere*.** As our inquiry progressed, we realised that the CIA's fellow civilian intelligence agencies (domestic and foreign) are not necessarily the most appropriate choices as partners or liaisons on highly secretive operations due to their encumbered civilian oversight mechanisms. Thus, an integral part of our investigative strategy, building on our knowledge of the NATO framework, was to apply equal scrutiny to the **CIA's partnerships with Military Intelligence services**.

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[133] *Ibidem*, in Enclosure "B" – Basic Principles and Minimum Standards of Security, at the section entitled "Basic Principles," p. 3, § 9(g).

[134] *Ibidem*. See, *inter alia*, Enclosure "B" – Basic Principles and Minimum Standards of Security, at the section entitled "Basic Principles," p. 2, § 9(b): "classified information shall be disseminated solely on the basis of the principle of need-to-know to individuals who have been briefed on the relevant security procedures… only security cleared individuals shall have access."

[135] See Alasdair Roberts, "NATO, Secrecy and the Right to Information", *supra* note 56, at p. 89.

[136] *Ibidem*, in Enclosure "B" – Basic Principles and Minimum Standards of Security, at the section entitled "Personnel Security," p. 4, § 11; see also the supporting provisions in Enclosure "C" – Personnel Security, pp. 1-4. In the previous version of the NATO policy, C-M(55)15(Final) as reissued in 1964, anyone receiving a security clearance was assessed to have shown "unquestioned loyalty [and] such character, habits, associated and discretion as to cast no doubt upon their trustworthiness."

III. Secret detention operations in Poland

i. Partnering with military intelligence in Poland

167. Since the May 2002 "quasi-reform"[137] of its secret services, Poland has had two civilian intelligence agencies: the Internal Security Agency (*Agencja Bezpieczenstwa Wewnetrznego, or ABW*); and the Foreign Intelligence Agency (*Agencja Wywiadu, or AW*). Neither of these services was considered a viable choice as a CIA partner for the sensitive operations of the HVD programme in Poland, precisely because they are "subject to civil supervision, both by Parliament and Government."[138] Since their creation, the Heads of both the *ABW* and the *AW* have been appointed and tasked by the Prime Minister, and are directly accountable to the Council of Ministers, initially through a Cabinet Committee chaired by the PM (*Kolegium do Spraw Służb Specjalnych*) and latterly through the position of Minister-Coordinator for the Special Services.[139] The *ABW* and the *AW* are both also answerable to the Commission for Special Services in the Polish Parliament (*Sejmowa Komisja do Spraw Służb Specjalnych*).

168. According to our sources, the CIA determined that the bilateral arrangements for operation of its HVD programme had to **remain absolutely outside of the mechanisms of civilian oversight**. For this reason the CIA's chosen partner intelligence agency in Poland was the **Military Information Services** (*Wojskowe Służby Informacyjne, or WSI*), whose officials are part of the Polish Armed Forces and enjoy "military status" in defence agreements under the NATO framework. The *WSI* was able to maintain far higher levels of secrecy than the two civilian agencies due to its recurring ability to emerge "virtually unscathed"[140] from post-Communism reform processes designed at achieving democratic oversight.

169. The *WSI* was formally accountable to the Minister of Defence, but our sources describe it as having operated more as a kind of "cartel" serving the self-interests of particular elite groups. I find it especially interesting that Poles we spoke to regard the processes of military intelligence reform[141] as smokescreens aimed at *obstructing* transparency and *preserving* corrupt access to state resources.[142] There is no doubt that the *WSI* is an agency quite accustomed to covert action that challenges the boundaries of legality and morality.

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[137] See Andrzej Zybertowicz, "An Unresolved Game – The role of the Intelligence Services in the nascent Polish Democracy", conference paper published jointly by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), the Norwegian Parliamentary Intelligence Oversight Committee, and the Human Rights Centre at the Department of Law, Durham University, Oslo, September 2003, copy on file with the Rapporteur (hereinafter "Zybertowicz, The Role of the Polish Intelligence Services"), at p. 2: "when the Polish Parliament passed the new law on secret services… instead of explanation of [the] many scandals and taking legal measures towards those responsible, instead of accountability, the public opinion has been offered a quasi-reform of the services. It deserves this label because, among other things, it did not meet [the] objects of its own designers."

[138] See Response of Poland to CoE Secretary General under Article 52 ECHR, *supra* note 94, at p. 2. The phrase is used in this context to describe the system of oversight for the AW: "Parliament [the *Sejm*] exercising its prerogatives through the Commission for Special Services, also controls the Polish Foreign Intelligence Agency in matters relating to its co-operation with partner secret services of other States."

[139] The position of Minister-Coordinator for the Special Services was created in November 2005 and is presently filled by Minister Zbigniew Wassermann.

[140] See Zybertowicz, The Role of the Polish Intelligence Services, *supra* note 139, at pages 3 and 6-7.

[141] Reform of the military intelligence services in Poland has been a contentious issue since the early 1990s, and a topical one throughout my mandate as Rapporteur. Prior attempts at regulating the *WSI* appear to have been half-hearted, at best. From its creation in August 1991 to December 1995 it operated exclusively under secret military orders; then until July 2003 it came under the nominal control of the Ministry of Defence, but without close legal oversight. Even the Law on the Military Secret Services passed by Parliament on 9.07.2003 contained no external verification procedures. Since late 2005, at the instruction of Prime Minister Jaroslaw Kaczynski, the *WSI* has been gradually dissolved and replaced by a restructured military counter-intelligence unit. Deputy defence minister Antoni Macierewicz, who heads the new unit, published a report on the dissolution in February 2007, but the process appears to have done little to assuage public scepticism or criticism. For analysis of the report and reactions to it, see *inter alia* Joanna Najfeld, "Polish Military Intelligence involved in Illegal Activities," Network Europe, 23.02.2007, available at http://networkeurope.radio.cz/feature/polish-military-intelligence-involved-in-illegal-activities.

[142] See also Zybertowicz, The Role of the Polish Intelligence Services, *supra* note 139, at pages 6-7. The author lists what he sees as the objects of "self-reform" in the *WSI*, including "to prevent outsiders – including democratically established control and oversight bodies – from obtaining thorough access to the Services", "to present the *WSI* as a useful ally to the NATO authorities", and to retain an "upper hand in economic institutional rearrangements, including key financial flows and major privatisation schemes."

170. From our interviews with current and former Polish military intelligence officials, we have established that the *WSI*'s role in the HVD programme comprised two levels of co-operation. On the first level, **military intelligence officers provided extraordinary levels of physical security** by setting up temporary or permanent military-style "buffer zones" around the CIA's detainee transfer and interrogation activities. This approach was deployed most notably to protect the CIA's movements to and from, as well as its activities within, the military training base at Stare Kiejkuty. Classified documents, the existence of which was made known to our team, describe how *WSI* agents performed these security roles under the guise of a Polish Army Unit (*Jednostka Wojskowa*) denoted by the code *JW-2669*, which was the formal occupant of the Stare Kiejkuty facility.[143]

171. On the second level, the *WSI*'s assistance depended to a large extent on its **covert penetration of other state and parastatal institutions through its collaboration with undercover "functionaries" in their ranks**. Our sources have indicated to us that *WSI* collaborators were present within institutions including: the Polish Air Navigation Services Agency (*Polska Agencja Zeglugi Powietrznej*), where they assisted in disguising the existence and exact movements of incoming CIA flights;[144] the Polish Border Guard (*Strazy Granicznej*), where they ensured that normal procedures for incoming foreign passengers were not strictly applied when those CIA flights landed; and the national Customs Office (*Główny Urzad Celny*), where they resolved irregularities in the non-payment of fees related to CIA operations. Thus the military intelligence partnership brought with it influence throughout a society-wide "undercover community,"[145] none of which was checked by the conventional civilian oversight mechanisms.

172. When asked to give an example of a *WSI* collaborator who occupied an important position in the operation of the CIA's covert programme, several Polish sources named Mr Jerzy Kos, former Chairman of the Board of Mazury-Szczytno Airport Company (*Porty Lotnicze "Mazury Szczytno"*) and Director of Szymany Airport throughout 2003 and 2004.[146] A source in Polish military intelligence said: "anyone who has contact with the Americans is our man. The Director [Kos] is our man". Another senior Polish official familiar with the arrangements explained to us:

> "Polish military intelligence operatives were appointed to these positions. We said to place them anywhere with importance to the way this programme is run. This is how you come to know Mr Kos as the Director at Szymany Airport."

173. Mr Jerzy Kos went on to become a director of the Polish private construction company "*Jedynka Wroclawska SA"* and was taken hostage in Iraq in June 2004 whilst pursuing company projects there. When Mr Kos was brought to safety shortly afterwards in a rare raid by US Special Forces,[147] media outlets reported that the rescue operation attested to Mr Kos' links to the intelligence services.[148] Indeed, my inquiry has been informed that Mr Kos' "connections with [the] Polish secret service" in his business affairs have been "confirmed quite unambiguously"[149] during judicial

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[143] One of the few means of verifying – through independent public sources – the fact that *JW-2669* was stationed at Stare Kiejkuty during this period is through photogrammetric studies of activity on Internet servers by users with particular "net-names". In outputs from such studies, *inter alia* of 23.10.2003, the "net-name" *JW-2669* is registered as being assigned to "Jednostka Wojskowa 2669, Stare Kiejkuty".

[144] For more information on the means used to cover up CIA flights into Poland, see section III.iii below, entitled "The anatomy of CIA secret transfers and detentions in Poland."

[145] As in many former communist countries, the secret services in Poland are accustomed to using networks of operatives and informants that span many of the most important institutions of the state, as well as the private sector. These networks comprise what is known as the "undercover community." For a description of this "crucial notion" in Poland, which the author refers to as "the security complex," see Zybertowicz, The Role of the Polish Intelligence Services, *supra* note 139, at pages 4-5.

[146] Between 2002 and 2004, the commercial company headed by Mr Kos shared responsibility for operating Szymany Airport with a military unit stationed on site. The airport had a mixed "civil-military" character, whereby aircraft registered as undertaking "military flights" were dealt with under special procedures.

[147] See, for example, Fox News, "Polish Iraq Hostage Praises US Rescuers", Warsaw, 10.06.2004; available at http://www.foxnews.com/story/0,2933,122359,00.html.

[148] The Italian press, for example, reported that Mr Kos was the "007 of Warsaw" and bore a "subcutaneous microchip" that allowed rescuers to trace the location at which he and his fellow hostages were being held; see *La Repubblica*, "Ostaggi liberati grazie a un microchip sottopelle", 16.06.2004, available at http://www.repubblica.it/2004/f/sezioni/politica/ostliberi2/chipinchiesta/chipinchiesta.html. On 15.06.2004 AP quoted Mr Kos himself as having said: "They [the kidnappers] thought I am an American co-operating with the CIA and I tried to explain that I am a Pole, that I was there to build houses."

[149] Letter to my inquiry from Justice Jaroslaw Horobiowski, Judge in the District Court for Wroclaw-Fabryczna (Bankrupty and Pre-insolvency Proceedings), dated 7.11.2006, copy on file with the Rapporteur. Mr Kos' business affairs given as examples by Justice Horobiowski in this regard are "his role [with] *Jedynka Wroclawska* in Iraq, his mysterious kidnapping, then [the] strange circumstances of his rescuing, and his being director of the (former military) airport in Szymany." Justice Horobiowski also states that the revelations about secret service connections were made by some former directors of the company.

proceedings[150] relating to the subsequent bankruptcy of *Jedynka Wroclawska*. As a military intelligence operative facilitating the uniquely sensitive covert actions of the CIA in Poland, Mr Kos was one link in a chain of operations that led right to the top of Polish Government.

ii. Responsible political authorities in Poland

174. During several months of investigations, our team has held discussions with various Polish sources, including civilian and military intelligence operatives, representatives of state or municipal authorities, and high-ranking officials who hold first-hand knowledge of the operations of the HVD programme in Poland. Based upon these discussions, which have come to the same conclusions, my inquiry allows me to state that some individual high office-holders knew about and authorised Poland's role in the CIA's operation of secret detention facilities for High-Value Detainees on Polish territory, from 2002 to 2005. The following persons could therefore be held accountable for these activities: the President of the Republic of Poland, Aleksander KWASNIEWSKI, the Chief of the National Security Bureau (also Secretary of National Security Committee), Marek SIWIEC, the Minister of National Defence (Ministerial oversight of Military Intelligence), Jerzy SZMAJDZINSKI, and the Head of Military Intelligence, Marek DUKACZEWSKI.

175. In my analysis the hierarchy for control of the Polish Military Information Services, or *WSI*, was chronically lacking in formal oversight and independent monitoring. As a result the structure described here from 2002 to 2005 depended to a great extent on close relationships of trust and professional familiarity, both among the Polish principals and between the Poles and their American counterparts. Several of our sources characterised the bonds between these four individuals as being a combination of loyal personal allegiance ("we all serve one another") and strong common notions of national duty ("… but first we serve the Republic of Poland").

176. There was complete consensus on the part of our key senior sources that President Kwasniewski was the foremost national authority on the HVD programme. One military intelligence source told us: "Listen, Poland agreed from the top down… From the President – yes… to provide the CIA all it needed." Asked whether the Prime Minister and his Cabinet were briefed on the HVD programme, our source said: "Even the *ABW* [Internal Security Agency] and *AW* [Foreign Intelligence Agency] do not have access to all of our classified materials. Forget the Prime Minister; it operated directly under the President."

177. Our investigations have revealed that the state office from which much of the strength of this Polish accountability structure derived was the **National Security Bureau** (*Biuro Bezpieczenstwa Narodowego, or BBN*), located in the Chancellery of President Kwasniewski. Our sources confirmed to us that the bilateral operational arrangements for the HVD programme in Poland were "negotiated on the part of the President's office by the National Security Bureau [*BBN*]."

178. Marek Dukaczewski, an outstanding military intelligence officer ultimately promoted to the rank of General, served the BBN in the Chancellery of his close friend Aleksander Kwasniewski for the first five years of the latter's Presidency, from 1996 to 2001. Mr Dukaczewski worked directly alongside Marek Siwiec during this period, whilst Mr Siwiec was a Secretary of State in the Presidential Chancellery and then became Chief of the BBN. Jerzy Szmajdzinski was appointed Minister of National Defence for Mr Kwasniewski's second term, in October 2001. Shortly afterwards, Mr Dukaczewski was nominated Head of the Military Information Services, the *WSI*, starting in December 2001.

[150] In addition to the statements in court, trade unionists wrote an open letter stating that Mr Kos' posting to Iraq may also have entailed some intelligence functions. See letter on behalf of *Jedynka Wroclawska SA* to Wroclaw Prosecutor Leszek Karpina, dated 26.04.2006, copy on file with the Rapporteur.

179. Besides this accountability structure, which remained in place from the immediate aftermath of the 11 September 2001 attacks throughout Poland's involvement in the CIA's covert HVD programme, probably no other Polish official had knowledge of it. Indeed, the "highest level of classification" at national and intergovernmental levels, understood to match NATO's "Cosmic Top Secret" category,[151] still attaches to the information pertaining to operations in Poland. Our unravelling of such secrecy to expose Polish participation in unlawful detention and transfer operations is perhaps the greatest testament to the "dynamics of truth" in motion. However an alternative interpretation, which provided my inquiry with motivation in the face of systematic cover-up, came in one of our most memorable moments of testimony from a top-level Polish source. He stated simply:

> "*Listen, there are no secrets in war. There is no intelligence in war. You cannot keep something secret in a time of conflict*."

iii. The anatomy of CIA secret transfers and detentions in Poland

180. Notwithstanding the approach of the Polish authorities towards this inquiry,[152] our team was able to uncover new documentary evidence from two separate Polish sources showing actual landings in Poland by aircraft associated with the CIA.

181. These sources corroborate one another and provide the first verifiable records of a number of landings of "rendition planes" significant enough to prove that CIA detainees were being transferred into Poland. I can now confirm that at least ten flights by at least four different aircraft serviced the CIA's secret detention programme in Poland between 2002 and 2005. At least six of them arrived **directly from Kabul, Afghanistan** during precisely the period in which our sources have told us that High-Value Detainees (HVDs) were being transferred to Poland. Each of these flights landed at the same airport I named in my 2006 report as a detainee drop-off point: **Szymany**.

182. The most significant of these flights, including the aircraft identifier number, the airport of departure (ADEP), as well as the time and date of arrival into Szymany, are the following:

i. N63MU from DUBAI, arrived in SZYMANY at 14h56 on 5 December 2002
ii. N379P from RABAT, arrived in SZYMANY at 02h23 on 8 February 2003
iii. N379P from KABUL, arrived in SZYMANY at 16h00 on 7 March 2003
iv. N379P from KABUL, arrived in SZYMANY at 18h03 on 25 March 2003
v. N379P from KABUL, arrived in SZYMANY at 01h00 on 5 June 2003
vi. N379P from KABUL, arrived in SZYMANY at 02h58 on 30 July 2003
vii. N313P from KABUL, arrived in SZYMANY at 21h00 on 22 September 2003
viii. N63MU from KABUL, arrived in SZYMANY at an unrecorded time on 28 July 2005

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[151] See NATO, Security within the North Atlantic Treaty Organisation, 17.06.2002, *supra* note 73; in Enclosure "B" – Basic Principles and Minimum Standards of Security, at p. 5, § 18(a). In NATO terms, the category of security classification attached to the bilateral operations of the HVD Programme is known as "COSMIC TOP SECRET (CTS)", a category for which "unauthorised disclosure would result in exceptionally grave damage" to NATO and / or to participating member States.

[152] The approach of the Polish authorities towards my inquiry is dealt with in further detail below. The official position of the Polish Government remains unchanged since it was announced on 10 December 2005: "The Polish Government strongly denies the speculation occasionally appearing in the media as to the existence of secret prisons on the territory of the Republic of Poland, supposedly used for the detention of foreigners suspected of terrorism. There are no such prisons in Poland and there are no prisoners detained in contravention of the laws and international conventions to which Poland is a party." Most recently it was reproduced in submissions before the United Nations Committee Against Torture (CAT) in Geneva; see *Written replies by the Government of Poland to the list of issues (CAT/C/POL/Q/4/Rev.1) to be taken up in connection with the consideration of the fourth periodic report of Poland (CAT/C/67/Add.5)*, UN Document CAT/C/POL/Q/4/Rev.1/Add.1, 30 March 2007, available at http://www.ohchr.org/english/bodies/cat/cats38.htm; response to Question 12, at page 23, § 72.

183. My first observation regarding the dates of these flights is that several of them conform closely to the dates on which particular "High-Value Detainees" (HVDs) were transferred to CIA "black sites," particularly in outward movements from Kabul, Afghanistan. The most conspicuous example pertains to the so-called "mastermind" of the 9/11 attacks, Khalid Sheikh Mohamed (KSM), who was captured in Rawalpindi, Pakistan on 1 March 2003[153]. Our insider sources have told that KSM was transferred to a secret CIA facility "within days" of his arrest; and from analysis of materials supporting the 9/11 Commission Report[154], we know that the process of interrogating him commenced shortly afterwards[155], and continued throughout 2003. It is noteworthy that the well-known rendition plane N379P undertook a clandestine flight from Kabul to Szymany on 7 March 2003, less than one week after KSM's arrest. Whilst it is not possible at this stage to state the fact definitively, it is likely that the transfer of KSM and several other HVDs into Poland throughout 2003 took place on the flights uncovered in this report.

184. The full extent of my proof, however, goes beyond merely the number of confirmed flights into Szymany and their concordance with suspected dates of HVD transfers. Through our careful analysis of hundreds of pages of raw aeronautical "data strings,"[156] we can now demonstrate that in the majority of cases these CIA flights were **deliberately disguised so that their actual movements would not be tracked or recorded** – either "live" or after the fact – by the supranational air safety agency Eurocontrol. The system of cover-up entailed several different steps involving both American and Polish collaborators.

185. The aviation services provider customarily used by the CIA,[157] **Jeppesen International Trip Planning**,[158] filed multiple "dummy" flight plans for many of these flights. The "dummy" plans filed by Jeppesen – specifically, for the N379P aircraft – often featured an airport of departure (ADEP) and / or an airport of destination (ADES) that the aircraft never actually intended to visit. If Poland was mentioned at all in these plans, it was usually only by mention of Warsaw as an alternate, or back-up airport, on a route involving Prague or Budapest, for example. Thus the eventual flight paths for N379P registered in Eurocontrol's records were inaccurate and often incoherent, bearing little relation to the actual routes flown and almost never mentioning the name of the Polish airport where the aircraft actually landed – Szymany.

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[153] On the capture of KSM, see *inter alia* B. Raman, "How significant is Khalid Sheikh's arrest?" on Rediff.com, 3.03.2003, available at http://in.rediff.com/news/2003/mar/03raman.htm; and BBC News Online, "Bush hails 'Al-Qaeda killer' arrest," 4.03.2003, available at http://news.bbc.co.uk/2/hi/south_asia/2817441.stm.

[154] The full report and records of the National Commission on Terrorist Attacks upon the United States (the "9/11 Commission") are available online at http://www.9-11commission.gov/. In particular, Chapters 5 and 7 of the Commission Report are said to "rely heavily on information obtained from captured Al-Qaeda members;" specifically ten detainees, including Khalid Sheikh Mohamed, "whose custody has been confirmed officially by the US Government." See the inset on "Detainee Interrogation Reports," in Chapter 5, at page 146. For specific dates on which KSM and other "high-value detainees" were interrogated, see, in particular, "Notes to Chapter 5", in Notes to the 9/11 Commission Report, at pages 488 to 499.

[155] Interrogations of KSM are dated as early as 12.04.2003, just over a month after his capture; see "Notes to Chapter 5", 9/11 Commission Report, *ibidem*. Further interrogations are dated at frequent intervals throughout 2003 and 2004.

[156] "Data strings" are exchanges of messages or digital data (mostly in the form of coded text and numbers) between different entities around the world on a network known as the AFTN (Aeronautical Fixed Telecommunication Network). "Data strings" record all communications filed in relation to each particular aircraft as its flights are planned in advance, and as it flies between different international locations. The filings come from diverse entities, including aviation service providers, ANS (Air Navigation Services) authorities, airport authorities and government agencies. I have obtained complete sets of "data strings" for about twenty flight circuits, which I selectively requested from the AFTN system. The selected circuits include each of the circuits featuring undeclared flights of CIA aircraft into Szymany, as well as circuits featuring landings in Romania and a large number of rendition operations pertaining to individual detainees whose cases I dealt with in my report of 2006. Our team has conducted an in-depth analysis of all these "data strings," together with information in the Marty database and in consultation with aviation experts.

[157] Jeppesen International Trip Planning is the travel service of Jeppesen Dataplan, an aviation services provider based in San Jose, California and a subsidiary of Boeing, the world's largest aerospace company. On 30 May 2007, the ACLU announced a lawsuit against Jeppesen Dataplan for its involvement in the renditions of three individuals: Ahmed Agiza, Binyam Mohamed and El-Kassim Britel. See American Civil Liberties Union, "ACLU Sues Boeing Subsidiary for Participation in CIA Torture and Kidnapping," 30 May 2007, available at http://www.aclu.org/safefree/torture/29920prs20070530.html. For the first revelations about Jeppesen's involvement in CIA detainee transfers, including the rendition of Khaled El-Masri, see Jane Mayer, "Outsourcing: The CIA's Travel Agent", in *The New Yorker*, 30.10.2006, available at http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer. The Managing Director of Jeppesen is quoted in the article as having said: "*We do all the extraordinary rendition flights – you know, the torture flights. Let's face it, some of these flights do end up that way.*"

[158] Communications, notably flight plans, filed by Jeppesen International Trip Planning are identified in the AFTN system by the use of the company's "originator address," which is KSFOXLDI.

186. The **Polish Air Navigation Services Agency** (*Polska Agencja Zeglugi Powietrznej*), commonly known as PANSA, also played a crucial role in this systematic cover-up. PANSA's Air Traffic Control in Warsaw[159] navigated all of these flights through Polish airspace, exercising control over the aircraft through each of its flight phases[160] right up to the last phase, when control was handed over to the authority supervising the airfield at Szymany,[161] immediately before the aircraft's landing. PANSA navigated the aircraft in the majority of these cases without a legitimate and complete flight plan having been filed for the route flown.

187. Moreover, in certain instances PANSA took on the **responsibility of filing the onward flight plan for the next leg of the circuit after Szymany**. We know that PANSA filed such flight plans in instances where Szymany had been omitted completely from the original Jeppesen flight plans, and where the aircraft was required to fly onwards from Szymany to a destination outside Poland. Similarly in at least one instance where the aircraft flew onwards from Szymany to Warsaw – and thus did not require initially to leave Polish airspace – PANSA simply navigated the onward flight without a flight plan.

188. It is also noteworthy that Jeppesen appears to have followed PANSA's contributions to these operations very closely, acting upon responses from the flight management system to PANSA's communications within minutes of their being received. Furthermore, both Jeppesen and PANSA have co-ordinated their actions with the in-flight communications from the aircraft's Pilot-in-Command.[162]

189. Accordingly, several circuits we have analysed show the following "sequencing" of flight navigation responsibilities for a typical circuit of N379P involving a landing at Szymany, which demonstrate a calculated cover-up of the aircraft's movements:

- Jeppesen files flight plans for every element of the circuit up to and including N379P's return to Europe from Kabul; typically Jeppesen's flight plan(s) from Kabul onwards reflect fictitious routes, featuring false airports of destination and departure that are registered in the Eurocontrol flight management system;
- N379P's Pilot-in-Command then flies from Kabul into Polish airspace, at which point the Polish authorities (PANSA) take over to navigate the aircraft to a landing at Szymany Airport without a corresponding flight plan, but in conjunction with Polish military authorities in Warsaw and on the ground;
- PANSA also handles onward flight planning for N379P's departure from Szymany, either by navigating the aircraft to a stopover in Warsaw or by filing a flight plan for its next international destination, such as Prague or Larnaca;
- Jeppesen resumes its planning role once N379P has left Szymany, filing flight plans for the remaining elements of the circuit, starting from either Warsaw or the first international airport after Szymany, continuing until the aircraft's return to its base in the United States.

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[159] The entire national airspace of Poland comprises one single Flight Information Region (FIR), denoted by the four-letter code EPWW. Poland therefore has only one Area Control Centre (ACC). All air traffic into Poland is controlled by the Polish Air Navigation Services Agency, PANSA, from its Air Traffic Management Centre at Warsaw Airport. For an excellent overview of Polish Air Traffic Control, see PANSA, "Air Traffic Control", available at http://www.polatca.pansa.pl/kontrola_eng.htm.

[160] We have identified the relevant "data strings" communications about these flights being sent from the AFTN address "EPWAZPZX", which denotes the "Approach Control Centre – Air Traffic Service Reporting Office at Warsaw Airport". In addition to the phase of general "Region Control" for all of Poland, the phase of "Approach control" for Szymany Airport, during which the movements of all civil or military aircraft are controlled within a specified range of the airport, is dealt with from Warsaw. Szymany Airport does not meet the criteria (i.e. passenger airports that maintain fixed flight connections) to have its own Approach Control unit so it relies on the unit at Warsaw Airport.

[161] We have identified the relevant "data strings" communications about these flights being sent to the AFTN address "EPSYYDYX", which denotes the "Authority Supervising the Aerodrome at Szymany Airport". Several airport officials who were present at Szymany Airport when these flights arrived in 2003 have told us that their notification came from military sources in Warsaw and that all arrangements for the landings were handled using special military units on the ground. Polish Air Traffic Control explains these procedures in the following terms: "Military operations carried out in the military aerodrome zones are controlled by a military unit that directly co-operates with the Approach Control." From our Polish insider sources, we know that the Director of Military Operations, working with PANSA Approach Control in Warsaw, as well as key officials in the Border Guards who notified Szymany of the landings, and military officers who took over from civilian officials at Szymany to deal with them on the ground, were working on behalf of Polish military intelligence in collaboration with the CIA.

[162] We have been able to establish through our investigations that the men registered as Pilot-in-Command (PIC) for the undeclared flights into Szymany are established CIA pilots. We have records of their full names and have been able similarly to vouch for their engagement as pilots in multiple detainee transfer operations involving other countries. We have also confirmed their appearance on flight manifests with known CIA "rendition teams" by referring to documents provided to us confidentially from on an ongoing judicial inquiry in a Council of Europe member State.

190. The analysis of "data strings" has also enabled me to confirm further intricate details of the "anatomy" of these CIA clandestine operations. For example, each of these flights was operated under a "special status" or STS designation.[163] The aircraft were thereby exempted from adhering to the normal rules of air traffic flow management (ATFM), and did not, for example, have to wait at airports for approved departure slots. Since such exemptions are only granted when "specifically authorised by the relevant national authority,"[164] they provide further evidence of Polish complicity in the operations. The clearest proof of Poland's knowledge and authorisation of such landings is demonstrated by the following two-line message, contained in several "data strings" for flights of N379P in 2003:

> **"STS/ATFM EXEMPT APPROVED**
> *POLAND LANDING APPROVED"*

191. "Data strings" have also enabled us to trace the official overflight and landing permits obtained from various other countries for these flights; the times and "waypoints" at which the aircraft entered or departed the national airspace of each country; and the actual routes flown between Szymany and other points on the "global spider's web". I have used all of this information to create the graphic representations of "Disguised CIA flights into Szymany Airport, Poland,"[165] which accompany this report as an appendix.

192. In concluding this section it is only fitting that I should note here, with considerable regret, that the cover-up of CIA flights into Szymany seems to have carried over into the approach adopted by the Polish authorities towards my inquiry on the specific question of national aviation records. In over eighteen months of correspondence, Poland has failed to furnish my inquiry with any data from its own records confirming CIA-connected flights into its airspace or airports. The excuses from the Polish authorities for having failed to do so unfortunately do not seem to be credible.

193. In my report of 2006, I commented that the absence of flight records from Poland was "unusual,"[166] to say the least. Mr Karol Karski, Chairperson of the Polish Delegation to PACE, suggested that I "did not use the information received from Poland honestly"[167] and stated, in his subsequent correspondence, that he hoped to "answer [my] request exhaustively" having "addressed one more time the relevant Polish authorities and asked for proper information". He then repeated a familiar undertaking:

> "I would like to assure you that I will transmit to you the complete data as soon as I will be provided with it."[168]

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[163] The status of the flight goes to the all-important question as to whether the function it is performing is considered to be "state," "civilian" or "military." These undeclared flights into Szymany, which we understand to have been operated as "military flights", eased their passage into Poland by securing exemptions as "special status", or STS, flights. STS designators are very strictly limited, because once granted they allow deviations from planned routes and other important exemptions. See Eurocontrol, User Relations and Development Bureau, *IFPS Users Manual*, Edition No. 11.2, 30.03.2007 (hereinafter "Eurocontrol IFPS Users Manual"), available at http://www.cfmu.eurocontrol.int; at Section 50, "Special Status Flights (STS)", p. 50-1.

[164] The particular STS indicator used by flights into Szymany was "AFTMEXEMPTAPPROVED". According to Eurocontrol: "*This exemption designator shall only be used with the proper authority. Any wrongful use of this designator to avoid flow restriction shall be regarded by the relevant states as a serious breach of procedure and shall be dealt with accordingly.*" See Eurocontrol IFPS Users Manual, *Ibidem*, at Section 54, "STS/AFTMEXEMPTAPPROVED Indicator", p. 54-1.

[165] See Appendix No. 1 to the present report, entitled "Disguised CIA flights into Szymany Airport, Poland."

[166] See Marty Report 2006, Council of Europe Doc. 10957, *supra* note 6, at section 2.6.2, "The case of Poland", §§ 63 to 75, pages 20 to 21.

[167] Contribution of Mr Karol Karski, Chairperson of the Delegation of Poland to PACE, at the 17th Sitting of the Plenary of the Parliamentary Assembly during its 2006 Session, Strasbourg, 27.06.2006.

[168] Letter to me from Mr Karol Karski, Chairperson of the Polish Delegation to PACE, 28.12.2006.

194. After several further months passed,[169] Mr Karski ultimately responded with the following three items of information:[170]

- "the Polish Government has definitively closed the investigation into alleged secret CIA prisons and in this connection, once again explicitly denies all speculations appearing in the media";
- "the European Parliament's Temporary [TDIP] Committee… has all the information available to the Polish side, concerning the aircraft listed in [your] letter"; and
- "the registers of flight movements over the territory of Poland in 2001 to 2005 are in Eurocontrol databases."

195. This response of the Polish authorities is patently unsatisfactory. The third item of information is belied by the findings I have presented above, along with the accompanying graphic and data in the annex. Meanwhile the second statement suggests that the Polish Government is attempting to deceive both the CoE and the European Parliament by playing the institutions off against one another.[171]

196. On the whole, Mr Karski's response casts the Polish authorities in a negative light, whichever one of two possible conclusions I might choose to draw. Is the Polish Government unable to lay its hands on official data from Polish sources, which our team successfully uncovered and which at least one airport official is publicly known[172] to possess? Or have the Polish authorities willfully withheld valuable information from my inquiry? I strongly hope that the Polish authorities now take the situation in hand and retrace fully the unfolding of this situation and establish respective responsibilities.

a. Transfer of HVDs into CIA detention in Poland

197. Our enquiry regarding Poland included talks with Polish airport employees, civil servants, security guards, Border Guards and military intelligence officials who hold first-hand knowledge of one or more of the undeclared flights into Szymany. Their testimonies are crucial in establishing what happened in the time after these CIA-associated aircraft landed at Szymany. The following account is a compilation of testimonies from our confidential sources about these events.

b. Arrivals and "drop-offs" at Szymany Airport

- Each of these landings was preceded, usually less than 12 hours in advance, by a telephone call to Szymany Airport from the Warsaw HQ of the Border Guards (*Strazy Granicznej*), or a military intelligence official, informing the Director Mr Jerzy Kos of an arriving "American aircraft"
- The airport manager, who assumed the flights were coming from the United States, was instructed to adhere to "strict protocols" to prepare for the flights, including: clearing the runways of all other aircraft and vehicles; and making sure that all Polish staff were brought in to the terminal building from the vicinity of the runway, including local security officials and airport employees
- The perimeter and grounds of the airport were secured by military officers and Border Guards, the latter of whom were registered on a roll-call document that lists names of those present on more than five dates between 2002 and 2005
- American officials from the nearby Stare Kiejkuty intelligence training base assumed "control" on the dates in question, arriving in several passenger vans in advance of the landing; "everything Americans," said one Polish source present for several landings, "even the drivers [of the vans] were Americans."
- A "landing team" comprising American officials waited at the edge of the runway, in two or three vans with their engines often running; the aircraft touched down in Szymany and taxied to a halt at

[169] On 14.03.2007, I sent a reminder letter to Mr Karski on this issue, concluding: "*I respectfully urge you to re-emphasise to the Polish authorities the importance of sending me a swift and comprehensive reply to my letter, along with the requested data.*"
[170] Letter to me from Mr Karol Karski, Chairperson of the Polish Delegation to PACE, 28.03.2007.
[171] When I read that "*all the information on the Polish side*" had been given to the EP's TDIP Committee, I recalled the resolution adopted on 12.02.2007 by the very same Committee, in which it regrets that "*contradictory statements were made about the flight plans for those CIA flights, which were first said not to have been retained, then said probably to have been archived at the airport, and finally claimed to have been sent by the Polish Government to the Council of Europe.*" See European Parliament Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (A6-0020/2007 – Rapporteur: Giovanni Claudio Fava), 12.02.2007, at § 172. It is scarcely credible for the Polish Government to practice such evasion towards me and my fellow Parliamentarians.
[172] See Tom Hundley, "Remote Polish airstrip holds clues to secret CIA flights," *Chicago Tribune*, 6.02.2007, available at http://www.chicagotribune.com/news/nationworld/chi-0702060187feb06,1,1986708.story The article says: "Jaroslaw Jurczenko, the airport's director, denied that flight records had ever been lost for the mysterious landings and provided the *Tribune* with documentation for seven of the flights in question."

the far end of the runway, several hundred metres (and out of visible range) from the four-storey terminal control tower

- The vans drove out to the far end of the runway and parked at close proximity to the aircraft; officials from within the vans were said to have boarded the aircraft "every time", although it is not clear whether any then stayed on board
- All the officers charged with "processing" the passengers on these aircraft were Americans; no Polish eye-witness has yet come forward to state whether or not any detainees disembarked the aircraft upon any of these landings – indeed, it may be that no Polish eye-witness to such an event exists
- However, asked where the HVDs actually entered Poland, one of our sources in Polish military intelligence confirmed that "it was on the runway of Szczytno-Szymany"; another said "they come on planes and they entered at this airport"
- Documentation, in Polish, attests to persons having been "picked up" [verbal translation] at Szczytno-Szymany in conjunction with at least two aircraft landings in 2003; the documentation also refers to the dispatch of vehicles to the airport from the military unit stationed at the Stare Kiejkuty facility
- Having spent only a short time next to the aircraft after each landing, the vans then drove back past the side of the terminal building, without stopping, before leaving airport premises through the front security gate; the vans put their "headlights up to full level" and airport officials say they "turned our eyes away"
- The vans then drove less than two kilometres along a simple tarmac road, lined by thick pine forest on both sides, through an area which was entirely out of bounds to private or commercial vehicles during these procedures, having been cordoned off for "military operations"; at the end of the tarmac road, the vans travelled north-east beyond Szczytno for approximately 15 to 20 minutes before joining an unpaved access road next to a lake;[173]
- at the end of this access road they reached an entrance of the Stare Kiejkuty intelligence training base, where multiple sources have confirmed to me that the CIA held High-Value Detainees (HVDs) in Poland.

c. Secret detention operations at Stare Kiejkuty

198. The stringent limitations on information about what happened to detainees "dropped-off" at Szymany are perhaps the best example of the "need-to-know" principle of secrecy in practice. Polish officials were not involved in the interrogations or transfers of HVDs, nor did they have personal contact. In explaining his understanding of HVD treatment or conditions in detention, one Polish source said:

> "I have no understanding of detainee treatment. We were not "treating" the detainees. Those were the responsibilities of the Americans."

199. We were told that senior Polish military intelligence officials who visited Stare Kiejkuty were ordered to "limit rotation and operational demands on Polish officers to make the HVD programme work." Beyond this fleeting insight, however, neither Polish nor American sources who discussed the HVD programme with us would agree to speak about the exact "operational details" of secret detentions at Stare Kiejkuty, nor would they confirm how long it was operated for, which other facilities were used as part of the same programme in Poland, nor how and when exactly the detainees left the country.

[173] A member of our team re-traced the route from Szymany Airport to the Stare Kiejkuty intelligence training base.

200. The legacy of the HVD programme in Poland is palpable in the self-perceptions of those Polish officials who participated in its operations. The members of military intelligence with whom we spoke seemed, on one level, to be in denial as to whether secret detentions in violation of Poland's human rights obligations had taken place in their country; yet, on another level, they showed signs of resentment mainly that their American allies had betrayed their bond of trust by leaking details of the programme. These contradictory sentiments, often difficult to gauge accurately, are aptly captured by the following statement:

> "*The [Stare Kiejkuty] base was America's choice; our job was their security. If any American is here, it is America's responsibility, but he also becomes Poland's responsibility too. So it is my responsibilty…*"

IV. Secret detention operations in Romania

i. Partnering with military intelligence in Romania

201. In Romania, after the December 1989 Revolution and the dismantling of the repressive *Securitate* in 1990, the reforms of the intelligence services were focussed, understandably, on preventing the politicisation and abuse of internal state security structures. Similarly, much of the subsequent discussion around democratic oversight in the country has looked at ways of controlling "institutional actors and leading political figures with authority over the security and intelligence domain who disregard the legal stipulations regarding political neutrality."[174]

202. As I have analysed Romania's complex array of different agencies and sub-structures that collect intelligence for the state,[175] I have realised that preserving political neutrality is merely one of a variety of competing considerations that affect the objectivity and effectiveness of their accountability structures.[176] In the context of my inquiry, it seems to me that while Romania has made at least superficial efforts to rid its civilian intelligence services of the scourges of their *Securitate* past, its oversight mechanisms do not go far enough to prevent the exercise of what could be called "unitary executive authority" – on the part of the President – over military intelligence services and the wider defence community.

203. This analysis conforms to the testimony of our Romanian sources, who said that the Americans **chose to work with the military intelligence services because the military "cover" afforded the CIA flexible deployment options and guarantees of secrecy under the NATO framework**. As the following comparison shows, there are substantial disparities between the respective monitoring mechanisms in the civilian and military spheres.

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[174] See Larry Watts, Office of the National Security Advisor of the Romanian President, "Control and Oversight of Security Intelligence in Romania", Working Paper No. 111, published by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, February 2003, copy on file with the Rapporteur (hereinafter "Watts, Oversight of Security Intelligence in Romania"), at p. 27. The author recommends that "real sanctions should be introduced and enforced" in such instances where rule of law is subverted by political considerations.

[175] There are at least six different secret services in Romania, several of them housed under individual Government Ministries. The agencies that I have not discussed specifically in this section include the General Directorate of Intelligence and Internal Protection (*Directia Generala de Informatii si de Protectie Interna, or DGIPI*) in the Ministry of the Interior, and the Independent Protection and Anti-Corruption Agency (*Serviciul Independent de Protectie si Anticoruptie, or SIPA*) in the Ministry of Justice.

[176] For a much more developed discussion of the relevant considerations, see: European Commission for Democracy through Law (Venice Commission), "Report on the Democratic Oversight of the Security Services", Study No. 388/2006, CDL-DEM(2007)001, 24.05.2007. In its concluding remarks, the Commission highlights "recurring issues in the design of oversight procedures", as follows: "First is the need to establish mechanisms to prevent political abuse while providing for effective governance of the agencies. Overall, the objective is that security and intelligence agencies should be insulated from political abuse without being isolated from executive governance;" and "the challenge for oversight and accountability is to adapt or devise processes that simultaneously command democratic respect while protecting national security;" at pp. 49-50, § 215 to 226. (Soon to be issued as CDL-AD(2007)016 – to be made available on http://venice.coe.int.

204. First, in the civilian sphere, Romania's two main agencies of the post-Communist era, the Romanian [Domestic] Intelligence Service (*Serviciul roman de informatii, or SRI*) and the Foreign Intelligence Service (*Serviciul de informatii externe, or SIE*) were created under specific laws[177] and a multi-layered oversight structure, which purport to immunise them from manipulation along party-political lines. The SRI and the SIE operate independently of Government and are not subordinated to the incumbent executive. They are each subjected to parliamentary scrutiny through dedicated Special Parliamentary Committees.[178] The **Supreme Council of National Defence** (*Consiliul Suprem de Aparare a Tarii, or CSAT*), an autonomous administrative body chaired by the non-partisan Office of the President,[179] organises and continually monitors the activities of the SRI and the SIE, in line with its mandate to co-ordinate the overall national security and defence of the country. As such, the possibilities for a handful of people at the heart of Government to use the SRI or the SIE to pursue their own personal, political or strategic agenda are exceedingly narrow.

205. In contrast, intelligence gathering in the military sphere is a competence formally overseen by the Ministry of National Defence,[180] through its **General Directorate for Defence Intelligence** (*Directia Generala de Informatii a Apararei, or DGIA*). What little parliamentary scrutiny of defence intelligence is supposed to exist[181] certainly does not apply to its organisational, planning or operational aspects. On the contrary, strict compatibility with NATO structures, insisted upon as a criteria for NATO accession, means that the majority of Romanian military intelligence activities are kept secret from all but those who "need to know".

206. According to our sources, the relevant sub-unit of the DGIA that worked with the CIA on its clandestine operations was the **Directorate for Military Intelligence and Representation** (*Directia Informatii si Reprezentare Militara, or DIRM*), also known as the **"J2" Unit**. This unit was not involved in transporting, holding or interrogating any detainees – since these were tasks performed solely by the Americans – but, according to one Romanian officer, the "J2" officers "co-operated and adjusted" to accommodate the CIA personnel's needs.

207. As part of a wider restructuring of the DGIA in 2003,[182] the "J2" unit increased in scope and importance at a very strategic moment in Romania's co-operation with the United States, just as American forces were deploying into the country in large numbers to launch their aerial missions into Iraq for Operation Iraqi Freedom.[183] The place at which these US forces were stationed, the 86th **Air Force Base at Mihail Kogalniceanu Airfield**,[184] became the most significant point in the country for a whole range of collaborative activities in a "partnership" between Romanian and American personnel.

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[177] For the SRI, see the *Law on the Organisation and Functioning of the Romanian Intelligence Service (SRI)*, Law No. 14/1992; for the SIE, see the *Law on the Organisation and Functioning of the Foreign Intelligence Service (SIE)*, Law No. 1/1998.

[178] For the SRI, see the *Decision of the Romanian Parliament on the Organisation and Functioning of the Joint Committee of the Senate and the Chamber of Deputies for Parliamentary Oversight of the Romanian Intelligence Service (SRI)*, Decision No. 30/1993; for the SIE, see the *Decision of the Romanian Parliament on the Organisation and Functioning of the Special Committee for Parliamentary Oversight of the Foreign Intelligence Service (SIE)*, Decision No. 44/1998. Indeed, some commentators say that the increased transparency and growing public trust in the SRI and the SIE owe largely to the strength of these parliamentary accountability mechanisms. See, for example, Watts, Oversight of Security Intelligence in Romania, *Ibidem*: "Romania's semi-presidential system has proven itself capable of blocking the over-accumulation and over-centralisation of power by government executives."

[179] In addition to the President (Chair), the membership of the CSAT includes: the Prime Minister (Vice-Chair); the Ministers of Defence, Economy and Commerce, Finance, Justice, Interior and Administrative Reform, and Foreign Affairs; the Directors of the SRI and SIE; the Presidential Advisor on National Security; and the Chief of General Staff; see the CSAT website at: http://csat.presidency.ro/. The CSAT is regulated under a 2002 statute - Law No. 415/2002 – and its activities are themselves reported regularly to the Parliamentary Committee for Defence, Public Order and Security. For further discussion on related matters, see also Karoly Szabo, "Parliamentary Overview of Intelligence Services in Romania," workshop paper published by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), delivered at the workshop on "Democratic and Parliamentary Oversight of Intelligence Services", Geneva, 3-5.10.2002, copy on file with the Rapporteur.

[180] The Ministry of National Defence (*Ministerul Apararii Nationale*) was renamed as the Ministry of Defence (*Ministerul Apararii*) in April 2007. I have used its old name, which applied in the period in question.

[181] Formally speaking, military intelligence activities are supposed to be subject to the same parliamentary scrutiny as all the activities of the Ministry of National Defence, namely through the Committees on Defence, Public Order and National Security in both the Senate and the Chamber of Deputies of the Romanian Parliament. In reality, these Committees are far removed from the actual work of the *DGIA* services.

[182] See, for example, Doru Dragomir, "Hurricane in the Army's Secret Services", Bucharest Ziua, 9.04.2003, at p. 9; available online at http://www.ziua.net/.

[183] Between February and June 2003, United States Armed Forces (both airforce and ground troops) deployed an expeditionary group for operations in Iraq at the 86th Air Force Base – Mihail Kogalniceanu Airfield ("MK Airfield"), near Constanta, Romania. According to Romanian military personnel at the airfield, the deployment reached up to "5,000 bodies" at its peak, albeit that most of the troops were only there temporarily, or in transit. MK Airfield was used for the purpose of "regrouping and resupplying air deployments before entering action in theatre in Iraq."

[184] At the time of Operation Iraqi Freedom, and up until 27.04.2004, MK stood on its own as the 57th Air Force Base of the Romanian Air Force. From 1.05.2004, the self-standing air force base at MK was "disbanded" and Romanian military air traffic

208. A noteworthy aspect of this partnership was that everything was carried out under the NATO framework. The deployment at MK Airfield in February 2003 was authorised in a Memorandum of Understanding signed by President Ion Iliescu in late 2002, in which the terms of NATO-SOFA and the bilateral SOFA-Supplemental were expressly referenced. "NATO concepts" were applied to the deployment, including MK's designation as an APOD / APOE,[185] and the phase being referred to as "regrouping." Most important of all, a **Joint Operations Centre** was established in which American and Romanian personnel "from each and every branch" of their respective armed forces and services worked together side-by-side throughout the Operation, sharing operational knowledge **in strict accordance with the NATO Security Policy**.

209. Members of the Directorate for Military Intelligence, the "J2" Unit, participated in the Joint Operations Centre,[186] which – as our American sources confirmed – also received "visits"[187] from operatives of the CIA's Counterterrorist Centre (CTC) between February and June 2003. While the whole four-month period of Operation Iraqi Freedom at MK Airfield was characterised as "a military activity in support of a military operation," the relationships formed and strengthened between members of the respective intelligence services – both individually and collectively – were just as indispensable in the broader context of the "war on terror."[188] The Operation was construed as a welcome "dry-run" for Romania in NATO and for potential future bilateral actions between the partners.

210. Continuity in the evolving relationship between American and Romanian services can perhaps best be illustrated by highlighting the role of the then Head of the Directorate of Military Intelligence and Representation (*Sef al Directiei de Informatii si Reprezentare Militara*), **Sergiu Tudor Medar**. General-Lieutenant Medar served in the United States for seven years in the 1990s, heading the Office of the Romanian Defense Attache in Washington, DC until 1999. Between 2000 and 2003 he headed the original incarnation of the Directorate of Military Intelligence in the DGIA; then from 2003 until the end of 2005 he was Head of the restructured "J2" Unit. General-Lieutenant Medar was a prescient choice for the CIA as a liaison for secret detention operations in Romania: not only was he trusted beyond doubt in both US and NATO military circles; he was also, as the following quote attests, aware of the potential perils of partnering with military intelligence to achieve an essentially political goal:

> "The civilian leadership's tendency in using its control over intelligence for political purposes is likely to be even bigger than its desire to keep the military component under its firm control. Some equilibrium must be established between the professional experience of the Military Intelligence Service and the authority of the civilian political leadership."[189]

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reduced significantly, as part of wider restructuring in the Ministry of National Defence. The MK Airfield is therefore now administered from Fetesti as an extension of the 86th Air Force Base; the only active unit located at MK is the 863 Helicopter Squadron.

[185] APOD stands for Aerial Port of Debarkation; APOE stands for Aerial Port of Embarkation. Under NATO concepts these references mean that MK Airfield was hosting primarily transport aircraft that were bringing in and shipping out personnel and equipment.

[186] Confirmed in interviews by the Rapporteur's representative with Romanian military personnel stationed at MK Airfield. Military intelligence was the second of nine categories of military staff that participated in the Joint Operations Centre. The other categories were: personnel, operations, logistics, planning, communications, training, finance and budget, and "cimic" – or civil-military co-operation.

[187] Visits by US official's to Romanian facilities in the context of their classified bilateral arrangements are regulated under the NATO framework and the *Agreement on the protection of military classified information* of 21 June 1995 (entered into force in 2003). See "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20 January 2006; at page 1. Article 5(1) of the 1995 Agreement states as follows: "The authorisation for "visits" by one party to units or installations of the other party where access to state classified military information is necessary, will be limited to official purposes… [and] to government officials both parties have agreed upon."

[188] One example of how Romanian military intelligence continued to collaborate with the United States in the "war on terror" was Parliament's endorsement in March 2004 of President Iliescu's proposals to send a special military intelligence detachment of 30 officers to serve in the International Security Assistance Force (ISAF) in Afghanistan. See Rompres News Agency, Bucharest, "Parliament approves Romanian military intelligence unit for Afghanistan," reproduced on BBC Monitoring, 2.03.2004, available at http://www.roembus.org/english/news/international_media/2004/march/02/BBC_Monitoring_20_03_2004_Parliament%20approves%20Romanian%20military%20intelligence%20unit%20for%20Afghanistan.htm.

[189] See Sergiu Medar, "The role of military intelligence in the process of military and political-military decision-making" (original in Romanian), internal document of the Directorate for Military Intelligence, Bucharest, 2000; cited in Florin Ureche, "Civilian Control over Military Intelligence Services", in *Romanian Military Thinking*, April 2006, pp. 63-74, copy on file with the Rapporteur; at p. 68.

ii. Responsible political authorities in Romania

211. During several months of investigations, our team has held discussions with numerous Romanian sources, including civilian and military intelligence operatives, representatives of state and municipal authorities, and high-ranking officials who hold first-hand knowledge of CIA operations on the territory of Romania. Based upon these discussions, my inquiry has concluded that the following individual office-holders knew about, authorised and stand accountable for Romania's role in the CIA's operation of "out-of-theatre" secret detention facilities on Romanian territory, from 2003 to 2005: the former President of Romania (up to 20 December 2004), Ion ILIESCU, the current President of Romania (20 December 2004 onwards), Traian BASESCU, the **Presidential Advisor on National Security** (until 20 December 2004), Ioan TALPES, the **Minister of National Defence** (Ministerial oversight up to 20 December 2004), Ioan Mircea PASCU, and the **Head of Directorate for Military Intelligence**, Sergiu Tudor MEDAR.

212. Collaborating with the CIA in this very small circle of trust, Romania's leadership in the fields of national security and military intelligence effectively **short-circuited the classic mechanisms of democratic accountability**. Both of the political principals, President Iliescu and National Security Advisor Talpes, sat on (and most often chaired) the CSAT - the Supreme Council of National Defence – throughout this period, yet they withheld the CIA "partnership" from the other members of that body who did not have a "need to know." This criterion excluded the majority of civilian office-holders in the Romanian Government from complicity at the time. Similarly, the Directors of the respective civilian intelligence agencies, the SRI and the SIE, were not briefed about the operational details and were thus granted "plausible deniability".

213. We were told that the confidants on the military side, Defence Minister Pascu and General-Lieutenant Medar, had concealed important operational activities from senior figures in the Army and powerful structures to which they were subordinated. According to our sources, "co-operation with America in the context of the NATO framework" was used as a general smokescreen behind which to hide the operations of the CIA programme.

214. Sergiu Medar's role here merits special attention. Of the four named offices of state in which individuals held knowledge of the CIA's programme, Medar was the only office-holder who "crossed over" from the Presidency of Ion Iliescu to the Presidency of Traian Basescu. Medar remained Head of the "J2" Unit for another year after the handover of power to President Basescu on 20 December 2004; indeed, it appears that he stayed in position right through to the clear-out of the European "black sites", which we believe to have occurred in November or early December 2005.

215. It is also worth commenting on General-Lieutenant Medar's close relationship with the current President Traian Basescu. When Basescu assumed office, in December 2004, his very first Presidential Decree granted Sergiu Tudor Medar the decorated status of Three-Star General. In 2005 Basescu appointed Medar as his National Security Advisor and, in 2006, selected him as the first Head of the consolidated National Intelligence Directorate. Relationships of trust, loyalty and familiarity are vital to the preservation of secrecy, as the NATO Security Policy makes clear.

216. Ioan Talpes, the then **Presidential Advisor on National Security** (*Consilierul prezidential pentru securitate nationala*), was also an instrumental figure in the CIA programme from its inception. According to our sources, Talpes guided President Iliescu's every decision on issues of NATO harmonisation and bilateral relations with the United States; it has even been suggested that Talpes was the one who initiated the idea of making facilities on Romanian soil available to US agencies for activities in pursuit of its "war on terror." After December 2004, although Talpes no longer acted as the Presidential Advisor on National Security, he quickly become Chair of the Senate Committee on Defence, Public Order and National Security, which meant that he exercised at least a theoretical degree of "parliamentary oversight" over his own successor in the Advisor role.

217. Several of our Romanian sources commented that they felt proud to have been able to assist the United States in detaining "high-value" terrorists – not only as a gesture of pro-American sentiment, but also because they thought it was "in the best interests of Romania."

218. Those involved in the programme further recounted fond tales of how the US has recognised their individual contributions over the years: some Romanian officials were invited to CIA Headquarters at Langley, Virginia where they received awards; most got to meet key figures in the Bush Administration, at home and abroad; and at least one high-level group of delegates from Bucharest accepted personal thanks from President Bush in the Oval Office.

iii. The anatomy of CIA secret transfers and detentions in Romania

a. Creating a secure area for CIA transfers and detentions

219. When the United States Government made its approach for the establishment of a "black site" in Romania – offering formidable US support for Romania's full accession into the NATO Alliance as the "biggest prize" in exchange – it **relied heavily upon its key liaisons in the country** to make the case to then President Iliescu. As one high-level Romanian official who was actually involved in the negotiations told us, it was "proposed to the President that we should provide full protection for the United States from an intelligence angle. Nobody from the Romanian side should interfere in these [CIA] activities".

220. In line with its staunch support under the NATO framework, Romania entered a bilateral "technical agreement" with the intention of giving the US the full extent of the permissions and protections it sought. According to one of our sources with knowledge of the arrangement, there was an

> "… order [given] to our [military] intelligence services, on behalf of the President, to provide the CIA with all the facilities they required and to protect their operations in whichever way they requested …".

221. From extensive discussions with our Romanian sources, I understand that the manner of protection requested by the CIA was for Romanian military intelligence officers on the ground to create an area or "zone" in which the CIA's physical security and secrecy would be impenetrably protected, even from perceived intrusion by their counterparts in the Romanian services. A source in Romanian military intelligence described the notion of a "secure area" as follows:

> "We were the ones responsible for proper security for the CIA operations. It is not possible for we Romanians to enter or to see inside the area. Americans can come and go, no interference, no restriction – anything is possible. It is normal, because they are our allies, the Americans, yes."

222. The precise location and character of the "black site" were not, to the best of my knowledge, stipulated in the original classified bilateral arrangements between Romania and the United States. Our team discussed those questions with multiple sources and we believe that to name a location explicitly would go beyond what it is possible to confirm from the Romanian side. One senior source in military intelligence objected to the notion that anyone but the Americans would "need to know" this information:

> "But I tell you that our Romanian officers do not know what happened inside those areas, because we sealed them off and we had control. There were Americans operating there free from interference – only they saw, only they heard – as regards the prisoners."

223. Nonetheless we were able to confirm the approximate borderlines of the CIA's "outer perimeter" for its secure area in Romania. We were assisted by a source in military intelligence, a detailed map and an annex to the Access Agreement of 2005, in which reference is made to "facilities"[190] generally and to one relevant "manoeuvre area" in particular.[191] Our source used his right index finger to draw an invisible elliptical perimeter on the map, which encompassed a vertical column between the towns of Tulcea (to the north) and Constanta (to the south), as well as an area extending approximately 50 kilometers inland (to the west) and in the opposite direction to the Black Sea coast (to the east).[192] Referring to the role of the Romanian "J2" Unit in supporting bilateral arrangements with the CIA, our source said: *"We have to seal [this] entire area and limit access there."*

224. The secure area in question includes several current and former military installations, including all of those facilities named in the Access Agreement of 2005, which have been used by the United States under a "special regime of access" since late 2001.[193] Nonetheless, the main reason that led one of our CIA sources to say that his "guys were familiar with the area" was its inclusion of the landing point at which scores of civil and military flights carrying American service personnel have landed throughout the "war on terror": Mihail Kogalniceanu Airfield.

225. In the light of all that I have said above about MK Airfield, I only wish to draw attention to one further factor that has made it a venue so conducive to "partnership" with the CIA: its "dual" military-civilian character.[194] Military personnel worked routinely with civilian Air Traffic Controllers in processing both civil and military flights at the Airfield – each according to the applicable aviation rules. The system used at MK Airfield bears great similarities, albeit on a much smaller scale, to the system used at Kabul Airport (OAKB),[195] which became such a hub in the context of coalition military activities in Afghanistan and simultaneously a destination or departure point for multiple known renditions of CIA detainees on board civilian aircraft since the start of the "war on terror".

226. During the period of interest to my inquiry – from 2002 until 2005 – the civilian section of the MK Airfield had a Director General with a formidable "dual" civil-military character of his own. **Rtd. Colonel Mircea Dionisie** was a former controlling **Commander of the military Air Force Base** at MK Airfield in the communist pre-1989 era. He returned to the Airfield in 2002 and became the **Director General of the civilian airport**, now known as *Aeroportul International Mihail Kogalniceanu Constanta* (AIMKC).[196] Rtd. Colonel Dionisie stayed in this position until 12 July 2005 and therefore oversaw the bulk of the flights into and out of the MK Airfield, the exact movements of which – as well as their connections to CIA detainee transfers – my inquiry has attempted to trace.

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[190] The four named facilities are as follows: Smardan Training Range; Babadag Training Area and Rail Head; Mihail Kogalniceanu Air Base, co-located with 34th Mechanised Brigade Base; and Cincu Training Range.

[191] See "Annex A – Facilities", the first of two annexes to the Access Agreement between Romania and the United States, 6.12.2005, at p. 9. Under the last of the four named facilities, Cincu Training Range, the "manouvre area" is described as follows: "comprised of areas in Tulcea and Constanta counties ("Judetul" in Romanian), bounded generally by the towns of Babadag in the north, Babadag Training Area in the east, Tariverde in the south and Horia in the west."

[192] In total, the perimeter line encompasses an area of about 1,500 square kilometers of territory in south-eastern Romania. See Appendix No. 2 to the present report, entitled "The 'secure zone' for CIA transfers and detentions in Romania."

[193] See the discussion on bilateral NATO SOFA arrangements between Romania and the United States earlier in this report, at section II.iii.b, entitled "Application of the NATO framework in Romania."

[194] The "dual use" character of MK Airfield dates back to 1961, when the Romanian Ministry of National Defence handed over the following elements of the airfield to the civilian authorities of Constanta International Airport: the runway / landing strip; the "parking aprons" for both light and heavy aircraft; the terminal buildings, including the Air Traffic Control Tower; and the main entrance / exit points from the adjacent highway. This restructuring created two "sections" on the MK Airfield: a civilian section and a military section. According to our discussions with Romanian military personnel stationed at the MK Airfield, the civilian and military sections keep one another informed only "for operational reasons [e.g. use of the runway] and on a need-to-know basis." These personnel told us that "*everybody plays by the rules, and that is one of the main reasons for the military side's close co-operation with the civilian side.*"

[195] It is a little known fact that Romanian personnel managed and operated Kabul Airport as one of their tasks in the context of their NATO deployment, 2004 to 2006. Our team spoke with a senior military officer who was seconded directly from MK Airfield to serve for several months at OAKB.

[196] Denoted by the ICAO code "LRCK". *Aeroportul International Mihail Kogalniceanu Constanta* (AIMKC) is the new name of the airport. It was previously called simply *Aeroportul International Constanta* (AIC), but – according to its current Director General – took on the additional MK in its name in order to benefit from the "free publicity" generated by the media scandal over CIA flights allegedly having landed at MK Airfield. Mihail Kogalniceanu was the first President of Romania and – in addition to the MK Airfield – also gave his name to a town about 50 kilometres north of Constanta. Romanians tell me it was the first town in the country to have an entirely literate population.

b. Transfer of detainees into Romania: the cover-up persists

227. Our efforts to obtain accurate actual flight records pertaining to the movements of aircraft associated with the CIA in Romania were characterised by obfuscation, inconsistency and genuine confusion. I must begin this assessment, however, by commending my colleagues and their assistant in the Romanian Delegation to PACE and, in particular, its Chairperson Gyorgy Frunda, for demonstrating exceptional good faith and professionalism, and for extending the very best of co-operation and assistance to my inquiry. It is unfortunate that the Romanian authorities more generally did not match the levels of thoroughness and transparency shown by this Delegation.

228. Specifically I hold three principal concerns with the approach of the Romanian authorities towards the repeated allegations of secret detentions in Romania, and towards my inquiry in particular. In summary, my concerns are: far-reaching and unexplained inconsistencies in Romanian flight and airport data; the responsive and defensive posturing of the national parliamentary inquiry, which stopped short of genuine inquisitiveness; and the insistence of Romania on a position of sweeping, categorical denial of all the allegations, in the process overlooking extensive evidence to the contrary from valuable and credible sources.

229. First I was confounded by the clear **inconsistencies in the flight data** provided to my inquiry from multiple different Romanian sources. In my analysis I have considered data submitted directly from the Romanian Civil Aeronautical Authority (RCAA),[197] data provided by the Romanian Senate Committee,[198] and data gathered independently by our team in the course of its investigations. I have compared the data from these Romanian sources with the records maintained by Eurocontrol, comprehensive aeronautical "data strings" generated by the international flight planning system, and my complete Marty Database. The disagreement between these sources is too fundamental and widespread[199] to be explained away by simple administrative glitches, or even by in-flight changes of destination by Pilots-in-Command, which were communicated to one authority but not to another. There presently exists **no truthful account of detainee transfer flights into Romania**, and the reason for this situation is that the Romanian authorities probably do not want the truth to come out.

[197] See, for example, *Information from the records of the Romanian Civil Aeronautic Authority (RCAA) and the Romanian Ministry of National Defence*, contained as Appendices to the letters sent to me by Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, dated 24.02.2006 and 7.04.2006.

[198] The committee to which I refer is the "Senate Committee of Inquiry to investigate the allegations regarding the use of Romanian territory for CIA detention facilities or flights by CIA-chartered aircraft", established under Article 1 of Decision No. 29 of the Senate, Parliament of Romania, 21.12.2005 (hereinafter referred to as the "Senate Inquiry Committee"). The Chairperson of the Committee was Senator Norica Nicolai, supported by Vice-Chair George Cristian Maior and Secretary Ilie Petrescu. The Committee released its final report on 5.03.2007 (hereinafter "Senate Inquiry Committee Final Report, 5.03.2007" – page numbers refer to the original, Romanian version), a copy of which was submitted as an attachment to Senator Nicolai's letter to me dated 20.03.2007. My inquiry was also provided with copies of most of the annexes to the final report, including substantial information from airport authorities, handling service providers and the national Air Traffic Services Administration (ROMATSA). I am grateful to Senator Nicolai for facilitating access for my inquiry to important information in Romania.

[199] In my letters to the Romanian authorities, I highlighted crucial inconsistencies in flight data relating to the movements of a host of CIA-linked aircraft in Romania, including N313P, N379P and N85VM. The documentation I received back from the Senate Inquiry Committee helps to establish certain landings, but is not authoritative enough to state categorically the exact paths flown by these aircraft, nor the full list of locations in Romania at which they did or did not land. I cannot, for example, content myself with "evidence" that aircraft changed their routes or destinations based on hand-written annotations on flight plans. In several cases I have "data strings" attesting to communications relating to these aircraft that do not correspond with the Senate Inquiry Committee's version of events.

230. I found it especially disappointing that the Senate Inquiry Committee chose to interpret its mandate in the rather restrictive terms of defending Romania against what it called "serious accusations against our country, based solely on 'indications', 'opinions', 'probabilities', 'extrapolations' [and] 'logical deductions'."[200] In particular, the Committee's conclusions are not framed as coherent findings based on objective fact-finding, but rather as "clear responses to the specific questions raised by Mr Dick Marty,"[201] referring to both my 2006 report and subsequent correspondence. Accordingly the categorical nature of the Committee's "General Conclusions,"[202] "Conclusions based on field investigations and site visits"[203] and "Final Conclusions"[204] cannot be sustained. The Committee's work can thus be seen as an exercise in denial and rebuttal, without impartial consideration of the evidence. Particularly in the light of the material and testimony I have received from sources in Romania, the Committee does not appear to have engaged in a credible and comprehensive inquiry.

231. The Romanian national delegation to PACE, in their carefully worded reply, ruled out the existence of unlawful CIA activity,[205] and appeared to offer prospects of constructive and transparent co-operation in the search for the truth. However the Romanian Government and Parliament have preferred to keep control of information by directing everything through the Senate Committee,[206] and ultimately reverted to their initial position of complete denial.[207]

[200] See Senate Inquiry Committee Final Report, 5.03.2007, *supra* note 200, at Chapter 2, "References to Romania", page 5.
[201] See Senate Inquiry Committee Final Report, 5.03.2007, *supra* note 200; generally at Chapter 5, "Conclusions reached by the Committee based on its documentation and monitoring activities"; and specifically at pages 10, 11, 12 and 13.
[202] By way of example, the first general conclusion states categorically: "Neither the Romanian Civil Aeronautic Authority nor any other institutions or structures of state with relevant competences in the field investigated by the Committee has any knowledge about civilian aircraft operated or chartered by the CIA or by any other company on behalf of the CIA, landing or flying over national territory;" *Ibidem*, at page 10.
[203] The Committee rules out embarkation or disembarkation of any passengers on the key flights listed in the Marty Report of 2006, and states that aircraft associated with the CIA landed only in Bucharest. With regard to MK Airfield, the Committee "concludes that there is no facility that could have been used for the purpose of detention, not even on an ad-hoc basis. Moreover, none of the flights considered suspicious by the Marty Inquiry, by NGOs or by the media has ever landed at this airport;" *Ibidem*, at page 11. Among other evidence, our team obtained records of actual flights into MK Airfield by aircraft associated with the CIA, which directly contradicts the Committee's claim.
[204] Final Conclusion No. 5 states as follows: "On the question of whether certain Romanian institutions could have participated knowingly or participated through omission or negligence in unlawful detainee transfer operations in Romanian airspace or at Romanian airports, the Committee's response is negative;" *Ibidem*, at page 14. It should be noted that other final conclusions are not so categorical, however, particularly with regard to whether secret detention facilities could have existed in locations other than the grounds or immediate vicinity of the named airports.
[205] See *inter alia* "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, to Dick Marty, 20.01.2006; pp. 5 to 6. The language of such submissions was carefully worded so as not to exclude the types of CIA operations I have described in this report: *"No Romanian authority has any knowledge or information about any aircraft illegally transporting prisoners. No Romanian authority has been, legally or illegally, involved in secret transportation of prisoners… The Romanian Government has never issued any authorisation for any transport of prisoners via Romania."*
[206] In two written decisions, on 14 and 21.11.2006, the Romanian Senate rejected the requests of the Romanian Delegation to PACE to respond to my correspondence directly, and instead assigned to the Senate Committee the sole authority for preparing Romania's official responses. These decisions were followed by a four-month period during which we received no communications, ended only by Senator Nicolai's submission of the Final Report by letter dated 20.05.2007.
[207] At the end of my inquiry, the official position of Romania has developed no further than the original denials it adopted at the beginning. See "Response of the Romanian Government on the investigation initiated by the Secretary General of the Council of Europe, in accordance with Article 52 ECHR", appended to the letter from Mihal-Razvan Ungureanu, Romanian Minister of Foreign Affairs, to Terry Davis, 15.02.2006; at page 4: *"… no public official or other person acting in an official capacity has been involved in any manner in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty… Official investigations have been conducted by several Government authorities [whose] results confirmed that no such activities took place on Romanian territory."*

V. Human rights abuses involved in the CIA secret detention programme

i. Re-humanising the people held in secret detention

232. The policy of secret detentions and renditions pursued by the current US administration has created a dangerous precedent of dehumanisation. Many of the people caught up in the CIA's global spider's web[208] are rightly described as "ghost prisoners"[209] because they have been made invisible for many years.[210]

233. Meanwhile the US Government's descriptions of its captives in the "war on terror" can only serve to exacerbate this dehumanising effect. The Administration routinely speaks of "aliens", "deadly enemies" and "faceless terrorists," with the clear intention of dehumanising its detainees in the eyes of the American population. The NGO community, for its part, calls them "ghost prisoners".

234. By characterising the people held in secret detention as "different" from us – not as humans, but as ghosts, aliens or terrorists – the US Government tries to lead us into the trap of thinking they are not like us, they are not subjects of the law, therefore their human rights do not deserve protection.

235. President Bush has laid this trap on multiple occasions as a means of diverting attention from the abusive conditions in which certain detainees in US custody are being held.[211] Our team heard first-hand how distinctions are drawn in the mind of guards and interrogators: in an interview with one of our CIA sources who has extensive knowledge of detainee treatment, we asked whether a known form of detainee treatment should be considered as abusive. "*Here's my question,*" replied our source. "*Was the guy a terrorist? 'Cause if he's a terrorist then I figure he got what was coming to him. I've met a lot of them and one thing I know for sure is that they ain't human – they ain't like you and me*."

236. Yet what has struck me most often as I have examined the cases of scores of people held in secret detention – some of whom I have met – is precisely the opposite: these detainees' ordeals have affected me profoundly as I have always thought of them as fellow human beings. The worst criminals, even those who deserve the harshest punishment, must be given humane treatment and a fair trial. This, moreover, is what makes us a civilised society.

237. It is for these reasons that we must combat their being seen as "ghost prisoners" by repeatedly pointing out that persons detained in the course of counter-terrorist operations are and remain human beings whose human rights must be protected and who are entitled to humane treatment as laid down in the ECHR. In this section of my report I have set out expressly to place the emphasis on the human aspects of these people held in secret detention.

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[208] For the most comprehensive and authoritative known list of persons detained at one point by the United States, and whose fate and whereabouts remain unacknowledged, see the following report produced jointly by six leading human rights organisations: Amnesty International, Cageprisoners, Center for Constitutional Rights, Center for Human Rights and Global Justice at NYU School of Law, Human Rights Watch and REPRIEVE, "Off the Record – US Responsibility for Enforced Disappearances in the 'War on Terror'," 7 June 2007, available at http://www.chrgj.org/docs/OffRecord/OFF_THE_RECORD_FINAL.pdf.

[209] See, for example, various reports by Human Rights Watch: most recently "Ghost Prisoner – Two Years in Secret CIA Detention", HRW Volume 19, No. 1(G), February 2007, available at: http://hrw.org/reports/2007/us0207/us0207webwcover.pdf; and earlier "List of 'Ghost Prisoners' possibly in CIA custody", 30 November 2005, available at http://hrw.org/english/docs/2005/11/30/usdom12109.htm.

[210] In its report entitled "USA / Yemen: Secret Detention in CIA 'Black Sites'", Amnesty International described how one detainee had been transformed from a person his father described as a "very gentle man, who is always laughing", to someone who sat through an encounter with "never even the ghost of a smile on his face". See AI Index: AMR 51/177/2005, 8 November 2005, available at http://web.amnesty.org/library/index/engamr511772005; at page 2.

[211] The speech delivered by President Bush on 06.09.2006 is a prime example of the type of rhetoric used to convince the audience that the people in US custody are inhuman and undeserving of empathy. The speech is strewn with references to "dangerous men", "terrorist enemies" and "those who kill Americans". Talking about Guantanamo Bay, President Bush states: "It's important for Americans and others across the world to understand the kind of people held". In his conclusion, President Bush states: "The adversaries are different… We're fighting for the cause of humanity, against those who seek to impose the darkness of tyranny and terror upon the entire world."

ii. Reconstructing the conditions in a CIA secret detention cell

238. We must try to visualise the ordeal of secret detention in order to be able to appreciate fully the physical and psychological plight of its victims. For this purpose, I am attempting in this section to reconstruct as many aspects as possible of the conditions in a CIA secret detention cell.

239. A reconstruction of this nature is the first step towards regaining respect for fundamental human rights, because it forces us to ask ourselves the question: "what if the tables were turned?" This is the root of the Geneva Conventions and the military's traditional reluctance to mistreat prisoners of war.

240. In this context, the policy debate in the United States around detainee treatment has given rise to interesting contributions, many of which rightly assert that "*issues of detainee treatment raise profound questions of American values*".[212] In the US political sphere, the McCain Amendment[213] to the Detainee Treatment Act seems to offer us a threshold for the specific acts that we should and should not allow with regard to the detention, transfer and interrogation of foreign captives. This threshold can be summarised as follows:

> If even one single American captive were to be held under these conditions or treated in this manner, and the American population would find it abhorrent or unacceptable, then America should not be practising the acts in question against detainees whom it holds from other countries.

241. The fact of being detained outside any judicial or ICRC control in an unknown location is already a form of torture, as Louise Arbour, UN High Commissioner for Human Rights has said. All the member states of the Council of Europe have a duty not to tolerate such treatment either on their territory or elsewhere.

242. In the following paragraphs I seek to convey the most intimate, always undeniably human experiences of being held and interrogated in such conditions. I have grouped these conditions under the following five thematic headings: confinement, isolation and insufficient provision; careful physical conditioning of detainee and cell; permanent surveillance; mondane routine becomes unforgettable memories; and exertion of physical and psychological stress.

243. The descriptive testimonies on which the text is based have been kept strictly anonymous – largely upon the request of those who provided them – in order to protect the sources from which they emanate. These sources are mostly former or current detainees, human rights advocates, or people who have worked in the establishment or operations of CIA secret prisons.

244. The persons who endured these ordeals have also been granted anonymity. The following conditions and characteristics applied to several persons in every case, not specifically to any one individual.

iii. Confinement, isolation and insufficient provision

245. Detainees were taken to their cells by *strong people who wore black outfits, masks that covered their whole faces, and dark visors over their eyes.* Clothes were *cut up and torn off;* many detainees were then kept naked for *several weeks*.

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[212] See, most notably: Kenneth Anderson and Elisa Massimino, "The Cost of Confusion: Resolving Ambiguities in Detainee Treatment", part of the series entitled *Bridging the Foreign Policy Divide*, The Stanley Foundation, March 2007, available at http://www.stanleyfoundation.org/resources.cfm?ID=212; hereinafter "Anderson and Massimino, "Resolving Ambiguities in Detainee Treatment".

[213] The McCain Amendment, as it is popularly known, was the initiative of Republican Senator John McCain, who himself had been held captive during the Vietnam War. The Amendment passed before the United States Senate on 5 October 2005 (90 votes in favour, 9 against), but its force was weakened due to the use of a Presidential Signing Statement in which President Bush said that his "*constitutional authority*" as Commander in Chief took precedence in "*protecting the American people from further terrorist attacks*."

246. Detainees were only a bucket to urinate into, a bowl from which to eat breakfast and dinner (delivered at intervals, in silence) and a blanket.

247. Detainees went through months of *solitary confinement and extreme sensory deprivation* in cramped cells, shackled and handcuffed at all times.

248. Detainees were given *old, black blankets* that were too small to lie upon at the same time as attempting to cover oneself.

249. Detainees received *unfamiliar food, like canned beef and rice*, many only ate in order to give some warmth against *cruel cold weather*.

250. Food was *raw*, *tasteless* and was often tipped out *carelessly on a shallow dish so part of it would waste*. Apart from a *thin foam mattress* to lie on or rest against, many cells had a bare floor and blank walls.

251. At one point in 2004, eight persons were being kept together in one CIA facility in Europe, but were administered according to *a strict regime of isolation*. Contact between them through sight or sound was *forbidden… and prevented* unless it was expressly decided to create *limited conditions where they could see or come into contact with one another because it would serve [the CIA's] intelligence-gathering objectives to allow it*.

252. A common feature for many detainees was the *four-month isolation regime*. During this period of over 120 days, absolutely no human contact was granted with anyone but masked, silent guards. *There's not meant to be anything to hold onto. No familiarity, no comfort, nobody to talk to, no way out. It's a long time to be all alone with your thoughts.*

a. Careful physical conditioning of detainee and cell

253. In the process of being transferred into secret detention, all detainees are *physically screened* in order to assess their health and conditioning, identify any injuries or scars they may bear, and *get a complete picture to compare them against once they are in detention*. These screenings, for which the subject is stripped naked, used a *body chart*, similar to the inventory diagrams provided by rent-a-car companies upon leasing a vehicle, on which specific marks are noted. In every case, the subject is videotaped or at least photographed naked before transfer.

254. The air in many cells emanated from a ventilation hole in the ceiling, which was often controlled to produce extremes of temperature: *sometimes so hot one would gasp for breath, sometimes freezing cold.*

255. Many detainees described *air conditioning for deliberate discomfort*.

256. Detainees were exposed at times to *over-heating in the cell*; at other times *drafts of freezing breeze*.

257. Detainees never experienced natural light or natural darkness, although most were *blindfolded many times so they could see nothing*.

b. Permanent surveillance

258. Detainees speak hatefully about the *surveillance cameras*, positioned so that *in every inch of the cell they would be observed*.

259. Detainees were also listened to by interrogators, over *hidden microphones in the walls*.

260. Notwithstanding the presence of video cameras inside the cells, masked prison guards regularly *looked in and knocked on the door of the cell, demanding detainees to raise their hands to show that they are alive*.

c. Mundane routines become unforgettable memories

261. Breakfast was delivered in the morning, followed by lunch in the early afternoon. The morning food was typically *two or three triangles of cheese with no foil, two slices of tomato, some boiled potatoes, bread and olives*. The afternoon food was typically *boiled white rice with sliced luncheon meat*.

262. On some special occasions, including certain religious holidays, special foods including cooked meat with sauce, nuts and dates, fresh fruit and vegetables, or pieces of chocolate were delivered to the cells. There was even provision for treats *like unwrapped candy bars and dessert cakes*.

263. Special routines developed around the delivery of food. The light bulb, which was *always on*, would be briefly turned off; the food would be delivered; and then the light bulb would be turned back on again. There was a hatch in the door of the cell for delivery of food but it was *completely unpredictable whether the guards would use the hatch, or open the doors and bring the food in*.

264. Detainees had a bucket for a toilet, which was *about a foot deep and ten inches in diameter*.

265. At time the electricity supply went dead. The music stopped and the light went out. For a brief period one could heard *different voices shouting*, some more distant than others but all incoherent.

d. Exertion of physical and psychological stress

266. There was a *shackling ring* in the wall of the cell, about half a metre up off the floor. Detainees' hands and feet were clamped in *handcuffs and leg irons*. Bodies were regularly forced into *contorted shapes* and chained to this ring for long, painful periods.

267. Most persons in CIA custody attempted sooner or later to resist or protest their treatment and interrogation. Yet their efforts would largely be in vain. According to one source involved in CIA interrogation: "*you know they are starting to crack when they come back at you; when they get really vocal or they try to challenge your authority. So you hold out… you push them over the edge*".

268. The sound most commonly heard in cells was *a constant, low-level hum of white noise from loudspeakers*. Other recollections speak of an external *humming noise*, like aircraft, engines or a generator. The constant noise was punctuated by blasts of *loud Western music* – rock music, rap music and *thumping beats*, or *distorted verses from the Koran*, or *irritating noises – thunder, planes taking off, cackling laughter, the screams of women and children*.

269. Detainees were subjected to *relentless noise and disturbance* were deprived of the chance to sleep.

270. The *torture music* was turned on, or at least *made much louder*, as punishment for perceived infractions *like raising one's voice, calling out, or not waving quickly enough when guards demanded a response from you*.

271. The gradual escalation of *applied physical and psychological exertion*, combined in some cases with more *concentrated pressure periods* for the purposes of interrogation, is said to have caused many of those held by the CIA to develop enduring psychiatric and mental problems.

VI. Secrecy and cover-up: how the United States and its European partners evade responsibility for CIA clandestine operations

i. A case study of Khaled El-Masri

272. The circumstances of the abduction of German citizen Khaled El-Masri are exposed in some detail in my first report of June 2006[214]. At that time it had not been possible to determine the exact circumstances of Mr El-Masri's return to Europe.

273. We believe we have now managed to retrace in detail Mr El-Masri's odyssey and to shed light on his return to Europe: if we, with neither the powers nor resources, were able to do so, why were the competent authorities unable to manage it? There is only one possible explanation: they are not interested in seeing the truth come out.

a. Exposing El-Masri's secret "homeward rendition" to Europe

274. In addition to reporting on the system of secret detentions in CoE member States, my inquiry also set out to shed light on one of the unsolved mysteries of the "global spider's web," captured by the following question: In the course of its covert operations, how does the CIA return home a detainee whom it concedes to have been an innocent victim of erroneous rendition and secret detention?

275. Our case study is that of the German citizen Khaled El-Masri, whose ordeal at the hands of the UBK[215] in "the former Yugoslav Republic of Macedonia" and the CIA in Afghanistan, from 1 January to 28 May 2004, I documented in comprehensive detail in my report last year.[216] We were able to prove the involvement of the CIA in Mr El-Masri's transfer to Afghanistan by linking the flight that carried him there – on the aircraft N313P, flying from Skopje ("the former Yugoslav Republic of Macedonia") to Baghdad (Iraq) to Kabul (Afghanistan) on 24 January 2004 – to another known CIA detainee transfer on the same plane two days earlier, thus establishing the first "rendition circuit."[217]

276. Upon Mr El-Masri's arrival in Afghanistan, he was taken to a CIA secret detention facility near Kabul and held in a "small, filthy, concrete cell"[218] for a period of over four months. During this period the CIA discovered that no charges could be brought against him and that his passport was genuine,[219] but inexplicably kept Mr El-Masri in his squalid, solitary confinement for several weeks thereafter.

277. Mr El-Masri told us about his eventual release on 28 May 2004 in as much detail as he was able to recollect,[220] but there were naturally some important unanswered questions in his account, precisely because the CIA did not want him to know what was happening to him. Mr El-Masri was blindfolded throughout his return flight to Europe, immediately bundled into the back of a van upon arrival and driven for several hours "up and down mountains, on paved and unpaved roads." The men who transported him in the van spoke a language he did not recognise. When his blindfold was eventually removed Mr El-Masri found himself in unfamiliar, mountainous terrain, in the dark,

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[214] *Supra* note 6, pp. 25-29.
[215] UBK stands for Uprava za Bezbednosti I Kontrarazuznavanje; it is the Security and Counter-Intelligence Service of the Former Yugoslav Republic of Macedonia.
[216] See the Marty Report 2006, *supra* note 6, at pp. 25 to 32, §§ 92 to 132.
[217] I used the phrase "rendition circuit" to describe consecutive detainee transfer operations by the same CIA-linked aircraft in quick succession. For more details, see the Marty Report 2006, *supra* note 6, at pages 18 to 19, §§ 52 to 55. Also see Appendix No. 1 to the same report, "Flight logs related to the Successive Rendition Operations of Binyam Mohamed and Khaled El-Masri in January 2004."
[218] For a full description of Khaled El-Masri's ordeal in his own words, see Declaration of Khaled El-Masri in support of Plaintiff's Opposition to the United States' Motion to Dismiss, in *El-Masri v. Tenet et al*, Eastern District Court of Virginia in Alexandria, 6.04.2006 (hereinafter "El-Masri statement to US Court in Alexandria, 06.04.2006"), available at http://www.aclu.org/pdfs/safefree/elmasri_decl_exh.pdf.
[219] Several news media outlets have published insider accounts of the process by which the CIA learned of their mistake but failed to act to rectify it. See, for example, NBC Investigative Unit, "CIA accused of detaining innocent man – If the Agency knew he was the wrong man, why was he held?" 21.04.2005. The article states: "In March [2004]… the CIA finally finished checking his passport and found it was not a fake… The CIA realised it had the wrong man, a genuine German citizen, in custody… Condoleezza Rice learned of the mistake and ordered El-Masri's immediate release… But that didn't end the case. About two weeks later, Rice learned El-Masri was still being held and ordered him released again. In late May [2004], he was finally freed."
[220] Our team has spent many hours meeting with Khaled El-Masri, notably between March and May 2006, during which he has courageously recounted his experiences to us. We have also met extensively with his German lawyer, Manfred Gnjidic, and his American attorneys at the American Civil Liberties Union (ACLU) in New York. We are grateful to all of them for their commitment and assistance to our inquiry.

instructed to walk along an isolated path without looking over his shoulder. He said he feared that he was "about to be shot in the back and left to die," with nobody having any idea of how he had got there.

278. In the ensuing three years, Mr El-Masri's case has been investigated and reported extensively, including by the *Untersuchungsausschuss* of the German Bundestag and by German prosecutors, both of which I shall address below. Yet a key piece of the jigsaw, namely the means by which Mr El-Masri was returned from Afghanistan to an unknown point in Europe[221], has eluded investigators until now.

279. Today I think I am in a position to reconstruct the circumstances of Mr El-Masri's return from Afghanistan: he was flown out of Kabul on 28 May 2004 on board a CIA-chartered Gulfstream aircraft with the tail number **N982RK to a military airbase in Albania called Bezat-Kuçova Aerodrome**.[222] We have obtained primary data on this extraordinary homeward rendition from three separate sources and we are able to publish the relevant flight logs from the Marty Database as an appendix to this report.[223]

280. Our team was first alerted to an unusual "flight circuit" through European airspace on the date in question by a submission from the national aviation authorities of Bosnia and Herzegovina (BiH).[224] The submission cited three "diplomatic permissions for state aircraft," which it said had been issued in relation to "flight movements for the needs of CIA, USA." The most relevant of these permissions, of which I subsequently obtained a copy,[225] was described as follows:

> "On the 26 May 2006 permission [was] issued to the company "RICHMON AVIATION" [sic] for traveller charter flight on the day of 28 May 2004. Line: Auki/Gwaunaru'u – Sarajevo – Prag. Aircraft type: Gulsstrim III, Registration N982RK, which is also its call sign."

281. Three elements of this permission caught our attention: the role of the charter company Richmor Aviation;[226] the outlandish notion that a Gulfstream III would fly to Sarajevo from the Solomon Islands airport of Auki/Gwaunaru'u;[227] and the mention of 28 May 2004, which we knew as the date on which Khaled El-Masri was released. The first of these elements was the key to our locating the flight logs for the N982RK aircraft; the second was evidence of a smokescreen on the part of the CIA to cover up the aircraft's actual arrival from Bezat-Kuçova Aerodrome; and the third was the match we had been looking for to solve the mystery of the circumstances of Mr El-Masri's return to Europe.

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[221] See El-Masri statement to US Court in Alexandria, 06.04.2006, at p. 21. "Sam", a German-speaking official who accompanied Mr El-Masri on this flight, told him that he "would eventually land in a European country but that it would not be Germany itself."

[222] The military airbase in question appears to have two variations on its name: the first is Bezat-Kuçova; the other is Berat-Kuçovë. The airbase is denoted by the ICAO code LAKV. It is situated in the south of Albania, between the towns of Vlorë and Korcë, about 40 miles (64 km) south of the capital Tirana. The airbase underwent a comprehensive renovation and upgrade between 2002 and 2004 in order to bring it into line with NATO standards, as part of Albania's NATO accession process.

[223] See Appendix No. 3 to the present report, entitled "Flight logs related to the secret 'homeward rendition' of Khaled El-Masri in May 2004."

[224] Submission No. 02-292.7-525-6/06, "Report on flight movements", prepared by Mr Dorde Ratkovic, Director General, Directorate for Civil Aviation in the BiH Ministry of Transport and Communications, Sarajevo, 17.05.2006; attached to the letter to me from Mr Elmir Jahic, Chairperson of the BiH Delegation to PACE, Sarajevo, 14.06.2006.

[225] Permission No. 292.7-361/04 issued by Hasan Hedzepagic, Senior Advisor for Flight Authorisation, Directorate for Civil Aviation in the BiH Ministry of Transport and Communications, Sarajevo, 26.05.2004, sent as a fax to "Richmon [sic] Aviation", USA; attached to the letter to me from Aljosa Campara, Secretary General of the BiH Delegation to PACE, "Report on flight movements – copies of permissions issued", Sarajevo, 8.01.2007.

[226] We were familiar with Richmor Aviation as the operator of the aircraft with the tail number N85VM, which was used in the CIA's rendition of the Egyptian cleric Abu Omar on 17.02.2003. See Appendix No. 4 to the Marty Report 2006, "Flight logs related to the rendition of Abu Omar."

[227] Quite apart from the fantastical route, the N982RK aircraft's maximum flight capacity of 6 hours 52 minutes, as listed in the "data strings" I have obtained, would make it impossible to complete this journey.

282. We have since received confirmation from CIA insiders that Albania was indeed the country to which the Agency opted to send Mr El-Masri from Afghanistan. We were told by these American sources that originally the CIA had asked "the former Yugoslav Republic of Macedonia" whether it would accept a "reversal" of the January 2004 rendition, but that this approach was instantly rejected: *"You can imagine that was the last thing the Macedonians wanted! They had no reason to take the problem back."*

283. The CIA's second choice of Albania was favourable from a geographical point of view since it opened the option to drive Mr El-Masri to the Macedonian border immediately upon arrival and thus set him free in a state of disorientation that might diminish his credibility if he went public with his story. From a policy point of view, Albania has also proven to be a willing bilateral partner in providing the United States with a "dumping ground"[228] for its unwanted detainees in the "war on terror." At least eight former inmates of Guantanamo Bay remain stranded in Albania[229] because their refugee status does not allow them to go home to their families.

284. At the end of his own ordeal, Mr El-Masri was not shot in the back but instead confronted by police guards at a checkpoint on what appeared to be the border between "the former Yugoslav Republic of Macedonia" and Albania. From there he was driven for about six hours to Tirana, Albania's capital city, and sent home to Germany on a commercial flight from Mother Theresa Airport to Frankfurt. He received a boarding card for this final flight and an Albanian exit stamp in his passport for 29 May 2004.

285. There have been other new developments concerning in particular the activities of the prosecutor's office in Munich, the proceedings in the German Bundestag's parliamentary committee of inquiry (*Untersuchungsausschuss/UA)*, Mr El-Masri's civil lawsuit against the CIA before US courts, and, last but not least, his personal situation.

286. The case against Mr El-Masri's kidnappers before the Munich prosecutor's office is still pending. Upon the initiative of the prosecutor, international arrest warrants were launched against 13 suspected CIA agents in January 2007.[230] The Bavarian judicial authorities did not in any way interfere with the launch of these arrest warrants, but no progress has as yet been made in apprehending the persons concerned or even identifying them by their actual names.

287. In Germany – in contrast to Italy - it is not possible to try suspects *in absentia*. In reply to a formal request for judicial cooperation addressed to the Macedonian authorities in early 2006, the prosecutors were given only the "official version" of the events as already publicly stated by the authorities.[231]

288. Nor has any progress been made in identifying "Sam", the German-speaking agent who, it is claimed, accompanied Mr El-Masri home from Afghanistan[232]. It was revealed recently[233] that then Interior Minister Schily was personally present in Kabul at the time when "Sam" announced to Mr El-Masri that he would soon be repatriated. But the prosecutor sees no link between Mr Schily's presence and the allegations made by Mr El-Masri himself that "Sam" was in fact a German federal agent.

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[228] The phrase "dumping ground" is used by the US lawyer of five Uighur Muslims from western China who were sent to Albania in May 2006 upon their release from Guantanamo Bay; see BBC News Online, "Albania takes Guantanamo Uighurs", available at http://news.bbc.co.uk/2/hi/americas/4979466.stm.

[229] See, for example, BBC News, "Guantanamo refugee rues asylum deal," 18.05.2007, available at http://news.bbc.co.uk/2/hi/africa/6668167.stm. The nationalities of the eight men in Albania are listed as: an Algerian, an Egyptian, an Uzbek and the five Uighurs.

[230] In its press release of 31.01.2007, the Prosecutor's Office acknowledged having received additional information from the Milan Prosecutor's Office and from the Council of Europe's Rapporteur, Dick Marty.

[231] See Marty report 2006, *supra* note 6, p. 27, §§ 106-111.

[232] See Marty report 2006, *supra* note 6, p. 26, §§ 99-100, p. 27, § 103, p. 32, § 130.

[233] See n-tv, 23.11.2006.

289. It has been revealed that the telephones of Mr El-Masri's lawyer, Mr Gnjidic, were tapped from January until May 2006 on the instructions of the prosecutor's office. At the time, there were also long conversations between Mr Gnjidic and my collaborator as part of the mandate given to me by the Parliamentary Assembly. The prosecutor in charge[234] informed me that the reason for the wire-tap, which was court-approved as provided for by law[235], was to document any possible attempts made by the suspected kidnappers to contact Mr Gnjidic with a view to offering Mr El-Masri a settlement. As no such contacts were made, however, the wire-tap was terminated. Mr Gnjidic, who had not been informed of this wire-tap in advance, appealed against the decision authorising the surveillance. Its extension beyond March was found unlawful on appeal, but the legality of the initial wire-tap was upheld. Mr Gnjidic then lodged a constitutional complaint (*Verfassungsbeschwerde*) against the authorisation of the initial wire-tap before the Federal Constitutional Court (*Bundesverfassungsgericht*). In submissions to this court,[236] the Federal Ministry of the Interior commented that if it found the wire-tap justified. On 17 May 2007, the Federal Constitutional Court held that the wire-tap had violated Mr Gnjidic's constitutionally protected right to privacy.

290. Whilst the Bundestag's parliamentary committee of inquiry (UA) has not yet completed its work, it is now undisputed in this body that Mr El-Masri's account of his ordeal is true[237]. This means that there is no longer any doubt that the Macedonian authorities' official version is inaccurate[238]. This confirms our belief that the latter consciously concealed the truth.

291. Disagreement between the representatives of the German Government and opposition parties in the Bundestag committee of inquiry continues to exist as to the extent to which different German authorities were involved or at least informed of Mr El-Masri's case, and when. The testimonies of a Telecom employee and a junior member of the German intelligence services – claiming that Macedonian officials informed the German embassy in Skopje of Mr El-Masri's detention before he was transported to Afghanistan - were not considered by the majority of the committee to be sufficiently conclusive to be able to hold the political leadership accountable[239].

292. More generally, opposition members on the committee have voiced their frustration that the executive is limiting the possibility for the committee to elucidate the truth by invoking official secrecy, refusing access to key files or testimony on this ground. Information relating to the "core field of executive privilege" and information which must be kept secret in the higher interests of the state *(Staatswohl)* is not available to the UA even when meeting in camera. It is the executive itself which decides what information falls into this category, apparently without any parliamentary control; the current trend is to extend this concept of knowledge restricted to the executive, a move which has come in for much criticism from the members of the UA. The latter have recently decided to refer this matter to the Federal Constitutional Court[240]. Even classified information which does not fall into this category has to be dealt with in camera by the committee, which means that it cannot be publicised by the members of the UA; this too has been criticised by some members of the Bundestag[241].

293. Prosecutor Hofmann, who also testified before the UA, had transmitted the entire case file to the committee, including elements that were classified as secret. But during his public testimony, he was obliged to withhold his answers to certain questions relating to classified documents. His offer to discuss the classified material in a closed session was not taken up, although this procedure had been followed for other witnesses.

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[234] Mr Martin Hofmann, whom I met in December 2006 in Geneva. I should like to thank Mr Hofmann for his kind cooperation.
[235] A prolongation of the wire-tap was subsequently refused by the competent judge.
[236] On file with the inquiry.
[237] According to Max Stadler, Liberal member of the Bundestag's committee of inquiry and the *Parlamentarisches Kontollgremium (PKG)* who spoke with a member of our team on 25.05.2007, this is the opinion of all members, including those from the party currently in power.
[238] Mr Stadler, *supra* note 239, indicates that this is also the view of the committee of inquiry, which does not however believe that its terms of reference allows it to record this officially.
[239] The political leadership could only be held responsible for "organisational error" for failing to report back with the relevant information in good time.
[240] Tagesthemen.de of 21.05.2007, citing Dr. Max Stadler (Liberal).
[241] Mr Stadler has alluded to "organised leaks" by members of government parties designed or at least objectively likely to mislead the public on the substance of the in camera discussions – one case in point was the private hearing of officers who had interrogated Mr Kurnaz in Guantanamo Bay and the matter of the American "offer", apparently refused by the German authorities, to allow Mr Kurnaz to be repatriated.

294. As a result of the UA's work, the German government and government departments have been made more aware of human rights aspects and the rule of law[242]. The UA recently agreed to avail itself, for the first time, of the possibility provided for in the law governing committees of inquiry to appoint a "special investigator" with effect from the summer 2007 parliamentary recess, tasked on behalf of the UA with looking into the CIA rendition flights[243].

295. Meanwhile Mr El-Masri's civil lawsuit in the United States against the CIA is entering its final phase: an appeal to the US Supreme Court, after the rejection of his case on grounds of state secrecy in the first instance, upheld by the court of appeal[244], was announced by Mr Gnijdic on 30 May 2007.

296. Against this background, Mr El-Masri himself is still suffering severely from the psychological consequences of the ordeal he has gone through. He has been repeatedly victimised by personal attacks in the local media and has been unable to find employment in the last three years. In January 2007, he lashed out physically at a vocational training officer, who he felt had treated him unfairly. On 17 May 2007, he was arrested in Neu-Ulm as a suspect in a case of arson and placed in a psychiatric hospital[245]. This dramatic development in Mr El-Masri's personal situation merely confirms the repeated claims by his lawyer, Mr Gnjidic, that Mr El-Masri is in desperate need of immediate professional psycho-social post-traumatic care[246]. According to his current therapist[247], the conflict between his post-traumatic care and the pressure arising from the various ongoing procedures to establish the truth simply adds to Mr El-Masri's problems.

297. It is therefore all the more regrettable that Mr El-Masri has not yet been given an official apology for the abuses he has suffered, despite the fact that Mr Schily has stated before the *Untersuchungsausschuss* that Mr El-Masri is innocent and that the Americans have long since offered their own apology to the German Government.

298. I have the following comments regarding these developments in the El-Masri case.

b. The "legal vacuum": denial of accountability to El-Masri in Germany and in the United States

299. In the present state of affairs, Mr El-Masri is unable to hold accountable those responsible for his ordeal both in Germany and in the United States. The core of the problem is the doctrine of state secrecy, which at present constitutes an absolute obstacle to the effective prosecution of Mr El-Masri's kidnappers in Germany, the full clarification of responsibilities in the *Untersuchungsausschuss* and Mr El-Masri's civil lawsuit against the CIA in the United States.

300. As Mr Gnjidic has said so aptly in his complaint against the wire-tap of his law office: whilst the domain of professional secrecy - the traditionally protected relationship between lawyers and doctors and their clients, journalists and their sources - is gradually shrinking, the realm of state secrecy is increasingly expanding. "Equality of arms" - part of the "fair trial" requirements under Article 6 ECHR - becomes a hollow phrase under these conditions[248].

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[242] Mr Stadler gave as an example an apparently similar case of a long-term German resident arrested in Pakistan who was able to return to Germany without the government raising the objections it did in the case of Mr Kurnaz; a second example is the approach adopted by the Bundestag's Legal Affairs Committee to a bill to facilitate information exchange between executive services in the fight against terrorism. The Committee insisted on including measures to prevent this being misused for rendition purposes.

[243] Mr Stadler insisted that this "special investigator" would not be replacing the Committee but would be preparing the way by carrying out preliminary investigations which would facilitate the UA's subsequent work.

[244] No 06-1667 of 02.03.2007 (4th circuit).

[245] He is suspected of having laid fire to a wholesale market in Neu-Ulm (cf. Spiegel online 17.05.2007).

[246] Letter from Mr Gnjidic to Chancellor Merkel of 26.04.2007, passed on to the Bavarian Prime Minister's Office by letter from the Chancellor's office of 11.05.2007 with a request to take this issue up as a matter of urgency (copy of both letters on file); since February 2006, Mr El-Masri has received limited therapy (70 hours) from the treatment centre for torture victims in Neu-Ulm, but this therapy was considered as insufficient both by Mr Gnjidic and by the therapist herself (cf. SPIEGEL-online 18.05.2007). Although Mr El-Masri had asked for treatment at the centre shortly after his return to Germany in 2004, it took until 2006 for Mr Gnjidic to obtain the required health insurance funding agreement to start this limited treatment.

[247] Cf. Spiegel-online, 18.05.2007 (interview with Ms Gerlinde Dötsch).

[248] Mr Gnjidic's graphic comparison : the lawyer gets to fight with a pocket knife, the executive with a sword.

301. The US Supreme Court, if it chooses to hear Mr El-Masri's case, and the German Federal Constitutional Court, following the appeal lodged by the minority representatives of the Bundestag's committee of inquiry, will have to take a position on the extent to which the executive is allowed to act in complete secrecy, without the possibility for either judicial or parliamentary scrutiny of its actions. Here, we have on the one hand lawyers and judges – in favour of judicial and/or parliamentary control, and on the other the executive, and in particular the intelligence agencies and other special services, claiming the freedom to act in secrecy on the pretext of the supposed higher interests of the state. Mr Gnjidic's constitutional complaint, in contrast, has led to a clearer definition of the realm of professional secrecy.

302. These are undeniably key issues for the defence of human rights and for the fight against terrorism. Short-circuiting the different mechanisms of judicial and parliamentary control does not make the fight against terrorism more effective. Rather, this vacuum can lead to arbitrary action and all sorts of dysfunctioning. While certain operational means must of course remain confidential, there is nothing to prevent making provision for transparent procedures for subsequent review. Continuing to invoke state secrecy years after the events is unacceptable in a democratic society.

303. Moreover, state secrecy cannot in any circumstances justify or conceal criminal acts and serious human rights violations. From the point of view of the rule of law, the ruling of the US Court of Appeal (4th circuit) in Mr El-Masri's case[249] is disappointing and regrettable: whilst the Court of Appeal acknowledges that it is for the courts to decide on the extent of state secrecy[250], it takes a very restrictive stance as to the scope of judicial review, insisting on the court being obliged to accord the "utmost deference" to the responsibilities of the executive branch[251]. This "deference" goes so far that "in certain circumstances a court may conclude that an explanation by the Executive of why a question cannot be answered would itself create an unacceptable danger of injurious disclosure. […] In such a situation, a court is obliged to accept the executive branch's claim of privilege without further demand"[252].

304. One may legitimately ask how such reasoning can be reconciled with the fundamental principles of the rule of law. The case law of the US Supreme Court cited in support of this wide interpretation of the state secrecy doctrine[253] dates back to the 19th century and the worst periods of the Cold War, when there was an almost blind trust in the infallibility and incorruptibility of its secret services. It is therefore to be hoped that the United States Supreme Court will use the opportunity of the El-Masri case to take a fresh approach to and modernise the "state secrets doctrine", to bring it into line with the principle of the separation of powers and the requirement for transparency in a genuinely democratic society.

305. In *Fitzgerald*[254], another United States Court of Appeal rightly points out that *"[w]hen the state secrets privilege is validly asserted, the result is unfairness to individual litigants – through the loss of important evidence or dismissal of a case – in order to protect a greater public value*." How can it be seriously argued that information establishing the responsibility of State officials in serious violations of human rights is of "a greater public value" deserving protection in a democratic society?

[249] No. 06-1667 of 02.03.2007
[250] Quoting the US Supreme Court in *Reynolds* (345 US at 9-10) "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers"
[251] Again quoting the US Supreme Court (*Nixon*, 418 US at 710)
[252] Court of Appeal (*supra* note 246) p. 12, with references to the US Supreme Court's *Reynolds* judgment (345 US at 9).
[253] The *Reynolds* case dates back to 1953; another leading case (*Totten v. United States, 92 US 105)* to 1875, and the *United States v. Nixon (418 US 683)* to 1974; *Chi.& S. Air Lines, Inc., v. Waterman S.S.Corp., 333 US 103, 111* to 1972
[254] 776 F.2d at 1238 n.3 (cited by the Court of Appeal in the El-Masri case, *supra* note 246, p. 23)

306. The principle of judicial self-restraint is certainly a good thing, but this is truly corrupted when it results in a denial by the judicial system of its own role, leading to impunity for the perpetrators of serious human rights violations.

307. Judges, prosecutors and lawyers cannot *a priori* be considered national security risks, any more than other agents of States themselves. If necessary to safeguard legitimate state secrets that may well be intertwined with illegitimate ones, judicial personnel participating in proceedings involving state secrets can be subjected to a specific clearing or vetting procedure, as is done in a number of jurisdictions, and placed under an obligation to maintain the secrecy of the information they are given access to[255].

308. In order to ensure accountability, information pertaining to serious human rights violations committed by agents of the executive should not, and need not be permitted to be shielded by the notion of state secrecy or national security.

309. What applies to courts must also apply to parliamentary committees of inquiry: the executive must not be allowed to thwart inquiries into its own possible wrongdoings by classifying relevant information.

c. The German parliamentary committee of inquiry and the work of the prosecutors in Munich

- The Bundestag committee of inquiry

310. The German parliamentary committee of inquiry responsible for establishing the facts in the El-Masri case is emblematic. Of course the *Bundestag*'s decision to conduct a serious inquiry into the case of Mr El-Masri and into possibly reprehensible activities by the German special services is welcome. It is, however, regrettable that most members of the committee have to date been content to receive documentation that has been rendered very incomplete by government censorship. The committee has also frequently been quick to accept the reasons given by witnesses for refusing to give evidence: on each occasion, "state secrecy" or the so-called doctrine of *exekutive Eigenverantwortung* (the domain of the executive's own responsibility, exempt from parliamentary scrutiny) has been accepted. It should also be made clear that the standing committee responsible for supervising the activities of the secret services (*Parlamentarisches Kontrollgremium (PKG))* has access to secret information[256], and that the parliamentary committee of inquiry was granted access behind closed doors both to classified documents and to witness testimony on matters classified as secret. What is in dispute between majority and minority representatives is the extent to which parliamentarians can demand access to classified materials, and what use they can make of it in public if they consider that the matter in question requires their constituents to be informed. This matter needs clarification, generally and also for future reference. The parliamentary committee of inquiry is fulfilling its supervisory remit in the interest of parliament as a whole, and its work must not be primarily influenced by considerations of short-term political rivalry[257]. Any majority, in a democratic system, can become the minority at the next election, and should have an interest in protecting parliamentary scrutiny of executive action. I therefore welcome the decision of the opposition representatives on the parliamentary committee of inquiry to apply to the Federal Constitutional Court for a clearer definition of the scope of the doctrine of the executive's own responsibility (*exekutive Eigenverantwortung*)[258].

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[255] In the same way as the procedure described by the 4th Circuit Court of Appeals (*supra* note 246, pp. 11-12 and 21-22) for the judicial review of the issue whether the information sought to be protected qualifies as privileged under the state secrets doctrine.

[256] On the other hand, this body has no power to summon witnesses. The government is under an obligation to "report" to the PKG, but there is no statutory obligation (subject to criminal penalty) like that which exists for witnesses summoned by a committee of inquiry, for the executive's representatives on the PKG to tell the truth.

[257] As seems to be the case, according to Mr Stadler, within the German parliamentary committee of inquiry: while the representatives of government parties, especially the Christian Democrats who were in the opposition at the material time, take a very active and open attitude during the examination of witnesses, government discipline comes fully into play when the facts are being assessed, with the representatives of government parties never having voted for a motion to take evidence (*Beweisantrag*) tabled by minority representatives or having tabled such a motion themselves.

[258] cf. tagesthemen.de of 21.05.2007, announcing the appeal to the Federal Constitutional Court.

311. My last remark about the parliamentary committee of inquiry concerns the reception of its work by public opinion. The committee's work revealed some very questionable aspects of certain decisions taken by the former Minister in charge of the coordination of the special services (now Minister for Foreign Affairs), in particular as regards the case of Mr Kurnaz; the latter could apparently have been released from Guantanamo by the United States much earlier, if only the German authorities had agreed to repatriate him[259]. Whilst some media outlets raised the question of whether the Minister concerned should remain a member of the Government, his popularity as measured by opinion polls did not suffer at all; it even grew. The cases of Mr El-Masri and Mr Kurnaz, whose responsibility was never established, and who suffered extreme hardships, spending months and years in unlawful detention without any excuse having been offered or compensation paid, gave rise to unpleasant comments in the tabloid press about these two men of Arab origin and of Muslim faith[260]. The apparent success of this media strategy may also be a symptom of latent islamophobia[261], a worrying phenomenon which should cause concern to political leaders and to all who play an active role in civil society.

- The Munich Prosecutor's office

312. The prosecutors in Munich continue to encounter difficulties as a result of the refusal by the authorities in the United States and "the former Yugoslav Republic of Macedonia" to co-operate in the search for the truth. The assistance of these countries' authorities is vital in order to prove the facts and establish responsibilities. It has now been established that there is no truth whatsoever in the replies given by the Macedonian authorities. Another official request for assistance, containing very specific questions, would seem to be necessary.

d. Deception and failure to account on the part of "the former Yugoslav Republic of Macedonia"

313. A Macedonian parliamentary committee concluded on 18 May that the country's secret services "did not overstep their powers" in the case of Mr El-Masri.[262] Its Chairman, Mr Rahic, was quoted in the media as saying that "until El-Masri's account is proved and we are presented with strong evidence, we will believe the Interior Ministry". This seems a fairly rash thing to say, even allowing for the fact that this report had not been published when those words were spoken. However, the new facts now brought into the public domain should finally trigger action on the basis of the "readiness of this committee and the parliament of the Republic of Macedonia to fully investigate and solve this case", to which Mr Rahic reportedly referred.

314. The "official version" of Mr El-Masri's involuntary stay in "the former Yugoslav Republic of Macedonia" has definitely become utterly untenable, in the light of not only the work of the *Bundestag*'s committee of inquiry, but also the information that we believe we can provide about the arrangements for Mr El-Masri's secret return to Europe. It is now high time for those responsible for the deception - vis-à-vis the German *Bundestag*, the Munich prosecutors, the European Parliament and the Council of Europe - to offer their apologies to the unfortunate protagonist in this case and to divulge once and for all the whole truth. There is a feeling that responsibility for this refusal to tell the truth lies with the highest representatives of the State, who seem likely to have orchestrated the presentation of this official version[263]. For the sake of restoring the mutual trust indispensable for European co-operation in this sensitive field, I urge the Macedonian President and Parliament to show a willingness to co-operate in the search for the truth without further delay.

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[259] The Assembly's Rapporteur on Guantanamo, Kevin McNamara (United Kingdom/SOC), received on 28.02.2005 an official reply from the German Government regarding the case of Mr Kurnaz to a questionnaire sent to all member states as to whether the authorities knew of a national or permanent resident now held in Guantanamo and if so, what they were doing to secure the person's repatriation. The answer was laconic: The US authorities were not approached by the German authorities as Turkey is responsible for and able to grant diplomatic protection to Mr Kurnaz. In Resolution 1433 (2005) the Assembly appealed to all member states "*to enhance their diplomatic and consular efforts to protect the rights and ensure the release of any of their citizens, nationals or former residents currently detained at Guantanamo Bay, whether legally obliged to do so or not*".

[260] See BILD.de, 22.05.2007 ("*Warum lassen wir uns von so einem terrorisieren*"); 05.02.2007 ("*Ausgerechnet El-Masri*"); 31.01.2007 ("*Wie wurde aus diesem Libanesen eigentlich ein Deutscher?*"). This campaign by BILD is criticised by Hans Leyendecker in the Süddeutsche Zeitung of 21.05.2005.

[261] Mr Stadler also said that he was disappointed by this lack of solidarity with victims perceived as "alien". Even inside the parliamentary committee of inquiry, some members remained hesitant until such time as the MPs personally heard moving accounts of their appalling sufferings given by Mr El-Masri and Mr Kurnaz.

[262] In a letter of 05.06.2007 the Head of the Macedonian Delegation, Mr Sambevski, transmitted this assessment to me officially.

[263] See Marty report 2006, *supra* note 6, pp. 27-28 (§§ 106-111).

315. The positive example of Bosnia and Herzegovina, which has fully acknowledged the facts relating to "its" case of rendition[264], deserves to be re-emphasised here. Its authorities showed responsibility and sincerity, and should also be congratulated on their country's recent election by the UN General Assembly to membership of the United Nations Human Rights Council[265].

ii. Complicity and accountability in other rendition cases

a. The role of the Italian authorities in the case of Abu Omar

316. New developments in this case, described in some detail in the June 2006 report[266] include new arrest warrants delivered on 3 July 2006 against four more US citizens, including Jeffrey Castelli, the director of the Italian office of the CIA at the time of the abduction, which increased the number of arrest warrants against American agents to 26. In July 2006, two arrest warrants were also delivered against Italian agents working for SISMI, the military intelligence agency (Mr Pignero and Mr Mancini). By November 2006, the Milan Prosecutor's office had fulfilled all technical requirements for the transmission by the Italian Minister of Justice of the relevant extradition requests to the American authorities. But to date, the Minister has still not transmitted these requests. It may be helpful to point out that the treaty on judicial assistance between the United States and Italy explicitly provides for extradition even of their nationals.

317. In November 2006, Mr Pollari was removed from his post as director of SISMI "in the course of a reorganisation of the secret services"[267].

318. In a letter smuggled out of his prison in Egypt (published by the *Chicago Tribune* and the *Corriere della Sera* on 7 January 2007), Abu Omar described in detail how he was abducted from Italy and the abominable tortures to which he was subjected in Egypt, which go well beyond the dehumanising methods used in the CIA's own secret prisons network[268].

319. In February 2007, 26 US citizens and seven Italians, including Mr Pollari, were formally indicted, the trial being due to begin on 8 June 2007.[269] Mr Pollari, the only defendant who appeared during the preliminary hearing, has insisted that Italian intelligence played no role in the alleged abduction, and told the judge he was unable to defend himself properly because documents clarifying his position were not permitted in the proceedings because they contain state secrets[270]. In fact, the evidence collected by the prosecution is overwhelming: SISMI had been informed of the operation relating to Mr Omar, and Italian agents certainly did take part in the operation.

320. In February and March, the Italian Government asked the Constitutional Court to annul the committal for trial of the 33 defendants in the Abu Omar case, as the prosecution had exceeded its powers, using documents which were classified and tapping phone conversations of Italian intelligence agents in their pursuit of the suspects. The Constitutional Court declared both government applications admissible, but has not to date ruled on their merits[271]. Italian Prime Minister Romano Prodi declared[272] that important information relating to the co-operation between the CIA and the Italian military intelligence constituted a state secret, and that, on the Abu Omar case, he "was following Mr Berlusconi's line"[273]. Worse still, the previous government had not explicitly raised the issue of state secrecy, whereas the current Minister of Justice had not hesitated to apply to the Constitutional Court, taking the view that the judges in Milan had encroached on an area reserved for the executive.

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[264] See Marty report 2006, *supra* note 6, pp. 32-23 (§§ 133-149).
[265] In place of Belarus, the candidature of which was strongly opposed by the Parliamentary Assembly's Legal Affairs Committee in a public appeal adopted on 14.05.2007.
[266] See Marty report 2006, *supra* note ***, p. 37 (§ 162).
[267] www.wsws.org, 29.01.2007
[268] See my description of these methods, *supra* at section V.iii.
[269] BBC NEWS/World/Europe/Italy orders CIA kidnapping trial ; Chicago Tribune online edition, 17.03. 2007.
[270] Times Online, 16.02.2007.
[271] See Chicago Tribune online edition, 17.03.2007.
[272] www.wsws.org, 29.01.2007
[273] See Reuters, 10.02.2007

321. But how can it be forgotten that a senior Italian official, General Pollari, head of military intelligence, lied unashamedly to the European Parliament? How is it possible to explain the deafening silence of the Berlusconi and Prodi governments in relation to the kidnapping of Abu Omar - who held refugee status - by an American commando operation, and to the sabotaging by this operation of a major anti-terrorist investigation being carried out by the Milan prosecution service?

322. In my previous report, I had already applauded the competence and high-quality work of Milan's judges and police. It is distressing to see now the kind of treatment to which judges of such merit as Armando Spataro and Ferdinando Pomarici are being subjected, prosecutors who have for years, not without great personal risk, been committed to combating terrorism, always effectively and with strict respect for the rule of law. The point has now been reached at which these judges stand accused of violating state secrecy!

323. In Italy, as in Germany, irrespective of the alternation in political power between parties, the same line has apparently been chosen, namely the preservation at any price of relations (and especially of interests) with the powerful ally, with "state secrecy" being invoked whenever an unpleasant truth might become public. This also enables conduct which is against the law to be covered up, and government offices to evade their responsibilities, and it is a very serious obstacle to the independence of the judicial system.

324. Our colleague Christos Pourgourides has demonstrated in his report adopted by the Assembly in April 2007 on “Fair trial issues in cases involving espionage and state secrecy”[274] how overly broad and unclear legislation on state secrecy has been abused to imprison and silence independent scientists, journalists and lawyers and “whistleblowers”. This inquiry shows that overly broad and unclear concepts of state secrecy also stand in the way of accountability of the executive for blatant human rights violations. In the same way as Mr Pourgourides has rightfully argued that information that is already in the public domain cannot be a “state secret”[275], we must strive for recognition that information on serious human rights abuses committed by executive authorities must not be kept under wraps as “state secrets” either. I can only wish my friend Armando Spataro success in his struggle for these principles in Italy.

b. The role of the Canadian authorities in the case of Maher Arar

325. After the rather dark picture conveyed by the attitudes of several European governments, it is comforting to mention a positive example, that of Canada, which holds observer status with the Parliamentary Assembly of the Council of Europe.

326. The case of Maher Arar, the Canadian citizen abducted in New York and subjected to torture in a Syrian prison, must serve as an example to European states, showing that this kind of case may be understood in a more dignified way, more appropriate to a state governed by the rule of law.

327. A special commission of inquiry[276] conducted a separate inquiry into the facts and a detailed examination of the various political aspects, in order to establish the facts and to draw conclusions from the shortcomings evident in this case. The Report of the Events Relating to Maher Arar – Analysis and Recommendations (364 pages) was published in July 2006. The commission’s official website provides ample information about the terms of reference of the inquiry, the role of the commissioner and counsel, and the commission’s rules of procedure. The website also provides in great detail background documents of the factual inquiry (including transcripts of public hearings, and summaries of in camera hearings, reports from expert witnesses and the detailed “Fact Finder’s Report”). Similar information is published as regards the examination of political aspects.

[274] See Doc 11031. (available at http://www.coe.int)
[275] While this seems self-explanatory, it was called into question by the US Court of Appeal, *supra*, note 246, at p. 20, footnote 5.
[276] See www.ararcommission.ca

328. In the framework of this report, I do not, unfortunately, have the resources to analyse and comment on this important work in any detail. This is very regrettable, but it is highly desirable to draw on the work done by the Canadian commission of inquiry in the process of the follow-up that must be given to the Assembly's recommendations by the Committee of Ministers, to ensure that similar abuses and mistakes never happen again in our member states.

329. Not surprisingly, a central issue for the commission on the case of Maher Arar was once again that of official secrecy and national security. But contrary to the situation in Europe and in the United States, Canada appears to have found a workable solution that safeguards both accountability and true national security interests. In simplified terms, the commissioner, an experienced judge, was given access to all the information required. Certain documents, which the government considered secret in the interest of national security, national defence or international relations, were examined in a procedure in which both parties were heard, and were not reproduced in the public version of the report (although attention was drawn to their absence). Thus it is not the government which is the sole arbiter of what should be regarded as a state secret. Such a procedure deserves the greatest attention in the preparation of the terms of reference for the new Council of Europe investigation mechanism which we propose to set up.

330. The Commissioner of the Inquiry, Justice Dennis O'Connor, stated that he was "*able to say categorically that there is no evidence to indicate that Mr Arar has committed any offence or that his activities constitute a threat to the security of Canada*"[277] – thus unequivocally clearing Mr Arar's name. He was able to make this statement being "*satisfied that I have been able to examine all the Canadian information relevant to the mandate. [...] I received some of the evidence in closed, or in camera hearings and am unable to refer to some of the evidence heard in those hearings in the public version of this report. However, I am pleased to say that I am able to make public all of my conclusions and recommendations, including those based on in camera evidence.*"[278]

331. I should like to conclude by citing Mr Arar himself[279], who gave an excellent description of the role and function of the principle of accountability: "*This is because accountability is not about seeking revenge; it is about making our institutions better and a model for the rest of the world. Accountability goes to the heart of our democracy. It is a fundamental pillar that distinguishes our society from police states.*"

332. Explaining how he has been able to cope with the stress of surviving torture, the stress of not being able to find a job, the stress endured at the inquiry, he wrote: "*I draw my strength from my faith; from my loving, caring, strong wife; and from the support and generosity I have received from Canadians. I have rediscovered Canada through its people, people who made me feel proud of being Canadian.*"

333. These are impressive words coming from a man who was held for a year in the most abject conditions, including torture, in a prison run by the Syrian secret services, to which he had been handed over by the CIA, which had been able to rely on the co-operation of their Canadian counterparts, who had supplied completely baseless information about alleged links with El-Qaida. Mr Arar's ordeal continued after his return to Canada, which had been delayed by all kinds of setbacks, with leaks of information being organised with the intention of discrediting him and trying to justify the behaviour of the services responsible for his abduction.

334. Canada's attitude deserves to be highlighted, for the way in which the country's institutions coped with this serious and awkward case. Canadian society managed to resist some press attempts to condition its reaction, and unhesitatingly displayed solidarity with a man who had suffered such injustice[280]. Mr Arar also benefited from psychosocial assistance and received substantial compensation from the government for the damage suffered[281]. The Canadian public also expects the recommendations set out in the report to be implemented and those responsible to be brought to

[277] Report, available at http://www.ararcommission.ca , hereinafter: Arar Commission Report, p. 9.
[278] Arar Commission Report, p. 10.
[279] See http://www.maherarar.ca - A Message from Maher Arar
[280] Canadian society does seem particularly sensitive, as the recent arguments about alleged ill-treatment meted out to two Afghan detainees seem to show (see LeDevoir.com, file:///Users/dick/Desktop/Afghanistan%20-%20Le%20Canada%20n'a%20pas%20vérifié%20les%20allégations%20de%20torture.webarchive)
[281] In January 2007, Mr Arar received $ Can 11.5 (about € 7.5 million) in compensation, and a formal public apology from the Canadian Prime Minister.

account for their conduct[282]. There are striking differences in every respect between the way in which the Arar case was dealt with and the attitude taken to the El-Masri case. In particular, it should finally be pointed out that neither the United States nor Syria saw fit to co-operate with the Canadian commission of inquiry. Mr Arar's civil action against US authorities has run into the same difficulties due to the doctrine of state secrecy as that of Mr El-Masri.

c. Proposal by the All Party Parliamentary Group on Extraordinary Rendition (APPG) to improve the UK's mechanisms dealing with rendition requests

335. While the APPG did not achieve any progress regarding the specific cases of UK residents abducted in Gambia and finally taken to Guantanamo Bay[283], its chair, Mr Andrew Tyrie, has recently submitted a proposal to the UK Government to improve the UK's mechanisms in this area, aimed at improving the protection of detainees transported through the UK, increasing transparency and defining responsibilities more clearly[284]. The APPG also expressed its support for the proposals made by the Secretary General of the Council of Europe following the opening of a procedure under Article 52 of the ECHR, and for the work of the Parliamentary Assembly, including the resolution and recommendation proposed with the report of June 2006. There is no possible doubt in group members' minds that "extraordinary renditions" have indeed taken place.

336. The House of Commons Intelligence and Security Committee, however, has yet to publish its report on extraordinary renditions[285].

VII. Secret detentions and renditions: the diminishing effect on respect for human rights worldwide

i. A collateral damage of the war on terror: diminishing respect for human rights

337. The policy pursued by the current US Administration has undeniably been a contributory factor in tarnishing the image of the United States, a country regarded as a model of democracy and respect for individual freedoms. The huge wave of sympathy for the American people following the tragic events of 11 September rapidly gave way to incomprehension, irritation, and even overt hostility. The commission of unlawful acts - abductions, the exporting of torture to other countries even though they are regarded as "rogue states", the setting up of detention centres beyond any judicial supervision - has severely affected the moral authority of the United States. Worse still, the world's greatest power is becoming a negative role model for other countries, which feel that they may legitimately follow the same path and flout human rights. The systematic exporting of such activities outside American territory also constitutes a form of contempt for the rest of the world, and the reservation of such methods exclusively for non-Americans is an expression of an "apartheid" mentality in the legal sphere. This feeling is further reinforced by the US Administration's systematic refusal to place itself under the jurisdiction of an international court, although it is always ready to impose such jurisdiction on others[286]. This attitude merely fuels deplorable and damaging anti-Americanism, for it creates a movement of sympathy for Islamic fundamentalism, thereby giving a feeling of legitimacy to the criminal groups which resort to terror. The collateral damage caused by the "war on terrorism" being waged by the current US Administration is very serious. More serious, and more intolerable, however, is the attitude taken by many European governments, which have allowed - when they have not directly co-operated in - a whole series of unlawful acts on their territory, acts which the US Administration itself refused to commit in its own country.

[282] cf. CBC news item of 29.01.2007
[283] See Marty report 2006, *supra* note 6, page 46.
[284] Letter of 18.05.2007 (on file).
[285] The report must first be addressed to the Prime Minister, who shall decide about what can be made public.
[286] It should not be forgotten that the United States is still refusing to ratify the treaty setting up the International Criminal Court; as at 01.01.2007, 104 States had acceded to the Rome Statute governing the ICC.

ii. Continued secret detentions in the Chechen Republic and failure to cooperate with the CPT: unacceptable collateral damage to the values of the Council of Europe

a. CPT 3rd Public Statement and detentions in the village of Tsentoroy

338. The June 2006 report referred to serious allegations about enforced disappearances, and about the existence of secret detention centres and the systematic use of torture in Chechnya. Subsequently the CPT (European Committee for the Prevention of Torture) has issued new concrete conclusions about this region, in the third public declaration published recently.

339. Under Article 10(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Committee may make, by a two-thirds majority, a public declaration after a Party to the Convention "*fails to cooperate or refuses to improve the situation in the light of the Committee's recommendations.*" According to the statement, "*the CPT remains deeply concerned*" by the fact that "[*r]esort to torture and other forms of ill-treatment by members of law enforcement agencies and security forces continues, as does the related practice of unlawful detentions*"[287] and that investigations into these cases are largely ineffective.[288] This statement follows two previous public statements also concerning the Chechen Republic in July 2001 and July 2003, which illustrates the extreme gravity of the situation. Member states' duty to cooperate with the CPT and the follow-up to be given to the CPT's public statements by the Council of Europe generally deserve to be the subject of a separate report by the Committee on Legal Affairs and Human Rights.

340. In the framework of my mandate concerning allegations of secret detentions in Council of Europe member states, I invited the chair of the Russian delegation to PACE, Mr Konstantin Kosachev, to comment on the CPT's 3rd public statement and the allegations of secret detentions in the village of Tsentoroy. In his answer dated 15 May 2007, Mr Kosachev wrote the following:

> "*According to the Ministry of the Interior of the Russian Federation, the delegation of the CE Committee for the Prevention of Torture (CPT) headed by Mr M. Palma visited the village of Tsentoroy (Kurchaloevskiy region of the Chechen Republic) and inspected all the premises they were interested in. They did not find either secret detention facilities there or any facts proving the rumours of their existence. No applications or complaints from residents were lodged to the law-enforcement bodies of the Chechen Republic about illegal detentions of people with their further stationing in the village of Tsentoroy (Kurchaloevskiy region of the Chechen Republic).*
>
> *The CPT report of November 2006 on the results of the two visits of the Committee said that there were illegal detention facilities in the village of Tsentoroy (Kurchaloevskiy region of the Chechen Republic). In response, the Ministry of the Interior of the Russian Federation carried out thorough additional inspections. The information brought to the notice of the European community and the Parliamentary Assembly of the Council of Europe was not confirmed.*
>
> *The FSB of the Russian Federation does not have any information about the existence of any secret detention centre in the village of Tsentoroy (Kurchaloevskiy region of the Chechen Republic).*"

341. Under the Anti-Torture Convention, the CPT is duty-bound to maintain the confidential character of its work, and can therefore not comment publicly on this reply. But the Russian authorities have failed to provide a specific response to the point that I highlighted in my own letter, namely that it transpires from an official reply given to the CPT by the Russian authorities, which the CPT made public in part (in the above-mentioned Public Statement[289]), that at least one secret detention facility – i.e. a place of detention that was not declared as such vis-à-vis the CPT – has existed within the premises of the Chechen President's Security Service in the village of Tsentoroy[290]. I do not consider the above reply – a general denial - as a sufficient response to the specific issue I raised in my letter. The declaration in Mr Kosachev's letter that the CPT delegation visiting Tsentoroy did not find either

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[287] CPT, Public statement concerning the Chechen Republic of the Russian Federation, made on 13.03.2007 and relating to a visit in November 2006 (available at http://www.coe.int

[288] *Ibid.*

[289] In a letter of 20.03.2007 published on the website of the Russian Ministry of Foreign Affairs, the Ministry's Director of Humanitarian Cooperation and Human Rights complained to the CPT chair about the publication of certain elements of reply the Russian authorities consider as confidential.

[290] I refer, in particular, to page 24 of document CPT/Inf (2007)17.

secret detention facilities there or any facts proving the rumours of their existence and that no applications or complaints regarding unlawful detentions in this locality were received by local law enforcement authorities is clearly contradicted by the CPT's own public findings:

> "*In the course of the 2006 visits, the CPT's delegation again spoke with a number of persons who gave detailed and credible accounts of being unlawfully held – on occasion for prolonged periods – in places in the Chechen Republic. Frequent reference was made to facilities located in the village of Tsentoroy in the Kurchaloy district […]* ***. In certain cases, formal complaints had been lodged with the prosecution services*** *relating to unlawful detention and ill-treatment at Tsentoroy. […] The CPT's delegation gained access to Tsentoroy on 2 May 2006 […].* ***The layout of the compound and, more specifically, the location and internal features of the secure rooms and adjacent ante-room, corresponded closely to descriptions which the delegation had received from persons who alleged that they had been held there*** *(and subjected to various forms of ill-treatment).*"

b. Alleged secret detentions in Grozny

342. Another allegedly illegal prison in the Chechen Republic – located in Grozny, the capital of the Chechen Republic – is under discussion before the Sub-Committee on Human Rights. Prompted by a publication of the Russian human rights group "Memorial"[291] alleging the destruction of evidence concerning acts of torture and enforced disappearance by the destruction of a former school building, which had until recently housed a notorious detention centre of the Ministry of the Interior of the Chechen Republic, the Sub-Committee asked the Russian Prosecutor General's Office for explanations. The building was razed to the ground within hours of "Memorial" going public with its findings of damning inscriptions on the walls of cells and other evidence collected on the premises, which "Memorial" documented on video to the extent possible. The explanations given to the Sub-Committee in the Prosecutor General's reply of 11 September 2006 were not considered satisfactory by the Sub-Committee. Its additional questions of 12 October 2006 were answered on 21 May 2007. I prefer not to comment on these replies now, as they are yet be discussed by the Sub-Committee[292].

343. Whilst I am not in a position to draw any final conclusions from the as yet incomplete information presented above, regarding the razed detention centre in Grozny, there no longer seems to be any doubt, in the light of the CPT's public statement, that persons had been detained secretly in Tsentoroy[293]. I also cannot help noticing the general lack of transparency permeating detentions in the North Caucasus characterised by thousands of disappearances that are still not elucidated, especially in cases where there are indications that one or the other of the State institutions responsible for law enforcement was involved. In several recent decisions, the European Court of Human Rights has condemned the Russian Federation for failing seriously and effectively to investigate such cases[294].

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[291] Human Rights Center Memorial, May 2006 (on file, English version provided by International Helsinki Federation, Vienna, on 14.06.2006, complete with transcription of wall inscriptions, and photographs taken by Memorial); see also "Unofficial Places of Detention in the Chechen Republic", International Helsinki Federation, Vienna, 15.05.2006 (addressed to me shortly before the publication of the June 2006 Interim Report) http://www.ihf-hr.org/viewbinary/viewdocument.php?download=1&doc_id=6810

[292] The topic was last on the Sub-Committee's agenda on 18.04.2007; on the same day, the Russian delegation informed the Sub-Committee's Chair that no reply had yet been received from the Prosecutor General's Office. The Sub-Committee therefore postponed consideration of this matter "for one last time". A reply was received by the Sub-Committee's chair on 21.05.2007.

[293] cf. Public Statement, paras. 28 and 29 (*supra* note 289 and p. 24 of document CPT/Inf (2007)17, quoting from an official reply by the Russian authorities: "*In the course of the investigation* ***it was established that on the night of 7 November*** *2004, "D", a member of an armed group (gang), was detained in the Khasavyurt district of the Republic of Dagestan by officers from the ChR President's Security Service and* ***taken to the Security Service base in Tsentoroy. On 8 November 2004 he was transferred*** *to Gudermes ROVD.*" (emphasis added)

[294] Akhmadova and Sadulayeva v. Russia (10.05.2005), Application No 40464/02; Bazorkina v. Russia (27.07.2006), Application No 69481/01; Baysayeva v. Russia (05.04.2007)

344. As a confidence-building measure, I propose that the Assembly invites the Russian Federation to fully publish the CPT's reports and to work closely with this body to stamp out the practice of secret detentions from its territory, including the North Caucasus.

VIII. Need for consensus solutions to the HVD dilemma whilst ensuring respect for human rights

345. The typical response from members of the Bush Administration when confronted with reports on the impact of United States' policies in the context of the "war on terror" is two-fold. First, they will state that the criticisms are overstated and counter-productive;[295] second, they will complain that the authors of such reports make little effort to propose viable solutions to what they see as an intractable dilemma: how do we target, capture, detain and "bring to justice" the people we suspect of being "high-value" terrorists? John Bellinger tends to pose a simple question to his European counterparts:

> *"I guess I ask you, what is the solution to this problem?"*[296]

346. In view of the importance and the complexity of terrorism, it seems indispensable to attempt to form an international consensus on its precise nature and scope, as well as on the means to fight against it. Since the US Government continually re-emphasises that its "war on terror" is for the good of citizens of the wider free world, and Europeans in particular, then it is imperative that we agree upon the principles and legal standards that govern it.[297]

347. We must further ensure that we do not allow our collective vision and judgment to be clouded on issues such as detainee treatment, which I have addressed here through the lens of interrogation techniques.

348. As I conclude this inquiry, my overwhelming conviction is that clearer and fairer terms of engagement can only result from our finding consensus on how to react. It is also indispensable to take into account political considerations which foster terrorism and the means of modifying them.

i. Towards consensus definitions of phrases used in the "war on terror"

349. I believe that three definitions in particular are in urgent need of clarification. The first of these is the notion of a "war" against international terrorists. The policy of the Bush Administration **characterises "war" in unfeasibly broad terms**. It is easy to see why the metaphor of "war" plays a formidable political role in rallying American support for US foreign policy, but it also serves to weaken and destabilise the essential framework upon which the "laws of war" are based.

350. In the context of my inquiry, I have analysed US "programmes" that President Bush has placed squarely under his "war on terror" metaphor: primarily the "High-Value Detainee" or HVD programme, and the "rendition" programme. Yet these activities rarely resemble war as we know it in the classic military sense. Accordingly I agree with the following assessment of two prominent American commentators:

> *"Insofar as counterterrorism policy requires all of the tools of government, most of these tools will not in fact be the tools of war in the actual meaning of armed conflict. Instead they will involve surveillance, interdiction of terrorist financing, intelligence gathering, diplomacy and other methods. Thus the language of global war is necessarily metaphorical."*[298]

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[295] See John Bellinger, Chief Legal Advisor to the US Secretary of State, and Dan Fried, Assistant Secretary of State, Bureau of European and Eurasian Affairs; *Joint Brieifing to European Delegation during the visit of the TDIP Temporary Committee of the European Parliament to Washington, DC*, 11.05.2006 (hereinafter "Bellinger, *Briefing to European Delegation*, or Fried, *Briefing to European Delegation*"). Assistant Secretary of State Fried told the delegation: "The undisciplined public discussion, unbalanced by unintelligent conclusions from responsible people such as yourselves can have an unintended consequence of making it more difficult to work effectively to the benefit of your Governments and your societies as well as ours."

[296] Bellinger, *Briefing to European Delegation*, *Ibidem*.

[297] I do not intend, in this brief section, to repeat my comparative analysis of "Legal Perspectives" in the US and the Council of Europe contained in my report last year, as I feel that it remains just as pertinent today: see the Marty Report 2006, *supra* note 6, at section 10, pp. 54 -59, §§ 265-279.

[298] See Anderson and Massimino, "Resolving Ambiguities in Detainee Treatment", *supra* note 214, at p. 3. The authors also state, at p. 14: "The counterterrorism policies of any new [US] administration or new Congress … must start from the view that counterterrorism operates across a wide range of activities. At one end is law enforcement … at the other end is war … The real action against terrorists themselves takes place in a zone between those two extremes."

351. The second ill-conceived expression is that of the "enemy," the present definition of which is an affront to international human rights and, in particular, to our notions of equality before the law. From as early as President Bush's Military Order of 13 November 2001,[299] to as recently as the Military Commissions Act of 2006,[300] **notions of "otherness" – particularly foreign nationality – have been at the heart of United States policy on detaining terrorist suspects**.

352. I firmly believe that the same basic human rights standards should be applied equally regardless of whether a detainee is American or non-American, whether ally or adversary, whether of the highest or lowest "value", whether targeted by the CIA, the DoD or the FBI, and whether held on the territory of the United States or overseas. By acting otherwise in its practice and its legislation, the US Government has instituted a form of **legal apartheid**, where human rights and legal protections are applied to detainees in lesser or greater measure on an entirely discriminatory basis.

353. Nowhere has this legal apartheid been more apparent than in the subject matter of this report – the CIA's covert programme to hold foreign "enemy" HVDs in secret detention overseas, including on the territory of Council of Europe member states. It is high time that we end this untenable discrimination – and with it we must banish forever the Bush Administration mindset that effectively says "if it is illegal for us to use such a practice at home or on our own citizens, let us export or outsource it so we will not be held to account for it."

354. The third definition we must clarify is that of the "combatant". The strategic choice of the Bush Administration to persist with the "war on terror" metaphor has ultimately had the effect of "conferring on suspected terrorists the elevated status of combatants"[301] – when in reality they ought to be dealt with in the same manner as other members of international criminal networks, such as arms traders, drugs smugglers or human traffickers. I believe that giving such status to members of Al Qaeda has served to galvanise its leadership and reinforce its self-perception as a revolutionary "people's army." Khalid Sheikh Mohamed and other HVDs have capitalised on their status to send "political" messages during their CSRT hearings at Guantanamo Bay.[302] I also agree with the US Army's own assessment that "insurgents" given a sense of legitimacy will surely harden as adversaries, not least in their effective resistance to interrogation.[303]

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[299] See Office of the Press Secretary, The White House, "President Issues Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism", 13.11.2001, full text available at: http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html.

[300] See Military Commissions Act of 2006, http://www.loc.gov/rr/frd/Military_Law/MC_Act-2006.html. The Act makes explicit distinctions between US citizens and non-citizens, or "aliens", as grounds for affording lesser legal protections (including denial of *habeus corpus* rights) to the latter category.

[301] See Human Rights First, "Testimony of Elisa Massimino before the US House of Representatives, Committee on Armed Services", 29.03.2007, available at http://www.humanrightsfirst.org/. HRF made a compelling case to Congress to review several of the problematic definitions I have discussed here: "How we treat our terrorist suspects – including how we try them – speaks volumes about who we are as a nation, and our confidence in the institutions and values that set us apart. The distinction between the United States and its terrorist enemies has narrowed over the course of this conflict."

[302] I refer here to the Combatant Status Review Tribunal (CSRT) hearings in which KSM and other detainees among the fourteen HVDs at Guantanamo Bay appeared earlier this year, available at: http://www.defenselink.mil/home/features/Detainee_Affairs/. See, for example, Department of Defense, "Unclassified Verbatim Transcript of CSRT Hearing for ISN 10024" [known to be Khalid Sheikh Mohamed], 10.03.2007. KSM declared himself a "combatant" with the phrase: "For sure, I am an American enemy." He also attempted to position himself as a "revolutionary" by stating: "we [Al Qaeda] consider we and George Washington doing same thing."

[303] In this regard, see US Department of Defense, Army Field Manual on Interrogation, FM3-24/MCWP3-33.5, December 2006, at pages 1 to 23. Under the section entitled "Counterinsurgency", the Manual states: "It is easier to separate an insurgency from its resources and let it die than to kill every insurgent [because] dynamic insurgencies can replace losses quickly. Skilful counterinsurgents must thus cut off the sources of that recuperative power." One such source is said to be the status afforded to an insurgent by his enemy.

ii. Towards consensus standards on interrogation techniques

355. It has now been widely agreed in America and internationally that the "enhanced interrogation techniques"[304] used on the CIA's "high-value" detainees in secret detention overstepped the mark in terms of what is legal, moral and effective. Two very recent commentaries in this area – one by a UN Special Rapporteur[305] and one by an expert group of American "intelligence scientists"[306] – provide arguments in favour of review and strict regulation of interrogation techniques.

356. The UN Rapporteur, Martin Scheinin, has re-emphasised that many of interrogation techniques in which "the CIA has indeed been involved, and continues to be involved", in his assessment "involve conduct that amounts to a breach of the non-derogable right to be free from torture and any form of cruel, inhuman or degrading treatment."[307]

357. The American study, by the Intelligence Science Board, focuses on practical considerations, essentially considering whether or not interrogation techniques like those used by the CIA are effective in gathering accurate intelligence. In its entirety, the report concludes that many post-9/11 techniques are "outmoded, amateurish and unreliable;"[308] in its detail, the report offers plausible explanations as to how interrogations have so frequently spiralled into abuse:

> *"Too often, interrogators intensely and aggressively pursue their operational agenda without sufficiently acknowledging that the source, too, has an agenda … Disregarding the source's interests can lead to unexpected and seemingly inexplicable areas of disagreement and even outright defiance … As this war [on global terrorism] has continued, evidence of the employment of coercive methods by US interrogators has appeared with alarming frequency."*[309]

358. In my opinion, the very option to make use of coercive techniques based on physical and psychological pain or duress is a poisoned chalice in the hands of a CIA interrogator. Such is the national security imperative to gather tangible, actionable intelligence – not to mention the sense of outrage at the 11 September attacks for which the HVDs are being blamed, which often mutates into an irrational desire for vengeance – CIA interrogators have resorted and will continue to resort to whatever extremes of coercive treatment they are told is permissible.

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[304] Six of these "enhanced interrogation techniques" were described in an ABC News report in November 2005, summarised as follows: "water boarding" (induced fear of drowning on a detainee strapped to a board); "cold cell" (naked at 50 degrees Fahrenheit, repeatedly doused with cold water); "long-time standing" (shackled in a stress position for up to 40 hours, causing extreme pain and sleep deprivation); "attention slap" (open-handed strike across the face); "belly slap" (hard, open-handed strike to the stomach); and "attention grab" (taking hold of the detainee's shirt, shaking forcefully). See Brian Ross and Richard Esposito, "CIA's Harsh Interrogation Techniques Described – Sources Say Agency's Tactics lead to Questionable Confessions, Sometimes to Death", ABC News, 18.11.2005, available at: http://abcnews.go.com/WNT/Investigation/story?id=1322866.

[305] See Martin Scheinin, UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, "Press Conference discussing Preliminary Findings on Visit to United States," 16-25.05.2007 (hereinafter "Scheinin, 'Preliminary Findings on Visit to US'").

[306] See US National Defence Intelligence College, Intelligence Science Board, *Educing Information – Interrogation: Science and Art (Foundations for the Future)*, Phase I Report, Washington, DC, completed December 2006 – released 29.05.2007 (hereinafter "Intelligence Science Board, *Educing Information*").

[307] See Scheinin, "Preliminary Findings on Visit to US," *supra* note 307.

[308] For a review of the full report and several background interviews with its authors, see Scott Shane and Mark Mazzetti, "Interrogation Methods are Criticised", in *The New York Times*, 30.05.2007, available at: http://www.nytimes.com/2007/05/30/washington/30interrogate.html?bl=&_r=1&ei=5087%0A&en=dc81cce01b99827c&ex=1180756800&adxnnl=1&oref=slogin&adxnnlx=1180692698-m6KgJwvypPYbDzvaqwOvCA

[309] See Steve Kleinman, "Barriers to Success: Critical Challenges in Developing a New Educing Information Paradigm," excerpts taken from pp. 254, 255 and 265, in *Intelligence Science Board*, "Educing Information", *supra* note 308, at pp. 235-266.

359. I support unambiguous, transparent and strictly enforced rules on CIA detainee interrogation. The Executive Order that President Bush "shall issue" imminently[310] should be published in full and should expressly outlaw not only the abhorrent practice of "water boarding," but also techniques like slapping, stress positions, sleep deprivation and extremes of temperature. I note that even the Army Field Manual of September 2006 leaves open the possibility that such techniques are not prohibited, so that manual does not strike me as an appropriately robust set of minimum standards. When the long-awaited rules for the CIA are finally issued, they must set higher, clearer thresholds that maintain the integrity of these important interrogations.

iii. Perceptions of the HVD programme and its likely reactivation

360. At the time of his 6 September 2006 speech, President Bush lauded the HVD programme as a policy that "*has been, and remains, one of the most vital tools in our war against the terrorists*". In the experience of our team during this inquiry, the President's view is largely shared among those officers who had knowledge of the programme. With only very few exceptions, the majority of our sources in the CIA and the wider intelligence community have described the HVD programme as a success, or in one case "*about as good as it could have turned out*".

361. The following is an excerpt from our interview with a senior US intelligence source:

> "I think you have to understand that the programme we ran through 2005, into 2006 to handle the HVDs was both needs-oriented and results-oriented. We needed to show that we could capture those responsible for 9/11, break down key Al-Qaeda cells at their source, and keep the threat of terror attacks as far away from the American people as possible. We needed to work with our most trusted allies to avoid leaks that would endanger national security – ours or theirs. The results speak for themselves.
>
> And if you look at our situation now, the needs are different from the immediate post-9/11 period. Bringing those 14 HVDs to Guantanamo – the Zubaydahs and the KSMs – was like drawing a line under that programme in the way it had been operating, as a lot of guys weren't happy going on with it. Sure, there'll be something else to replace it, but we don't know what that looks like yet."

362. Our sources have stated categorically to us that from the perspective of the CIA officials who operated it, the specific aspects of the "High-Value Detainee" programme on which this report concentrates – including the European "black sites" – belong to a chapter of the post-9/11 story that is essentially closed.

363. At first sight, this analysis appears valid. The 14 HVDs whom our sources agreed to discuss with us (at least on a limited basis) have been transferred to and are all now held at Guantanamo Bay. They have received visits from representatives of the International Committee of the Red Cross (ICRC), which indicates that their fundamental rights as detainees have at last been regularised, at least as far as this particular aspect is concerned. They are no longer regarded as having high "live" intelligence value for the CIA or the US Government,[311] and so they were subject to Combatant Status Review Tribunal (CSRT) proceedings in early 2006 to rubber-stamp their status as "unlawful enemy combatants". Ultimately, these HVDs will be among the first detainees to be charged with specific offences in individual military commissions processes.

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[310] According to the Military Commissions Act 2006, at §§ 6(a)(3)(A) and (B), the President "shall issue" an Executive Order containing authoritative interpretations of the "meaning and application of the Geneva Conventions" that would then apply to interrogations carried out by the CIA. Recent news reports have stated that a lengthy deliberative process involving lawyers in the State Department, the White House, Directorate of National Intelligence and the Department of Defense would most likely lead to this Executive Order being published before the summer of 2007; see, for example, Mark Mazzetti, "CIA Awaits Rules on Terrorism Interrogations," in *The New York Times*, 25.03.2007, available at: http://www.nytimes.com/2007/03/25/washington/25interrogate.html?ex=1332475200&en=c7c0814347030512&ei=5088&partner=rssnyt&emc=rss

[311] See Remarks by President Bush, 06.09.2006, *supra* note 3: "*We have largely completed our questioning of the men – and to start the process for bringing them to trial, we must bring them into the open". One of our sources also conceded that having held these detainees for several years in incommunicado detention, it would be "disingenuous" to say that they are still 'live intelligence assets'".*

364. On the other hand, however, there can be little doubt that the Bush Administration is prepared to resort once again to some form of CIA detention and interrogation regime in the future. If President Bush's claim on 6 September 2006 that "*there are now no terrorists in the CIA program*" represented the closing of one chapter, then his very next sentence heralded the opening of another: "*But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical – and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information*".[312]

365. Indeed, there are clear indications that the HVD programme has been reactivated in recent months. The transfer of Abd Al-Iraqi to Guantanamo Bay in April 2007[313] bore strikingly similar characteristics to the 14 transfers in September 2006: during his several months in CIA detention prior to his transfer to Cuba, he appears to have been kept incommunicado and subjected to interrogation at an unknown site.

366. Indeed Al-Iraqi's handover to the Department of Defense only *after* his intelligence value to the CIA had been completely exploited would seem to confirm this statement from one of our intelligence sources: "*The CIA has gone from having no interest in interrogation to being the agency of preference in this area. We'll only give them up to the DoD once we've got everything we can out of them.*"

iv. Concluding thoughts

367. It is my sincere hope that my report this year will catalyse a renewed appreciation of the legal and moral quagmire into which we have collectively sunk as a result of the US-led "war on terror." Almost six years in, we seem no closer to pulling ourselves out of this quagmire, partly because of the absence of factual clarity – perpetuated by secrecy, cover-up and dishonesty – about the exact practices in which the US and its allies have engaged, and partly because a lack of urgency and political will on both sides of the Atlantic to unite around consensus solutions.

368. By clarifying some of the unspoken truths that have previously held us back in this exercise, I hope I have spurred right-minded Americans and Europeans alike into realising that our common values, in tandem with our common security, depend on our uniting to end the abusive practices inherent in US policies like the "High-Value Detainee" programme.

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[312] See Remarks by President Bush, 06.09.2006, *supra* note 3. Also, for the President's interpretation of the CIA programme's status under the revised law, see The White House, Office of the Press Secretary, "President Bush Signs Military Commissions Act of 2006", 17.10.2006, available at http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html. The Act, he said, "will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives."

[313] See US Department of Defense, "Defense Department takes custody of al-Qaeda leader," 27 April 2007, available at http://www.defenselink.mil/news/newsarticle.aspx?id=32969.

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT C

THE WHITE HOUSE
PRESIDENT GEORGE W. BUSH

For Immediate Release
Office of the Press Secretary
September 6, 2006

President Discusses Creation of Military Commissions to Try Suspected Terrorists

The East Room

- Fact Sheet: The Administration's Legislation to Create Military Commissions
- Myth/Fact: The Administration's Legislation to Create Military Commissions
- Fact Sheet: Bringing Terrorists to Justice
- In Focus: National Security

1:45 P.M. EDT

THE PRESIDENT: Thank you. Thanks for the warm welcome. Welcome to the White House. Mr. Vice President, Secretary Rice, Attorney General Gonzales, Ambassador Negroponte, General Hayden, members of the United States Congress, families who lost loved ones in the terrorist attacks on our nation, and my fellow citizens: Thanks for coming.

On the morning of September the 11th, 2001, our nation awoke to a nightmare attack. Nineteen men, armed with box cutters, took control of airplanes and turned them into missiles. They used them to kill nearly 3,000 innocent people. We watched the Twin Towers collapse before our eyes -- and it became instantly clear that we'd entered a new world, and a dangerous new war.

The attacks of September the 11th horrified our nation. And amid the grief came new fears and urgent questions: Who had attacked us? What did they want? And what else were they planning? Americans saw the destruction the terrorists had caused in New York, and Washington, and Pennsylvania, and they wondered if there were other terrorist cells in our midst poised to strike; they wondered if there was a second wave of attacks still to come.

With the Twin Towers and the Pentagon still smoldering, our country on edge, and a stream of intelligence coming in about potential new attacks, my administration faced immediate challenges: We had to respond to the attack on our country. We had to wage an unprecedented war against an enemy unlike any we had fought before. We had to find the terrorists hiding in America and across the world, before they were able to strike our country again. So in the early days and weeks after 9/11, I directed our government's senior national security officials to do everything in their power, within our laws, to prevent another attack.

Nearly five years have passed since these -- those initial days of shock and sadness -- and we are thankful that the terrorists have not succeeded in launching another attack on our soil. This is not for the

lack of desire or determination on the part of the enemy. As the recently foiled plot in London shows, the terrorists are still active, and they're still trying to strike America, and they're still trying to kill our people. One reason the terrorists have not succeeded is because of the hard work of thousands of dedicated men and women in our government, who have toiled day and night, along with our allies, to stop the enemy from carrying out their plans. And we are grateful for these hardworking citizens of ours.

Another reason the terrorists have not succeeded is because our government has changed its policies -- and given our military, intelligence, and law enforcement personnel the tools they need to fight this enemy and protect our people and preserve our freedoms.

The terrorists who declared war on America represent no nation, they defend no territory, and they wear no uniform. They do not mass armies on borders, or flotillas of warships on the high seas. They operate in the shadows of society; they send small teams of operatives to infiltrate free nations; they live quietly among their victims; they conspire in secret, and then they strike without warning. In this new war, the most important source of information on where the terrorists are hiding and what they are planning is the terrorists, themselves. Captured terrorists have unique knowledge about how terrorist networks operate. They have knowledge of where their operatives are deployed, and knowledge about what plots are underway. This intelligence -- this is intelligence that cannot be found any other place. And our security depends on getting this kind of information. To win the war on terror, we must be able to detain, question, and, when appropriate, prosecute terrorists captured here in America, and on the battlefields around the world.

After the 9/11 attacks, our coalition launched operations across the world to remove terrorist safe havens, and capture or kill terrorist operatives and leaders. Working with our allies, we've captured and detained thousands of terrorists and enemy fighters in Afghanistan, in Iraq, and other fronts of this war on terror. These enemy -- these are enemy combatants, who were waging war on our nation. We have a right under the laws of war, and we have an obligation to the American people, to detain these enemies and stop them from rejoining the battle.

Most of the enemy combatants we capture are held in Afghanistan or in Iraq, where they're questioned by our military personnel. Many are released after questioning, or turned over to local authorities -- if we determine that they do not pose a continuing threat and no longer have significant intelligence value. Others remain in American custody near the battlefield, to ensure that they don't return to the fight.

In some cases, we determine that individuals we have captured pose a significant threat, or may have intelligence that we and our allies need to have to prevent new attacks. Many are al Qaeda operatives or Taliban fighters trying to conceal their identities, and they withhold information that could save American lives. In these cases, it has been necessary to move these individuals to an environment where they can be held secretly [sic], questioned by experts, and -- when appropriate -- prosecuted for terrorist acts.

Some of these individuals are taken to the United States Naval Base at Guantanamo Bay, Cuba. It's important for Americans and others across the world to understand the kind of people held at Guantanamo. These aren't common criminals, or bystanders accidentally swept up on the battlefield -- we have in place a rigorous process to ensure those held at Guantanamo Bay belong

at Guantanamo. Those held at Guantanamo include suspected
bomb makers, terrorist trainers, recruiters and facilitators, and potential suicide bombers. They are in our custody so they cannot murder our people. One detainee held at Guantanamo told a questioner questioning him -- he said this: "I'll never forget your face. I will kill you, your brothers, your mother, and sisters."

In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency. This group includes individuals believed to be the key architects of the September the 11th attacks, and attacks on the USS Cole, an operative involved in the bombings of our embassies in Kenya and Tanzania, and individuals involved in other attacks that have taken the lives of innocent civilians across the world. These are dangerous men with unparalleled knowledge about terrorist networks and their plans for new attacks. The security of our nation and the lives of our citizens depend on our ability to learn what these terrorists know.

Many specifics of this program, including where these detainees have been held and the details of their confinement, cannot be divulged. Doing so would provide our enemies with information they could use to take retribution against our allies and harm our country. I can say that questioning the detainees in this program has given us information that has saved innocent lives by helping us stop new attacks -- here in the United States and across the world. Today, I'm going to share with you some of the examples provided by our intelligence community of how this program has saved lives; why it remains vital to the security of the United States, and our friends and allies; and why it deserves the support of the United States Congress and the American people.

Within months of September the 11th, 2001, we captured a man known as Abu Zubaydah. We believe that Zubaydah was a senior terrorist leader and a trusted associate of Osama bin Laden. Our intelligence community believes he had run a terrorist camp in Afghanistan where some of the 9/11 hijackers trained, and that he helped smuggle al Qaeda leaders out of Afghanistan after coalition forces arrived to liberate that country. Zubaydah was severely wounded during the firefight that brought him into custody -- and he survived only because of the medical care arranged by the CIA.

After he recovered, Zubaydah was defiant and evasive. He declared his hatred of America. During questioning, he at first disclosed what he thought was nominal information -- and then stopped all cooperation. Well, in fact, the "nominal" information he gave us turned out to be quite important. For example, Zubaydah disclosed Khalid Sheikh Mohammed -- or KSM -- was the mastermind behind the 9/11 attacks, and used the alias "Muktar." This was a vital piece of the puzzle that helped our intelligence community pursue KSM. Abu Zubaydah also provided information that helped stop a terrorist attack being planned for inside the United States -- an attack about which we had no previous information. Zubaydah told us that al Qaeda operatives were planning to launch an attack in the U.S., and provided physical descriptions of the operatives and information on their general location. Based on the information he provided, the operatives were detained -- one while traveling to the United States.

We knew that Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of procedures. These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations. The Department of Justice reviewed the authorized methods extensively and determined them to be lawful. I cannot describe the specific methods used -- I think you understand why -- if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary.

Zubaydah was questioned using these procedures, and soon he began to provide information on key al Qaeda operatives, including information that helped us find and capture more of those responsible for the attacks on September the 11th. For example, Zubaydah identified one of KSM's accomplices in the 9/11 attacks -- a terrorist named Ramzi bin al Shibh. The information Zubaydah provided helped lead to the capture of bin al Shibh. And together these two terrorists provided information that helped in the planning and execution of the operation that captured Khalid Sheikh Mohammed.

Once in our custody, KSM was questioned by the CIA using these procedures, and he soon provided information that helped us stop another planned attack on the United States. During questioning, KSM told us about another al Qaeda operative he knew was in CIA custody -- a terrorist named Majid Khan. KSM revealed that Khan had been told to deliver $50,000 to individuals working for a suspected terrorist leader named Hambali, the leader of al Qaeda's Southeast Asian affiliate known as "J-I". CIA officers confronted Khan with this information. Khan confirmed that the money had been delivered to an operative named Zubair, and provided both a physical description and contact number for this operative.

Based on that information, Zubair was captured in June of 2003, and he soon provided information that helped lead to the capture of Hambali. After Hambali's arrest, KSM was questioned again. He identified Hambali's brother as the leader of a "J-I" cell, and Hambali's conduit for communications with al Qaeda. Hambali's brother was soon captured in Pakistan, and, in turn, led us to a cell of 17 Southeast Asian "J-I" operatives. When confronted with the news that his terror cell had been broken up, Hambali admitted that the operatives were being groomed at KSM's request for attacks inside the United States -- probably [sic] using airplanes.

During questioning, KSM also provided many details of other plots to kill innocent Americans. For example, he described the design of planned attacks on buildings inside the United States, and how operatives were directed to carry them out. He told us the operatives had been instructed to ensure that the explosives went off at a point that was high enough to prevent the people trapped above from escaping out the windows.

KSM also provided vital information on al Qaeda's efforts to obtain biological weapons. During questioning, KSM admitted that he had met three individuals involved in al Qaeda's efforts to produce anthrax, a deadly biological agent -- and he identified one of the individuals as a terrorist named Yazid. KSM apparently believed we already had this information, because Yazid had been captured and taken into foreign custody before KSM's arrest. In fact, we did not know about Yazid's role in al Qaeda's anthrax program. Information from Yazid then helped lead to the capture of his two principal assistants in the anthrax program. Without the information provided by KSM and Yazid, we might not have uncovered this al Qaeda biological weapons program, or stopped this al Qaeda cell from developing anthrax for attacks against the United States.

These are some of the plots that have been stopped because of the information of this vital program. Terrorists held in CIA custody have also provided information that helped stop a planned strike on U.S. Marines at Camp Lemonier in Djibouti -- they were going to use an explosive laden water tanker. They helped stop a planned attack on the U.S. consulate in Karachi using car bombs and motorcycle bombs, and they helped stop a plot to hijack passenger planes and fly them into Heathrow or the Canary Wharf in London.

We're getting vital information necessary to do our jobs, and that's to protect the American people and our allies.

Information from the terrorists in this program has helped us to identify individuals that al Qaeda

deemed suitable for Western operations, many of whom we had never heard about before. They include terrorists who were set to case targets inside the United States, including financial buildings in major cities on the East Coast. Information from terrorists in CIA custody has played a role in the capture or questioning of nearly every senior al Qaeda member or associate detained by the U.S. and its allies since this program began. By providing everything from initial leads to photo identifications, to precise locations of where terrorists were hiding, this program has helped us to take potential mass murderers off the streets before they were able to kill.

This program has also played a critical role in helping us understand the enemy we face in this war. Terrorists in this program have painted a picture of al Qaeda's structure and financing, and communications and logistics. They identified al Qaeda's travel routes and safe havens, and explained how al Qaeda's senior leadership communicates with its operatives in places like Iraq. They provided information that allows us -- that has allowed us to make sense of documents and computer records that we have seized in terrorist raids. They've identified voices in recordings of intercepted calls, and helped us understand the meaning of potentially critical terrorist communications.

The information we get from these detainees is corroborated by intelligence, and we've received -- that we've received from other sources -- and together this intelligence has helped us connect the dots and stop attacks before they occur. Information from the terrorists questioned in this program helped unravel plots and terrorist cells in Europe and in other places. It's helped our allies protect their people from deadly enemies. This program has been, and remains, one of the most vital tools in our war against the terrorists. It is invaluable to America and to our allies. Were it not for this program, our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By giving us information about terrorist plans we could not get anywhere else, this program has saved innocent lives.

This program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they've determined it complied with our laws. This program has received strict oversight by the CIA's Inspector General. A small number of key leaders from both political parties on Capitol Hill were briefed about this program. All those involved in the questioning of the terrorists are carefully chosen and they're screened from a pool of experienced CIA officers. Those selected to conduct the most sensitive questioning had to complete more than 250 additional hours of specialized training before they are allowed to have contact with a captured terrorist.

I want to be absolutely clear with our people, and the world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it -- and I will not authorize it. Last year, my administration worked with Senator John McCain, and I signed into law the Detainee Treatment Act, which established the legal standard for treatment of detainees wherever they are held. I support this act. And as we implement this law, our government will continue to use every lawful method to obtain intelligence that can protect innocent people, and stop another attack like the one we experienced on September the 11th, 2001.

The CIA program has detained only a limited number of terrorists at any given time -- and once we've determined that the terrorists held by the CIA have little or no additional intelligence value, many of them have been returned to their home countries for prosecution or detention by their governments. Others have been accused of terrible crimes against the American people, and we have a duty to bring those responsible for these crimes to justice. So we intend to prosecute these men, as appropriate, for their crimes.

Soon after the war on terror began, I authorized a system of military commissions to try foreign terrorists accused of war crimes. Military commissions have been used by Presidents from George

Washington to Franklin Roosevelt to prosecute war criminals, because the rules for trying enemy combatants in a time of conflict must be different from those for trying common criminals or members of our own military. One of the first suspected terrorists to be put on trial by military commission was one of Osama bin Laden's bodyguards -- a man named Hamdan. His lawyers challenged the legality of the military commission system. It took more than two years for this case to make its way through the courts. The Court of Appeals for the District of Columbia Circuit upheld the military commissions we had designed, but this past June, the Supreme Court overturned that decision. The Supreme Court determined that military commissions are an appropriate venue for trying terrorists, but ruled that military commissions needed to be explicitly authorized by the United States Congress.

So today, I'm sending Congress legislation to specifically authorize the creation of military commissions to try terrorists for war crimes. My administration has been working with members of both parties in the House and Senate on this legislation. We put forward a bill that ensures these commissions are established in a way that protects our national security, and ensures a full and fair trial for those accused. The procedures in the bill I am sending to Congress today reflect the reality that we are a nation at war, and that it's essential for us to use all reliable evidence to bring these people to justice.

We're now approaching the five-year anniversary of the 9/11 attacks -- and the families of those murdered that day have waited patiently for justice. Some of the families are with us today -- they should have to wait no longer. So I'm announcing today that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody have been transferred to the United States Naval Base at Guantanamo Bay. (Applause.) They are being held in the custody of the Department of Defense. As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice. (Applause.)

We'll also seek to prosecute those believed to be responsible for the attack on the USS Cole, and an operative believed to be involved in the bombings of the American embassies in Kenya and Tanzania. With these prosecutions, we will send a clear message to those who kill Americans: No longer -- how long it takes, we will find you and we will bring you to justice. (Applause.)

These men will be held in a high-security facility at Guantanamo. The International Committee of the Red Cross is being advised of their detention, and will have the opportunity to meet with them. Those charged with crimes will be given access to attorneys who will help them prepare their defense -- and they will be presumed innocent. While at Guantanamo, they will have access to the same food, clothing, medical care, and opportunities for worship as other detainees. They will be questioned subject to the new U.S. Army Field Manual, which the Department of Defense is issuing today. And they will continue to be treated with the humanity that they denied others.

As we move forward with the prosecutions, we will continue to urge nations across the world to take back their nationals at Guantanamo who will not be prosecuted by our military commissions. America has no interest in being the world's jailer. But one of the reasons we have not been able to close Guantanamo is that many countries have refused to take back their nationals held at the facility. Other countries have not provided adequate assurances that their nationals will not be mistreated -- or they will not return to the battlefield, as more than a dozen people released from Guantanamo already have. We will continue working to transfer individuals held at Guantanamo, and ask other countries to work with us in this process. And we will move toward the day when we can eventually close the detention facility at Guantanamo Bay.

I know Americans have heard conflicting information about Guantanamo. Let me give you some facts. Of the thousands of terrorists captured across the world, only about 770 have ever been sent to

Guantanamo. Of these, about 315 have been returned to other countries so far -- and about 455 remain in our custody. They are provided the same quality of medical care as the American service members who guard them. The International Committee of the Red Cross has the opportunity to meet privately with all who are held there. The facility has been visited by government officials from more than 30 countries, and delegations from international organizations, as well. After the Organization for Security and Cooperation in Europe came to visit, one of its delegation members called Guantanamo "a model prison" where people are treated better than in prisons in his own country. Our troops can take great pride in the work they do at Guantanamo Bay -- and so can the American people.

As we prosecute suspected terrorist leaders and operatives who have now been transferred to Guantanamo, we'll continue searching for those who have stepped forward to take their places. This nation is going to stay on the offense to protect the American people. We will continue to bring the world's most dangerous terrorists to justice -- and we will continue working to collect the vital intelligence we need to protect our country. The current transfers mean that there are now no terrorists in the CIA program. But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical -- and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information.

Some may ask: Why are you acknowledging this program now? There are two reasons why I'm making these limited disclosures today. First, we have largely completed our questioning of the men -- and to start the process for bringing them to trial, we must bring them into the open. Second, the Supreme Court's recent decision has impaired our ability to prosecute terrorists through military commissions, and has put in question the future of the CIA program. In its ruling on military commissions, the Court determined that a provision of the Geneva Conventions known as "Common Article Three" applies to our war with al Qaeda. This article includes provisions that prohibit "outrages upon personal dignity" and "humiliating and degrading treatment." The problem is that these and other provisions of Common Article Three are vague and undefined, and each could be interpreted in different ways by American or foreign judges. And some believe our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act -- simply for doing their jobs in a thorough and professional way.

This is unacceptable. Our military and intelligence personnel go face to face with the world's most dangerous men every day. They have risked their lives to capture some of the most brutal terrorists on Earth. And they have worked day and night to find out what the terrorists know so we can stop new attacks. America owes our brave men and women some things in return. We owe them their thanks for saving lives and keeping America safe. And we owe them clear rules, so they can continue to do their jobs and protect our people.

So today, I'm asking Congress to pass legislation that will clarify the rules for our personnel fighting the war on terror. First, I'm asking Congress to list the specific, recognizable offenses that would be considered crimes under the War Crimes Act -- so our personnel can know clearly what is prohibited in the handling of terrorist enemies. Second, I'm asking that Congress make explicit that by following the standards of the Detainee Treatment Act our personnel are fulfilling America's obligations under Common Article Three of the Geneva Conventions. Third, I'm asking that Congress make it clear that captured terrorists cannot use the Geneva Conventions as a basis to sue our personnel in courts -- in U.S. courts. The men and women who protect us should not have to fear lawsuits filed by terrorists because they're doing their jobs.

The need for this legislation is urgent. We need to ensure that those questioning terrorists can continue to do everything within the limits of the law to get information that can save American lives. My administration will continue to work with the Congress to get this legislation enacted -- but time is of the

essence. Congress is in session just for a few more weeks, and passing this legislation ought to be the top priority. (Applause.)

As we work with Congress to pass a good bill, we will also consult with congressional leaders on how to ensure that the CIA program goes forward in a way that follows the law, that meets the national security needs of our country, and protects the brave men and women we ask to obtain information that will save innocent lives. For the sake of our security, Congress needs to act, and update our laws to meet the threats of this new era. And I know they will.

We're engaged in a global struggle -- and the entire civilized world has a stake in its outcome. America is a nation of law. And as I work with Congress to strengthen and clarify our laws here at home, I will continue to work with members of the international community who have been our partners in this struggle. I've spoken with leaders of foreign governments, and worked with them to address their concerns about Guantanamo and our detention policies. I'll continue to work with the international community to construct a common foundation to defend our nations and protect our freedoms.

Free nations have faced new enemies and adjusted to new threats before -- and we have prevailed. Like the struggles of the last century, today's war on terror is, above all, a struggle for freedom and liberty. The adversaries are different, but the stakes in this war are the same: We're fighting for our way of life, and our ability to live in freedom. We're fighting for the cause of humanity, against those who seek to impose the darkness of tyranny and terror upon the entire world. And we're fighting for a peaceful future for our children and our grandchildren.

May God bless you all. (Applause.)

END 2:22 P.M. EDT

THE WHITE HOUSE
PRESIDENT GEORGE W. BUSH

For Immediate Release
September 6, 2006

Fact Sheet: Bringing Terrorists to Justice

President Discusses Creation of Military Commissions to Try Suspected Terrorists
In Focus: National Security

Today, The President Announced That Khalid Sheikh Mohammed ("KSM"), Abu Zubaydah, Ramzi Bin Al Shibh, And 11 Other Terrorists In CIA Custody Have Been Transferred To The Custody Of The Department Of Defense, At The U.S. Naval Base At Guantanamo Bay. More information on the individuals transferred to Guantanamo is available at http://www.odni.gov/announcements/content/DetaineeBiographies.pdf.

These Men Have Provided Valuable Information That Has Saved Innocent Lives In The United States And Around The World. In addition to terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the U.S., in a separate program operated by the CIA. The detainees recently transferred to the U.S. Naval Base at Guantanamo Bay were previously held and questioned by the CIA. The CIA program focused on a number of suspected terrorist leaders and operatives – dangerous men with unparalleled knowledge about terrorist networks and plans for new attacks.

The CIA Program Has Been, And Remains, One Of The Most Vital Tools In Our War Against The Terrorists. Questioning of detainees in the program has given us information that has saved innocent lives by helping us to stop new attacks in America and abroad.

Information From Detainees Questioned In This Program Has Helped Unravel Plots And Terrorist Cells

According To Our Intelligence Community, The Program Has Produced Information That Has Saved Lives. Some Examples Include The Following:

- **Abu Zubaydah Told Us That Al Qaida Operatives Were Planning To Launch An Attack Inside The United States.** Based on information he provided, the operatives were detained, one while traveling to the U.S. Zubaydah also disclosed that Khalid Sheikh Mohammed ("KSM") was the mastermind behind the September 11 attacks.

- **Information Provided By Zubaydah Also Helped Lead To The Capture Of Ramzi Bin Al Shibh, One Of KSM's Accomplices In 9/11.** Together, these two terrorists provided information that helped in the planning and execution of the operation that captured KSM.

- **KSM Provided Information That Led Us To The Capture Of A Terrorist Operative Named**

Zubair, Who Provided Information That Helped Lead To The Capture Of Hambali – The Leader Of Al Qaida's Southeast Asian Affiliate Known As JI (Jamal Islamia). After Hambali's arrest, KSM was questioned again, and he identified Hambali's brother as the leader of a JI cell, and Hambali's conduit for communications with al Qaida. Hambali's brother was soon captured, and he in turn led us to a cell of 17 Southeast Asian JI operatives. When confronted with the news that his terror cell had been broken up, Hambali admitted that the operatives were being groomed at KSM's request for attacks inside the U.S., possibly using airplanes.

- **KSM Also Told Us Many Details Of Other Plots To Kill Innocent Americans And Provided Vital Information On Al Qaida's Efforts To Obtain Biological Weapons For Terrorist Attacks.** He described the design of planned attacks on buildings inside the U.S. and how operatives were directed to carry them out. He told us the operatives had been instructed to ensure the explosions went off at a point that was high enough to prevent the people trapped above from escaping out of the windows.

Suspected Terrorists In The CIA Program Have Provided Everything From Initial Leads To Photo Identifications To Precise Locations Of Where Terrorists Were Hiding – Helping Us Take Potential Mass Murderers Off The Streets Before They Were Able To Kill Or Kill Again. Detainees in this program have helped us identify individuals that al Qaida deemed suitable for Western operations, including terrorists sent to case targets inside the U.S. Detainees in this program have identified al Qaida travel routes and safe havens, and explained how al Qaida's senior leadership communicates with its operatives in Iraq. They have identified voices in recordings of intercepted calls and helped us understand the meaning of potentially critical terrorist communications.

Legislation Authorizing The Creation Of Military Commissions To Try These Suspected Terrorists For War Crimes

Today, The President Sent Legislation To Congress To Specifically Authorize The Creation Of Military Commissions To Try These Suspected Terrorists For War Crimes. The Bill ensures that these commissions are established in a way that protects our national security and ensures a full and fair trial for the accused. As soon as Congress acts to authorize the military commissions the President proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September 11, 2001, can face justice. We will also seek to prosecute those believed to be responsible for the attack on the USS Cole – and an operative believed to be involved in the bombings of the American embassies in Kenya and Tanzania.

The Legislation Also Includes Vital Provisions To Preserve Our Ability To Question Key Terrorist Leaders And Operatives. We will continue to hunt down terrorist leaders and operatives. And as more high-ranking terrorists are captured, the CIA program will be crucial to obtaining the life-saving information they can provide.

- **The Supreme Court's Recent Determination That Common Article Three (CA3) Of The Geneva Conventions Applies To The War With Al Qaida Put In Question The Future Of The CIA Program.** CA3 prohibits "outrages upon personal dignity" and "humiliating and degrading treatment." These and other provisions are vague and undefined and could be interpreted in different ways by American and foreign judges.

- **We Owe Our Military And Intelligence Personnel Involved In Capturing And Questioning Terrorists Clear Rules So They Can Continue To Do Their Jobs And Protect Our People.** We are asking Congress to pass legislation that will clarify the rules for our personnel fighting the

war on terror. We need to ensure that those questioning the terrorists can continue to do everything within the limits of the law to get information that can save American lives.

Passing This Legislation Is A Top Priority, And We Will Work With Congress To Act Quickly To Strengthen And Clarify Our Laws To Meet The Threats Of A New Era. We will ensure that the CIA program goes forward in a way that follows the law, meets the national security needs of our country, and protects the brave men and women we ask to obtain information that will save innocent lives.

# # #

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

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The New York Times

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WIN WIN MARCH 18

January 23, 2009

Obama Orders Secret Prisons and Detention Camps Closed

By SCOTT SHANE

WASHINGTON — Saying that "our ideals give us the strength and moral high ground" to combat terrorism, President Obama signed executive orders Thursday ending the Central Intelligence Agency's secret overseas prisons, banning coercive interrogation methods and closing the Guantánamo Bay detention camp within a year.

But even as he reversed the most disputed counterterrorism policies of the Bush years, Mr. Obama postponed for at least six months difficult decisions on the details. He ordered a cabinet-level review of the most challenging questions his administration faces — what to do with dangerous prisoners who cannot be tried in American courts; whether some interrogation methods should remain secret to keep Al Qaeda from training to resist them; and how the United States can make sure prisoners transferred to other countries will not be tortured.

As Mr. Obama signed three orders in a White House ceremony, 16 retired generals and admirals who have fought for months for a ban on coercive interrogations stood behind him and applauded. The group, organized to lobby the Obama transition team by the group Human Rights First, did not include any career C.I.A. officers or retirees.

"We intend to win this fight," Mr. Obama said, "We are going to win it on our own terms."

One of Mr. Obama's orders requires the C.I.A. to use only the 19 interrogation methods outlined in the Army Field Manual, ending President Bush's policy of permitting the agency to use some secret methods that went beyond those allowed for military interrogators.

"We believe we can abide by a rule that says, we don't torture, but we can effectively obtain the intelligence we need," Mr. Obama said.

The orders, and Mr. Obama's televised statement, marked an abrupt break with the Bush administration. Critics for years have accused Mr. Bush of permitting torture and damaging the country's moral standing in the world, while Dick Cheney, the former president and vice president, insisted that all their programs were lawful and had prevented a repeat of the Sept. 11, 2001 terrorist attacks.

John D. Hutson, a retired admiral and law school dean, was at the signing ceremony "He really gets it," Mr. Hutson said of Mr. Obama in an interview a few minutes after the ceremony. "He acknowledged that this isn't easy. But he is absolutely dedicated to getting us back on track as a nation. This is the right thing to do morally, diplomatically, militarily and Constitutionally. But it also makes us safer."

Democrats in Congress and human rights groups largely hailed Mr. Obama's moves, while some

Republicans said they were unrealistic.

Representative Peter Hoekstra of Michigan, the top Republican on the House Intelligence Committee, said the decision to close Guantánamo by a year from now "places hope ahead of reality — it sets an objective without a plan to get there."

He said that in briefings for Congress on Wednesday, administration officials "could not answer questions as to what they will do with any new jihadists or enemy combatants that we capture."

"What are we to do with these people, bring them to the very place they hoped to attack: The United States? What do we do with confessed 9/11 mastermind Khalid Sheikh Mohammed and his fellow terrorist conspirators, offer them jail cells in American communities?"

By contrast, Sen. John Kerry, the Massachusetts Democrat and chairman of the Senate Foreign Relations Committee, said, "Today is a great day for the rule of law in the United States of America," adding: "America is ready to lead again — not just with our words, but by our example."

Mr. Obama's order closing Guantánamo assigns the attorney general to lead a review of what should happen to the remaining detainees and does not rule out the possibility of trying some of them using military commissions, as has the Bush administration, though possibly with different procedures.

One task force, with the attorney general and secretary of defense as co-chairmen, will study detainee policy and report to the president in six months. A second task force, led by the attorney general, and with the secretary of defense and director of national intelligence as vice co-chairs, will study whether the Army Field Manual should remain the only standard for interrogators and review the practice of extraordinary rendition, in which captured terrorist suspects are transferred to other countries.

One more order directed a high-level review of the case of Ali Saleh Kahlah al-Marri, a suspected terrorist — Mr. Obama called him "dangerous" — who is currently being held in a military jail in South Carolina.

The new White House counsel, Gregory B. Craig, briefed lawmakers about some elements of the orders on Wednesday evening. A Congressional official who attended the session said Mr. Craig acknowledged concerns from intelligence officials that new restrictions on C.I.A. methods might be unwise and indicated that the White House might be open to allowing the use of methods other the 19 techniques allowed for the military.

But the executive order on interrogations is certain to be received with some skepticism at the C.I.A., which for years has maintained that the military's interrogation rules are insufficient to get information from senior Qaeda figures like Khalid Sheikh Mohammed. The Bush administration asserted that the harsh interrogation methods were instrumental in gaining valuable intelligence on Qaeda operations.

The intelligence agency built a network of secret prisons in 2002 to house and interrogate senior Qaeda figures captured overseas. The exact number of suspects to have moved through the prisons is unknown, although Michael V. Hayden, the departing director of the agency, has in the past put the number at "fewer than 100."

The secret detentions brought international condemnation, and in September 2006, Mr. Bush ordered that

the remaining 14 detainees in C.I.A. custody be transferred to Guantánamo Bay and tried by military tribunals.

But Mr. Bush made clear then that he was not shutting down the C.I.A. detention system, and in the last two years, two Qaeda operatives are believed to have been detained in agency prisons for several months each before being sent to Guantánamo.

A government official said Mr. Obama's order on the C.I.A. would still allow its officers abroad to temporarily detain terrorism suspects and transfer them to other agencies, but would no longer allow the agency to carry out long-term detentions.

Since the early days after the 2001 attacks, the intelligence agency's role in detaining terrorism suspects has been significantly scaled back, as has the severity of interrogation methods the agency is permitted to use. The most controversial practice, the simulated drowning technique known as water-boarding, was used on three suspects but has not been used since 2003, C.I.A. officials said.

But at the urging of the Bush administration, Congress in 2006 authorized the agency to continue using harsher interrogation methods than those permitted for use by other agencies, including the military. Those exact methods remain classified. The order on Guantánamo says that the camp, which received its first hooded and chained detainees seven years ago this month, "shall be closed as soon as practicable, and no later than one year from the date of this order."

The order calls for a cabinet-level panel to grapple with issues including where in the United States prisoners might be moved and what courts they could be tried in. It also provides for a new diplomatic effort to transfer some of the remaining men, including more than 60 that the Bush administration had cleared for release.

The order also directs an immediate assessment of the prison itself to ensure that the men are held in conditions that meet the humanitarian requirements of the Geneva Convention. That provision appeared to be a pointed embrace of the international treaties that the Bush administration often argued did not apply to detainees captured in the war against terrorism.

The seven years of the detention camp have included four suicides, hunger strikes by scores of detainees, and accusations of extensive use of solitary confinement and abusive interrogations, which the Department of Defense has long denied. Last week a senior Pentagon official said she had concluded that interrogators at Guantánamo had tortured one detainee, who officials have said was a would-be "20th hijacker" in the attacks of Sept. 11, 2001.

The new administration late Tuesday night ordered an immediate halt to the military commission proceedings for prosecuting detainees at Guantánamo and filed a request in Federal District Court in Washington to stay habeas corpus proceedings there. Government lawyers described both delays as necessary for the administration to make a broad assessment of detention policy.

The cases immediately affected include those of five detainees charged as the coordinators of the 2001 attacks, including the case against Mr. Mohammed, the self-described mastermind.

The decision to stop the commissions was described by the military prosecutors as a pause in the war-crimes system "to permit the newly inaugurated president and his administration time to review the military commission process generally and the cases currently pending before the military commissions, specifically."

More than 200 detainees' habeas corpus cases have been filed in federal court, and lawyers said they expected that all of the cases would be stayed.

Mr. Obama had suggested in the campaign that, in place of military commissions, he would prefer prosecutions in federal courts or, perhaps, in the existing military justice system, which provides legal guarantees similar to those of American civilian courts.

William Glaberson contributed reporting from New York.

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FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

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Transcript of Director Hayden's Interview with Charlie Rose

(Posted with permission from the Charlie Rose Show
watch the interview at www.charlierose.com/home [external link disclaimer])

October 24, 2007

Director of the Central Intelligence Agency, General Michael V. Hayden, appeared on the Charlie Rose show on October 22, 2007. Below is the transcript of their conversation.

CHARLIE ROSE (Host): General Michael Hayden is here. He is the Director of the Central Intelligence Agency. He was the first ever Deputy Director of National Intelligence. He was the Director of the National Security Agency from 1999 to 2005. He has overseen some of the most controversial national security programs--the NSA's warrantless eavesdropping on US citizens and the CIA's rendition and enhanced interrogation programs. He has said he wants to use a full authority allowed by law and that his spikes will have chalk on them. I am pleased to have General Hayden at this table to talk about his sense of what the CIA's mission is, and how he puts that within the framework of the constitutional framework of the United States, and the challenge he sees from the rest of the world. So I say welcome, first.

D/CIA: Thank you. Thanks for the opportunity to be here.

ROSE: Tell me what you think the CIA's mission is.

D/CIA: In general, it's to defend the Republic, and you need to understand the Republic in the broadest sense. It's to defend the security, the safety, the physical safety of the American people. It's to defend the interests of the United States of America, and it's to defend a value system that this nation represents.

ROSE: You have also said that it has to protect America and it has to help policymakers understand the world around them.

D/CIA: Yes. Intelligence in any form, but particularly from my agency. If you know, Charlie, we've got the largest group of analysts in the Intelligence Community, and the only group of analysts that's not attached to some Cabinet-level department. So that autonomy gives us great opportunity, but also creates some burdens for us as well in terms of the requirement for us to be absolutely objective. And what I tried to describe--and I do this with our analysts--is that intelligence exists in that nexus between the world as it is and the world as we want it to be. And it's in that nexus that policy is formed. And the challenge for intelligence--but particularly for the analysts of the CIA--is to be in that nexus, to be relevant to the policymakers' questions, while at the same time not being captured by the policymakers' preferences. That's really demanding. It's hard to do, but that's the space where we've got to work.

ROSE: That's one of the questions that has arisen within this Administration with the Vice President and his office--whether intelligence has been captured.

D/CIA: Captured? How do you mean captured?

ROSE: Well, captured, whether the Vice President has his own intelligence and whether the Vice President, you know, is a different figure in terms of--and you've seen this up close, because you were the deputy to John Negroponte when he was the Director of National Intelligence.

D/CIA: Right. No. I mean all policymakers come to the creation of policy with their own personal histories, with their own view of man, with their own view of the world, with their own view of the best possible approaches that the Republic could have. We're part of that mix. We bring a view of the world into that--into that conversation.

ROSE: The CIA brings a view of the world into that conversation.

D/CIA: That's correct.

ROSE: Without policy recommendations.

D/CIA: We have to be policy relevant. Otherwise we're spending an awful lot of your tax dollars just to be interesting. What we need to be is relevant, so we've got to answer the questions that policymakers put to us. And frankly, we've got to answer a few questions that they don't think to put to us as well. But the fact that a policymaker disagrees with us--or more frequently, a policymaker challenges us--makes us stand by our assumptions, makes us stand by our conclusions. That's the cost of doing business, and if you're a really good analyst, you actually welcome that. That's not something that should put you off.

ROSE: So if you see a policymaker question your view or your analyst with great enthusiasm, you welcome that?

D/CIA: We do.

ROSE: Because you want to know whether you're doing the right thing.

D/CIA: That's right. And that actually is one metric, one measure, of the relevance of what it is we're saying to the policymakers' formulation of policy.

ROSE: Here's the flip side of that.

D/CIA: Sure.

ROSE: Policymakers have made a decision about a certain policy, and they're just looking--they are out there looking for some intelligence that you'll give them that will support a point of view that they already have. That's the danger that some people worry about.

D/CIA: Of course. That exists in any human endeavor. That, you know, human nature being what it is. Anyone can go into a question, particularly a complex question with a preconceived point of view. And one can go through--there's massive amounts of data out there now. Let me step back and give you an example from people in my community. It's going to sound a little defensive, but, you know, in our conversation before we started, you said you wanted this to be a candid conversation. All right? It's pretty easy looking back after 9/11, looking into that vast ocean of data that existed prior to 9/11, and pick out the threads that show you how one could have arrived at a conclusion that the attacks were imminent, that the attacks would be of this nature, that they would happen at this time, and so on. So there is so much data out there that the human mind has to come at that data with at least some hypotheses.

ROSE: Okay, but--

D/CIA: A policymaker can do that. But so can we, and their hypotheses and ours can legitimately bump up against one another.

ROSE: Do you accept all the conclusions of the 9/11 Commission?

D/CIA: Yes.

ROSE: That's a case where they looked at everything and made certain--

D/CIA: Conclusions in terms of the recommendations--

ROSE: Right.

D/CIA: --they made to our community. And by and large, almost all those recommendations have been enacted.

ROSE: When you look at this statement, "America needs something that arguably goes against our grain, a truly great intelligence service that can be operated powerfully, invisibly, legally"--

D/CIA: It actually states quite clearly and simply starkly the dilemma of a secret intelligence service inside of a free society. But a free society needs a secret intelligence service as much as, if not more than, other forms of government around the world. And that presents us with great challenges--not us as an Agency, but it presents us as a people with these kinds of great challenges.

ROSE: Do we have a great intelligence service?

D/CIA: I believe we do have a great intelligence service. Is it good enough in all circumstances? Of course not. We live in the human condition. We try to make it better each day. But one of the messages I feel compelled to give to the American public is that the CIA and the American Intelligence Community writ large is in a class by its own. If we were comparing our intelligence services to the intelligence services around the world, and we were grading on a curve, we'd have to give ourselves an A-plus.

ROSE: All right. Let me just--

D/CIA: But life and the American people don't grade on the curve. It's an absolute scale. And that demands that we be better at everything we do.

ROSE: So you are saying to us, "I don't know of any nation that has a better intelligence service, and I've seen many of them, because it is my job to have relationships with many of them."

D/CIA: It would be unfair of me to endorse precisely what you just said. But when you think of the scale of intelligence that our nation must have, and to give you that mix of both global coverage, which no one--no other nation--currently has, and excellence, you can see where the bar is for the American Intelligence Community. It's very demanding.

ROSE: When you came there, people said the following things. They said he's there to calm a troubled agency, to restore the luster and restore the professionalism. Have you done that? Have you had to do that? Have you had to change a culture over there?

D/CIA: What you say roughly captures some of the things that we had to take on when I came there with Steve Kappes and Michael Morell.

ROSE: Who had quit?

D/CIA: That's right--who had left about 16 months ago. All right, the first thing we had to do, and I said this in my confirmation hearings, was to get the Agency out of the news as source or subject. There is no worse place for an intelligence service like CIA to be than on Page 1, above the fold in your daily newspaper. That's a distraction to the kind of work that the Agency has to do. So the first thing we wanted to do--this is really very simple. And Steve and Michael and I, my first message to the workforce was simply this: let's just go back to work. Let's just go what it is, go back and do what it is we know we have to do to defend America, to defend the Republic the way I described it a few minutes ago.

ROSE: Have you reached a point now where you think it's important to communicate something about the CIA? We asked you to come here, and it was not the first invitation. You appeared at the Council of Foreign Relations.

D/CIA: Yes.

ROSE: You made a speech, which was a candid and forceful speech about how you saw the CIA. Have you reached a point where you think it's important to communicate?

D/CIA: It is.

ROSE: Because you are bothered by something?

D/CIA: I am. And let me try to describe the narrative--

ROSE: Okay.

D/CIA: --that perhaps has gotten me, gotten the Agency to this point. As I said in my confirmation hearing, out of the press as source or subject. Settle down. Back to work. Do our mission. And I think we've been somewhat successful in doing that.

But there are other dynamics at work here as well. Many of the things this agency does on behalf of the American people have become controversial, have become controversial in a way that affects the workforce. I mean, these aren't people separated from the American political culture who come to work at Langley and our activities around the world. These people are fully, completely Americans. They are affected by what goes on in the broader political culture when it's discussing the kind of work that they do. I think that public discourse has not been well informed. And so I am here. I was at the Council on Foreign Relations last month to give our perspective on some of these critical questions about the Agency that are now out there in the public forum.

ROSE: All right. Let's talk about the idea that you cited in the Council on Foreign Relations, just to give you some sense of information and how you see the battle and what techniques and means that you use in the battle.

D/CIA: Right.

ROSE: You have said the United States is at war. There is a state of armed conflict, and that the CIA is a vital element of that war. Tell me about the war and what you think the challenge is, because you say that everybody--that there's a real danger, more so than any time since the Civil War.

D/CIA: Right.

ROSE: And that everybody in America who lives in a major city is a possible target.

D/CIA: That's right. And that statement, you know, as I believe I put it, we believe we are in a state of armed conflict with al-Qaeda and its affiliates, that this conflict is global in scope, and that the only way we can win that war and to defend the Republic is to take that war to the enemy wherever he may be.

ROSE: Okay.

D/CIA: I recognize that I said it so starkly. I recognize that that is not a universally held view globally. And much to my disappointment, it is not a universally held view domestically. We had a meeting at--

ROSE: That we were at war or the nature of the enemy?

D/CIA: No, no. That this is a war.

ROSE: Right.

D/CIA: And that we must consider it a war, that it isn't a law enforcement problem or some other kind of approach to this particular problem that we're facing today, that this is an armed conflict. After the attacks on September 11th, we all learned lessons. You asked me about the 9/11 Commission and so on. One of the ones that I internalized personally because of my experience at that time as the Director of the National Security Agency was that this was not, in its essence, primarily a law enforcement issue. This was an armed conflict.

That is, again, not universally accepted by other governments in the world. And in March, I was invited to talk. The German ambassador asked me to come to his residence. Germany at that time was in the chair of the European Union. And he had this every-other-week meeting with the ambassadors to the United States from the countries of the European Union. And I went there at lunch to speak. It was a very good exchange of ideas. But I made that point precisely the way I said it: "We are in a state of armed conflict." And that's a view that I know is not held by many of the governments that are represented in that room.

ROSE: Well, it is said that the British have been successful because they believed it is a police effort, that that's why they've been able to roll up some of those people that they have in Britain.

D/CIA: Right. And the British are wonderful partners. And we share information with them intimately. And their success is our success and vice versa. Rolling up people on the verge of an attack in Great Britain is not a comforting measure of success in this war. You know, if we try to defeat this enemy at the moment of attack, and it may be just that. It may be the moment of attack.

ROSE: Right.

D/CIA: We may not be able to defeat him on the battlefield he has chosen, but that moment of attack has a trail. That trail goes back--it goes back in time. It goes back in space. It goes back in actors. And if we can attack back there against those people who are plotting, against those people who are planning, against those facilitators, I'd rather bet the safety of the Republic and the safety of our allies on that kind of an approach rather than--if you want to use a sports metaphor--playing a little offense rather than having a

perpetual first down and goal on the three-yard line in the homeland.

ROSE: I mean, is there anybody that doesn't think that this is a serious challenge to America's national security and we ought to take the battle to them and we ought to use--and be vigorous in our effort--to find out where the leadership is, what their targets are, what their means are, and whether they have the possibility in the United States, which you say you don't know--

D/CIA: Right.

ROSE: --to do damage to the United States in the homeland.

D/CIA: To clarify the last points that you made, what we don't know is whether or not they have operatives in the homeland. The other preconditions for attack we've stated pretty clearly. We think exist. But take your question and take it out of the abstract, and let's move it to the very practical, all right?

When I was at the Council on Foreign Relations, I said, you know, I have to act. I'm the head of the CIA. And I can't simply admire the problem or relish in its complexities. If I pick up someone who will do harm to America, if we're able to somehow get our hands on someone like that, I think I realistically have three options: I can detain him under the authorities the President has given us if he meets certain criteria. I can conduct a rendition. That is, taking that person to some other country, a third country. Or I can send that person to Guantanamo. And I said that very starkly at the Council on Foreign Relations to say those are the options that I have. Now I later learned, someone else had commented, well you could put him into a judicial process. That's the question that I see an awful lot on friction on.

ROSE: Okay, let me just tell you who argues the judicial process--Colin Powell. Colin Powell says we have nothing to fear from putting them in a judicial process.

D/CIA: That--I don't think we have anything to fear by putting them into a judicial process, if that is possible, but that cannot be our only approach to this problem. There are many people about whom I have more than sufficient intelligence to know that they intend to do great harm to the United States, but it's the kind of information that may not be admissible in a court of law, or it may be the kind of information that I cannot submit to a judicial process because of the threat it would impose to sources and methods. Back to the premise, this is a war, this is not a law enforcement activity.

ROSE: You think that's true about Khalid Sheikh Mohammed?

D/CIA: It was true for a while.

ROSE: That you--before you captured him or after you captured?

D/CIA: No--

ROSE: That you didn't have the evidence to put him on trial?

D/CIA: No, no. Remembering that the premise here is that this is a war.

ROSE: Right.

D/CIA: That the safety of the nation for a period of time was better served by keeping him in a dentition facility with the Central Intelligence Agency where our access to him had no filter, had no interruption, so that we could develop from him all the information that we did develop from him that prevented future attacks. At some point, and I realize, a captured al-Qaeda senior like Khalid Sheikh Mohammed--his intelligence value never bleeds off to zero. But at some point, at some point, the intelligence value has to be measured against the other tools that the nation has at its disposal, and in this case, the summer of last year and the summer of 2006, the decision was made for KSM and for the 13 other people who were in custody at that time that the intelligence value had aged off to such a point that they could be moved to the next step of the process and that they can be prosecuted. Now the difficulty of prosecution--and that's not in my inbox. You read the press and the coverage as closely as I, and you can see all the complications that we have to work through as a society to prosecute.

ROSE: Let's separate two things. One, General Powell I think was talking about Guantanamo primarily. Now, are you making the same distinction? I mean KSM is now in Guantanamo, yes?

D/CIA: Yes.

ROSE: So should he have judicial process now, or do you think that as long as you think he is an asset that might tell you something, you should not give him and put him into some recognized judicial process?

D/CIA: We have made the judgment that the intelligence value of those individuals, the 14 that we moved there last September and the one additional person that we moved there this past year, Abd al-Hadi al-Iraqi, that the intelligence value of those people have degraded to a point that these other needs now take dominance. And we can't put them through a judicial process.

ROSE: I think what most Americans--

D/CIA: And I should add, okay, we are not the nation's jailers. We are the nation's intelligence service. We hold these people because they have intelligence value, and when they don't have intelligence value, other agencies, other arms of the US government have to step up. It could be a legal process. It could be indefinite detention as a combatant at Guantanamo.

ROSE: I want to get to torture and all that and interrogation in just a moment, but let me just stay with the argument where you are: rendition. Rendition is where you take somebody and you transport them to another country.

D/CIA: Correct.

ROSE: Correct?

D/CIA: Right.

ROSE: How many people have you done this to?

D/CIA: Mid-range, two figures since September 11, 2001. A pace somewhat behind the number of renditions conducted in the 1990s.

ROSE: Who was renditioned in the 1990s?

D/CIA: There were a whole variety of people that were moved between countries.

ROSE: Are we talking about a hundred people since 9/11?

D/CIA: No, mid-range, two figures.

ROSE: Two figures. So 50, 60. Whatever. Doesn't matter. Have been renditioned to somewhere.

D/CIA: Right.

ROSE: When you take them there, what happens? Who is in charge of the interrogation? What role does the CIA play? How much can the CIA do or does the CIA want to look the other way, is the impression of many people, as you know.

D/CIA: No, I understand. And that's--you've asked me, why did I want to come on the show now? It's these kind of impressions that need to be corrected. Let me scale this. I'm sorry. This maybe a slightly longer answer than you--

ROSE: Go ahead.

D/CIA: --bargained for. All right. The total number of people detained by the CIA is fewer than a hundred. In the life of the program, since the capture of Abu Zubaydah in March of 2002. Of these people detained, the number against whom we have used any kind of enhanced interrogation techniques is fewer than a third of the fewer than a hundred.

ROSE: Okay.

D/CIA: All right. Beyond those people, okay, that we've actually detained, there is another group of people, as you've described, on whom we've conducted renditions. We have moved them from one country to another.

ROSE: Why do you do that? Why is that necessary?

D/CIA: In order to take them off the battlefield. Now you ask me why don't I just detain them? The reason is that under the authorities--the authorities under which we operate have clear criteria for people to be detained by the Central Intelligence Agency, and it's not run-of-the-mill al-Qaeda. For people who want to do us harm, who may not meet the criteria of detention, but whom everyone would agree have to be taken off the battlefield.

ROSE: And you say under--without equivocation, that you do not go turn them over to foreign intelligence services because they have means and methods that you would be uncomfortable using. That is a fact?

D/CIA: That is a fact. And that is US law. Let me talk just for a moment about the requirements that we have to meet when we conduct a rendition. We have to believe that mistreatment of that individual is less rather than more likely, and we talked about this at the Council in Foreign Relations as you've described--

ROSE: That's the test.

D/CIA: And the overall history of the receiving government is obviously something that we have to take into account. But the law requires us to make an independent judgment on this individual. And the criteria that exists in the legislative history of our treaty ratification that creates this requirement for us is less rather than more likely. Now you may argue, and some have, that's a relatively low bar. And I've said in other audiences, we're not looking to do this 49/51. When we seek assurances from the receiving nation, we want assurances, we want them to mean those assurances and we have a responsibility, we, plural--the United States government, including its intelligence services--that the United States government as a whole, to do our very best to ensure that the receiving government lives up to those promises.

ROSE: Is there a CIA person always there in terms of interrogation?

D/CIA: No, of course not.

ROSE: So you don't know. You just have a promise from that government, from the leadership of that government that that's what they're going to do?

D/CIA: We have a promise and a commitment from that government. Clearly, in most instances, you would assume, I think, that we have a relationship with that government and with that service. For them to do something beyond their promised behavior for us is not something they would take lightly. We rely on that and all the tools at our disposal to ensure that they've lived up to their commitment.

ROSE: You have--I'll come back to this later. You have said there are two things. There is a close battle and a deep battle.

D/CIA: Yes.

ROSE: The close battle is what we have been talking about. The deep battle is trying to influence hearts and minds--

D/CIA: Right.

ROSE: --trying to prevent people or provide an alternative so they don't go joining groups that wish us harm. Do you also agree that how you do the close battle may very well influence, so if, in fact, you're doing

things--

D/CIA: Yes, absolutely. I agree.

ROSE: And--or if your reputation is doing things, then you're in trouble, because it hurts your effort, and there are many people today that believe, around the world, that that's the reality, and they're saying America is not what it represents itself to be.

D/CIA: Right, right.

ROSE: I'm not telling you anything--

D/CIA: And let me agree as strongly as I humanly can that the close battle and how we fight it is connected to the deep battle. The close battle being taking off the battlefield those who would kill or harm America or its allies. And the deep battle being that long-term war of ideas in which that which seems to motivate those folks we now have a problem with in the close fight, that which seems to motivate them is muted and changed--a change in belief or an attitude or in the causes. The underlying causes that create those who seem to want to act against us. They are absolutely connected. But one of the reasons we're talking here today, one of the reasons I talked to the Council on Foreign Relations, is to try to describe, to the best of our ability--and it's really hard for a secret intelligence service to talk about things that are secret--but to describe to the best of our ability what it is we are really doing, rather than the phrase you used a minute ago, the appearance or the assumption or some other word that describes--what's the right word, Charlie? Propaganda, of what it is my agency is actually trying to do. When I tell audiences that want to be thoughtful, that in the life of this program it's fewer than a hundred, with regard to interrogation techniques it's fewer than a third, and the number of renditions is actually smaller than that, mid-range, two figures. Now we can begin to have something of a reasonable conversation about reality rather than image.

ROSE: I need some help with terms here. What does enhanced technique mean? The President has come back and said enhanced technique executive order, okay. You have changed--you have added to that, I think, or maybe the President did, that there can be no enhanced technique that you haven't approved.

D/CIA: That's correct.

ROSE: All right. What is enhanced technique? What are we talking about here?

D/CIA: Well--

ROSE: Is it something close to torture?

D/CIA: No. First of all, as you know, I'm not going to talk about any specific techniques.

ROSE: Right.

D/CIA: All right?

ROSE: Whether it's waterboarding or anything else, you can't qualify it as an enhanced technique or not.

D/CIA: That's correct. And I can't comment on--

ROSE: Sleep deprivation or--

D/CIA: And I can't comment on any of the techniques we may or may not have used. That's right. All right?

ROSE: But you can't tell me whether those are acceptable or whether those are enhanced techniques? In other words, a lot of us want to know, what's your definition of torture, and how does it differ from what might be a conventional definition of torture? Is sleep deprivation torture, you know, is waterboarding torture? What is torture, regardless of whether you've used it or not?

D/CIA: Amongst that you've asked me for a personal opinion.

ROSE: Right.

D/CIA: All right. And let me put that up on the table and then move beyond it. My personal opinion isn't of great value to this conversation. What matters is US law. But before leaving personal opinion, let me tell you that the actions I've asked our officers to do, in my time as Director, my personal conscience is very content with what it is I've asked them to do. Okay--

ROSE: Whether it had to do with--KSM, or even the people who have plotted 9/11?

D/CIA: Right.

ROSE: And they were the ones who plotted 9/11, two of them.

D/CIA: Right. I'm talking about--

ROSE: Your conscience is clear--

D/CIA: In terms of my conscience--

ROSE: Your conscience clear as to whatever was done to those people during your time as Director of the CIA.

D/CIA: Absolutely. Absolutely.

ROSE: What about before?

D/CIA: Well, let me get to the earlier question you asked. You said what are enhanced techniques?

ROSE: Right.

D/CIA: And I'm going to have to work backwards a little bit from this, all right? But the other document

that's out there, all right, the other document that people point to and say, why can't you follow this document?

ROSE: Right.

D/CIA: Is the Army Field Manual. And what I will describe for you is that enhanced techniques, all right, are in that range between the Army Field Manual, okay, and the limits of what US law and US treaty obligations allow. No one has ever claimed that the Army Field Manual exhausts all the lawful interrogation techniques that the American Republic can use to defend itself.

ROSE: Just for the benefit of--the Army Field Manual is what the military and the Department of Defense uses as its standard.

D/CIA: That's correct. And I think it's a powerful document for America's Army and for the Department of Defense.

ROSE: What's at the other end, so I can understand what's in between? What is it that American Constitution and the American law allow?

D/CIA: Well, now we're getting into--talk much longer, we'll be getting into very specific techniques. Let me build from the Army Field Manual forward to give you some sense as to what that range might be between the limits of the Field Manual and the limits of US law and US treaty obligation. The Army Field Manual was written to develop and describe a set of techniques that the US Department of Defense--and by the way, that's a friendly institution for me. That's where I have my roots.

ROSE: Your career.

D/CIA: Right. That America's Army is confident that you can teach 20, 21, 22-year-old interrogators to do, in battlefield circumstances, in fast-moving situations, sometimes with minimal supervision in order to get tactically relevant information from captured enemy combatants in almost all cases who will be lawful combatants under the Geneva Convention. Why anyone would think a document that meets that description should be the document that controls the activities of the Central Intelligence Agency, I don't understand. There are other things that are perfectly lawful that are within the limits of our treaty obligations--the Convention Against Torture, Common Article 3 of the Geneva Convention.

ROSE: Why can't anybody define to me what's lawful, though, between the Army Field Manual and the American Constitution? Just define for me what's lawful.

D/CIA: Because--because--and this point, if you were in my office at Langley, and we were talking, I'd probably hit a button and have three or four lawyers come down and back-stop me.

ROSE: Right.

D/CIA: But for the GI director of Central Intelligence Agency, I am familiar enough with US law to know that that limit up here is tied into beyond the Army Field Manual, a limit beyond which CIA cannot go. It's tied into a body of US law, a body of US precedent. It's tied to how we have articulated domestically our requirements under the 5th, 8th, and 14th Amendments to the US Constitution. And my lawyers tell me that the sum total of law tied to those constitutional amendments is summarized by the standard of "shock the conscience." And shock the conscience--

ROSE: If you shock the conscience, it's illegal.

D/CIA: That's right.

ROSE: Unconstitutional.

D/CIA: It would be a violation of--depending on how badly it's shocked the conscience, one could consider it torture. One could also consider it to be cruel, inhuman, and degrading activity, all of which are equally forbidden inside of US law.

ROSE: What do you say to somebody who says, if you captured somebody that planned, let's say you captured Osama Bin Laden tomorrow, who may very well know what plans there are. All--whatever is necessary, do. What do you say to those Americans who say the reverse? I'm not worried about the Constitution.

D/CIA: Yeah.

ROSE: I'm worried about protecting--

D/CIA: Protecting America.

ROSE: --the homeland.

D/CIA: That's correct.

ROSE: And this person may know things that will kill Americans. Go to it, General.

D/CIA: There are absolute standards. Those standards are embodied in our law. They're in the Military Commissions Act, for example. They're in how we ratify the Convention Against Torture. They're in domestic US law that forbid different aspects of torture. Some things are just absolutely forbidden. Some things are just wrong. And they're mentioned very specifically.

ROSE: It would shock the conscience.

D/CIA: It's beyond--

ROSE: Beyond shock the conscience.

D/CIA: And it's--and they would shock the conscience to such a degree, okay, that American jurisprudence

cannot imagine circumstances when they would not shock the conscious, all right? But then are a whole bunch other activities. I read an interesting piece in today's Wall Street Journal, and I'm paraphrasing here, and I probably won't get it perfectly right. But they were talking about the shock the conscience standard, all right? And they pointed out that if they took you and me, all right, people of our age, and put us, you and me, through what Marine Corps recruits go through at Paris Island and forced us to do that, that would probably shock the conscience. But it's not illegal to do it to Marine Corps recruits, all right? That same behavior is not absolutely wrong--

ROSE: Are you talking about things like sleep deprivation, cold and extreme, and--

D/CIA: All the things, all the stresses that we put these recruits through, all right? But we don't think that's torture or cruel, inhuman, and degrading--

ROSE: But I don't think when people think about torture that's what they're talking about. You know? This leads to another--

D/CIA: Well, that's a wonderful point because maybe that is what I'm talking about.

ROSE: So we're saying we do--do that it's torture. If we do that, it's not torture, that's what you're saying?

D/CIA: Again, I'm not going to talk about--

ROSE: I know that, but what you just said to me. But there is--I mean, if--I--you would say to me, clearly the United States does not torture.

D/CIA: Right.

ROSE: The President said that. The United States does not torture.

D/CIA: That's right.

ROSE: And under no circumstance would we do it because no information is worth violating our DNA. Is that what you'd say?

D/CIA: I've actually talked about conducting this war in a way that does not change our DNA as a people. That's a phrase I've actually used. That's right.

ROSE: What do we know about interrogations? What do we know about what works because I read a range of people say that those people who think beating someone up is the way to get them to talk have gotten it wrong.

D/CIA: Right.

ROSE: The way time after time it's proven that you get information is over process that has more to do with psychology than it does with force.

D/CIA: Right.

ROSE: Is that right or wrong?

D/CIA: Well, first of all, just a footnote in our conversation. We don't beat anybody up.

ROSE: All right.

D/CIA: Let's move on from that.

ROSE: No matter what they've done?

D/CIA: That's right. I mean, again, I said earlier, we're not the nation's jailers.

ROSE: Right.

D/CIA: And we're not out there to punish either. We're out there to learn. We're out there--

ROSE: And get information.

D/CIA: We're out there to get information. That's right. We have found universally, and I can say this without qualification the most powerful tool we have in gaining information from a captured detainee is our knowledge. We had one instance where we had a detainee. We took him into our custody. We told him who we were and we also told him who he was.

ROSE: Show him you knew a lot about him?

D/CIA: That's correct. And in that case, proved to be sufficient.

ROSE: Because? What was at work?

D/CIA: Well, what was at work was that we knew more about him than he expected. In many ways, we knew more about him than he knew himself.

ROSE: So he had assumed he had no reason not to disclose?

D/CIA: Well, we were, again, the purpose of this is to get information from him. And if you can challenge his misleading stories, if you can deconstruct his cover story, those things allow us to take information and to gain that information. Now you talked earlier-- and I need to come back to this--because the belief out there is that torture does not work. All right?

ROSE: Some believe that.

D/CIA: I believe that. All right? And let me turn that syllogism on its head. Right? This does work. These fewer than a hundred detainees that we've had have created just under nine thousand intelligence reports. They comprise some of the most critical information we've ever gained on al-Qaeda. If you accept the

premise that torture doesn't work, then you have to accept the fact that this did work. It provided us with very reliable, massive amounts of information.

ROSE: Okay, let me just ask this, just for the benefit of this. You have learned important things from those people who were in rendition, very important things that have enabled you to do better in the fight against terrorism, al-Qaeda, whatever you might perceive to be the enemy.

D/CIA: Right.

ROSE: And you're saying I'd be happy for anybody to know what techniques we used in order to get them to give us this vital information? I would have no problem if being on the front page of the New York Times what techniques we used because we don't torture, because I don't believe torture works. What works is psychology, what works is giving them information that we know about them, what works is--

D/CIA: I am unable to tell a quarter billion Americans what it is we're doing on their behalf.

ROSE: Because?

D/CIA: Because that information would become available to our enemies, and would become the table of contents of their training manual against us. Having said that, I wish I could tell a quarter billion Americans what we're doing on their behalf. I believe the vast majority of the American people would be quite comfortable with what their secret intelligence service is doing.

ROSE: And that's your message?

D/CIA: Yeah.

ROSE: When you look at the information, just help me understand how valuable the information has been from people like KSM, Abu Zubaydah--

D/CIA: Right. Detainees writ large. Those al-Qaeda members we have captured have been historically the single greatest source of information we've had on al-Qaeda. To use a metaphor that may explain what we're about, intelligence is often described as putting the pieces of a puzzle together. In almost all circumstances, our analysts have pieces of the puzzle incomplete, never all the pieces. And they've never seen the picture on the top of the box. A detainee very frequently has a lot of pieces, and the detainee has seen the picture on the top of the box. That kind of information is invaluable.

The people we have in our program are not run-of-the-mill al-Qaeda. These are high value detainees. There are criteria which I unfortunately cannot describe. There are criteria which must be met before people can be detained in this program by the Central Intelligence Agency. So we are talking about people whom we have every expectation, have seen the tops of quite a few puzzle boxes.

ROSE: It is said that the CIA is studying the effectiveness and retaining a jettison techniques on a sliding scale. Now I assume what that means is that if you're getting a lot of information with a certain technique, that it becomes a much more valuable technique. Can you help me understand this?

D/CIA: Yeah. There is kind of a myth out there, and I'm going to be too flippant, maybe irreverent in describing it. That somehow, you know, it's Tuesday, we go in, meet the detainee, and say it's Tuesday, let's use number 12 or number 6. I mean that's not what this is about. We work very hard to get into a relationship with this detainee that CIA, the United States Army, or any other interrogator would describe as "debriefing." A conversation with someone who is now sitting there talking to you about the things you're interested in. So that's, I think, the first thing I need to point out. Secondly, the way you phrased your question, Charlie, accused us of being a learning organization. Guilty.

ROSE: Okay.

D/CIA: We are a learning organization. And clearly, we have developed experience over the years in which this program has--

ROSE: Tell me what's the most important thing you've learned.

D/CIA: I don't mean to dodge the question, but I'm going to tell you what I think the most important thing we've learned is this. And we have adjusted the program based upon these realities. It was our belief last summer, if you recall, we had the detainee treatment Act. We had the Hamdan decision. We had these 14 individuals in CIA custody, even though we had a belief--and some of them in our custody for years. Even though we had a belief that we were not the nation's jailers. And that we had to move on. We had to move forward. We believed this program, you can probably tell from some of my comments, we believe this program was appropriate, lawful and effective. But we needed it to move forward inside the broader American political culture. So we made a conscious decision inside CIA, and we worked this decision, this belief inside the Administration, that this program, if it were to go forward, had to go forward on something more than just a definition of its lawfulness. That it had to go forward with not just a definition of its lawfulness, but it had to have I guess what I'd call both policy and political legs. So that this was not the CIA's program, that this was America's program. And so what we did, beginning last September, was actually the day the president spoke in the White House announcing that the 14 had been brought to Guantanamo. I began to dialogue with Congress. I briefed all members of both of our oversight committees on all aspects of the detention and interrogation program, sought their thoughts on techniques that we may want to use going forward, and only after we had had that dialogue--now, to be fair, so that no one misunderstands here, we didn't ask the committees to vote on anything. But we laid out what it was we were doing. We had pretty rich dialogue. Their views informed my judgment, and that at the end of the day, and actually in 2007, we went forward to the President, to the Department of Justice, with a program. I can't describe that program to you, but I would suggest to you that it would be wrong to assume that the program of the past is necessarily the program moving forward into the future.

ROSE: There is also this. It would seem to me you would less and less need it as you go forward. And I still don't understand, and I hear you but I don't understand why it's necessary to take it to foreign countries

where nobody can see, nobody knows anything, but, again, you say that's because you have nowhere else to bring them.

D/CIA: My choices are limited.

ROSE: Right.

D/CIA: All right?

ROSE: But you have nowhere else you can take them, other than to some foreign country where you turn it over to some foreign government.

D/CIA: Well, I'm open to ideas. I can keep them. That's detention. I can move them to a foreign government. That's rendition. We can move them to Guantanamo.

ROSE: I think most Americans would prefer detention or Guantanamo, I think, because you're putting people in the hands of other people and you're just going on just a promise --

D/CIA: It's more than just a promise. I told you that the care we're required to take, and in many cases, these people are actually criminals, wanted, in their--

ROSE: In their countries--

D/CIA: In their countries--

ROSE: And that's why the regions you choose--I know that argument. Here is another argument that you make. There is this thing called a space that you say, the space is to give the CIA space to do what it needs to do, because it's engaged in a war, and in this space, it's been given it by the Constitution. You believe that certain kinds of things happening in our country, or in part of what's happening, one is media, influenced and tighten the space. You believe that press coverage in some ways limits your maneuverability and restricts your space. Right?

D/CIA: I'm tempted to say yes, but I'm reluctant to, because I know the importance of a free press. I know what it means to me as a citizen. I know what it means to CIA officers because they're all American citizens as well. I guess what I'm looking for--what puzzles me is not that we're the subject of many stories. I'd rather we weren't the subject of so many, but that happens. What puzzles me is to why there seems to be this temptation--almost irresistible--temptation to take any story about us and move it into the darkest corner of the room.

ROSE: Tell me what you mean by that. You've said that before.

D/CIA: Let me give you an example.

ROSE: What's the darkest corner of the room?

D/CIA: There was a story about 10 days ago from a rather large newspaper up the street.

ROSE: Right. This would be the New York Times.

D/CIA: It would be. That talked about--they claimed that there had been a Department of Justice opinion in the spring of 2005, that --and if you read the article, you would seem to get the impression that it expanded the authorities of CIA, or expanded the number of techniques that would be used. And all of us at the Agency looked at the story and maybe this is our narrow perspective. I mean we all kind of have a point of view depending on what it is we do day in and day out. We were looking at the story, something of a narrative disbelief. Number one, and I can't get too far in detail about this, which I truly do regret. The opinion that Justice gave the CIA in the spring of 2005 was the result of a request from our Agency for greater clarity on the program, legal clarity, on a program that was already existing. That's one fact. Number two, that's history. Since the time of the decision that the New York Times reported on in the spring of 2005, we had the Detainee Treatment Act in December of 2005, we had the Hamdan decision in the summer of 2006, we had the Military Commissions Act in the fall of 2006. They have all changed the legal landscape under which CIA's program is operated.

ROSE: Made it more restrictive.

D/CIA: It changed the legal framework and so--that to look at an opinion Justice offered in the spring of 2005--that simply has no relevance to the lawfulness or the legal opinion under which CIA is operating in the fall of 2007.

ROSE: Okay. But you also mean that, for example, there was reporting by the New York Times, too, about Swiss bank accounts. I've forgotten exactly the details. But Bill Keller, the editor, they went ahead with the story.

D/CIA: This is a Swift story.

ROSE: Did you know beforehand the story was coming?

D/CIA: Yes. And--

ROSE: Was there any effort by anybody to talk to Bill Keller of the New York Times and say, "This will do damage to us if you run this story?"

D/CIA: This is largely handled by the Department of Treasury because it's more in their lane than in ours.

ROSE: Right, right.

D/CIA: And the answer is yes, we viewed this story that it would do damage. And I--

ROSE: And they listened and then went ahead with printing because they believed you were wrong, or somebody--they believed that it did not damage national security and that there were other means to find

out, or whatever their rationalization was, or whatever their decision making was.

D/CIA: Yeah. That's correct.

ROSE: Okay. You also believe that, in fact, if somebody within the CIA leaks a story, and a mainstream publication, in this case, publishes it, they are, in a sense, culpable.

D/CIA: The CIA officer?

ROSE: No. No. You know, that--that's not even a question, right.

D/CIA: Okay. Good.

ROSE: Culpable in the sense that he may violate some CIA regulation or something. But if the mainstream media publishes it, they are, too. They have some--

D/CIA: Yes. Let me choose my words carefully, all right? And give me a minute or two to talk about this because this is very important because I don't want, me personally or my agency especially, okay, to be characterized as having a view against the free press. All right? That's simply not true. What I have said in the past, that someone who willingly breaks the trust we have given them in terms of their oath of office with regard to protecting classified information.

ROSE: People who leak to the press.

D/CIA: That's correct. They are guilty of a crime, all right? But I've also said those who pursue that information, those who decide to print that information are not without their responsibilities, right? I never said it was a crime, okay? I never said, in all cases, they must not print. But I did say there are real responsibilities here. It can erode the ability of the nation to defend itself. And so in the case of the Swift program, it does have an impact on what it is we can do.

ROSE: How would you solve this issue?

D/CIA: That's a very difficult question. And you know this may not be a problem to be solved. This may be a condition that we have to manage.

ROSE: But you do believe it reduces your space. You just said as much.

D/CIA: I did. No--it--

ROSE: That in as much in the Council on Foreign Relations Speech.

D/CIA: It does, all right? And therefore, it's my role in this debate to point that out, okay? I did not say in my Council on Foreign Relations speech, any action should be taken against the press.

ROSE: But you did simply said it damages our efforts to--

D/CIA: It does.

ROSE: --do our jobs.

D/CIA: What I was trying to do--

ROSE: --is what you're saying.

D/CIA: What I was trying to do was to call the attention of the press and folks like yourself and others to this issue. This is not a free ride. America is made less safe when these kinds of stories are made public. Now, there may be--there may be other concerns --

ROSE: Would you accept the idea that there are people--reasonable people can disagree over that?

D/CIA: I can. But let me add, all right? We haven't talked about it. But I was going to say, but I was at NSA when we began and continued with the president identified later as the Terrorist Surveillance Program.

ROSE: Right, right.

D/CIA: All right? Even I--by the way, very comfortable with the lawfulness of the program and incredibly comfortable with the scrupulousness with which it was carried out--even I can see that there is a civil liberties issue there.

ROSE: Right.

D/CIA: What is the civil liberties issue with the Swift program?

ROSE: I don't know that there's a civil liberties issue there.

D/CIA: So, so, what would be--

ROSE: In other words, those--

D/CIA: What was the major compelling public--

ROSE: --debates the question you would ask is whose civil liberties are we damaging, you know, by--

D/CIA: By this program.

ROSE: By this program.

D/CIA: Okay, which--

ROSE: Which you're using to get information about the flow of funds.

D/CIA: Right. Which was briefed to Congress. Which did have external oversight.

ROSE: Right.

D/CIA: All the things, all the sins that were alleged in the NSA program.

ROSE: All right. Let me just to a couple of other things. Recently there was information about the al-Qaeda web site. Was that a big deal?

D/CIA: I don't know enough specifically to give you a judgment. I really don't know. I'm going to dodge the question.

ROSE: They fear that that got out in the public and they shut it down.

D/CIA: I'm familiar with the narrative, I've read the press accounts with it, but I just don't know enough about it internally to give you a judgment.

ROSE: All right. Let me go to wiretapping for a second. I mean, you were at the NSA before you came over here. I've heard people who work within NSA and work with the CIA say to friends of mine, not to me, but to say to people who cover those agencies, a lot of very good people, strong, patriotic people, believe that wiretapping gave them information that was important in fighting the battle against America's enemies. However, each of them said, I would have just felt better if we'd gotten a warrant. I just felt better and it didn't seem to me that that is the issue, you know, with a program for getting a warrant. That that's what ought to have happened and when that was violated, then you got into problems.

D/CIA: All right. Getting out of my current lane.

ROSE: Yeah, but your previous lane.

D/CIA: If history--two jobs back, as a matter of fact, in the literal meaning of that word, okay? Based on the facts of the case, until the story broke in the New York Times in December of 2005, no one who was asked to be part of this program inside the National Security Agency expressed any reservations about being part of this program. After the story broke, people who were not part of the program quite understandably concerned about what might be going on, they then had went to the NSA IG to ask questions about it. No one in the history of the program pushed back on participating in it. They believed very strongly that what they were doing was both lawful and effective and appropriate.

ROSE: They might have had objections, but not said it.

D/CIA: Well, now you have to understand, NSA is actually a very conservative culture. In fact, the core of NSA is--

ROSE: With a bigger budget than CIA.

D/CIA: I can't talk about that. NSA is a very conservative culture legally. Our lawyers at NSA were notorious for their conservatism up through the morning of September 11th, 2001. The single most consistent criticism of the NSA legal office by our congressional oversight committee was that our legal office was too conservative. Now you've talked about warrants and why didn't you go get a warrant and so on, and it's a long issue. It's one that I wish we could lay out in great detail, but let me tell you what I said to anyone who'd care to listen during the life of this program when I briefed them on this program. And I made dozens of briefings on this program prior to the December 2005 story in the New York Times. Simple version that I gave is that FISA as currently crafted--

ROSE: Where you go to get the warrant?

D/CIA: That's correct. FISA, as currently crafted and implemented, could not give the nation the same degree of protection that was afforded by operating under the President's Article II authorities, which was what we were doing.

ROSE: Several questions that come up about the CIA. Your inspector general had an inquiry as to things that had happened.

D/CIA: Inquiry is the big and wrong word.

ROSE: Okay, what should it be?

D/CIA: Management review.

ROSE: A management review?

D/CIA: Mm-hmm.

ROSE: It is said, you weren't happy with that because he suggested or at least was considering the idea there might have been some criminal conduct--

D/CIA: No, no, no.

ROSE: Not true?

D/CIA: No, no, no, no.

ROSE: Not true. So were you unhappy with the results of his investigation or management review?

D/CIA: No. This is--

ROSE: Then why did we appoint somebody to look into the review? Mr. Deitz [inaudible]

D/CIA: The CIA IG, according to law--

ROSE: Right.

D/CIA: --operates under the overall direction of the Director of the CIA.

ROSE: That'd be you.

D/CIA: That's me. I am as responsible for the effective functioning of the IG's office as I am with any other office in the Central Intelligence Agency--

ROSE: And you weren't happy with it?

D/CIA: There are questions. There are questions about everything we do. We started this hour, yes, we do have a great intelligence service. I said yeah, we do, but we got to do a lot of things better. Well there are some things that I had questions about with regard with the IG, in terms--I had a couple reports on my desk, I looked at, said, these raise some questions in my mind. So I kept this as low key as I possibly could. I went to Bob Deitz, who was my general counsel at NSA who I brought into CIA, not as general counsel, but as a special advisor. All right? We didn't make this a federal case, almost in the literal meaning of the word. I asked Bob to organize a small team, and it was. He's got three people on it, okay. And to work with our Inspector General, John Helgerson, and to look at some of these questions that had been raised by the reports that I had in front of me. None of them were pushing back on the findings of the reports.

ROSE: That's the point--in no case--

D/CIA: In each case I acted on the findings in the report. But I wanted Bob to look at these questions and to work with John, John Helgerson, the Inspector General, to see if there was any merit in some of my concerns, and if there were, what we could do to improve the functioning of the IG, just like we want to improve the functioning of the DI, or have our National Clandestine Service or anything else. This was designed to be low key and it was low key for about five months. Bob has been doing this since April. He's doing a report out in the next week or so, not just to me, but to the IG.

ROSE: This conversation began with the great war that we're in, and we have to fight that war, and you want it clear, because it would hinder your effectiveness if there was misunderstanding about the CIA.

D/CIA: Right.

ROSE: That was part of the conversation at the beginning of this. With respect to the war, and with respect to al-Qaeda, what is--what is your--what can you tell us about al-Qaeda in Iraq and al-Qaeda outside of Iraq?

D/CIA: Al-Qaeda in Iraq, to borrow a phrase from my British friends, is at least on its back foot--

ROSE: Back foot. Wielding--

D/CIA: And may be back on another part of his body. All right? Now I don't want to overstate that, and I don't want to say it's irreversible. And I don't want to say this battle is won. We need to move on. I don't want to say any of those things. But we have had remarkable success against al-Qaeda in Iraq over the past six to twelve months, and has a telling effect on the battlefield, an effect that is statistically recognizable in what's being reported out of MNFI, General Petraeus' headquarters in Baghdad.

ROSE: How about al-Qaeda outside of Iraq?

D/CIA: Al-Qaeda outside of Iraq is a learning, adaptive organization. It is a very difficult--

ROSE: Regenerating is the term you used.

D/CIA: It is. And it's a term I'd share with you now. All right? It's been advantaged by a couple of things. Okay? The most is its ability to use that [inaudible] border region between Afghanistan and Pakistan as a safe haven to regenerate. Our National Intelligence Estimate from about three months ago said that they had leadership, a safe haven, and what we call operational lieutenants, the kind of operational leadership that were present in the FATA, in the federally administered tribal area. So that has allowed them, in some measure, to regenerate, yes. That's true.

ROSE: Protected in these tribal areas which is a bafflement to a lot of people, but nevertheless, we understand the nature of that terrain.

D/CIA: Exactly. The terrain, the culture, the fact that no central government has exercised control over--

ROSE: Exactly.

D/CIA: Ever.

ROSE: There is also this. If al-Qaeda would leave Iraq tomorrow, all of them, by some means, would we still have an Iraqi war?

D/CIA: It would be difficult--

ROSE: Sectarian violence, Shia versus Sunni, because there's not a government in Baghdad that can control it or is willing to control it?

D/CIA: I wouldn't simplify it to that degree, all right? Al-Qaeda in Iraq has been a pernicious accelerant to the conflict. There and the fact that we have been able to put them on their back foot or somewhere else has had a remarkable effect on the level of violence throughout the country. Because we have been able to do that, because the Sunni tribes have looked into the future and they don't like it, with an al-Qaeda dominated Islamic state there. Because they have done what they have done in terms of forming alliance with us and growingly, with the government in Baghdad, we have begun to see political relationships, sectarian, inter-sectarian relationships at the local level that we probably thought were impossible.

ROSE: You're talking about Anbar Province and places like that.

D/CIA: Beyond Anbar.

ROSE: But it's now moving beyond--

D/CIA: Yes.

ROSE: --but it doesn't say anything, because as you know, Bob Woodward reported in his book that you were in a meeting in which others who were there have, in a sense, confirmed to Bob Woodward, accordingly, that you had a very, very negative assessment of the government and their ability, certainly over the short term, to govern, to engage in any kind of political reconciliation. No confidence. The head of the CIA.

D/CIA: You actually characterize my remarks better than the story in the Washington Post did. Two observations, all right? Number one, we talked about the press and responsibility and so on. I was promised confidentiality in my remarks in front of that commission. Okay? It has a chilling effect on good government when someone who is promised confidentiality has that confidentiality broken. That's fact one--put that aside. Now, let's talk about what it was I said. And I think Bob, whom I actually have talked to in the past and consider a friend, Bob quoted a metaphor that I had used in the book which was running a marathon.

ROSE: Right.

D/CIA: And what he said was I saw no break in the future that would cause this thing to self-correct. This is a danger in relying on someone else's notes apparently for a meeting. What I said was there were no natural breaks in the future that I could see that would cause this to self-correct. Like if you recall, in the preceding years we were saying if we could just get to the Constitution, if we could just get to the national elections. It will cause a change in the political circumstances and we can expect things to get better. I said there were no longer any natural breaks. And I actually compared it--I used a lengthy metaphor at the time. I actually compared it to running the Pittsburgh marathon. It's my hometown. I ran it a couple years back. It's a hilly city.

ROSE: Yeah.

D/CIA: And I went out and drove the course the day before the race. And I noticed that at about mile 22, you had a mile and a half downhill. You get--

ROSE: If you got it there, you'd finish the race.

D/CIA: If I got it there and got to the bottom, I had three miles left of the finish, and I've run that before church on Sunday.

ROSE: But you're saying at that time when you--

D/CIA: That's a natural break.

ROSE: But at that time, you said you don't see the natural break, and you don't see a way to the finish at that time.

D/CIA: That's--I said there was no natural break. What has happened--

ROSE: Exactly my question.

D/CIA: We have created a national break with the injection of more American forces, five additional brigades into the combat equation there.

ROSE: You believe that?

D/CIA: I believe it. It is cause and effect. Now, you know, the plan that the president came up with, the plan that General Petraeus suggested was informed by the intelligence we had, all right? And we were part and parcel of the development of this strategy that led--that led to the surge. If you want to extend my marathon metaphor, just for one more round, it's as if we had a Gatorade station at Mile 22 rather than a hill. We've injected something from the outside into the process. And although we have not gotten some of the things we've talked about in the benchmarks, the oil wall, the debaath--change in the debaathification procedures and so on, there are other things happening, particularly at the local level, we discussed a few minutes ago.

ROSE: [inaudible] and things like that.

D/CIA: Exactly. At the national level, we are actually seeing some capacity growth inside the central government.

ROSE: I could go on and on and on, but I'm out of my time and your time as well. I thank you very much. I hope we can do this again, and this table is here for these kinds of conversations with you and your colleagues.

D/CIA: Thank you, thanks for the opportunity. These are serious questions. And I know that honest men can differ about some of the policies that we judge appropriate for the nation to have in the global war on terrorism, but they have to be reasoned discussions with as many facts on the table as possible.

ROSE: I would only add to that that it's important, I think, for policymakers and people who are in charge of the destiny of this country to engage in a dialogue with the country, and I encourage others to do what you have done, whether it's with me or someone else. It's an important part of the process, to understand beyond just policy statements and beyond just speeches, to see people, you know, because in a sense, I believe that, you know, there are a lot of people that you can disagree with, but they see and operate on the facts as they see them, and we don't necessarily have to, in all cases, question their motivation.

D/CIA: Yeah.

ROSE: But I thank you very much for coming.

D/CIA: Thank you.

ROSE: Michael Hayden, Director of the CIA. He's had a long and distinguished career in the military. He has served as head of NSA and then was the number two person next to John Negroponte as the Director

of National Intelligence and now runs the CIA. Thank you for joining us. See you next time.

Historical Document
Posted: Oct 24, 2007 07:27 AM
Last Updated: Jun 18, 2008 09:03 AM
Last Reviewed: Oct 24, 2007 07:27 AM

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FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT F

FOREIGN AFFAIRS

JULY / AUGUST 2007

Campaign 2008

Renewing American Leadership

Barack Obama

Volume 86 • Number 4

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Renewing American Leadership

Barack Obama

COMMON SECURITY FOR OUR COMMON HUMANITY

At moments of great peril in the last century, American leaders such as Franklin Roosevelt, Harry Truman, and John F. Kennedy managed both to protect the American people and to expand opportunity for the next generation. What is more, they ensured that America, by deed and example, led and lifted the world—that we stood for and fought for the freedoms sought by billions of people beyond our borders.

As Roosevelt built the most formidable military the world had ever seen, his Four Freedoms gave purpose to our struggle against fascism. Truman championed a bold new architecture to respond to the Soviet threat—one that paired military strength with the Marshall Plan and helped secure the peace and well-being of nations around the world. As colonialism crumbled and the Soviet Union achieved effective nuclear parity, Kennedy modernized our military doctrine, strengthened our conventional forces, and created the Peace Corps and the Alliance for Progress. They used our strengths to show people everywhere America at its best.

Today, we are again called to provide visionary leadership. This century's threats are at least as dangerous as and in some ways more complex

Barack Obama is a Democratic Senator from Illinois and a candidate for the Democratic presidential nomination.

REUTERS/CORBIS

Barack Obama at a town-hall-style meeting in Cedar Springs, Iowa, February 2007

than those we have confronted in the past. They come from weapons that can kill on a mass scale and from global terrorists who respond to alienation or perceived injustice with murderous nihilism. They come from rogue states allied to terrorists and from rising powers that could challenge both America and the international foundation of liberal democracy. They come from weak states that cannot control their territory or provide for their people. And they come from a warming

planet that will spur new diseases, spawn more devastating natural disasters, and catalyze deadly conflicts.

To recognize the number and complexity of these threats is not to give way to pessimism. Rather, it is a call to action. These threats demand a new vision of leadership in the twenty-first century—a vision that draws from the past but is not bound by outdated thinking. The Bush administration responded to the unconventional attacks of 9/11 with conventional thinking of the past, largely viewing problems as state-based and principally amenable to military solutions. It was this tragically misguided view that led us into a war in Iraq that never should have been authorized and never should have been waged. In the wake of Iraq and Abu Ghraib, the world has lost trust in our purposes and our principles.

After thousands of lives lost and billions of dollars spent, many Americans may be tempted to turn inward and cede our leadership in world affairs. But this is a mistake we must not make. America cannot meet the threats of this century alone, and the world cannot meet them without America. We can neither retreat from the world nor try to bully it into submission. We must lead the world, by deed and by example.

Such leadership demands that we retrieve a fundamental insight of Roosevelt, Truman, and Kennedy—one that is truer now than ever before: the security and well-being of each and every American depend on the security and well-being of those who live beyond our borders. The mission of the United States is to provide global leadership grounded in the understanding that the world shares a common security and a common humanity.

The American moment is not over, but it must be seized anew. To see American power in terminal decline is to ignore America's great promise and historic purpose in the world. If elected president, I will start renewing that promise and purpose the day I take office.

MOVING BEYOND IRAQ

To RENEW American leadership in the world, we must first bring the Iraq war to a responsible end and refocus our attention on the broader Middle East. Iraq was a diversion from the fight against the terrorists who struck us on 9/11, and incompetent prosecution of the war by America's civilian leaders compounded the strategic blunder of choosing to

wage it in the first place. We have now lost over 3,300 American lives, and thousands more suffer wounds both seen and unseen.

Our servicemen and servicewomen have performed admirably while sacrificing immeasurably. But it is time for our civilian leaders to acknowledge a painful truth: we cannot impose a military solution on a civil war between Sunni and Shiite factions. The best chance we have to leave Iraq a better place is to pressure these warring parties to find a lasting political solution. And the only effective way to apply this pressure is to begin a phased withdrawal of U.S. forces, with the goal of removing all combat brigades from Iraq by March 31, 2008—a date consistent with the goal set by the bipartisan Iraq Study Group. This redeployment could be temporarily suspended if the Iraqi government meets the security, political, and economic benchmarks to which it has committed. But we must recognize that, in the end, only Iraqi leaders can bring real peace and stability to their country.

To see American power in terminal decline is to ignore our great promise and historic purpose.

At the same time, we must launch a comprehensive regional and international diplomatic initiative to help broker an end to the civil war in Iraq, prevent its spread, and limit the suffering of the Iraqi people. To gain credibility in this effort, we must make clear that we seek no permanent bases in Iraq. We should leave behind only a minimal over-the-horizon military force in the region to protect American personnel and facilities, continue training Iraqi security forces, and root out al Qaeda.

The morass in Iraq has made it immeasurably harder to confront and work through the many other problems in the region—and it has made many of those problems considerably more dangerous. Changing the dynamic in Iraq will allow us to focus our attention and influence on resolving the festering conflict between the Israelis and the Palestinians—a task that the Bush administration neglected for years.

For more than three decades, Israelis, Palestinians, Arab leaders, and the rest of the world have looked to America to lead the effort to build the road to a lasting peace. In recent years, they have all too often looked in vain. Our starting point must always be a clear and strong commitment to the security of Israel, our strongest ally in the region

and its only established democracy. That commitment is all the more important as we contend with growing threats in the region—a strengthened Iran, a chaotic Iraq, the resurgence of al Qaeda, the reinvigoration of Hamas and Hezbollah. Now more than ever, we must strive to secure a lasting settlement of the conflict with two states living side by side in peace and security. To do so, we must help the Israelis identify and strengthen those partners who are truly committed to peace, while isolating those who seek conflict and instability. Sustained American leadership for peace and security will require patient effort and the personal commitment of the president of the United States. That is a commitment I will make.

Throughout the Middle East, we must harness American power to reinvigorate American diplomacy. Tough-minded diplomacy, backed by the whole range of instruments of American power—political, economic, and military—could bring success even when dealing with long-standing adversaries such as Iran and Syria. Our policy of issuing threats and relying on intermediaries to curb Iran's nuclear program, sponsorship of terrorism, and regional aggression is failing. Although we must not rule out using military force, we should not hesitate to talk directly to Iran. Our diplomacy should aim to raise the cost for Iran of continuing its nuclear program by applying tougher sanctions and increasing pressure from its key trading partners. The world must work to stop Iran's uranium-enrichment program and prevent Iran from acquiring nuclear weapons. It is far too dangerous to have nuclear weapons in the hands of a radical theocracy. At the same time, we must show Iran—and especially the Iranian people—what could be gained from fundamental change: economic engagement, security assurances, and diplomatic relations. Diplomacy combined with pressure could also reorient Syria away from its radical agenda to a more moderate stance—which could, in turn, help stabilize Iraq, isolate Iran, free Lebanon from Damascus' grip, and better secure Israel.

REVITALIZING THE MILITARY

To RENEW American leadership in the world, we must immediately begin working to revitalize our military. A strong military is, more than anything, necessary to sustain peace. Unfortunately, the U.S. Army and

the Marine Corps, according to our military leaders, are facing a crisis. The Pentagon cannot certify a single army unit within the United States as fully ready to respond in the event of a new crisis or emergency beyond Iraq; 88 percent of the National Guard is not ready to deploy overseas.

We must use this moment both to rebuild our military and to prepare it for the missions of the future. We must retain the capacity to swiftly defeat any conventional threat to our country and our vital interests. But we must also become better prepared to put boots on the ground in order to take on foes that fight asymmetrical and highly adaptive campaigns on a global scale.

We should expand our ground forces by adding 65,000 soldiers to the army and 27,000 marines. Bolstering these forces is about more than meeting quotas. We must recruit the very best and invest in their capacity to succeed. That means providing our servicemen and servicewomen with first-rate equipment, armor, incentives, and training—including in foreign languages and other critical skills. Each major defense program should be reevaluated in light of current needs, gaps in the field, and likely future threat scenarios. Our military will have to rebuild some capabilities and transform others. At the same time, we need to commit sufficient funding to enable the National Guard to regain a state of readiness.

Enhancing our military will not be enough. As commander in chief, I would also use our armed forces wisely. When we send our men and women into harm's way, I will clearly define the mission, seek out the advice of our military commanders, objectively evaluate intelligence, and ensure that our troops have the resources and the support they need. I will not hesitate to use force, unilaterally if necessary, to protect the American people or our vital interests whenever we are attacked or imminently threatened.

We must also consider using military force in circumstances beyond self-defense in order to provide for the common security that underpins global stability—to support friends, participate in stability and reconstruction operations, or confront mass atrocities. But when we do use force in situations other than self-defense, we should make every effort to garner the clear support and participation of others—as President George H. W. Bush did when we led the effort to oust Saddam Hussein from Kuwait in 1991. The consequences of forgetting that lesson in the context of the current conflict in Iraq have been grave.

HALTING THE SPREAD OF NUCLEAR WEAPONS

To RENEW American leadership in the world, we must confront the most urgent threat to the security of America and the world—the spread of nuclear weapons, material, and technology and the risk that a nuclear device will fall into the hands of terrorists. The explosion of one such device would bring catastrophe, dwarfing the devastation of 9/11 and shaking every corner of the globe.

As George Shultz, William Perry, Henry Kissinger, and Sam Nunn have warned, our current measures are not sufficient to meet the nuclear threat. The nonproliferation regime is being challenged, and new civilian nuclear programs could spread the means to make nuclear weapons. Al Qaeda has made it a goal to bring a "Hiroshima" to the United States. Terrorists need not build a nuclear weapon from scratch; they need only steal or buy a weapon or the material to assemble one. There is now highly enriched uranium—some of it poorly secured—sitting in civilian nuclear facilities in over 40 countries around the world. In the former Soviet Union, there are approximately 15,000–16,000 nuclear weapons and stockpiles of uranium and plutonium capable of making another 40,000 weapons—all scattered across 11 time zones. People have already been caught trying to smuggle nuclear material to sell on the black market.

As president, I will work with other nations to secure, destroy, and stop the spread of these weapons in order to dramatically reduce the nuclear dangers for our nation and the world. America must lead a global effort to secure all nuclear weapons and material at vulnerable sites within four years—the most effective way to prevent terrorists from acquiring a bomb.

This will require the active cooperation of Russia. Although we must not shy away from pushing for more democracy and accountability in Russia, we must work with the country in areas of common interest—above all, in making sure that nuclear weapons and material are secure. We must also work with Russia to update and scale back our dangerously outdated Cold War nuclear postures and de-emphasize the role of nuclear weapons. America must not rush to produce a new generation of nuclear warheads. And we should take advantage of recent technological advances to build bipartisan consensus behind

ratification of the Comprehensive Test Ban Treaty. All of this can be done while maintaining a strong nuclear deterrent. These steps will ultimately strengthen, not weaken, our security.

As we lock down existing nuclear stockpiles, I will work to negotiate a verifiable global ban on the production of new nuclear weapons material. We must also stop the spread of nuclear weapons technology and ensure that countries cannot build—or come to the brink of building—a weapons program under the auspices of developing peaceful nuclear power. That is why my administration will immediately provide $50 million to jump-start the creation of an International Atomic Energy Agency–controlled nuclear fuel bank and work to update the Nuclear Nonproliferation Treaty. We must also fully implement the law Senator Richard Lugar and I passed to help the United States and our allies detect and stop the smuggling of weapons of mass destruction throughout the world.

Finally, we must develop a strong international coalition to prevent Iran from acquiring nuclear weapons and eliminate North Korea's nuclear weapons program. Iran and North Korea could trigger regional arms races, creating dangerous nuclear flashpoints in the Middle East and East Asia. In confronting these threats, I will not take the military option off the table. But our first measure must be sustained, direct, and aggressive diplomacy—the kind that the Bush administration has been unable and unwilling to use.

COMBATING GLOBAL TERRORISM

To RENEW American leadership in the world, we must forge a more effective global response to the terrorism that came to our shores on an unprecedented scale on 9/11. From Bali to London, Baghdad to Algiers, Mumbai to Mombasa to Madrid, terrorists who reject modernity, oppose America, and distort Islam have killed and mutilated tens of thousands of people just this decade. Because this enemy operates globally, it must be confronted globally.

We must refocus our efforts on Afghanistan and Pakistan—the central front in our war against al Qaeda—so that we are confronting terrorists where their roots run deepest. Success in Afghanistan is still possible, but only if we act quickly, judiciously, and decisively. We

should pursue an integrated strategy that reinforces our troops in Afghanistan and works to remove the limitations placed by some NATO allies on their forces. Our strategy must also include sustained diplomacy to isolate the Taliban and more effective development programs that target aid to areas where the Taliban are making inroads.

I will join with our allies in insisting—not simply requesting—that Pakistan crack down on the Taliban, pursue Osama bin Laden and his lieutenants, and end its relationship with all terrorist groups. At the same time, I will encourage dialogue between Pakistan and India to work toward resolving their dispute over Kashmir and between Afghanistan and Pakistan to resolve their historic differences and develop the Pashtun border region. If Pakistan can look toward the east with greater confidence, it will be less likely to believe that its interests are best advanced through cooperation with the Taliban.

Although vigorous action in South Asia and Central Asia should be a starting point, our efforts must be broader. There must be no safe haven for those who plot to kill Americans. To defeat al Qaeda, I will build a twenty-first-century military and twenty-first-century partnerships as strong as the anticommunist alliance that won the Cold War to stay on the offense everywhere from Djibouti to Kandahar.

Here at home, we must strengthen our homeland security and protect the critical infrastructure on which the entire world depends. We can start by spending homeland security dollars on the basis of risk. This means investing more resources to defend mass transit, closing the gaps in our aviation security by screening all cargo on passenger airliners and checking all passengers against a comprehensive watch list, and upgrading port security by ensuring that cargo is screened for radiation.

To succeed, our homeland security and counterterrorism actions must be linked to an intelligence community that deals effectively with the threats we face. Today, we rely largely on the same institutions and practices that were in place before 9/11. We need to revisit intelligence reform, going beyond rearranging boxes on an organizational chart. To keep pace with highly adaptable enemies, we need technologies and practices that enable us to efficiently collect and share information within and across our intelligence agencies. We must invest still more in human intelligence and deploy additional trained operatives and diplomats with specialized knowledge of local cultures and languages. And we

should institutionalize the practice of developing competitive assessments of critical threats and strengthen our methodologies of analysis.

Finally, we need a comprehensive strategy to defeat global terrorists—one that draws on the full range of American power, not just our military might. As a senior U.S. military commander put it, when people have dignity and opportunity, "the chance of extremism being welcomed greatly, if not completely, diminishes." It is for this reason that we need to invest with our allies in strengthening weak states and helping to rebuild failed ones.

In the Islamic world and beyond, combating the terrorists' prophets of fear will require more than lectures on democracy. We need to deepen our knowledge of the circumstances and beliefs that underpin extremism. A crucial debate is occurring within Islam. Some believe in a future of peace, tolerance, development, and democratization. Others embrace a rigid and violent intolerance of personal liberty and the world at large. To empower forces of moderation, America must make every effort to export opportunity—access to education and health care, trade and investment—and provide the kind of steady support for political reformers and civil society that enabled our victory in the Cold War. Our beliefs rest on hope; the extremists' rest on fear. That is why we can—and will—win this struggle.

REBUILDING OUR PARTNERSHIPS

To RENEW American leadership in the world, I intend to rebuild the alliances, partnerships, and institutions necessary to confront common threats and enhance common security. Needed reform of these alliances and institutions will not come by bullying other countries to ratify changes we hatch in isolation. It will come when we convince other governments and peoples that they, too, have a stake in effective partnerships.

Too often we have sent the opposite signal to our international partners. In the case of Europe, we dismissed European reservations about the wisdom and necessity of the Iraq war. In Asia, we belittled South Korean efforts to improve relations with the North. In Latin America, from Mexico to Argentina, we failed to adequately address concerns about immigration and equity and economic growth.

In Africa, we have allowed genocide to persist for over four years in Darfur and have not done nearly enough to answer the African Union's call for more support to stop the killing. I will rebuild our ties to our allies in Europe and Asia and strengthen our partnerships throughout the Americas and Africa.

Our alliances require constant cooperation and revision if they are to remain effective and relevant. NATO has made tremendous strides over the last 15 years, transforming itself from a Cold War security structure into a partnership for peace. But today, NATO's challenge in Afghanistan has exposed, as Senator Lugar has put it, "the growing discrepancy between NATO's expanding missions and its lagging capabilities." To close this gap, I will rally our NATO allies to contribute more troops to collective security operations and to invest more in reconstruction and stabilization capabilities.

And as we strengthen NATO, we must build new alliances and partnerships in other vital regions. As China rises and Japan and South Korea assert themselves, I will work to forge a more effective framework in Asia that goes beyond bilateral agreements, occasional summits, and ad hoc arrangements, such as the six-party talks on North Korea. We need an inclusive infrastructure with the countries in East Asia that can promote stability and prosperity and help confront transnational threats, from terrorist cells in the Philippines to avian flu in Indonesia. I will also encourage China to play a responsible role as a growing power—to help lead in addressing the common problems of the twenty-first century. We will compete with China in some areas and cooperate in others. Our essential challenge is to build a relationship that broadens cooperation while strengthening our ability to compete.

In addition, we need effective collaboration on pressing global issues among all the major powers—including such newly emerging ones as Brazil, India, Nigeria, and South Africa. We need to give all of them a stake in upholding the international order. To that end, the United Nations requires far-reaching reform. The UN Secretariat's management practices remain weak. Peacekeeping operations are overextended. The new UN Human Rights Council has passed eight resolutions condemning Israel—but not a single resolution condemning the genocide in Darfur or human rights abuses in Zimbabwe. Yet

none of these problems will be solved unless America rededicates itself to the organization and its mission.

Strengthened institutions and invigorated alliances and partnerships are especially crucial if we are to defeat the epochal, man-made threat to the planet: climate change. Without dramatic changes, rising sea levels will flood coastal regions around the world, including much of the eastern seaboard. Warmer temperatures and declining rainfall will reduce crop yields, increasing conflict, famine, disease, and poverty. By 2050, famine could displace more than 250 million people worldwide. That means increased instability in some of the most volatile parts of the world.

I will show the world that America remains true to its founding values.

As the world's largest producer of greenhouse gases, America has the responsibility to lead. While many of our industrial partners are working hard to reduce their emissions, we are increasing ours at a steady clip—by more than ten percent per decade. As president, I intend to enact a cap-and-trade system that will dramatically reduce our carbon emissions. And I will work to finally free America of its dependence on foreign oil—by using energy more efficiently in our cars, factories, and homes, relying more on renewable sources of electricity, and harnessing the potential of biofuels.

Getting our own house in order is only a first step. China will soon replace America as the world's largest emitter of greenhouse gases. Clean energy development must be a central focus in our relationships with major countries in Europe and Asia. I will invest in efficient and clean technologies at home while using our assistance policies and export promotions to help developing countries leapfrog the carbon-energy-intensive stage of development. We need a global response to climate change that includes binding and enforceable commitments to reducing emissions, especially for those that pollute the most: the United States, China, India, the European Union, and Russia. This challenge is massive, but rising to it will also bring new benefits to America. By 2050, global demand for low-carbon energy could create an annual market worth $500 billion. Meeting that demand would open new frontiers for American entrepreneurs and workers.

BUILDING JUST, SECURE, DEMOCRATIC SOCIETIES

FINALLY, TO renew American leadership in the world, I will strengthen our common security by investing in our common humanity. Our global engagement cannot be defined by what we are against; it must be guided by a clear sense of what we stand for. We have a significant stake in ensuring that those who live in fear and want today can live with dignity and opportunity tomorrow.

People around the world have heard a great deal of late about freedom on the march. Tragically, many have come to associate this with war, torture, and forcibly imposed regime change. To build a better, freer world, we must first behave in ways that reflect the decency and aspirations of the American people. This means ending the practices of shipping away prisoners in the dead of night to be tortured in far-off countries, of detaining thousands without charge or trial, of maintaining a network of secret prisons to jail people beyond the reach of the law.

Citizens everywhere should be able to choose their leaders in climates free of fear. America must commit to strengthening the pillars of a just society. We can help build accountable institutions that deliver services and opportunity: strong legislatures, independent judiciaries, honest police forces, free presses, vibrant civil societies. In countries wracked by poverty and conflict, citizens long to enjoy freedom from want. And since extremely poor societies and weak states provide optimal breeding grounds for disease, terrorism, and conflict, the United States has a direct national security interest in dramatically reducing global poverty and joining with our allies in sharing more of our riches to help those most in need. We need to invest in building capable, democratic states that can establish healthy and educated communities, develop markets, and generate wealth. Such states would also have greater institutional capacities to fight terrorism, halt the spread of deadly weapons, and build health-care infrastructures to prevent, detect, and treat deadly diseases such as HIV/AIDS, malaria, and avian flu.

As president, I will double our annual investment in meeting these challenges to $50 billion by 2012 and ensure that those new resources are directed toward worthwhile goals. For the last 20 years, U.S. foreign

assistance funding has done little more than keep pace with inflation. It is in our national security interest to do better. But if America is going to help others build more just and secure societies, our trade deals, debt relief, and foreign aid must not come as blank checks. I will couple our support with an insistent call for reform, to combat the corruption that rots societies and governments from within. I will do so not in the spirit of a patron but in the spirit of a partner—a partner mindful of his own imperfections.

Our rapidly growing international AIDS programs have demonstrated that increased foreign assistance can make a real difference. As part of this new funding, I will capitalize a $2 billion Global Education Fund that will bring the world together in eliminating the global education deficit, much as the 9/11 Commission proposed. We cannot hope to shape a world where opportunity outweighs danger unless we ensure that every child everywhere is taught to build and not to destroy.

There are compelling moral reasons and compelling security reasons for renewed American leadership that recognizes the inherent equality and worth of all people. As President Kennedy said in his 1961 inaugural address, "To those people in the huts and villages of half the globe struggling to break the bonds of mass misery, we pledge our best efforts to help them help themselves, for whatever period is required—not because the communists may be doing it, not because we seek their votes, but because it is right. If a free society cannot help the many who are poor, it cannot save the few who are rich." I will show the world that America remains true to its founding values. We lead not only for ourselves but also for the common good.

RESTORING AMERICA'S TRUST

CONFRONTED BY Hitler, Roosevelt said that our power would be "directed toward ultimate good as well as against immediate evil. We Americans are not destroyers; we are builders." It is time for a president who can build consensus here at home for an equally ambitious course.

Ultimately, no foreign policy can succeed unless the American people understand it and feel they have a stake in its success—unless they trust that their government hears their concerns as well. We will not be able to increase foreign aid if we fail to invest in security and

opportunity for our own people. We cannot negotiate trade agreements to help spur development in poor countries so long as we provide no meaningful help to working Americans burdened by the dislocations of a global economy. We cannot reduce our dependence on foreign oil or defeat global warming unless Americans are willing to innovate and conserve. We cannot expect Americans to support placing our men and women in harm's way if we cannot show that we will use force wisely and judiciously. But if the next president can restore the American people's trust—if they know that he or she is acting with their best interests at heart, with prudence and wisdom and some measure of humility—then I believe the American people will be eager to see America lead again.

I believe they will also agree that it is time for a new generation to tell the next great American story. If we act with boldness and foresight, we will be able to tell our grandchildren that this was the time when we helped forge peace in the Middle East. This was the time we confronted climate change and secured the weapons that could destroy the human race. This was the time we defeated global terrorists and brought opportunity to forgotten corners of the world. And this was the time when we renewed the America that has led generations of weary travelers from all over the world to find opportunity and liberty and hope on our doorstep.

It was not all that long ago that farmers in Venezuela and Indonesia welcomed American doctors to their villages and hung pictures of JFK on their living room walls, when millions, like my father, waited every day for a letter in the mail that would grant them the privilege to come to America to study, work, live, or just be free.

We can be this America again. This is our moment to renew the trust and faith of our people—and all people—in an America that battles immediate evils, promotes an ultimate good, and leads the world once more.

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT G

Federal Register

Tuesday,
January 27, 2009

Part V

The President

Federal Register
Vol. 74, No. 16
Tuesday, January 27, 2009

Presidential Documents

Title 3—

The President

Executive Order 13491 of January 22, 2009

Ensuring Lawful Interrogations

By the authority vested in me by the Constitution and the laws of the United States of America, in order to improve the effectiveness of human intelligence-gathering, to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts, to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and to take care that the laws of the United States are faithfully executed, I hereby order as follows:

Section 1. *Revocation.* Executive Order 13440 of July 20, 2007, is revoked. All executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order. Heads of departments and agencies shall take all necessary steps to ensure that all directives, orders, and regulations of their respective departments or agencies are consistent with this order. Upon request, the Attorney General shall provide guidance about which directives, orders, and regulations are inconsistent with this order.

Sec. 2. *Definitions.* As used in this order:

(a) ''Army Field Manual 2–22.3'' means FM 2–22.3, Human Intelligence Collector Operations, issued by the Department of the Army on September 6, 2006.

(b) ''Army Field Manual 34–52'' means FM 34–52, Intelligence Interrogation, issued by the Department of the Army on May 8, 1987.

(c) ''Common Article 3'' means Article 3 of each of the Geneva Conventions.

(d) ''Convention Against Torture'' means the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100–20 (1988).

(e) ''Geneva Conventions'' means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

(f) ''Treated humanely,'' ''violence to life and person,'' ''murder of all kinds,'' ''mutilation,'' ''cruel treatment,'' ''torture,'' ''outrages upon personal dignity,'' and ''humiliating and degrading treatment'' refer to, and have the same meaning as, those same terms in Common Article 3.

(g) The terms ''detention facilities'' and ''detention facility'' in section 4(a) of this order do not refer to facilities used only to hold people on a short-term, transitory basis.

Sec. 3. *Standards and Practices for Interrogation of Individuals in the Custody or Control of the United States in Armed Conflicts.*

(a) **Common Article 3 Standards as a Minimum Baseline.** Consistent with the requirements of the Federal torture statute, 18 U.S.C. 2340–2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.

(b) **Interrogation Techniques and Interrogation-Related Treatment.** Effective immediately, an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2–22.3 (Manual). Interrogation techniques, approaches, and treatments described in the Manual shall be implemented strictly in accord with the principles, processes, conditions, and limitations the Manual prescribes. Where processes required by the Manual, such as a requirement of approval by specified Department of Defense officials, are inapposite to a department or an agency other than the Department of Defense, such a department or agency shall use processes that are substantially equivalent to the processes the Manual prescribes for the Department of Defense. Nothing in this section shall preclude the Federal Bureau of Investigation, or other Federal law enforcement agencies, from continuing to use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises.

(c) **Interpretations of Common Article 3 and the Army Field Manual.** From this day forward, unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government may, in conducting interrogations, act in reliance upon Army Field Manual 2–22.3, but may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation—including interpretations of Federal criminal laws, the Convention Against Torture, Common Article 3, Army Field Manual 2–22.3, and its predecessor document, Army Field Manual 34–52—issued by the Department of Justice between September 11, 2001, and January 20, 2009.

Sec. 4. *Prohibition of Certain Detention Facilities, and Red Cross Access to Detained Individuals.*

(a) **CIA Detention.** The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.

(b) **International Committee of the Red Cross Access to Detained Individuals.** All departments and agencies of the Federal Government shall provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States Government, consistent with Department of Defense regulations and policies.

Sec. 5. *Special Interagency Task Force on Interrogation and Transfer Policies.*

(a) **Establishment of Special Interagency Task Force.** There shall be established a Special Task Force on Interrogation and Transfer Policies (Special Task Force) to review interrogation and transfer policies.

(b) **Membership.** The Special Task Force shall consist of the following members, or their designees:

(i) the Attorney General, who shall serve as Chair;

(ii) the Director of National Intelligence, who shall serve as Co-Vice-Chair;

(iii) the Secretary of Defense, who shall serve as Co-Vice-Chair;

(iv) the Secretary of State;

(v) the Secretary of Homeland Security;

(vi) the Director of the Central Intelligence Agency;

(vii) the Chairman of the Joint Chiefs of Staff; and

(viii) other officers or full-time or permanent part-time employees of the United States, as determined by the Chair, with the concurrence of the head of the department or agency concerned.

(c) **Staff.** The Chair may designate officers and employees within the Department of Justice to serve as staff to support the Special Task Force. At the request of the Chair, officers and employees from other departments or agencies may serve on the Special Task Force with the concurrence of the head of the department or agency that employ such individuals. Such staff must be officers or full-time or permanent part-time employees of the United States. The Chair shall designate an officer or employee of the Department of Justice to serve as the Executive Secretary of the Special Task Force.

(d) **Operation.** The Chair shall convene meetings of the Special Task Force, determine its agenda, and direct its work. The Chair may establish and direct subgroups of the Special Task Force, consisting exclusively of members of the Special Task Force, to deal with particular subjects.

(e) **Mission.** The mission of the Special Task Force shall be:

(i) to study and evaluate whether the interrogation practices and techniques in Army Field Manual 2–22.3, when employed by departments or agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for other departments or agencies; and

(ii) to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.

(f) **Administration.** The Special Task Force shall be established for administrative purposes within the Department of Justice and the Department of Justice shall, to the extent permitted by law and subject to the availability of appropriations, provide administrative support and funding for the Special Task Force.

(g) **Recommendations.** The Special Task Force shall provide a report to the President, through the Assistant to the President for National Security Affairs and the Counsel to the President, on the matters set forth in subsection (d) within 180 days of the date of this order, unless the Chair determines that an extension is necessary.

(h) **Termination.** The Chair shall terminate the Special Task Force upon the completion of its duties.

Sec. 6. *Construction with Other Laws.* Nothing in this order shall be construed to affect the obligations of officers, employees, and other agents of the United States Government to comply with all pertinent laws and treaties of the United States governing detention and interrogation, including but not limited to: the Fifth and Eighth Amendments to the United States Constitution; the Federal torture statute, 18 U.S.C. 2340–2340A; the War Crimes Act, 18 U.S.C. 2441; the Federal assault statute, 18 U.S.C. 113; the Federal maiming statute, 18 U.S.C. 114; the Federal ''stalking'' statute, 18 U.S.C. 2261A; articles 93, 124, 128, and 134 of the Uniform Code of Military Justice, 10 U.S.C. 893, 924, 928, and 934; section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd; section 6(c) of the Military Commissions Act of 2006, Public Law 109–366; the Geneva Conventions; and the Convention Against Torture. Nothing in this order shall be construed to diminish any rights that any individual may have under these or other laws and treaties. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

THE WHITE HOUSE,
January 22, 2009.

[FR Doc. E9–1885
Filed 1–26–09; 11:15 am]
Billing code 3195–W9–P

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT H

Mission
The Central Intelligence Agency (CIA) is an independent US Government agency responsible for providing national security intelligence to senior US policymakers.

To learn more, visit CIA Vision, Mission & Values.

Message from the Director: Interrogation Policy and Contracts

RSS

Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the CIA's Interrogation Policy and Contracts

April 9, 2009

As you know, there is continuing media and congressional interest in reviewing past rendition, detention, and interrogation activities that took place dating back to 2002. I have also been asked about contract interrogators and detention facilities. Today, I sent a letter to our Congressional oversight committees outlining the Agency's current policy regarding interrogation of captured terrorists, including the policy on the use of contractors in the process.

- CIA's aggressive global pursuit of al-Qaida and its affiliates continues undiminished. Agency officers are working tirelessly—and successfully—to disrupt operations in strict accord with the President's Executive Order of January 22, 2009, concerning detention and interrogation.
- CIA officers, whose knowledge of terrorist organizations is second to none, will continue to conduct debriefings using a dialog style of questioning that is fully consistent with the interrogation approaches authorized and listed in the Army Field Manual. CIA officers do not tolerate, and will continue to promptly report, any inappropriate behavior or allegations of abuse. That holds true whether a suspect is in the custody of an American partner or a foreign liaison service.
- Under the Executive Order, the CIA does not employ any of the enhanced interrogation techniques that were authorized by the Department of Justice from 2002 to 2009.
- No CIA contractors will conduct interrogations.
- CIA no longer operates detention facilities or black sites and has proposed a plan to decommission the remaining sites. I have directed our Agency personnel to take charge of the decommissioning process and have further directed that the contracts for site security be promptly terminated. It is estimated that our taking over site security will result in savings of up to $4 million.
- CIA retains the authority to detain individuals on a short-term transitory basis. None have occurred since I have become Director. We anticipate that we would quickly turn over any person in our custody to U.S. military authorities or to their country of jurisdiction, depending on the situation.

CIA's focus will remain where the American people expect it to be—on the mission of protecting the country today and into the future. We will do that even as we cooperate with Congressional reviews of past interrogation practices. Officers who act on guidance from the Department of Justice—or acted on such guidance previously—should not be investigated, let alone punished. This is what fairness and wisdom require.

CIA will continue to honor the law as we defend the United States as we have done since the beginning of this program. That is what the men and women of this Agency demand. Together, we can, and will, do no less. Thank you for your service and dedication to protecting this nation.

Finally, let me take this opportunity to wish you and your families a Happy Easter and Passover.

Leon E. Panetta

Posted: Apr 09, 2009 01:37 PM
Last Updated: Jun 10, 2010 11:14 AM
Last Reviewed: Apr 09, 2009 01:37 PM

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT I

The New York Times

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August 25, 2009

U.S. Says Rendition to Continue, but With More Oversight

By DAVID JOHNSTON

WASHINGTON — The Obama administration will continue the Bush administration's practice of sending terrorism suspects to third countries for detention and interrogation, but pledges to closely monitor their treatment to ensure that they are not tortured, administration officials said Monday.

Human rights advocates condemned the decision, saying that continuing the practice, known as rendition, would still allow the transfer of prisoners to countries with a history of torture. They said that promises from other countries of humane treatment, called "diplomatic assurances," were no protection against abuse.

"It is extremely disappointing that the Obama administration is continuing the Bush administration practice of relying on diplomatic assurances, which have been proven completely ineffective in preventing torture," said Amrit Singh, a lawyer with the American Civil Liberties Union, who tracked rendition cases under President George W. Bush.

Ms. Singh cited the case of Maher Arar, a Syrian-born Canadian sent in 2002 by the United States to Syria, where he was beaten with electrical cable despite assurances against torture.

The announcement, by President Obama's Interrogation and Transfer Policy Task Force, seemed intended in part to offset the impact of the release on Monday of a long-withheld report by the C.I.A. inspector general, written in 2004, that offered new details about the brutal tactics used by the C.I.A. in interrogating terrorism detainees.

Though the Obama administration previously signaled that it would continue the use of renditions, some civil liberties groups were disappointed because, as a presidential candidate, Mr. Obama had strongly suggested he might end the practice. In an article in Foreign Affairs in the summer of 2007, Mr. Obama wrote, "To build a better, freer world, we must first behave in ways that reflect the decency and aspirations of the American people."

Mr. Obama continued, "This means ending the practices of shipping away prisoners in the dead of night to be tortured in far-off countries, of detaining thousands without charge or trial, of maintaining a network of secret prisons to jail people beyond the reach of the law." In January, the president ordered secret prisons run by the C.I.A. to be shut down.

The task force has proposed a more vigorous monitoring of the treatment of prisoners sent to other countries, but Ms. Singh said the usual method of such monitoring — visits from American or allied consular officials — had been ineffective. A Canadian consular official visited Mr. Arar several times, but the prisoner was too frightened to tell him about the torture, a Canadian investigation found.

The administration officials, who discussed the changes on condition that they not be identified, said that unlike the Bush administration, they would operate more openly and give the State Department a larger role in assuring that transferred detainees would not be abused.

“The emphasis will be on ensuring that individuals will not face torture if they are sent overseas,” said one administration official, adding that no detainees would be sent to countries known to conduct abusive interrogations.

Rendition began to be used regularly under President Bill Clinton and its use expanded rapidly under President Bush after the terrorist attacks in September 2001. American intelligence agencies often appeared to send detainees to other countries to avoid the legal complications of bringing them to the United States.

Some human rights advocates said they thought the Obama administration was maintaining the rendition program out of fear that its elimination would force the government to accept additional detainees on American soil and threaten Mr. Obama’s pledge to close the detention center at Guantánamo Bay, Cuba, by January.

The task force that recommended the modified transfer policy was set up in January to study changes in rendition and interrogation policies under an executive order signed by President Obama.

Another recommendation approved by Mr. Obama was a proposal to establish a multiagency interrogation unit within the Federal Bureau of Investigation, to oversee the interrogations of top terrorism suspects using largely noncoercive techniques approved by the administration earlier this year.

The creation of the new unit will formally strip the C.I.A. of its primary role in questioning high-level detainees, but agency officials said they would continue to play a substantial role.

“The C.I.A. took active part in the work of the task force, and the agency’s strong counterterrorism knowledge will be key to the conduct of future debriefings,” said Paul Gimigliano, a C.I.A. spokesman. “That won’t change.”

The new unit, to be called the High Value Interrogation Group, will be made up of analysts, linguists and other personnel from the C.I.A. and other intelligence and law enforcement agencies. It will operate under policies set by the National Security Council.

The officials said all interrogations would comply with guidelines contained in the Army Field Manual, which outlaws the use of physical force. The group will study interrogation methods, however, and may add additional noncoercive methods in the future, the officials said.

Tom Malinowski of Human Rights Watch said the new interrogation policy represented a significant step toward more humane treatment, though he expressed dismay that administration officials failed to impose stricter limits on rendition.

But he praised the Obama administration’s overall approach to difficult counterterrorism issues, saying the government had adopted “some of the most transparent rules against abuse of any democratic country.”

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DOCUMENT J

TOP SECRET/ //NOFORN,ORCON//MR1

FAX COVER SHEET

Central Intelligence Agency

Washington, DC 20505

30 December 2004

To:	DOJ Command Center For Dan Levin
Organization:	Office of Legal Counsel U.S. Department of Justice
Phone:	
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Comments: (S//NF) Dan, A generic description of the process. Thank you.

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Background Paper on CIA's Combined Use of Interrogation Techniques

Note: This paper provides further background information and details on High-Value Detainee (HVD) interrogation techniques to support documents CIA has previously provided the Department of Justice.

This paper focuses strictly on the topic of combined use of interrogation techniques.

The purpose of interrogation is to persuade High-Value Detainees (HVD) to provide threat information and terrorist intelligence in a timely manner, to allow the US Government to identify and disrupt terrorist plots and to collect critical intelligence on al-Qa'ida

In support of information previously sent to the Department of Justice, this paper provides additional background on how interrogation techniques are used, in combination and separately, to achieve interrogation objectives. Effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systematic, and cumulative manner to influence HVD behavior, to overcome a detainee's resistance posture. The goal of interrogation is to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner. For the purpose of this paper, the interrogation process can be broken into three separate phases: Initial Conditions; Transition to Interrogation; and Interrogation.

A. Initial Conditions. Capture, contribute to the physical and psychological condition of the HVD prior to the start of interrogation. Of these, "capture shock" and detainee reactions are factors that may vary significantly between detainees

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Regardless of their previous environment and experiences, once an HVD is turned over to CIA a predictable set of events occur:

1) Rendition.

a. The HVD is flown to a Black Site A medical examination is conducted prior to the flight. During the flight, the detainee is securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods. There is no interaction with the HVD during this rendition movement except for periodic, discreet assessments by the on-board medical officer.

b. Upon arrival at the destination airfield, the HVD is moved to the Black Site under the same conditions and using appropriate security procedures.

2) Reception at Black Site. The HVD is subjected to administrative procedures and medical assessment upon arrival at the Black Site.

the HVD finds himself in the complete control of Americans;

the procedures he is subjected to are precise, quiet, and almost clinical; and no one is mistreating him. While each HVD is different, the rendition and reception process generally creates significant apprehension in the HVD because of the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread an HVD might have of US custody. Reception procedures include:

a. The HVD's head and face are shaved.

b. A series of photographs are taken of the HVD while nude to document the physical condition of the HVD upon arrival.

c. A Medical Officer interviews the HVD and a medical evaluation is conducted to assess the physical condition of the HVD. The medical officer also determines if there are any contraindications to the use of interrogation techniques.

d. A Psychologist interviews the HVD to assess his mental state. The psychologist also determines if there are any contraindications to the use of interrogation techniques.

Transitioning to Interrogation - The Initial Interview. Interrogators use the Initial Interview to assess the initial resistance posture of the HVD and to determine--in a relatively benign environment--if the HVD intends to willingly participate with CIA interrogators. The standard on participation is set very high during the Initial Interview. The HVD would have to willingly provide information on actionable threats and location information on High-Value Targets at large--not lower level information--for interrogators to continue with the neutral approach.

to HQS. Once approved, the interrogation process begins provided the required medical and psychological assessments contain no contraindications to interrogation

C. Interrogation.

For descriptive purposes, these techniques can be separated into three categories: Conditioning Techniques; Corrective Techniques; and Coercive Techniques. To more completely describe the three categories of techniques and their effects, we begin with a summary of the detention conditions that are used in all CIA HVD facilities and that may be a factor in interrogations.

1) Existing detention conditions. Detention conditions are not interrogation techniques, but they have an impact on the detainee undergoing interrogation. Specifically, the HVD will be exposed to white noise/loud sounds (not to exceed 79 decibels) and constant light during portions of the interrogation process. These conditions provide additional operational security: white noise/loud sounds mask conversations of staff members and deny the HVD any auditory clues about his surroundings and deter and disrupt the HVD's potential efforts to communicate with other detainees. Constant light provides an improved environment for Black Site security, medical, psychological, and interrogator staff to monitor the HVD.

2) Conditioning Techniques. The HVD is typically reduced to a baseline, dependent state using the three interrogation techniques discussed below in combination. Establishing this baseline state is important to demonstrate to the HVD that he has no control over basic human needs. The baseline state also creates in the detainee a mindset in which he learns to perceive and value his personal welfare, comfort, and immediate needs more than the information he is protecting. The use of these

conditioning techniques do not generally bring immediate results; rather, it is the cumulative effect of these techniques, used over time and in combination with other interrogation techniques and intelligence exploitation methods, which achieve interrogation objectives. These conditioning techniques require little to no physical interaction between the detainee and the interrogator. The specific conditioning interrogation techniques are:

a. Nudity. The HVD's clothes are taken and he remains nude until the interrogators provide clothes to him.

b. Sleep Deprivation. The HVD is placed in the vertical shackling position to begin sleep deprivation. Other shackling procedures may be used during interrogations. The detainee is diapered for sanitary purposes, although the diaper is not used at all times.

c. Dietary manipulation. The HVD is fed Ensure Plus or other food at regular intervals. The HVD receives a target of 1500 calories per day per OMS guidelines.

3) Corrective Techniques. Techniques that require physical interaction between the interrogator and detainee are used principally to correct, startle, or to achieve another enabling objective with the detainee. These techniques-the insult slap, abdominal slap, facial hold, and attention grasp-are not used simultaneously but are often used interchangeably during an individual interrogation session. These techniques generally are used while the detainee is subjected to the conditioning techniques outlined above (nudity, sleep deprivation, and dietary manipulation). Examples of application include:

a. Insult Slap. The insult slap often is the first physical technique used with an HVD once an interrogation begins. As noted, the HVD may already be nude, in sleep deprivation, and subject to dietary manipulation, even though the detainee will likely feel little effect from these techniques early in the interrogation. The insult slap is used sparingly but periodically throughout the interrogation process when the interrogator needs to immediately correct the

detainee or provide a consequence to a detainee's response or non-response. The interrogator will continually assess the effectiveness of the insult slap and continue to employ it so long as it has the desired effect on the detainee. Because of the physical dynamics of the various techniques, the insult slap can be used in combination with water dousing or kneeling stress positions. Other combinations are possible but may not be practical.

b. Abdominal Slap. The abdominal slap is similar to the insult slap in application and desired result. It provides the variation necessary to keep a high level of unpredictability in the interrogation process. The abdominal slap will be used sparingly and periodically throughout the interrogation process when the interrogator wants to immediately correct the detainee

, and the interrogator will continually assess its effectiveness. Because of the physical dynamics of the various techniques, the abdominal slap can be used in combination with water dousing, stress positions, and wall standing. Other combinations are possible but may not be practical.

c. Facial Hold. The facial hold is a corrective technique and is used sparingly throughout interrogation. The facial hold is not painful and is used to correct the detainee in a way that demonstrates the interrogator's control over the HVD.

Because of the physical dynamics of the various techniques, the facial hold can be used in combination with water dousing, stress positions, and wall standing. Other combinations are possible but may not be practical.

d. Attention Grasp.

It may be used several times in the same interrogation. This technique is usually applied

grasp the HVD and pull him

into close proximity of the interrogator (face to face). Because of the physical dynamics of the various techniques, the attention grasp can be used in combination with water dousing or kneeling stress positions. Other combinations are possible but may not be practical.

4) Coercive Techniques. Certain interrogation techniques place the detainee in more physical and psychological stress and, therefore, are considered more effective tools in persuading a resistant HVD to participate with CIA interrogators. These techniques--walling, water dousing, stress positions, wall standing, and cramped confinement--are typically not used in combination, although some combined use is possible. For example, an HVD in stress positions or wall standing can be water doused at the same time. Other combinations of these techniques may be used while the detainee is being subjected to the conditioning techniques discussed above (nudity, sleep deprivation, and dietary manipulation). Examples of coercive techniques include:

a. Walling. Walling is one of the most effective interrogation techniques because it wears down the HVD physically, heightens uncertainty in the detainee about what the interrogator may do to him, and creates a sense of dread when the HVD knows he is about to be walled again.

nterrogator
An HVD may be walled one time (one impact with the wall) to make a point or twenty to thirty times consecutively when the interrogator requires a more significant response to a question. During an interrogation session that is designed to be intense, an HVD will be walled multiple times in the session. Because of the physical dynamics of walling, it is impractical to use it simultaneously with other corrective or coercive techniques.

b. Water Dousing. The frequency and duration of water dousing applications are based on water temperature and other safety considerations as

established by OMS guidelines. It is an effective interrogation technique and may be used frequently within those guidelines. The physical dynamics of water dousing are such that it can be used in combination with other corrective and coercive techniques. As noted above, an HVD in stress positions or wall standing can be water doused. Likewise, it is possible to use the insult slap or abdominal slap with an HVD during water dousing.

c. Stress Positions. The frequency and duration of use of the stress positions are based on the interrogator's assessment of their continued effectiveness during interrogation. These techniques are usually self-limiting in that temporary muscle fatigue usually leads to the HVD being unable to maintain the stress position after a period of time. Stress positions requiring the HVD to be in contact with the wall can be used in combination with water dousing and abdominal slap. Stress positions requiring the HVD to kneel can be used in combination with water dousing, insult slap, abdominal slap, facial hold, and attention grasp.

d. Wall Standing. The frequency and duration of wall standing are based on the interrogator's assessment of its continued effectiveness during interrogation. Wall standing is usually self-limiting in that temporary muscle fatigue usually leads to the HVD being unable to maintain the position after a period of time. Because of the physical dynamics of the various techniques, wall standing can be used in combination with water dousing and abdominal slap. While other combinations are possible, they may not be practical.

e. Cramped Confinement. Current OMS guidance on the duration of cramped confinement limits confinement in the large box to no more than 8 hours at a time for no more than 18 hours a day, and confinement in the small box to 2 hours.

[redacted] Because of the unique aspects of cramped confinement, it cannot be used in

combination with other corrective or coercive techniques.

D. Interrogation - A day-to-day look. This section provides a look at a prototypical interrogation with an emphasis on the application of interrogation techniques, in combination and separately.

2) Session One.

a. The HVD is brought into the interrogation room, and under the direction of the interrogators, stripped of his clothes, and placed into shackles

b. The HVD is placed standing with his back to the walling wall. The HVD remains hooded.

c. Interrogators approach the HVD, place the walling collar over his head and around his neck, and stand in front of the HVD.

d. The interrogators remove the HVD's hood and explain the HVD's situation to him, tell him that the interrogators will do what it takes to get important information, and that he can improve his conditions immediately by participating with the interrogators. The insult slap is normally used as soon as the HVD does or says anything inconsistent with the interrogators' instructions.

e. If appropriate, an insult slap or abdominal slap will follow.

f. The interrogators will likely use walling once it becomes clear that the HVD is lying, withholding information, or using other resistance techniques.

g. The sequence may continue for several more iterations as the interrogators continue to measure the HVD's resistance posture and apply a negative consequence to the HVD's resistance efforts.

h. The interrogators, assisted by security officers (for security purposes) will place the HVD in the center of the interrogation room in the vertical shackling position and diaper the HVD to begin sleep deprivation. The HVD will be provided with Ensure Plus (liquid dietary supplement) to begin dietary manipulation. The HVD remains nude. White noise (not to exceed 79db) is used in the interrogation

room. The first interrogation session terminates at this point.

i.

j. This first interrogation session may last from 30 minutes to several hours based on the interrogators' assessment of the HVD's resistance posture.

The three Conditioning Techniques were used to bring the HVD to a baseline, dependent state conductive to meeting interrogation objectives in a timely manner.

3) Session Two.

a. The time period between Session One and Session Two could be as brief as one hour or more than 24 hours

In addition, the medical and psychological personnel observing the interrogations must advise there are no contraindications to another interrogation session.

b.

c. Like the first session, interrogators approach the HVD, place the walling collar over his head and around his neck, and stand in front of the HVD.

d.

Should the HVD not respond appropriately to the first questions, the interrogators will respond with an insult slap or abdominal slap to set the stage for further questioning.

e.

The interrogators will likely use walling once interrogators determine the HVD is intent on maintaining his resistance posture.

f. The sequence may continue for multiple iterations as the interrogators continue to measure the HVD's resistance posture.

g. To increase the pressure on the HVD,

water douse the HVD for several minutes.

h. The interrogators, assisted by security officers, will place the HVD back into the vertical shackling position to resume sleep deprivation. Dietary manipulation also continues, and the HVD remains nude. White noise (not to exceed 79db) is used in the interrogation room. The interrogation session terminates at this point.

i. As noted above, the duration of this session may last from 30 minutes to several hours based on the interrogators' assessment of the HVD's resistance posture. In this example of the second session, the following techniques were used: sleep deprivation, nudity, dietary manipulation, walling, water dousing, attention grasp, insult slap, and abdominal slap. The three Conditioning Techniques were used to keep the HVD at a baseline, dependent state and to weaken his resolve and will to resist. In combination with these three techniques, other Corrective and Coercive Techniques were used throughout the interrogation session based on interrogation objectives and the interrogators' assessment of the HVD's resistance posture.

4) Session Three.

a.

In addition, the medical and psychological personnel observing the interrogations must find no contraindications to continued interrogation.

b. The HVD remains in sleep deprivation, dietary manipulation and is nude.

c. Like the earlier sessions, the HVD begins the session standing against the walling wall with the walling collar around his neck.

d. If the HVD is still maintaining a resistance posture, interrogators will continue to use walling and water dousing. All of the Corrective Techniques (insult slap, abdominal slap, facial hold, attention grasp) may be used several times during this session based on the responses and actions of the HVD. Stress positions and wall standing will be integrated into interrogations

Intense questioning and walling would be repeated multiple times.

Interrogators will often use one technique to support another. As an example, interrogators would tell an HVD in a stress position that he (HVD) is going back to the walling wall (for walling) if he fails to hold the stress position until told otherwise by the HVD. This places additional stress on the HVD who typically will try to hold the stress position for as long as possible to avoid the walling wall.

the

interrogators will remind the HVD that he is responsible for this treatment and can stop it at any time by cooperating with the interrogators.

e. The interrogators, assisted by security officers, will place the HVD back into the vertical shackling position to resume sleep deprivation. Dietary manipulation also continues, and the HVD remains nude. White noise (not to exceed 79db) is used in the interrogation room. The interrogation session terminates at this point. In this example of the third session, the following techniques were used: sleep deprivation, nudity, dietary manipulation, walling, water dousing, attention grasp, insult slap, abdominal slap, stress positions, and wall standing.

5) Continuing Sessions.

Interrogation techniques assessed as being the most effective will be emphasized while techniques will little assessed effectiveness will be minimized.

a.

b. The use of cramped confinement may be introduced if interrogators assess that it will have the appropriate effect on the HVD.

c.

d. Sleep deprivation may continue to the 70 to 120 hour range, or possibly beyond for the hardest resisters, but in no case exceed the 180-hour time limit. Sleep deprivation will end sooner if the medical or psychologist observer finds

contraindications to continued sleep deprivation.

e.

f

g. The interrogators' objective is to transition the HVD to a point where he is participating in a predictable, reliable, and sustainable manner. Interrogation techniques may still be applied as required, but become less frequent.

. This transition period lasts from several days to several weeks based on the HVDs responses and actions.

h. The entire interrogation process outlined above, including transition, may last for thirty days

On average, the actual use of interrogation techniques can vary upwards to fifteen days based on the resilience of the HVD.

If the interrogation team anticipates the potential need to use interrogation techniques beyond the 30-day approval period, it will submit a new interrogation plan to HQS for evaluation and approval.

2. Summary.

- Since the start of this program, interrogation techniques have been used in combination and separately to achieve critical intelligence collection objectives.
- The use of interrogation techniques in combination is essential to the creation of an interrogation environment conducive to intelligence collection. HVDs are well-trained, often battle-hardened terrorist operatives, and highly committed to jihad. They are intelligent and resourceful leaders and able to resist standard interrogation approaches.

However, there is no template or script that states with certainty when and how these techniques will be used in combination during interrogation. However, the exemplar above is a fair representation of how these techniques are actually employed.

- All CIA interrogations are conducted on the basis of the "least coercive measure" principle. Interrogators employ interrogation techniques in an escalating manner consistent with the HVD's responses and actions. Intelligence production is more sustainable over the long term if the actual use of interrogation techniques diminishes steadily and the interrogation environment improves in accordance with the HVD's demonstrated consistent participation with the interrogators.

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT K

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

August 1, 2002

Memorandum for John Rizzo
Acting General Counsel of the Central Intelligence Agency

Interrogation of al Qaeda Operative

You have asked for this Office's views on whether certain proposed conduct would violate the prohibition against torture found at Section 2340A of title 18 of the United States Code. You have asked for this advice in the course of conducting interrogations of Abu Zubaydah. As we understand it, Zubaydah is one of the highest ranking members of the al Qaeda terrorist organization, with which the United States is currently engaged in an international armed conflict following the attacks on the World Trade Center and the Pentagon on September 11, 2001. This letter memorializes our previous oral advice, given on July 24, 2002 and July 26, 2002, that the proposed conduct would not violate this prohibition.

I.

Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here, and this opinion is limited to these facts. If these facts were to change, this advice would not necessarily apply. Zubaydah is currently being held by the United States. The interrogation team is certain that he has additional information that he refuses to divulge. Specifically, he is withholding information regarding terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas. Zubaydah has become accustomed to a certain level of treatment and displays no signs of willingness to disclose further information. Moreover, your intelligence indicates that there is currently a level of "chatter" equal to that which preceded the September 11 attacks. In light of the information you believe Zubaydah has and the high level of threat you believe now exists, you wish to move the interrogations into what you have described as an "increased pressure phase."

As part of this increased pressure phase, Zubaydah will have contact only with a new interrogation specialist, whom he has not met previously, and the Survival, Evasion, Resistance, Escape ("SERE") training psychologist who has been involved with the interrogations since they began. This phase will likely last no more than several days but could last up to thirty days. In this phase, you would like to employ ten techniques that you believe will dislocate his

expectations regarding the treatment he believes he will receive and encourage him to disclose the crucial information mentioned above. These ten techniques are: (1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard. You have informed us that the use of these techniques would be on an as-needed basis and that not all of these techniques will necessarily be used. The interrogation team would use these techniques in some combination to convince Zubaydah that the only way he can influence his surrounding environment is through cooperation. You have, however, informed us that you expect these techniques to be used in some sort of escalating fashion, culminating with the waterboard, though not necessarily ending with this technique. Moreover, you have also orally informed us that although some of these techniques may be used with more than once, that repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions. You have also informed us that Zabaydah sustained a wound during his capture, which is being treated.

Based on the facts you have given us, we understand each of these techniques to be as follows. The attention grasp consists of grasping the individual with both hands, one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the individual is drawn toward the interrogator.

For walling, a flexible false wall will be constructed. The individual is placed with his heels touching the wall. The interrogator pulls the individual forward and then quickly and firmly pushes the individual into the wall. It is the individual's shoulder blades that hit the wall. During this motion, the head and neck are supported with a rolled hood or towel that provides a c-collar effect to help prevent whiplash. To further reduce the probability of injury, the individual is allowed to rebound from the flexible wall. You have orally informed us that the false wall is in part constructed to create a loud sound when the individual hits it, which will further shock or surprise in the individual. In part, the idea is to create a sound that will make the impact seem far worse than it is and that will be far worse than any injury that might result from the action.

The facial hold is used to hold the head immobile. One open palm is placed on either side of the individual's face. The fingertips are kept well away from the individual's eyes.

With the facial slap or insult slap, the interrogator slaps the individual's face with fingers slightly spread. The hand makes contact with the area directly between the tip of the individual's chin and the bottom of the corresponding earlobe. The interrogator invades the individual's personal space. The goal of the facial slap is not to inflict physical pain that is severe or lasting. Instead, the purpose of the facial slap is to induce shock, surprise, and/or humiliation.

Cramped confinement involves the placement of the individual in a confined space, the dimensions of which restrict the individual's movement. The confined space is usually dark.

The duration of confinement varies based upon the size of the container. For the larger confined space, the individual can stand up or sit down; the smaller space is large enough for the subject to sit down. Confinement in the larger space can last up to eighteen hours; for the smaller space, confinement lasts for no more than two hours.

Wall standing is used to induce muscle fatigue. The individual stands about four to five feet from a wall, with his feet spread approximately to shoulder width. His arms are stretched out in front of him, with his fingers resting on the wall. His fingers support all of his body weight. The individual is not permitted to move or reposition his hands or feet.

A variety of stress positions may be used. You have informed us that these positions are not designed to produce the pain associated with contortions or twisting of the body. Rather, somewhat like walling, they are designed to produce the physical discomfort associated with muscle fatigue. Two particular stress positions are likely to be used on Zubaydah: (1) sitting on the floor with legs extended straight out in front of him with his arms raised above his head; and (2) kneeling on the floor while leaning back at a 45 degree angle. You have also orally informed us that through observing Zubaydah in captivity, you have noted that he appears to be quite flexible despite his wound.

Sleep deprivation may be used. You have indicated that your purpose in using this technique is to reduce the individual's ability to think on his feet and, through the discomfort associated with lack of sleep, to motivate him to cooperate. The effect of such sleep deprivation will generally remit after one or two nights of uninterrupted sleep. You have informed us that your research has revealed that, in rare instances, some individuals who are already predisposed to psychological problems may experience abnormal reactions to sleep deprivation. Even in those cases, however, reactions abate after the individual is permitted to sleep. Moreover, personnel with medical training are available to and will intervene in the unlikely event of an abnormal reaction. You have orally informed us that you would not deprive Zubaydah of sleep for more than eleven days at a time and that you have previously kept him awake for 72 hours, from which no mental or physical harm resulted.

You would like to place Zubaydah in a cramped confinement box with an insect. You have informed us that he appears to have a fear of insects. In particular, you would like to tell Zubaydah that you intend to place a stinging insect into the box with him. You would, however, place a harmless insect in the box. You have orally informed us that you would in fact place a harmless insect such as a caterpillar in the box with him. [redacted]

Finally, you would like to use a technique called the "waterboard." In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water

is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning. The individual does not breathe any water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated. The water is usually applied from a canteen cup or small watering can with a spout. You have orally informed us that this procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning. You have also orally informed us that it is likely that this procedure would not last more than 20 minutes in any one application.

We also understand that a medical expert with SERE experience will be present throughout this phase and that the procedures will be stopped if deemed medically necessary to prevent severe mental or physical harm to Zubaydah. As mentioned above, Zubaydah suffered an injury during his capture. You have informed us that steps will be taken to ensure that this injury is not in any way exacerbated by the use of these methods and that adequate medical attention will be given to ensure that it will heal properly.

II.

In this part, we review the context within which these procedures will be applied. You have informed us that you have taken various steps to ascertain what effect, if any, these techniques would have on Zubaydah's mental health. These same techniques, with the exception of the insect in the cramped confined space, have been used and continue to be used on some members of our military personnel during their SERE training. Because of the use of these procedures in training our own military personnel to resist interrogations, you have consulted with various individuals who have extensive experience in the use of these techniques. You have done so in order to ensure that no prolonged mental harm would result from the use of these proposed procedures.

Through your consultation with various individuals responsible for such training, you have learned that these techniques have been used as elements of a course of conduct without any reported incident of prolonged mental harm. [redacted] of the SERE school, [redacted] has reported that, during the seven-year period that he spent in those positions, there were two requests from Congress for information concerning alleged injuries resulting from the training. One of these inquiries was prompted by the temporary physical injury a trainee sustained as result of being placed in a

confinement box. The other inquiry involved claims that the SERE training caused two individuals to engage in criminal behavior, namely, felony shoplifting and downloading child pornography onto a military computer. According to this official, these claims were found to be baseless. Moreover, he has indicated that during the three and a half years he spent as [redacted] of the SERE program, he trained 10,000 students. Of those students, only two dropped out of the training following the use of these techniques. Although on rare occasions some students temporarily postponed the remainder of their training and received psychological counseling, those students were able to finish the program without any indication of subsequent mental health effects.

You have informed us that you have consulted with [redacted] who has ten years of experience with SERE training [redacted] He stated that, during those ten years, insofar as he is aware, none of the individuals who completed the program suffered any adverse mental health effects. He informed you that there was one person who did not complete the training. That person experienced an adverse mental health reaction that lasted only two hours. After those two hours, the individual's symptoms spontaneously dissipated without requiring treatment or counseling and no other symptoms were ever reported by this individual. According to the information you have provided to us, this assessment of the use of these procedures includes the use of the waterboard.

Additionally, you received a memorandum from the [redacted] which you supplied to us. [redacted] has experience with the use of all of these procedures in a course of conduct, with the exception of the insect in the confinement box and the waterboard. This memorandum confirms that the use of these procedures has not resulted in any reported instances of prolonged mental harm, and very few instances of immediate and temporary adverse psychological responses to the training. [redacted] reported that a small minority of students have had temporary adverse psychological reactions during training. Of the 26,829 students trained from 1992 through 2001 in the Air Force SERE training, 4.3 percent of those students had contact with psychology services. Of those 4.3 percent, only 3.2 percent were pulled from the program for psychological reasons. Thus, out of the students trained overall, only 0.14 percent were pulled from the program for psychological reasons. Furthermore, although [redacted] indicated that surveys of students having completed this training are not done, he expressed confidence that the training did not cause any long-term psychological impact. He based his conclusion on the debriefing of students that is done after the training. More importantly, he based this assessment on the fact that although training is required to be extremely stressful in order to be effective, very few complaints have been made regarding the training. During his tenure, in which 10,000 students were trained, no congressional complaints have been made. While there was one Inspector General complaint, it was not due to psychological concerns. Moreover, he was aware of only one letter inquiring about the long-term impact of these techniques from an individual trained

over twenty years ago. He found that it was impossible to attribute this individual's symptoms to his training. [redacted] concluded that if there are any long-term psychological effects of the United States Air Force training using the procedures outlined above they "are certainly minimal."

With respect to the waterboard, you have also orally informed us that the Navy continues to use it in training. You have informed us that your on-site psychologists, who have extensive experience with the use of the waterboard in Navy training, have not encountered any significant long-term mental health consequences from its use. Your on-site psychologists have also indicated that JPRA has likewise not reported any significant long-term mental health consequences from the use of the waterboard. You have informed us that other services ceased use of the waterboard because it was so successful as an interrogation technique, but not because of any concerns over any harm, physical or mental, caused by it. It was also reported to be almost 100 percent effective in producing cooperation among the trainees. [redacted] also indicated that he had observed the use of the waterboard in Navy training some ten to twelve times. Each time it resulted in cooperation but it did not result in any physical harm to the student.

You have also reviewed the relevant literature and found no empirical data on the effect of these techniques, with the exception of sleep deprivation. With respect to sleep deprivation, you have informed us that is not uncommon for someone to be deprived of sleep for 72 hours and still perform excellently on visual-spatial motor tasks and short-term memory tests. Although some individuals may experience hallucinations, according to the literature you surveyed, those who experience such psychotic symptoms have almost always had such episodes prior to the sleep deprivation. You have indicated the studies of lengthy sleep deprivation showed no psychosis, loosening of thoughts, flattening of emotions, delusions, or paranoid ideas. In one case, even after eleven days of deprivation, no psychosis or permanent brain damaged occurred. In fact the individual reported feeling almost back to normal after one night's sleep. Further, based on the experiences with its use in military training (where it is induced for up to 48 hours), you found that rarely, if ever, will the individual suffer harm after the sleep deprivation is discontinued. Instead, the effects remit after a few good nights of sleep.

You have taken the additional step of consulting with U.S. interrogations experts, and other individuals with oversight over the SERE training process. None of these individuals was aware of any prolonged psychological effect caused by the use of any of the above techniques either separately or as a course of conduct. Moreover, you consulted with outside psychologists who reported that they were unaware of any cases where long-term problems have occurred as a result of these techniques.

Moreover, in consulting with a number of mental health experts, you have learned that the effect of any of these procedures will be dependant on the individual's personal history, cultural history and psychological tendencies. To that end, you have informed us that you have

completed a psychological assessment of Zubadyah. This assessment is based on interviews with Zubaydah, observations of him, and information collected from other sources such as intelligence and press reports. Our understanding of Zubaydah's psychological profile, which we set forth below, is based on that assessment.

According to this assessment, Zubaydah, though only 31, rose quickly from very low level mujahedin to third or fourth man in al Qaeda. He has served as Usama Bin Laden's senior lieutenant. In that capacity, he has managed a network of training camps. He has been instrumental in the training of operatives for al Qaeda, the Egyptian Islamic Jihad, and other terrorist elements inside Pakistan and Afghanistan. He acted as the Deputy Camp Commander for al Qaeda training camp in Afghanistan, personally approving entry and graduation of all trainees during 1999-2000. From 1996 until 1999, he approved all individuals going in and out of Afghanistan to the training camps. Further, no one went in and out of Peshawar, Pakistan without his knowledge and approval. He also acted as al Qaeda's coordinator of external contacts and foreign communications. Additionally, he has acted as al Qaeda's counter-intelligence officer and has been trusted to find spies within the organization.

Zubaydah has been involved in every major terrorist operation carried out by al Qaeda. He was a planner for the Millennium plot to attack U.S. and Israeli targets during the Millennium celebrations in Jordan. Two of the central figures in this plot who were arrested have identified Zubaydah as the supporter of their cell and the plot. He also served as a planner for the Paris Embassy plot in 2001. Moreover, he was one of the planners of the September 11 attacks. Prior to his capture, he was engaged in planning future terrorist attacks against U.S. interests.

Your psychological assessment indicates that it is believed Zubaydah wrote al Qaeda's manual on resistance techniques. You also believe that his experiences in al Qaeda make him well-acquainted with and well-versed in such techniques. As part of his role in al Qaeda, Zubaydah visited individuals in prison and helped them upon their release. Through this contact and activities with other al Qaeda mujahedin, you believe that he knows many stories of capture, interrogation, and resistance to such interrogation. Additionally, he has spoken with Ayman al-Zawahiri, and you believe it is likely that the two discussed Zawahiri's experiences as a prisoner of the Russians and the Egyptians.

Zubaydah stated during interviews that he thinks of any activity outside of jihad as "silly." He has indicated that his heart and mind are devoted to serving Allah and Islam through jihad and he has stated that he has no doubts or regrets about committing himself to jihad. Zubaydah believes that the global victory of Islam is inevitable. You have informed us that he continues to express his unabated desire to kill Americans and Jews.

Your psychological assessment describes his personality as follows. He is "a highly self-directed individual who prizes his independence." He has "narcissistic features," which are evidenced in the attention he pays to his personal appearance and his "obvious 'efforts' to

demonstrate that he is really a rather 'humble and regular guy.'" He is "somewhat compulsive" in how he organizes his environment and business. He is confident, self-assured, and possesses an air of authority. While he admits to at times wrestling with how to determine who is an "innocent," he has acknowledged celebrating the destruction of the World Trade Center. He is intelligent and intellectually curious. He displays "excellent self-discipline." The assessment describes him as a perfectionist, persistent, private, and highly capable in his social interactions. He is very guarded about opening up to others and your assessment repeatedly emphasizes that he tends not to trust others easily. He is also "quick to recognize and assess the moods and motivations of others." Furthermore, he is proud of his ability to lie and deceive others successfully. Through his deception he has, among other things, prevented the location of al Qaeda safehouses and even acquired a United Nations refugee identification card.

According to your reports, Zubaydah does not have any pre-existing mental conditions or problems that would make him likely to suffer prolonged mental harm from your proposed interrogation methods. Through reading his diaries and interviewing him, you have found no history of "mood disturbance or other psychiatric pathology[,]" "thought disorder[,] . . . enduring mood or mental health problems." He is in fact "remarkably resilient and confident that he can overcome adversity." When he encounters stress or low mood, this appears to last only for a short time. He deals with stress by assessing its source, evaluating the coping resources available to him, and then taking action. Your assessment notes that he is "generally self-sufficient and relies on his understanding and application of religious and psychological principles, intelligence and discipline to avoid and overcome problems." Moreover, you have found that he has a "reliable and durable support system" in his faith, "the blessings of religious leaders, and camaraderie of like-minded mujahedin brothers." During detention, Zubaydah has managed his mood, remaining at most points "circumspect, calm, controlled, and deliberate." He has maintained this demeanor during aggressive interrogations and reductions in sleep. You describe that in an initial confrontational incident, Zubaydah showed signs of sympathetic nervous system arousal, which you think was possibly fear. Although this incident led him to disclose intelligence information, he was able to quickly regain his composure, his air of confidence, and his "strong resolve" not to reveal any information.

Overall, you summarize his primary strengths as the following: ability to focus, goal-directed discipline, intelligence, emotional resilience, street savvy, ability to organize and manage people, keen observation skills, fluid adaptability (can anticipate and adapt under duress and with minimal resources), capacity to assess and exploit the needs of others, and ability to adjust goals to emerging opportunities.

You anticipate that he will draw upon his vast knowledge of interrogation techniques to cope with the interrogation. Your assessment indicates that Zubaydah may be willing to die to protect the most important information that he holds. Nonetheless, you are of the view that his belief that Islam will ultimately dominate the world and that this victory is inevitable may provide the chance that Zubaydah will give information and rationalize it solely as a temporary

setback. Additionally, you believe he may be willing to disclose some information, particularly information he deems to not be critical, but which may ultimately be useful to us when pieced together with other intelligence information you have gained.

III.

Section 2340A makes it a criminal offense for any person "outside of the United States [to] commit[] or attempt[] to commit torture." Section 2340(1) defines torture as:

> an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody of physical control.

18 U.S.C. § 2340(1). As we outlined in our opinion on standards of conduct under Section 2340A, a violation of 2340A requires a showing that: (1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant's custody or control; (4) the defendant specifically intended to inflict severe pain or suffering; and (5) that the acted inflicted severe pain or suffering. *See* Memorandum for John Rizzo, Acting General Counsel for the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* at 3 (August 1, 2002) ("Section 2340A Memorandum"). You have asked us to assume that Zubayadah is being held outside the United States, Zubayadah is within U.S. custody, and the interrogators are acting under the color of law. At issue is whether the last two elements would be met by the use of the proposed procedures, namely, whether those using these procedures would have the requisite mental state and whether these procedures would inflict severe pain or suffering within the meaning of the statute.

Severe Pain or Suffering. In order for pain or suffering to rise to the level of torture, the statute requires that it be severe. As we have previously explained, this reaches only extreme acts. *See id.* at 13. Nonetheless, drawing upon cases under the Torture Victim Protection Act (TVPA), which has a definition of torture that is similar to Section 2340's definition, we found that a single event of sufficiently intense pain may fall within this prohibition. *See id.* at 26. As a result, we have analyzed each of these techniques separately. In further drawing upon those cases, we also have found that courts tend to take a totality-of-the-circumstances approach and consider an entire course of conduct to determine whether torture has occurred. *See id.* at 27. Therefore, in addition to considering each technique separately, we consider them together as a course of conduct.

Section 2340 defines torture as the infliction of severe physical or mental pain or suffering. We will consider physical pain and mental pain separately. *See* 18 U.S.C. § 2340(1). With respect to *physical* pain, we previously concluded that "severe pain" within the meaning of

Section 2340 is pain that is difficult for the individual to endure and is of an intensity akin to the pain accompanying serious physical injury. *See* Section 2340A Memorandum at 6. Drawing upon the TVPA precedent, we have noted that examples of acts inflicting severe pain that typify torture are, among other things, severe beatings with weapons such as clubs, and the burning of prisoners. *See id.* at 24. We conclude below that none of the proposed techniques inflicts such pain.

The facial hold and the attention grasp involve no physical pain. In the absence of such pain it is obvious that they cannot be said to inflict severe physical pain or suffering. The stress positions and wall standing both may result in muscle fatigue. Each involves the sustained holding of a position. In wall standing, it will be holding a position in which all of the individual's body weight is placed on his finger tips. The stress positions will likely include sitting on the floor with legs extended straight out in front and arms raised above the head, and kneeling on the floor and leaning back at a 45 degree angle. Any pain associated with muscle fatigue is not of the intensity sufficient to amount to "severe physical pain or suffering" under the statute, nor, despite its discomfort, can it be said to be difficult to endure. Moreover, you have orally informed us that no stress position will be used that could interfere with the healing of Zubaydah's wound. Therefore, we conclude that these techniques involve discomfort that falls far below the threshold of severe physical pain.

Similarly, although the confinement boxes (both small and large) are physically uncomfortable because their size restricts movement, they are not so small as to require the individual to contort his body to sit (small box) or stand (large box). You have also orally informed us that despite his wound, Zubaydah remains quite flexible, which would substantially reduce any pain associated with being placed in the box. We have no information from the medical experts you have consulted that the limited duration for which the individual is kept in the boxes causes any substantial physical pain. As a result, we do not think the use of these boxes can be said to cause pain that is of the intensity associated with serious physical injury.

The use of one of these boxes with the introduction of an insect does not alter this assessment. As we understand it, no actually harmful insect will be placed in the box. Thus, though the introduction of an insect may produce trepidation in Zubaydah (which we discuss below), it certainly does not cause physical pain.

As for sleep deprivation, it is clear that depriving someone of sleep does not involve severe physical pain within the meaning of the statute. While sleep deprivation may involve some physical discomfort, such as the fatigue or the discomfort experienced in the difficulty of keeping one's eyes open, these effects remit after the individual is permitted to sleep. Based on the facts you have provided us, we are not aware of any evidence that sleep deprivation results in severe physical pain or suffering. As a result, its use does not violate Section 2340A.

Even those techniques that involve physical contact between the interrogator and the

individual do not result in severe pain. The facial slap and walling contain precautions to ensure that no pain even approaching this level results. The slap is delivered with fingers slightly spread, which you have explained to us is designed to be less painful than a closed-hand slap. The slap is also delivered to the fleshy part of the face, further reducing any risk of physical damage or serious pain. The facial slap does not produce pain that is difficult to endure. Likewise, walling involves quickly pulling the person forward and then thrusting him against a flexible false wall. You have informed us that the sound of hitting the wall will actually be far worse than any possible injury to the individual. The use of the rolled towel around the neck also reduces any risk of injury. While it may hurt to be pushed against the wall, any pain experienced is not of the intensity associated with serious physical injury.

As we understand it, when the waterboard is used, the subject's body responds as if the subject were drowning—even though the subject may be well aware that he is in fact not drowning. You have informed us that this procedure does not inflict actual physical harm. Thus, although the subject may experience the fear or panic associated with the feeling of drowning, the waterboard does not inflict physical pain. As we explained in the Section 2340A Memorandum, "pain and suffering" as used in Section 2340 is best understood as a single concept, not distinct concepts of "pain" as distinguished from "suffering." *See* Section 2340A Memorandum at 6 n.3. The waterboard, which inflicts no pain or actual harm whatsoever, does not, in our view inflict "severe pain or suffering." Even if one were to parse the statute more finely to attempt to treat "suffering" as a distinct concept, the waterboard could not be said to inflict severe suffering. The waterboard is simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering.

Finally, as we discussed above, you have informed us that in determining which procedures to use and how you will use them, you have selected techniques that will not harm Zubaydah's wound. You have also indicated that numerous steps will be taken to ensure that none of these procedures in any way interferes with the proper healing of Zubaydah's wound. You have also indicated that, should it appear at any time that Zubaydah is experiencing severe pain or suffering, the medical personnel on hand will stop the use of any technique.

Even when all of these methods are considered combined in an overall course of conduct, they still would not inflict severe physical pain or suffering. As discussed above, a number of these acts result in no physical pain, others produce only physical discomfort. You have indicated that these acts will not be used with substantial repetition, so that there is no possibility that severe physical pain could arise from such repetition. Accordingly, we conclude that these acts neither separately nor as part of a course of conduct would inflict severe physical pain or suffering within the meaning of the statute.

We next consider whether the use of these techniques would inflict severe *mental* pain or suffering within the meaning of Section 2340. Section 2340 defines severe mental pain or suffering as "the prolonged mental harm caused by or resulting from" one of several predicate

acts. 18 U.S.C. § 2340(2). Those predicate acts are: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that any of the preceding acts will be done to another person. *See* 18 U.S.C. § 2340(2)(A)–(D). As we have explained, this list of predicate acts is exclusive. *See* Section 2340A Memorandum at 8. No other acts can support a charge under Section 2340A based on the infliction of severe mental pain or suffering. *See id.* Thus, if the methods that you have described do not either in and of themselves constitute one of these acts or as a course of conduct fulfill the predicate act requirement, the prohibition has not been violated. *See id.* Before addressing these techniques, we note that it is plain that none of these procedures involves a threat to any third party, the use of any kind of drugs, or for the reasons described above, the infliction of severe physical pain. Thus, the question is whether any of these acts, separately or as a course of conduct, constitutes a threat of severe physical pain or suffering, a procedure designed to disrupt profoundly the senses, or a threat of imminent death. As we previously explained, whether an action constitutes a threat must be assessed from the standpoint of a reasonable person in the subject's position. *See id.* at 9.

No argument can be made that the attention grasp or the facial hold constitute threats of imminent death or are procedures designed to disrupt profoundly the senses or personality. In general the grasp and the facial hold will startle the subject, produce fear, or even insult him. As you have informed us, the use of these techniques is not accompanied by a specific verbal threat of severe physical pain or suffering. To the extent that these techniques could be considered a threat of severe physical pain or suffering, such a threat would have to be inferred from the acts themselves. Because these actions themselves involve no pain, neither could be interpreted by a reasonable person in Zubaydah's position to constitute a threat of severe pain or suffering. Accordingly, these two techniques are not predicate acts within the meaning of Section 2340.

The facial slap likewise falls outside the set of predicate acts. It plainly is not a threat of imminent death, under Section 2340(2)(C), or a procedure designed to disrupt profoundly the senses or personality, under Section 2340(2)(B). Though it may hurt, as discussed above, the effect is one of smarting or stinging and surprise or humiliation, but not severe pain. Nor does it alone constitute a threat of severe pain or suffering, under Section 2340(2)(A). Like the facial hold and the attention grasp, the use of this slap is not accompanied by a specific verbal threat of further escalating violence. Additionally, you have informed us that in one use this technique will typically involve at most two slaps. Certainly, the use of this slap may dislodge any expectation that Zubaydah had that he would not be touched in a physically aggressive manner. Nonetheless, this alteration in his expectations could hardly be construed by a reasonable person in his situation to be tantamount to a threat of severe physical pain or suffering. At most, this technique suggests that the circumstances of his confinement and interrogation have changed. Therefore, the facial slap is not within the statute's exclusive list of predicate acts.

Walling plainly is not a procedure calculated to disrupt profoundly the senses or personality. While walling involves what might be characterized as rough handling, it does not involve the threat of imminent death or, as discussed above, the infliction of severe physical pain. Moreover, once again we understand that use of this technique will not be accompanied by any specific verbal threat that violence will ensue absent cooperation. Thus, like the facial slap, walling can only constitute a threat of severe physical pain if a reasonable person would infer such a threat from the use of the technique itself. Walling does not in and of itself inflict severe pain or suffering. Like the facial slap, walling may alter the subject's expectation as to the treatment he believes he will receive. Nonetheless, the character of the action falls so far short of inflicting severe pain or suffering within the meaning of the statute that even if he inferred that greater aggressiveness was to follow, the type of actions that could be reasonably be anticipated would still fall below anything sufficient to inflict severe physical pain or suffering under the statute. Thus, we conclude that this technique falls outside the proscribed predicate acts.

Like walling, stress positions and wall-standing are not procedures calculated to disrupt profoundly the senses, nor are they threats of imminent death. These procedures, as discussed above, involve the use of muscle fatigue to encourage cooperation and do not themselves constitute the infliction of severe physical pain or suffering. Moreover, there is no aspect of violence to either technique that remotely suggests future severe pain or suffering from which such a threat of future harm could be inferred. They simply involve forcing the subject to remain in uncomfortable positions. While these acts may indicate to the subject that he may be placed in these positions again if he does not disclose information, the use of these techniques would not suggest to a reasonable person in the subject's position that he is being threatened with severe pain or suffering. Accordingly, we conclude that these two procedures do not constitute any of the predicate acts set forth in Section 2340(2).

As with the other techniques discussed so far, cramped confinement is not a threat of imminent death. It may be argued that, focusing in part on the fact that the boxes will be without light, placement in these boxes would constitute a procedure designed to disrupt profoundly the senses. As we explained in our recent opinion, however, to "disrupt profoundly the senses" a technique must produce an extreme effect in the subject. *See* Section 2340A Memorandum at 10–12. We have previously concluded that this requires that the procedure cause substantial interference with the individual's cognitive abilities or fundamentally alter his personality. *See id.* at 11. Moreover, the statute requires that such procedures must be calculated to produce this effect. *See id.* at 10; 18 U.S.C. § 2340(2)(B).

With respect to the small confinement box, you have informed us that he would spend at most two hours in this box. You have informed us that your purpose in using these boxes is not to interfere with his senses or his personality, but to cause him physical discomfort that will encourage him to disclose critical information. Moreover, your imposition of time limitations on the use of either of the boxes also indicates that the use of these boxes is not designed or calculated to disrupt profoundly the senses or personality. For the larger box, in which he can

both stand and sit, he may be placed in this box for up to eighteen hours at a time, while you have informed us that he will never spend more than an hour at time in the smaller box. These time limits further ensure that no profound disruption of the senses or personality, were it even possible, would result. As such, the use of the confinement boxes does not constitute a procedure calculated to disrupt profoundly the senses or personality.

Nor does the use of the boxes threaten Zubaydah with severe physical pain or suffering. While additional time spent in the boxes may be threatened, their use is not accompanied by any express threats of severe physical pain or suffering. Like the stress positions and walling, placement in the boxes is physically uncomfortable but any such discomfort does not rise to the level of severe physical pain or suffering. Accordingly, a reasonable person in the subject's position would not infer from the use of this technique that severe physical pain is the next step in his interrogator's treatment of him. Therefore, we conclude that the use of the confinement boxes does not fall within the statute's required predicate acts.

In addition to using the confinement boxes alone, you also would like to introduce an insect into one of the boxes with Zubaydah. As we understand it, you plan to inform Zubaydah that you are going to place a stinging insect into the box, but you will actually place a harmless insect in the box, such as a caterpillar. If you do so, to ensure that you are outside the predicate act requirement, you must inform him that the insects will not have a sting that would produce death or severe pain. If, however, you were to place the insect in the box without informing him that you are doing so, then, in order to not commit a predicate act, you should not affirmatively lead him to believe that any insect is present which has a sting that could produce severe pain or suffering or even cause his death. [redacted] so long as you take either of the approaches we have described, the insect's placement in the box would not constitute a threat of severe physical pain or suffering to a reasonable person in his position. An individual placed in a box, even an individual with a fear of insects, would not reasonably feel threatened with severe physical pain or suffering if a caterpillar was placed in the box. Further, you have informed us that you are not aware that Zubaydah has any allergies to insects, and you have not informed us of any other factors that would cause a reasonable person in that same situation to believe that an unknown insect would cause him severe physical pain or death. Thus, we conclude that the placement of the insect in the confinement box with Zubaydah would not constitute a predicate act.

Sleep deprivation also clearly does not involve a threat of imminent death. Although it produces physical discomfort, it cannot be said to constitute a threat of severe physical pain or suffering from the perspective of a reasonable person in Zubaydah's position. Nor could sleep deprivation constitute a procedure calculated to disrupt profoundly the senses, so long as sleep deprivation (as you have informed us is your intent) is used for limited periods, before hallucinations or other profound disruptions of the senses would occur. To be sure, sleep deprivation may reduce the subject's ability to think on his feet. Indeed, you indicate that this is

the intended result. His mere reduced ability to evade your questions and resist answering does not, however, rise to the level of disruption required by the statute. As we explained above, a disruption within the meaning of the statute is an extreme one, substantially interfering with an individual's cognitive abilities, for example, inducing hallucinations, or driving him to engage in uncharacteristic self-destructive behavior. *See infra* 13; Section 2340A Memorandum at 11. Therefore, the limited use of sleep deprivation does not constitute one of the required predicate acts.

We find that the use of the waterboard constitutes a threat of imminent death. As you have explained the waterboard procedure to us, it creates in the subject the uncontrollable physiological sensation that the subject is drowning. Although the procedure will be monitored by personnel with medical training and extensive SERE school experience with this procedure who will ensure the subject's mental and physical safety, the subject is not aware of any of these precautions. From the vantage point of any reasonable person undergoing this procedure in such circumstances, he would feel as if he is drowning at very moment of the procedure due to the uncontrollable physiological sensation he is experiencing. Thus, this procedure cannot be viewed as too uncertain to satisfy the imminence requirement. Accordingly, it constitutes a threat of imminent death and fulfills the predicate act requirement under the statute.

Although the waterboard constitutes a threat of imminent death, prolonged mental harm must nonetheless result to violate the statutory prohibition on infliction of severe mental pain or suffering. *See* Section 2340A Memorandum at 7. We have previously concluded that prolonged mental harm is mental harm of some lasting duration, e.g., mental harm lasting months or years. *See id.* Prolonged mental harm is not simply the stress experienced in, for example, an interrogation by state police. *See id.* Based on your research into the use of these methods at the SERE school and consultation with others with expertise in the field of psychology and interrogation, you do not anticipate that any prolonged mental harm would result from the use of the waterboard. Indeed, you have advised us that the relief is almost immediate when the cloth is removed from the nose and mouth. In the absence of prolonged mental harm, no severe mental pain or suffering would have been inflicted, and the use of these procedures would not constitute torture within the meaning of the statute.

When these acts are considered as a course of conduct, we are unsure whether these acts may constitute a threat of severe physical pain or suffering. You have indicated to us that you have not determined either the order or the precise timing for implementing these procedures. It is conceivable that these procedures could be used in a course of escalating conduct, moving incrementally and rapidly from least physically intrusive, e.g., facial hold, to the most physical contact, e.g., walling or the waterboard. As we understand it, based on his treatment so far, Zubaydah has come to expect that no physical harm will be done to him. By using these techniques in increasing intensity and in rapid succession, the goal would be to dislodge this expectation. Based on the facts you have provided to us, we cannot say definitively that the entire course of conduct would cause a reasonable person to believe that he is being threatened

with severe pain or suffering within the meaning of section 2340. On the other hand, however, under certain circumstances—for example, rapid escalation in the use of these techniques culminating in the waterboard (which we acknowledge constitutes a threat of imminent death) accompanied by verbal or other suggestions that physical violence will follow—might cause a reasonable person to believe that they are faced with such a threat. Without more information, we are uncertain whether the course of conduct would constitute a predicate act under Section 2340(2).

Even if the course of conduct were thought to pose a threat of physical pain or suffering, it would nevertheless—on the facts before us—not constitute a violation of Section 2340A. Not only must the course of conduct be a predicate act, but also those who use the procedure must actually cause prolonged mental harm. Based on the information that you have provided to us, indicating that no evidence exists that this course of conduct produces any prolonged mental harm, we conclude that a course of conduct using these procedures and culminating in the waterboard would not violate Section 2340A.

Specific Intent. To violate the statute, an individual must have the specific intent to inflict severe pain or suffering. Because specific intent is an element of the offense, the absence of specific intent negates the charge of torture. As we previously opined, to have the required specific intent, an individual must expressly intend to cause such severe pain or suffering. *See* Section 2340A Memorandum at 3 *citing Carter v. United States*, 530 U.S. 255, 267 (2000). We have further found that if a defendant acts with the good faith belief that his actions will not cause such suffering, he has not acted with specific intent. *See id.* at 4 *citing South Atl. Lmtd. Ptrshp. of Tenn. v. Reise*, 218 F.3d 518, 531 (4th Cir. 2002). A defendant acts in good faith when he has an honest belief that his actions will not result in severe pain or suffering. *See id. citing Cheek v. United States*, 498 U.S. 192, 202 (1991). Although an honest belief need not be reasonable, such a belief is easier to establish where there is a reasonable basis for it. *See id.* at 5. Good faith may be established by, among other things, the reliance on the advice of experts. *See id.* at 8.

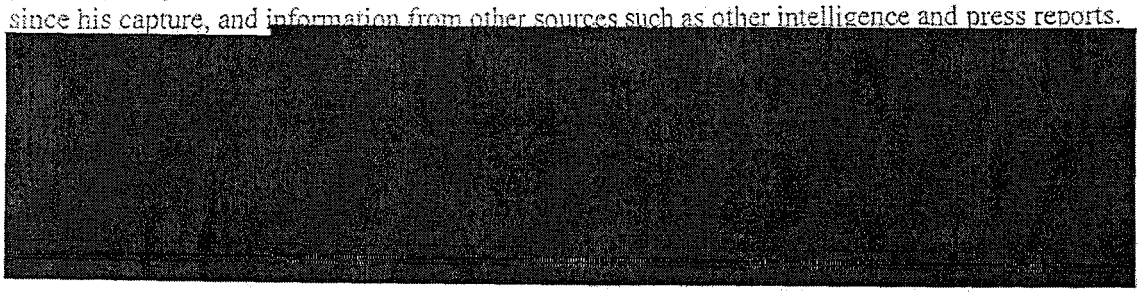
Based on the information you have provided us, we believe that those carrying out these procedures would not have the specific intent to inflict severe physical pain or suffering. The objective of these techniques is not to cause severe physical pain. First, the constant presence of personnel with medical training who have the authority to stop the interrogation should it appear it is medically necessary indicates that it is not your intent to cause severe physical pain. The personnel on site have extensive experience with these specific techniques as they are used in SERE school training. Second, you have informed us that you are taking steps to ensure that Zubaydah's injury is not worsened or his recovery impeded by the use of these techniques.

Third, as you have described them to us, the proposed techniques involving physical contact between the interrogator and Zubaydah actually contain precautions to prevent any serious physical harm to Zubaydah. In "walling," a rolled hood or towel will be used to prevent

whiplash and he will be permitted to rebound from the flexible wall to reduce the likelihood of injury. Similarly, in the "facial hold," the fingertips will be kept well away from the his eyes to ensure that there is no injury to them. The purpose of that facial hold is not injure him but to hold the head immobile. Additionally, while the stress positions and wall standing will undoubtedly result in physical discomfort by tiring the muscles, it is obvious that these positions are not intended to produce the kind of extreme pain required by the statute.

Furthermore, no specific intent to cause severe mental pain or suffering appears to be present. As we explained in our recent opinion, an individual must have the specific intent to cause prolonged mental harm in order to have the specific intent to inflict severe mental pain or suffering. *See* Section 2340A Memorandum at 8. Prolonged mental harm is substantial mental harm of a sustained duration, e.g., harm lasting months or even years after the acts were inflicted upon the prisoner. As we indicated above, a good faith belief can negate this element. Accordingly, if an individual conducting the interrogation has a good faith belief that the procedures he will apply, separately or together, would not result in prolonged mental harm, that individual lacks the requisite specific intent. This conclusion concerning specific intent is further bolstered by the due diligence that has been conducted concerning the effects of these interrogation procedures.

The mental health experts that you have consulted have indicated that the psychological impact of a course of conduct must be assessed with reference to the subject's psychological history and current mental health status. The healthier the individual, the less likely that the use of any one procedure or set of procedures as a course of conduct will result in prolonged mental harm. A comprehensive psychological profile of Zubaydah has been created. In creating this profile, your personnel drew on direct interviews, Zubaydah's diaries, observation of Zubaydah since his capture, and information from other sources such as other intelligence and press reports.



As we indicated above, you have informed us that your proposed interrogation methods have been used and continue to be used in SERE training. It is our understanding that these techniques are not used one by one in isolation, but as a full course of conduct to resemble a real interrogation. Thus, the information derived from SERE training bears both upon the impact of the use of the individual techniques and upon their use as a course of conduct. You have found that the use of these methods together or separately, including the use of the waterboard, has not resulted in any negative long-term mental health consequences. The continued use of these methods without mental health consequences to the trainees indicates that it is highly improbable

that such consequences would result here. Because you have conducted the due diligence to determine that these procedures, either alone or in combination, do not produce prolonged mental harm, we believe that you do not meet the specific intent requirement necessary to violate Section 2340A.

You have also informed us that you have reviewed the relevant literature on the subject, and consulted with outside psychologists. Your review of the literature uncovered no empirical data on the use of these procedures, with the exception of sleep deprivation for which no long-term health consequences resulted. The outside psychologists with whom you consulted indicated were unaware of any cases where long-term problems have occurred as a result of these techniques.

As described above, it appears you have conducted an extensive inquiry to ascertain what impact, if any, these procedures individually and as a course of conduct would have on Zubaydah. You have consulted with interrogation experts, including those with substantial SERE school experience, consulted with outside psychologists, completed a psychological assessment and reviewed the relevant literature on this topic. Based on this inquiry, you believe that the use of the procedures, including the waterboard, and as a course of conduct would not result in prolonged mental harm. Reliance on this information about Zubaydah and about the effect of the use of these techniques more generally demonstrates the presence of a good faith belief that no prolonged mental harm will result from using these methods in the interrogation of Zubaydah. Moreover, we think that this represents not only an honest belief but also a reasonable belief based on the information that you have supplied to us. Thus, we believe that the specific intent to inflict prolonged mental is not present, and consequently, there is no specific intent to inflict severe mental pain or suffering. Accordingly, we conclude that on the facts in this case the use of these methods separately or a course of conduct would not violate Section 2340A.

Based on the foregoing, and based on the facts that you have provided, we conclude that the interrogation procedures that you propose would not violate Section 2340A. We wish to emphasize that this is our best reading of the law; however, you should be aware that there are no cases construing this statute, just as there have been no prosecutions brought under it.

Please let us know if we can be of further assistance.

Jay S. Bybee
Assistant Attorney General

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT L

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Central Intelligence Agency
Inspector General

SPECIAL REVIEW

(TS[redacted]) COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES
(SEPTEMBER 2001 – OCTOBER 2003)
(2003-7123-IG)

7 May 2004

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F. Draft Office of Medical Services Guidelines on Medical and Psychological Support to Detainee Interrogations, 4 September 2003

OFFICE OF INSPECTOR GENERAL

SPECIAL REVIEW

(TS [redacted]) COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001 - OCTOBER 2003) (2003-7123-IG)

7 May 2004

INTRODUCTION

1. [redacted]

2. (TS [redacted]) In November 2002, the Deputy Director for Operations (DDO) informed the Office of Inspector General (OIG) that the Agency had established a program in the Counterterrorist Center to detain and interrogate terrorists at sites abroad ("the CTC Program"). He also informed OIG that he had just learned of and had dispatched a team to investigate [redacted] In January 2003, the DDO informed OIG that he had received allegations that Agency personnel had used unauthorized interrogation techniques with a detainee, 'Abd Al-Rahim Al-Nashiri, at another foreign site, and requested that

OIG investigate. Separately, OIG received information that some employees were concerned that certain covert Agency activities at an overseas detention and interrogation site might involve violations of human rights. In January 2003, OIG initiated a review of Agency counterterrorism detention and interrogation activities [redacted] and the incident with Al-Nashiri.[1] This Review covers the period September 2001 to mid-October 2003.[2] [redacted]

SUMMARY

3. (TS [redacted] the DCI assigned responsibility for implementing capture and detention authority to the DDO and to the Director of the DCI Counterterrorist Center (D/CTC). When U.S. military forces began detaining individuals in Afghanistan and at Guantanamo Bay, Cuba, [redacted]

4. (TS [redacted] the Agency began to detain and interrogate directly a number of suspected terrorists. The capture and initial Agency interrogation of the first high value detainee, Abu Zubaydah,

1 (S [redacted] NF) Appendix A addresses the Procedures and Resources that OIG employed in conducting this Review. The Review does not address renditions conducted by the Agency or interrogations conducted jointly with [redacted] the U.S. military.

2 (U) Appendix B is a chronology of significant events that occurred during the period of this Review.

[redacted]

in March 2002, presented the Agency with a significant dilemma.[4] The Agency was under pressure to do everything possible to prevent additional terrorist attacks. Senior Agency officials believed Abu Zubaydah was withholding information that could not be obtained through then-authorized interrogation techniques. Agency officials believed that a more robust approach was necessary to elicit threat information from Abu Zubaydah and possibly from other senior Al-Qa'ida high value detainees.

5. (TS [redacted]) The conduct of detention and interrogation activities presented new challenges for CIA. These included determining where detention and interrogation facilities could be securely located and operated, and identifying and preparing qualified personnel to manage and carry out detention and interrogation activities. With the knowledge that Al-Qa'ida personnel had been trained in the use of resistance techniques, another challenge was to identify interrogation techniques that Agency personnel could lawfully use to overcome the resistance. In this context, CTC, with the assistance of the Office of Technical Service (OTS), proposed certain more coercive physical techniques to use on Abu Zubaydah. All of these considerations took place against the backdrop of pre-September 11, 2001 CIA avoidance of interrogations and repeated U.S. policy statements condemning torture and advocating the humane treatment of political prisoners and detainees in the international community.

6. (TS [redacted]) The Office of General Counsel (OGC) took the lead in determining and documenting the legal parameters and constraints for interrogations. OGC conducted independent research

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4 (TS [redacted]) The use of "high value" or "medium value" to describe terrorist targets and detainees in this Review is based on how they have been generally categorized by CTC. CTC distinguishes targets according to the quality of the intelligence that they are believed likely to be able to provide about current terrorist threats against the United States. Senior Al-Qa'ida planners and operators, such as Abu Zubaydah and Khalid Shaykh Muhammad, fall into the category of "high value" and are given the highest priority for capture, detention, and interrogation. CTC categorizes those individuals who are believed to have lesser direct knowledge of such threats, but to have information of intelligence value, as "medium value" targets/detainees.

and consulted extensively with Department of Justice (DoJ) and National Security Council (NSC) legal and policy staff. Working with DoJ's Office of Legal Counsel (OLC), OGC determined that in most instances relevant to the counterterrorism detention and interrogation activities [redacted] the criminal prohibition against torture, 18 U.S.C. 2340-2340B, is the controlling legal constraint on interrogations of detainees outside the United States. In August 2002, DoJ provided to the Agency a legal opinion in which it determined that 10 specific "Enhanced Interrogation Techniques" (EITs) would not violate the torture prohibition. This work provided the foundation for the policy and administrative decisions that guide the CTC Program.

7. (TS [redacted]) By November 2002, the Agency had Abu Zubaydah and another high value detainee, 'Abd Al-Rahim Al-Nashiri, in custody [redacted] and the Office of Medical Services (OMS) provided medical care to the detainees.

8. [redacted]

[redacted]

[redacted]

9. (TS [redacted] From the beginning, OGC briefed DO officers assigned to these [redacted] facilities on their legal authorities, and Agency personnel staffing these facilities documented interrogations and the condition of detainees in cables.

10. (TS [redacted] There were few instances of deviations from approved procedures [redacted] with one notable exception described in this Review. With respect to two detainees at those sites, the use and frequency of one EIT, the waterboard, went beyond the projected use of the technique as originally described to DoJ. The Agency, on 29 July 2003, secured oral DoJ concurrence that certain deviations are not significant for purposes of DoJ's legal opinions.

11. [redacted]

12. [redacted]

[redacted]

13. [redacted] there were instances of improvisation and other undocumented interrogation techniques [redacted]

14. [redacted]

15. (TS, [redacted]) Agency efforts to provide systematic, clear and timely guidance to those involved in the CTC Detention and Interrogation Program was inadequate at first but have improved considerably during the life of the Program as problems have been identified and addressed. CTC implemented training programs for interrogators and debriefers.[6] Moreover, building upon operational and legal guidance previously sent to the field, the DCI

6 (TS, [redacted]) Before 11 September (9/11) 2001, Agency personnel sometimes used the terms *interrogation/interrogator* and *debriefing/debriefer* interchangeably. The use of these terms has since evolved and, today, CTC more clearly distinguishes their meanings. A debriefer engages a detainee solely through question and answer. An interrogator is a person who completes a two-week interrogations training program, which is designed to train, qualify, and certify a person to administer EITs. An interrogator can administer EITs during an interrogation of a detainee only after the field, in coordination with Headquarters, assesses the detainee as withholding information. An interrogator transitions the detainee from a non-cooperative to a cooperative phase in order that a debriefer can elicit actionable intelligence through non-aggressive techniques during debriefing sessions. An interrogator may debrief a detainee during an interrogation; however, a debriefer may not interrogate a detainee.

on 28 January 2003 signed "Guidelines on Confinement Conditions for CIA Detainees" and "Guidelines on Interrogations Conducted Pursuant [redacted] The DCI Guidelines require individuals engaged in or supporting interrogations [redacted] be made aware of the guidelines and sign an acknowledgment that they have read them. The DCI Interrogation Guidelines make formal the existing CTC practice of requiring the field to obtain specific Headquarters approvals prior to the application of all EITs. Although the DCI Guidelines are an improvement over the absence of such DCI Guidelines in the past, they still leave substantial room for misinterpretation and do not cover all Agency detention and interrogation activities.

16. (TS [redacted]) The Agency's detention and interrogation of terrorists has provided intelligence that has enabled the identification and apprehension of other terrorists and warned of terrorist plots planned for the United States and around the world. The CTC Program has resulted in the issuance of thousands of individual intelligence reports and analytic products supporting the counterterrorism efforts of U.S. policymakers and military commanders.

17. (TS [redacted]) The current CTC Detention and Interrogation Program has been subject to DoJ legal review and Administration approval but diverges sharply from previous Agency policy and rules that govern interrogations by U.S. military and law enforcement officers. Officers are concerned that public revelation of the CTC Program will seriously damage Agency officers' personal reputations, as well as the reputation and effectiveness of the Agency itself.

18. (TS [redacted] recognized that detainees may be held in U.S. Government custody indefinitely if appropriate law enforcement jurisdiction is not asserted. Although there has been ongoing discussion of the issue inside the Agency and among NSC,

Defense Department, and Justice Department officials, no decisions on any "endgame" for Agency detainees have been made. Senior Agency officials see this as a policy issue for the U.S. Government rather than a CIA issue. Even with Agency initiatives to address the endgame with policymakers, some detainees who cannot be prosecuted will likely remain in CIA custody indefinitely.

19. (TS [redacted]) The Agency faces potentially serious long-term political and legal challenges as a result of the CTC Detention and Interrogation Program, particularly its use of EITs and the inability of the U.S. Government to decide what it will ultimately do with terrorists detained by the Agency.

20. (TS [redacted]) This Review makes a number of recommendations that are designed to strengthen the management and conduct of Agency detention and interrogation activities. Although the DCI Guidelines were an important step forward, they were only designed to address the CTC Program, rather than all Agency debriefing or interrogation activities. [redacted]

21. [redacted]

BACKGROUND

22. (S) The Agency has had intermittent involvement in the interrogation of individuals whose interests are opposed to those of the United States. After the Vietnam War, Agency personnel experienced in the field of interrogations left the Agency or moved to other assignments. In the early 1980s, a resurgence of interest in teaching interrogation techniques developed as one of several methods to foster foreign liaison relationships. Because of political sensitivities the then-Deputy Director of Central Intelligence (DDCI) forbade Agency officers from using the word "interrogation." The Agency then developed the Human Resource Exploitation (HRE) training program designed to train foreign liaison services on interrogation techniques.

23. (S) In 1984, OIG investigated allegations of misconduct on the part of two Agency officers who were involved in interrogations and the death of one individual [redacted] Following that investigation, the Agency took steps to ensure Agency personnel understood its policy on

interrogations, debriefings, and human rights issues. Headquarters sent officers to brief Stations and Bases and provided cable guidance to the field.

24. (S) In 1986, the Agency ended the HRE training program because of allegations of human rights abuses in Latin America. [redacted] DO Handbook [redacted] which remains in effect, explains the Agency's general interrogation policy:

[redacted]

DISCUSSION

GENESIS OF POST 9/11 AGENCY DETENTION AND INTERROGATION ACTIVITIES

25. (TS [redacted]) The statutory basis for CIA's involvement in detentions and interrogations is [redacted] the National Security Act of 1947, as amended.[7] [redacted]

26. (TS [redacted]

27. (S//NF) The DCI delegated responsibility for implementation [redacted] to the DDO and D/CTC. Over time, CTC also solicited assistance from other Agency components, including OGC, OMS, [redacted] and OTS.

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7 (U//FOUO) DoJ takes the position that as Commander-in-Chief, the President independently has the Article II constitutional authority to order the detention and interrogation of enemy combatants to gain intelligence information.

8 [redacted]

9 [redacted]

10 [redacted]

28. (~~TS~~ [redacted]) To assist Agency officials in understanding the scope and implications [redacted] OGC researched, analyzed, and wrote "draft" papers on multiple legal issues. These included discussions of the [redacted] OGC shared these "draft" papers with Agency officers responsible [redacted]

29. [redacted]

THE CAPTURE OF ABU ZUBAYDAH AND DEVELOPMENT OF EITS

30. (~~TS~~ [redacted]) The capture of senior Al-Qa'ida operative Abu Zubaydah on 27 March 2002 presented the Agency with the opportunity to obtain actionable intelligence on future threats to the United States from the most senior Al-Qa'ida member in U.S. custody at that time. This accelerated CIA's development of an interrogation program [redacted]

[redacted]

[redacted]

31. (TS [redacted]) To treat the severe wounds that Abu Zubaydah suffered upon his capture, the Agency provided him intensive medical care from the outset and deferred his questioning for several weeks pending his recovery. The Agency then assembled a team that interrogated Abu Zubaydah using non-aggressive, non-physical elicitation techniques. [redacted] The Agency believed that Abu Zubaydah was withholding imminent threat information.

32. (TS [redacted]) Several months earlier, in late 2001, CIA had tasked an independent contractor psychologist, who had [redacted] experience in the U.S. Air Force's Survival, Evasion, Resistance, and Escape (SERE) training program, to research and write a paper on Al-Qa'ida's resistance to interrogation techniques.[13] This psychologist collaborated with a Department of Defense (DoD) psychologist who had [redacted] SERE experience in the U.S. Air Force and DoD to produce the paper, "Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective." Subsequently, the two psychologists developed a list of new and more aggressive EITs that they recommended for use in interrogations.

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12 [redacted]

13 (U//FOUO) The SERE training program falls under the DoD Joint Personnel Recovery Agency (JPRA). JPRA is responsible for missions to include the training for SERE and Prisoner of War and Missing In Action operational affairs including repatriation. SERE Training is offered by the U.S. Army, Navy, and Air Force to its personnel, particularly air crews and special operations forces who are of greatest risk of being captured during military operations. SERE students are taught how to survive in various terrain, evade and endure captivity, resist interrogations, and conduct themselves to prevent harm to themselves and fellow prisoners of war.

33. (TS [redacted]) CIA's OTS obtained data on the use of the proposed EITs and their potential long-term psychological effects on detainees. OTS input was based in part on information solicited from a number of psychologists and knowledgeable academics in the area of psychopathology.

34. (TS/ [redacted] OTS also solicited input from DoD/Joint Personnel Recovery Agency (JPRA) regarding techniques used in its SERE training and any subsequent psychological effects on students. DoD/JPRA concluded no long-term psychological effects resulted from use of the EITs, including the most taxing technique, the waterboard, on SERE students.[14] The OTS analysis was used by OGC in evaluating the legality of techniques.

35. (TS [redacted]) Eleven EITs were proposed for adoption in the CTC Interrogation Program. As proposed, use of EITs would be subject to a competent evaluation of the medical and psychological state of the detainee. The Agency eliminated one proposed technique—[redacted]—after learning from DoJ that this could delay the legal review. The following textbox identifies the 10 EITs the Agency described to DoJ.

14 (S) According to individuals with authoritative knowledge of the SERE program, the waterboard was used for demonstration purposes on a very small number of students in a class. Except for Navy SERE training, use of the waterboard was discontinued because of its dramatic effect on the students who were subjects.

TOP SECRET [redacted]

Enhanced Interrogation Techniques

- The attention grasp consists of grasping the detainee with both hands, with one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the detainee is drawn toward the interrogator.
- During the walling technique, the detainee is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash.
- The facial hold is used to hold the detainee's head immobile. The interrogator places an open palm on either side of the detainee's face and the interrogator's fingertips are kept well away from the detainee's eyes.
- With the facial or insult slap, the fingers are slightly spread apart. The interrogator's hand makes contact with the area between the tip of the detainee's chin and the bottom of the corresponding earlobe.
- In cramped confinement, the detainee is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller space lasts no more than two hours and in the larger space it can last up to 18 hours.
- Insects placed in a confinement box involve placing a harmless insect in the box with the detainee.
- During wall standing, the detainee may stand about 4 to 5 feet from a wall with his feet spread approximately to his shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all of his body weight. The detainee is not allowed to reposition his hands or feet.
- The application of stress positions may include having the detainee sit on the floor with his legs extended straight out in front of him with his arms raised above his head or kneeling on the floor while leaning back at a 45 degree angle.
- Sleep deprivation will not exceed 11 days at a time.
- The application of the waterboard technique involves binding the detainee to a bench with his feet elevated above his head. The detainee's head is immobilized and an interrogator places a cloth over the detainee's mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation.

TOP SECRET [redacted]

DoJ LEGAL ANALYSIS

36. (TS[redacted]) CIA's OGC sought guidance from DoJ regarding the legal bounds of EITs vis-à-vis individuals detained [redacted] The ensuing legal opinions focus on the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (Torture Convention),[15] especially as implemented in the U.S. criminal code, 18 U.S.C. 2340-2340A.

37. (U//FOUO) The Torture Convention specifically prohibits "torture," which it defines in Article 1 as:

> any act by which *severe* pain or suffering, whether physical or mental, is *intentionally* inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanction. [Emphasis added.]

Article 4 of the Torture Convention provides that states party to the Convention are to ensure that all acts of "torture" are offenses under their criminal laws. Article 16 additionally provides that each state party "shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to acts of torture as defined in Article 1."

[15] (U//FOUO) Adopted 10 December 1984, S. Treaty Doc. No. 100-20 (1988) 1465 U.N.T.S. 85 (entered into force 26 June 1987). The Torture Convention entered into force for the United States on 20 November 1994.

38. (U//FOUO) The Torture Convention applies to the United States only in accordance with the reservations and understandings made by the United States at the time of ratification.[16] As explained to the Senate by the Executive Branch prior to ratification:

> Article 16 is arguably broader than existing U.S. law. The phrase "cruel, inhuman or degrading treatment or punishment" is a standard formula in international instruments and is found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. To the extent the phrase has been interpreted in the context of those agreements, "cruel" and "inhuman" treatment or punishment appears to be roughly equivalent to the treatment or punishment barred in the United States by the Fifth, Eighth and Fourteenth Amendments. "Degrading" treatment or punishment, however, has been interpreted as potentially including treatment that would probably not be prohibited by the U.S. Constitution. [Citing a ruling that German refusal to recognize individual's gender change might be considered "degrading" treatment.] To make clear that the United States construes the phrase to be coextensive with its constitutional guarantees against cruel, unusual, and inhumane treatment, the following understanding is recommended:
>
> > "The United States understands the term 'cruel, inhuman or degrading treatment or punishment,' as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."[17] [Emphasis added.]

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16 (U) Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980). The United States is not a party to the Vienna Convention on treaties, but it generally regards its provisions as customary international law.

17 (U//FOUO) S. Treaty Doc. No. 100-20, at 15-16.

39. (U//FOUO) In accordance with the Convention, the United States criminalized acts of torture in 18 U.S.C. 2340A(a), which provides as follows:

> Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

The statute adopts the Convention definition of "torture" as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."[18] "Severe physical pain and suffering" is not further defined, but Congress added a definition of "severe mental pain or suffering:"

> [T]he prolonged mental harm caused by or resulting from–
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality. . . .[19]

These statutory definitions are consistent with the understandings and reservations of the United States to the Torture Convention.

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[18] (U//FOUO) 18 U.S.C. 2340(1).

[19] (U//FOUO) 18 U.S.C. 2340(2).

40. (U//FOUO) DoJ has never prosecuted a violation of the torture statute, 18 U.S.C. §2340, and there is no case law construing its provisions. OGC presented the results of its research into relevant issues under U.S. and international law to DoJ's OLC in the summer of 2002 and received a preliminary summary of the elements of the torture statute from OLC in July 2002. An unclassified 1 August 2002 OLC legal memorandum set out OLC's conclusions regarding the proper interpretation of the torture statute and concluded that "Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering whether mental or physical."[20] Also, OLC stated that the acts must be of an "extreme nature" and that "certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture." Further describing the requisite level of intended pain, OLC stated:

> Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.[21]

OLC determined that a violation of Section 2340 requires that the infliction of severe pain be the defendant's "precise objective." OLC also concluded that necessity or self-defense might justify interrogation methods that would otherwise violate Section 2340A.[22] The August 2002 OLC opinion did not address whether any other provisions of U.S. law are relevant to the detention, treatment, and interrogation of detainees outside the United States.[23]

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20 (U//FOUO) Legal Memorandum, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A (1 August 2002).

21 (U//FOUO) Ibid., p. 1.

22 (U//FOUO) Ibid., p. 39.

23 (U//FOUO) OLC's analysis of the torture statute was guided in part by judicial decisions under the Torture Victims Protection Act (TVPA) 28 U.S.C. 1350, which provides a tort remedy for victims of torture. OLC noted that the courts in this context have looked at the entire course

41. (U//FOUO) A second unclassified 1 August 2002 OLC opinion addressed the international law aspects of such interrogations.[24] This opinion concluded that interrogation methods that do not violate 18 U.S.C. 2340 would not violate the Torture Convention and would not come within the jurisdiction of the International Criminal Court.

42. (TS[redacted]) In addition to the two unclassified opinions, OLC produced another legal opinion on 1 August 2002 at the request of CIA.[25] (Appendix C.) This opinion, addressed to CIA's Acting General Counsel, discussed whether the proposed use of EITs in interrogating Abu Zubaydah would violate the Title 18 prohibition on torture. The opinion concluded that use of EITs on Abu Zubaydah would not violate the torture statute because, among other things, Agency personnel: (1) would not specifically intend to inflict severe pain or suffering, and (2) would not in fact inflict severe pain or suffering.

43. (TS[redacted]) This OLC opinion was based upon specific representations by CIA concerning the manner in which EITs would be applied in the interrogation of Abu Zubaydah. For example, OLC was told that the EIT "phase" would likely last "no more than several days but could last up to thirty days." The EITs would be used on "an as-needed basis" and all would not necessarily be used. Further, the EITs were expected to be used "in some sort of escalating fashion, culminating with the waterboard though not necessarily ending with this technique." Although some of the EITs

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of conduct, although a single incident could constitute torture. OLC also noted that courts may be willing to find a wide range of physical pain can rise to the level of "severe pain and suffering." Ultimately, however, OLC concluded that the cases show that only acts "of an extreme nature have been redressed under the TVPA's civil remedy for torture." White House Counsel Memorandum at 22 - 27.

24 (U//FOUO) OLC Opinion by John C. Yoo, Deputy Assistant Attorney General, OLC (1 August 2002).

25 (TS[redacted]) Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, "Interrogation of al Qaida Operative" (1 August 2002) at 15.

might be used more than once, "that repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions." With respect to the waterboard, it was explained that:

> . . . the individual is bound securely to an inclined bench . . . . The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, the air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning. The individual does not breathe water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of [12 to 24] inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated. The water is usually applied from a canteen cup or small watering can with a spout. . . . [T]his procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning. [I]t is likely that this procedure would not last more than 20 minutes in any one application.

Finally, the Agency presented OLC with a psychological profile of Abu Zubaydah and with the conclusions of officials and psychologists associated with the SERE program that the use of EITs would cause no long term mental harm. OLC relied on these representations to support its conclusion that no physical harm or prolonged mental harm would result from the use on him of the EITs, including the waterboard.[26]

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26 (TS/[redacted]) According to the Chief, Medical Services, OMS was neither consulted nor involved in the initial analysis of the risk and benefits of EITs, nor provided with the OTS report cited in the OLC opinion. In retrospect, based on the OLC extracts of the OTS report, OMS contends that the reported sophistication of the preliminary EIT review was exaggerated, at least as it related to the waterboard, and that the power of this EIT was appreciably overstated in the report. Furthermore, OMS contends that the expertise of the SERE psychologist/interrogators on

44. (TS[redacted]) OGC continued to consult with DoJ as the CTC Interrogation Program and the use of EITs expanded beyond the interrogation of Abu Zubaydah. This resulted in the production of an undated and unsigned document entitled, "Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel."[27] According to OGC, this analysis was fully coordinated with and drafted in substantial part by OLC. In addition to reaffirming the previous conclusions regarding the torture statute, the analysis concludes that the federal War Crimes statute, 18 U.S.C. 2441, does not apply to Al-Qa'ida because members of that group are not entitled to prisoner of war status. The analysis adds that "the [Torture] Convention permits the use of [cruel, inhuman, or degrading treatment] in exigent circumstances, such as a national emergency or war." It also states that the interrogation of Al-Qa'ida members does not violate the Fifth and Fourteenth Amendments because those provisions do not apply extraterritorially, nor does it violate the Eighth Amendment because it only applies to persons upon whom criminal sanctions have been imposed. Finally, the analysis states that a wide range of EITs and other techniques would not constitute conduct of the type that would be prohibited by the Fifth, Eighth, or Fourteenth Amendments even were they to be applicable:

> The use of the following techniques and of comparable, approved techniques does not violate any Federal statute or other law, where the CIA interrogators do not specifically intend to cause the detainee to undergo severe physical or mental pain or suffering (i.e., they act with the good faith belief that their conduct will not cause such pain or suffering): isolation, reduced caloric intake (so long as the amount is calculated to maintain the general health of the detainees), deprivation of reading material, loud music or white

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the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant. Consequently, according to OMS, there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe.

27 (TS[redacted]) "Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel," attached to [redacted] (16 June 2003).

noise (at a decibel level calculated to avoid damage to the detainees' hearing), the attention grasp, walling, the facial hold, the facial slap (insult slap), the abdominal slap, cramped confinement, wall standing, stress positions, sleep deprivation, the use of diapers, the use of harmless insects, and the water board.

According to OGC, this analysis embodies DoJ agreement that the reasoning of the classified 1 August 2002 OLC opinion extends beyond the interrogation of Abu Zubaydah and the conditions that were specified in that opinion.

NOTICE TO AND CONSULTATION WITH EXECUTIVE AND CONGRESSIONAL OFFICIALS

45. (TS[redacted]) At the same time that OLC was reviewing the legality of EITs in the summer of 2002, the Agency was consulting with NSC policy staff and senior Administration officials. The DCI briefed appropriate senior national security and legal officials on the proposed EITs. In the fall of 2002, the Agency briefed the leadership of the Congressional Intelligence Oversight Committees on the use of both standard techniques and EITs.

46. (TS[redacted]) In early 2003, CIA officials, at the urging of the General Counsel, continued to inform senior Administration officials and the leadership of the Congressional Oversight Committees of the then-current status of the CTC Program. The Agency specifically wanted to ensure that these officials and the Committees continued to be aware of and approve CIA's actions. The General Counsel recalls that he spoke and met with White House Counsel and others at the NSC, as well as DoJ's Criminal Division and Office of Legal Counsel beginning in December 2002 and briefed them on the scope and breadth of the CTC's Detention and Interrogation Program.

47. (TS[redacted]) Representatives of the DO, in the presence of the Director of Congressional Affairs and the General Counsel, continued to brief the leadership of the Intelligence Oversight Committees on the use of EITs and detentions in February

and March 2003. The General Counsel says that none of the participants expressed any concern about the techniques or the Program.

48. (TS[redacted]) On 29 July 2003, the DCI and the General Counsel provided a detailed briefing to selected NSC Principals on CIA's detention and interrogation efforts involving "high value detainees," to include the expanded use of EITs.[28] According to a Memorandum for the Record prepared by the General Counsel following that meeting, the Attorney General confirmed that DoJ approved of the expanded use of various EITs, including multiple applications of the waterboard.[29] The General Counsel said he believes everyone in attendance was aware of exactly what CIA was doing with respect to detention and interrogation, and approved of the effort. According to OGC, the senior officials were again briefed regarding the CTC Program on 16 September 2003, and the Intelligence Committee leadership was briefed again in September 2003. Again, according to OGC, none of those involved in these briefings expressed any reservations about the program.

GUIDANCE ON CAPTURE, DETENTION, AND INTERROGATION

49. (TS[redacted]) Guidance and training are fundamental to the success and integrity of any endeavor as operationally, politically, and legally complex as the Agency's Detention and Interrogation Program. Soon after 9/11, the DDO issued guidance on the standards for the capture of terrorist targets. [redacted]

50. (TS[redacted]) The DCI, in January 2003 approved formal "Guidelines on Confinement Conditions for CIA Detainees" (Appendix D) and "Guidelines on Interrogations Conducted

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28 [redacted]

29 (U//FOUO) Memorandum for the Record, [redacted] (5 August 2003).

Pursuant to [redacted] (Appendix E), which are discussed below. Prior to the DCI Guidelines, Headquarters provided guidance via informal briefings and electronic communications, to include cables from CIA Headquarters, to the field. [redacted]

51. (TS [redacted]) In November 2002, CTC initiated training courses for individuals involved in interrogations. [redacted]

52. [redacted]

53. [redacted]

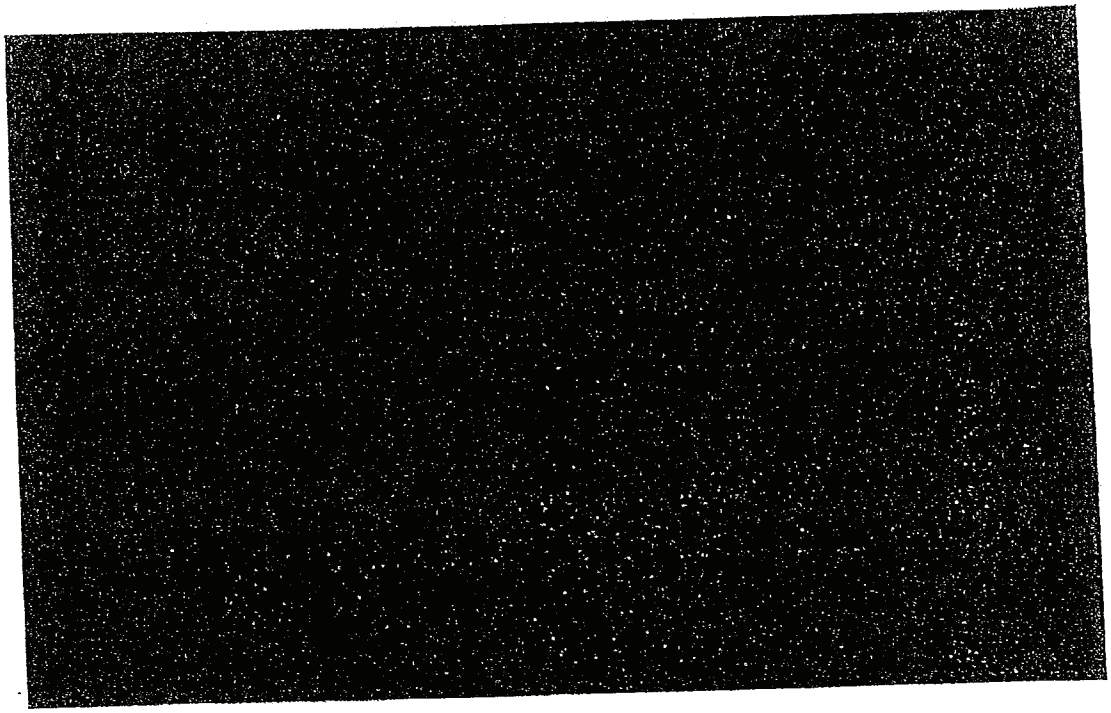
[redacted]

[redacted]

54. [redacted]

55. [redacted]

56. [redacted]



DCI Confinement Guidelines

57. (TS) Before January 2003, officers assigned to manage detention facilities developed and implemented confinement condition procedures. The January 2003 DCI Guidelines govern the conditions of confinement for CIA detainees held in detention facilities.

31

58. [redacted] They must review the Guidelines and sign an acknowledgment that they have done so. [redacted]

59. (TS/ [redacted]) The DCI Guidelines specify legal "minimums" and require that "due provision must be taken to protect the health and safety of all CIA detainees." The Guidelines do not require that conditions of confinement at the detention facilities conform to U.S. prison or other standards. At a minimum, however, detention facilities are to provide basic levels of medical care:

[redacted]

Further, the guidelines provide that:

[redacted]

[redacted]

DCI Interrogation Guidelines

60. (S//NF) Prior to January 2003, CTC and OGC disseminated guidance via cables, e-mail, or orally on a case-by-case basis to address requests to use specific interrogation techniques. Agency management did not require those involved in interrogations to sign an acknowledgement that they had read, understood, or agreed to comply with the guidance provided. Nor did the Agency maintain a comprehensive record of individuals who had been briefed on interrogation procedures.

61. (TS [redacted] The DCI Interrogation Guidelines require that all personnel directly engaged in the interrogation of persons detained have reviewed these Guidelines, received appropriate training in their implementation, and have completed the applicable acknowledgement.

62. (S//NF) The DCI Interrogation Guidelines define "Permissible Interrogation Techniques" and specify that "unless otherwise approved by Headquarters, CIA officers and other personnel acting on behalf of CIA may use only Permissible Interrogation Techniques. Permissible Interrogation Techniques consist of both (a) Standard Techniques and (b) Enhanced

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32 (S//NF) See [redacted] relevant text of DO Handbook [redacted]

Techniques."[33] EITs require advance approval from Headquarters, as do standard techniques whenever feasible. The field must document the use of both standard techniques and EITs.

63. (TS/ [redacted]) The DCI Interrogation Guidelines define "standard interrogation techniques" as techniques that do not incorporate significant physical or psychological pressure. These techniques include, but are not limited to, all lawful forms of questioning employed by U.S. law enforcement and military interrogation personnel. Among standard interrogation techniques are the use of isolation, sleep deprivation not to exceed 72 hours,[34] reduced caloric intake (so long as the amount is calculated to maintain the general health of the detainee), deprivation of reading material, use of loud music or white noise (at a decibel level calculated to avoid damage to the detainee's hearing), the use of diapers for limited periods (generally not to exceed 72 hours, [redacted] and moderate psychological pressure. The DCI Interrogation Guidelines do not specifically prohibit improvised actions. A CTC/Legal officer has said, however, that no one may employ any technique outside specifically identified standard techniques without Headquarters approval.

64. (TS/ [redacted]) EITs include physical actions and are defined as "techniques that do incorporate physical or psychological pressure beyond Standard Techniques." Headquarters must approve the use of each specific EIT in advance. EITs may be employed only by trained and certified interrogators for use with a specific detainee and with appropriate medical and psychological monitoring of the process.[35]

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33 (S) The 10 approved EITs are described in the textbox on page 15 of this Review.

34 (TS/ [redacted]) According to the General Counsel, in late December 2003, the period for sleep deprivation was reduced to 48 hours.

35 (TS/ [redacted]) Before EITs are administered, a detainee must receive a detailed psychological assessment and physical exam. [redacted]

Medical Guidelines

65. (TS [redacted]) OMS prepared draft guidelines for medical and psychological support to detainee interrogations. [redacted] (Appendix F.)

Training for Interrogations

66. (TS [redacted]) In November 2002, [redacted] initiated a pilot running of a two-week Interrogator Training Course designed to train, qualify, and certify individuals as Agency interrogators.[37] Several CTC officers,

36 (U//AIUO) A 28 March 2003 Lotus Note from C/CTC/Legal advised Chief, Medical Services that the "Seventh Floor" "would need to approve the promulgation of any further formal guidelines. . . . For now, therefore, let's remain at the discussion stage. . . ."

37 [redacted]

including a former SERE instructor, designed the curriculum, which included a week of classroom instruction followed by a week of "hands-on" training in EITs. [redacted]

67. (TS [redacted] Once certified, an interrogator is deemed qualified to conduct an interrogation employing EITs. [redacted]

68. (S//NF) [redacted]

[redacted]

[redacted] Students completing the Interrogation Course are required to sign an acknowledgment that they have read, understand, and will comply with the DCI's Interrogation Guidelines.

69. (TS [redacted]) In June 2003, CTC established a debriefing course for Agency substantive experts who are involved in questioning detainees after they have undergone interrogation and have been deemed "compliant." The debriefing course was established to train non-interrogators to collect actionable intelligence from high value detainees in CIA custody. The course is intended to familiarize non-interrogators with key aspects of the Agency interrogation Program, to include the Program's goals and legal authorities, the DCI Interrogation Guidelines, and the roles and responsibilities of all who interact with a high value detainee. [redacted]

DETENTION AND INTERROGATION OPERATIONS AT [redacted]

70. [redacted]

[redacted]

[redacted]

[redacted]

71. [redacted]

72. [redacted]

73. [redacted]

[redacted]

74. (TS) [redacted] psychologist/interrogators [redacted] led each interrogation of Abu Zubaydah and Al-Nashiri where EITs were used. The psychologist/interrogators conferred with [redacted] team members before each interrogation session. Psychological evaluations were performed by [redacted] psychologists.

75. [redacted]

76. (TS) [redacted] 15 November 2002. The interrogation of Al-Nashiri proceeded after [redacted] the necessary Headquarters authorization. [redacted]

[redacted]

psychologist/interrogators began Al-Nashiri's interrogation using EITs immediately upon his arrival. Al-Nashiri provided lead information on other terrorists during his first day of interrogation. On the twelfth day of interrogation, [redacted] psychologist/interrogators administered two applications of the waterboard to Al-Nashiri during two separate interrogation sessions. Enhanced interrogation of Al-Nashiri continued through 4 December 2002, [redacted]

Videotapes of Interrogations

77. (TS [redacted]) Headquarters had intense interest in keeping abreast of all aspects of Abu Zubaydah's interrogation [redacted] including compliance with the guidance provided to the site relative to the use of EITs. Apart from this, however, and before the use of EITs, the interrogation teams [redacted] decided to videotape the interrogation sessions. One initial purpose was to ensure a record of Abu Zubaydah's medical condition and treatment should he succumb to his wounds and questions arise about the medical care provided to him by CIA. Another purpose was to assist in the preparation of the debriefing reports, although the team advised CTC/Legal that they rarely, if ever, were used for that purpose. There are 92 videotapes, 12 of which include EIT applications. An OGC attorney reviewed the videotapes in November and December 2002 to ascertain compliance with the August 2002 DoJ opinion and compare what actually happened with what was reported to Headquarters. He reported that there was no deviation from the DoJ guidance or the written record.

78. (TS [redacted]) OIG reviewed the videotapes, logs, and cables [redacted] in May 2003. OIG identified 83 waterboard applications, most of which lasted less than 10 seconds.[41] [redacted]

41 (TS [redacted]) For the purpose of this Review, a waterboard application constituted each discrete instance in which water was applied for any period of time during a session.

[redacted] OIG found 11 interrogation videotapes to be blank. Two others were blank except for one or two minutes of recording. Two others were broken and could not be reviewed. OIG compared the videotapes to [redacted] logs and cables and identified a 21-hour period of time, which included two waterboard sessions, that was not captured on the videotapes.

79. (TS [redacted] OIG's review of the videotapes revealed that the waterboard technique employed at [redacted] was different from the technique as described in the DoJ opinion and used in the SERE training. The difference was in the manner in which the detainee's breathing was obstructed. At the SERE School and in the DoJ opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency interrogator [redacted] continuously applied large volumes of water to a cloth that covered the detainee's mouth and nose. One of the psychologists/interrogators acknowledged that the Agency's use of the technique differed from that used in SERE training and explained that the Agency's technique is different because it is "for real" and is more poignant and convincing.

[redacted]

80. (TS [redacted] From December 2002 until [redacted] September 2003, [redacted] During this time, Headquarters issued the formal DCI Confinement Guidelines, the DCI Interrogation Guidelines, and the additional draft guidelines specifically

42 [redacted]

addressing requirements for OMS personnel. This served to strengthen the command and control exercised over the CTC Program.

Background and Detainees

81. [redacted]

82. [redacted]

83. [redacted]

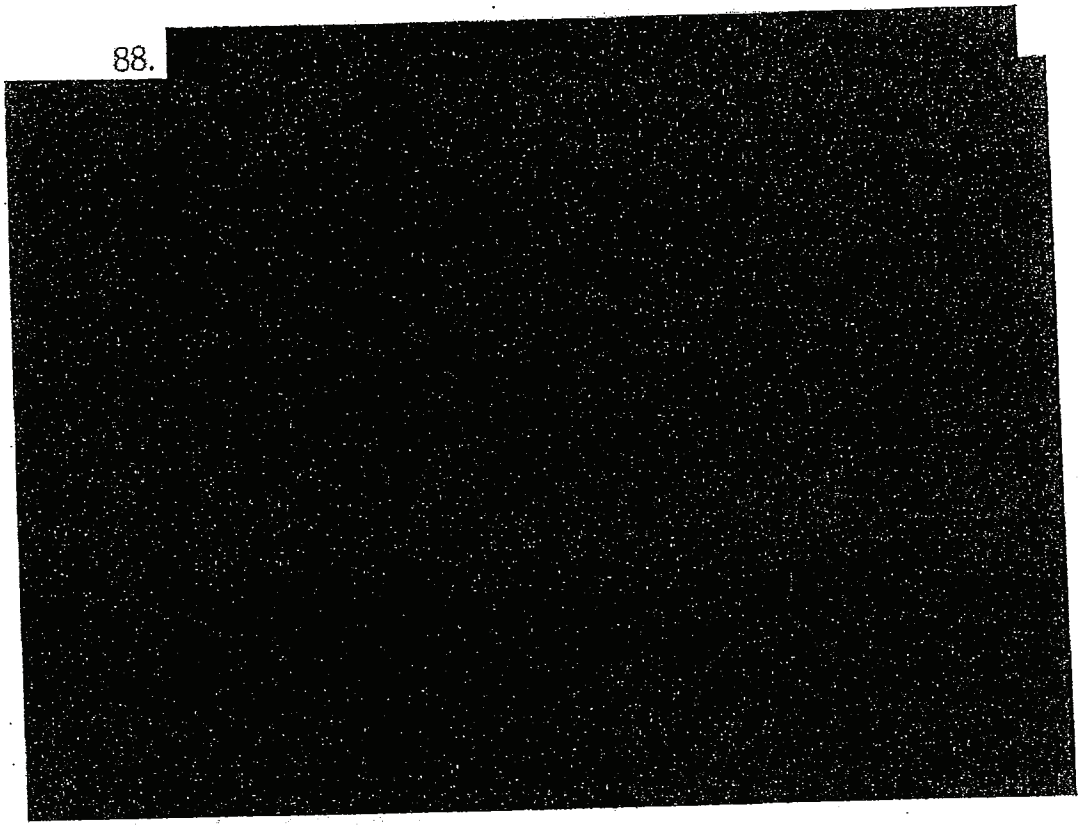
84.

85.

86.

87.

88. [redacted]



Guidance Prior to DCI Guidelines

89. (TS [redacted] the Agency was providing legal and operational briefings and cables [redacted] that contained Headquarters' guidance and discussed the torture statute and the DoJ legal opinion. CTC had also established a precedent of detailed cables between [redacted] and Headquarters regarding the interrogation and debriefing of detainees. The written guidance did not address the four standard interrogation techniques that, according to CTC/Legal, the Agency had identified as early as November 2002.[43] Agency personnel were authorized to employ standard interrogation techniques on a detainee without Headquarters' prior approval. The guidance did not specifically

[43] (S//NF) The four standard interrogation techniques were: (1) sleep deprivation not to exceed 72 hours, (2) continual use of light or darkness in a cell, (3) loud music, and (4) white noise (background hum).

address the use of props to imply a physical threat to a detainee, nor did it specifically address the issue of whether or not Agency officers could improvise with any other techniques. No formal mechanisms were in place to ensure that personnel going to the field were briefed on the existing legal and policy guidance.

Specific Unauthorized or Undocumented Techniques

90. (TS [redacted]) This Review heard allegations of the use of unauthorized techniques [redacted] The most significant, the handgun and power drill incident, discussed below, is the subject of a separate OIG investigation. In addition, individuals interviewed during the Review identified other techniques that caused concern because DoJ had not specifically approved them. These included the making of threats, blowing cigar smoke, employing certain stress positions, the use of a stiff brush on a detainee, and stepping on a detainee's ankle shackles. For all of the instances, the allegations were disputed or too ambiguous to reach any authoritative determination regarding the facts. Thus, although these allegations are illustrative of the nature of the concerns held by individuals associated with the CTC Program and the need for clear guidance, they did not warrant separate investigations or administrative action.

Handgun and Power Drill

91. (TS [redacted] interrogation team members, whose purpose it was to interrogate Al-Nashiri and debrief Abu Zubaydah, initially staffed [redacted] The interrogation team continued EITs on Al-Nashiri for two weeks in December 2002 [redacted] they assessed him to be "compliant." Subsequently, CTC officers at Headquarters [redacted] sent a [redacted] senior operations officer (the debriefer) [redacted] to debrief and assess Al-Nashiri.

92. (TS [redacted] The debriefer assessed Al-Nashiri as withholding information, at which point [redacted] reinstated [redacted] hooding, and handcuffing. Sometime between

28 December 2002 and 1 January 2003, the debriefer used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information.[44] After discussing this plan with [redacted] the debriefer entered the cell where Al-Nashiri sat shackled and racked the handgun once or twice close to Al-Nashiri's head.[45] On what was probably the same day, the debriefer used a power drill to frighten Al-Nashiri. With [redacted] consent, the debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded. The debriefer did not touch Al-Nashiri with the power drill.

93. (~~S//NF~~) The [redacted] and debriefer did not request authorization or report the use of these unauthorized techniques to Headquarters. However, in January 2003, newly arrived TDY officers [redacted] who had learned of these incidents reported them to Headquarters. OIG investigated and referred its findings to the Criminal Division of DoJ. On 11 September 2003, DoJ declined to prosecute and turned these matters over to CIA for disposition. These incidents are the subject of a separate OIG Report of Investigation.[46]

Threats

94. (~~TS~~ [redacted] During another incident [redacted] the same Headquarters debriefer, according to a [redacted] who was present, threatened Al-Nashiri by saying that if he did not talk, "We could get your mother in here," and, "We can bring your family in here." The [redacted] debriefer reportedly wanted Al-Nashiri to infer, for psychological reasons, that the debriefer might be [redacted] intelligence officer based on his Arabic dialect, and that Al-Nashiri was in [redacted] custody because it was widely believed in Middle East circles that [redacted] interrogation technique involves

44 (~~S//NF~~) This individual was not a trained interrogator and was not authorized to use EITs.

45 (U//FOUO) Racking is a mechanical procedure used with firearms to chamber a bullet or simulate a bullet being chambered.

46 (~~S//NF~~) Unauthorized Interrogation Techniques [redacted] 29 October 2003.

sexually abusing female relatives in front of the detainee. The debriefer denied threatening Al-Nashiri through his family. The debriefer also said he did not explain who he was or where he was from when talking with Al-Nashiri. The debriefer said he never said he was [redacted] intelligence officer but let Al-Nashiri draw his own conclusions.

95. (TS [redacted] An experienced Agency interrogator reported that the [redacted] interrogators threatened Khalid Shaykh Muhammad [redacted] According to this interrogator, the [redacted] interrogators said to Khalid Shaykh Muhammad that if anything else happens in the United States, "We're going to kill your children." According to the interrogator, one of the [redacted] interrogators said [redacted] With respect to the report provided to him of the threats [redacted] that report did not indicate that the law had been violated.

Smoke

96. (TS [redacted] An Agency [redacted] interrogator admitted that, in December 2002, he and another [redacted] smoked cigars and blew smoke in Al-Nashiri's face during an interrogation. The interrogator claimed they did this to "cover the stench" in the room and to help keep the interrogators alert late at night. This interrogator said he would not do this again based on "perceived criticism." Another Agency interrogator admitted that he also smoked cigars during two sessions with Al-Nashiri to mask the stench in the room. He claimed he did not deliberately force smoke into Al-Nashiri's face.

Stress Positions

97. (TS [redacted] OIG received reports that interrogation team members employed potentially injurious stress positions on Al-Nashiri. Al-Nashiri was required to kneel on the floor and lean back. On at least one occasion, an Agency officer reportedly pushed Al-Nashiri backward while he was in this stress position. On another occasion, [redacted] said he had to intercede after [redacted] expressed concern that Al-Nashiri's arms might be dislocated from his shoulders. [redacted] explained that, at the time, the interrogators were attempting to put Al-Nashiri in a standing stress position. Al-Nashiri was reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt.

Stiff Brush and Shackles

98. (TS [redacted] interrogator reported that he witnessed other techniques used on Al-Nashiri that the interrogator knew were not specifically approved by DoJ. These included the use of a stiff brush that was intended to induce pain on Al-Nashiri and standing on Al-Nashiri's shackles, which resulted in cuts and bruises. When questioned, an interrogator who was at [redacted] acknowledged that they used a stiff brush to bathe Al-Nashiri. He described the brush as the kind of brush one uses in a bath to remove stubborn dirt. A CTC manager who had heard of the incident attributed the abrasions on Al-Nashiri's ankles to an Agency officer accidentally stepping on Al-Nashiri's shackles while repositioning him into a stress position.

Waterboard Technique

99. (TS [redacted] The Review determined that the interrogators used the waterboard on Khalid Shaykh Muhammad in a manner inconsistent with the SERE application of the waterboard and the description of the waterboard in the DoJ OLC opinion, in that the technique was used on Khalid Shaykh Muhammad a large number of times. According to the General Counsel, the Attorney

General acknowledged he is fully aware of the repetitive use of the waterboard and that CIA is well within the scope of the DoJ opinion and the authority given to CIA by that opinion. The Attorney General was informed the waterboard had been used 119 times on a single individual.

100. (TS [redacted]) Cables indicate that Agency interrogators [redacted] applied the waterboard technique to Khalid Shaykh Muhammad 183 [redacted]

47 [redacted]

[redacted]

101. [redacted]

102. [redacted]

48 (TS [redacted]) The OLC opinion dated 1 August 2002 states: "You have also orally informed us that it is likely that this procedure [waterboard] would not last more than 20 minutes in any one application." [redacted]

[redacted]

103. [redacted]

104. [redacted]

105. [redacted]

106. [redacted]

[redacted]

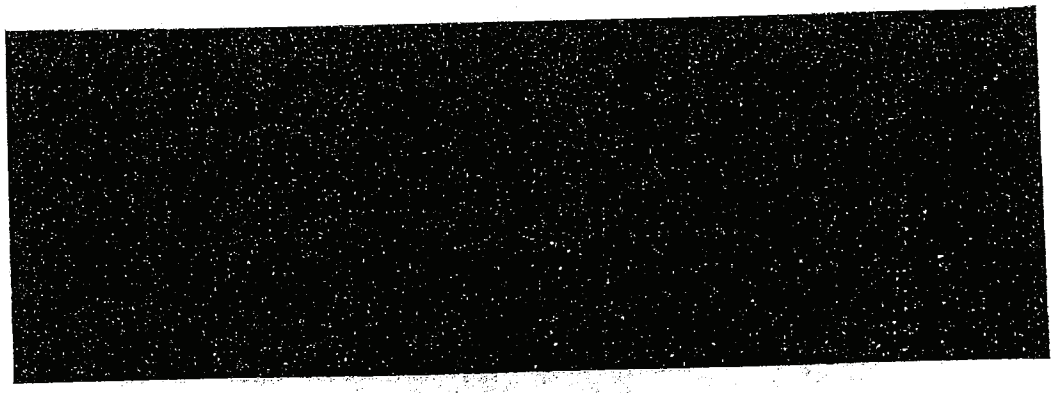
107. [redacted]

108. [redacted]

[redacted]

109. [redacted]

110. [redacted]



111.

112.

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113. [redacted]

114. [redacted]

115. [redacted]

[redacted]

116. [redacted]

117. [redacted]

[redacted]

118. [redacted]

119. [redacted]

120. [redacted]

53 (TS) [redacted] The first session of the interrogation course began in November 2002. See paragraphs 64-65.

121.

122.

Interrogators are required to sign a statement certifying they have read and understand the contents of the folder.

123.

[redacted]

[redacted]

124. [redacted]

125. [redacted]

126. [redacted]

[redacted]

127. [redacted]

128. [redacted]

129. [redacted]

54 [redacted]

130. [redacted]

131. [redacted]

132. [redacted]

133. [redacted]

134. [redacted]

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[redacted]

[redacted]

156. [redacted]

157. [redacted]

158. [redacted]

[redacted]

159.

160.

[redacted]

161. [redacted]

162. [redacted]

163. [redacted]

[redacted]

Specific Unauthorized or Undocumented Techniques

164. (TS [redacted] was but one event in the early months of [redacted] Agency activity in [redacted] that involved the use of interrogation techniques that DoJ and Headquarters had not approved. Agency personnel reported a range of improvised actions that interrogators and debriefers reportedly used at that time to assist in obtaining information from detainees. The extent of these actions is illustrative of the consequences of the lack of clear guidance at that time and the Agency's insufficient attention to interrogations in [redacted]

165. (TS [redacted] OIG opened separate investigations into two incidents: [redacted] and the death of a detainee at a military base in Northeast Afghanistan (discussed further in paragraph 192). These two cases presented facts that warranted criminal investigations. Some of the techniques discussed below were used with [redacted] and will be further addressed in connection with a Report [redacted] In other cases of undocumented or unauthorized techniques, the facts are ambiguous or less serious, not warranting further investigation. Some actions discussed below were taken by employees or contractors no longer associated with the Agency. Agency management has also addressed administratively some of the actions.

Pressure Points

166. (TS [redacted] In July 2002, [redacted] operations officer, participated with another operations officer in a custodial interrogation of a detainee [redacted] reportedly used a "pressure point" technique: with both of his hands on the detainee's neck, [redacted] manipulated his fingers to restrict the detainee's carotid artery.

167. (TS) who was facing the shackled detainee, reportedly watched his eyes to the point that the detainee would nod and start to pass out; then, the shook the detainee to wake him. This process was repeated for a total of three applications on the detainee. The acknowledged to OIG that he laid hands on the detainee and may have made him think he was going to lose consciousness. The also noted that he has years of experience debriefing and interviewing people and until recently had never been instructed how to conduct interrogations.

168. (S//NF) CTC management is now aware of this reported incident, the severity of which was disputed. The use of pressure points is not, and had not been, authorized, and CTC has advised the that such actions are not authorized.

Mock Executions

169. (TS) The debriefer who employed the handgun and power drill on Al-Nashir advised that those actions were predicated on a technique he had participated in The debriefer stated that when he was between September and October 2002, offered to fire a handgun outside the interrogation room while the debriefer was interviewing a detainee who was thought to be withholding information.[68] staged the incident, which included screaming and yelling outside the cell by other CIA officers and guards. When the guards moved the detainee from the interrogation room, they passed a guard who was dressed as a hooded detainee, lying motionless on the ground, and made to appear as if he had been shot to death.

170. (TS [redacted] The debriefer claimed he did not think he needed to report this incident because the [redacted] had openly discussed this plan [redacted] several days prior to and after the incident. When the debriefer was later [redacted] and believed he needed a non-traditional technique to induce the detainee to cooperate, he told [redacted] he wanted to wave a handgun in front of the detainee to scare him. The debriefer said he did not believe he was required to notify Headquarters of this technique, citing the earlier, unreported mock execution [redacted]

171. (TS [redacted] A senior operations officer [redacted] recounted that around September 2002, [redacted] heard that the debriefer had staged a mock execution. [redacted] was not present but understood it went badly; it was transparently a ruse and no benefit was derived from it. [redacted] observed that there is a need to be creative as long as it is not considered torture. [redacted] stated that if such a proposal were made now, it would involve a great deal of consultation. It would begin with [redacted] management and would include CTC/Legal, [redacted] and the CTC [redacted]

172. (S//NF) The [redacted] admitted staging a "mock execution" in the first days that [redacted] was open. According to the [redacted] the technique was his idea but was not effective because it came across as being staged. It was based on the concept, from SERE school, of showing something that looks real, but is not. The [redacted] recalled that a particular CTC interrogator later told him about employing a mock execution technique. The [redacted] did not know when this incident occurred or if it was successful. He viewed this technique as ineffective because it was not believable.

[redacted]

173. (TS [redacted] Four [redacted] who were interviewed admitted to either participating in one of the above-described incidents or hearing about them. [redacted] described staging a mock execution of a detainee. Reportedly, a detainee who witnessed the "body" in the aftermath of the ruse "sang like a bird."

174. (TS/ [redacted] revealed that approximately four days before his interview with OIG, the [redacted] stated he had conducted a mock execution [redacted] in October or November 2002. Reportedly, the firearm was discharged outside of the building, and it was done because the detainee reportedly possessed critical threat information. [redacted] stated that he told the [redacted] not to do it again. He stated that he has not heard of a similar act occurring [redacted] since then.

Use of Smoke

175. (TS [redacted] A CIA officer [redacted] revealed that cigarette smoke was once used as an interrogation technique in October 2002. Reportedly, at the request of [redacted] an interrogator, the officer, who does not smoke, blew the smoke from a thin cigarette/cigar in the detainee's face for about five minutes. The detainee started talking so the smoke ceased. [redacted] heard that a different officer had used smoke as an interrogation technique. OIG questioned numerous personnel who had worked [redacted] about the use of smoke as a technique. None reported any knowledge of the use of smoke as an interrogation technique.

176. (TS [redacted] admitted that he has personally used smoke inhalation techniques on detainees to make them ill to the point where they would start to "purge." After this, in a weakened state,

these detainees would then provide with information.[70] denied ever physically abusing detainees or knowing anyone who has.

Use of Cold

177.

178. (TS) In late July to early August 2002, a detainee was being interrogated Prior to proceeding with any of the proposed methods, officer responsible for the detainee requesting Headquarters authority to employ a prescribed interrogation plan over a two-week period. The plan included the following:

> Physical Comfort Level Deprivation: With use of a window air conditioner and a judicious provision/deprivation of warm clothing/blankets, believe we can increase [the detainee's] physical discomfort level to the point where we may lower his mental/trained resistance abilities.

CTC/Legal responded and advised, "[C]aution must be used when employing the air conditioning/blanket deprivation so that [the detainee's] discomfort does not lead to a serious illness or worse."

179.

70 (S) This was substantiated in part by the CIA officer who participated in this act with the

[redacted]

180. [redacted]

181 [redacted]

182. [redacted]

[redacted]

183. (TS/[redacted] Many of the officers interviewed about the use of cold showers as a technique cited that the water heater was inoperable and there was no other recourse except for cold showers. However, [redacted] explained that if a detainee was cooperative, he would be given a warm shower. He stated that when a detainee was uncooperative, the interrogators accomplished two goals by combining the hygienic reason for a shower with the unpleasantness of a cold shower.

184. (TS/[redacted] In December 2002, [redacted] cable reported that a detainee was left in a cold room, shackled and naked, until he demonstrated cooperation.

185. (TS/[redacted] When asked in February 2003, if cold was used as an interrogation technique, the [redacted] responded, "not per se." He explained that physical and environmental discomfort was used to encourage the detainees to improve their environment. [redacted] observed that cold is hard to define. He asked rhetorically, "How cold is cold? How cold is life threatening?" He stated that cold water was still employed [redacted] however, showers were administered in a heated room. He stated there was no specific guidance on it from Headquarters, and [redacted] was left to its own discretion in the use of cold. [redacted] added there is a cable from [redacted] documenting the use of "manipulation of the environment."

186. (TS[redacted] Although the DCI Guidelines do not mention cold as a technique, the September 2003 draft OMS Guidelines on Medical and Psychological Support to Detainee Interrogations specifically identify an "uncomfortably cool environment" as a standard interrogation measure. (Appendix F.) The OMS Guidelines provide detailed instructions on safe temperature ranges, including the safe temperature range when a detainee is wet or unclothed.

Water Dousing

187. (TS/ [redacted] According to [redacted] and others who have worked [redacted] "water dousing" has been used [redacted] since early 2003 when [redacted] officer introduced this technique to the facility. Dousing involves laying a detainee down on a plastic sheet and pouring water over him for 10 to 15 minutes. Another officer explained that the room was maintained at 70 degrees or more; the guards used water that was at room temperature while the interrogator questioned the detainee.

188. (TS/ [redacted] A review [redacted] from April and May 2003 revealed that [redacted] sought permission from CTC [redacted] to employ specific techniques for a number of detainees. Included in the list of requested techniques was water dousing.[72] Subsequent cables reported the use and duration of the techniques by detainee per interrogation session.[73] One certified interrogator, noting that water dousing appeared to be a most effective technique, requested CTC to confirm guidelines on water dousing. A return cable directed that the detainee must be placed on a towel or sheet, may not be placed naked on the bare cement floor, and the air temperature must exceed 65 degrees if the detainee will not be dried immediately.

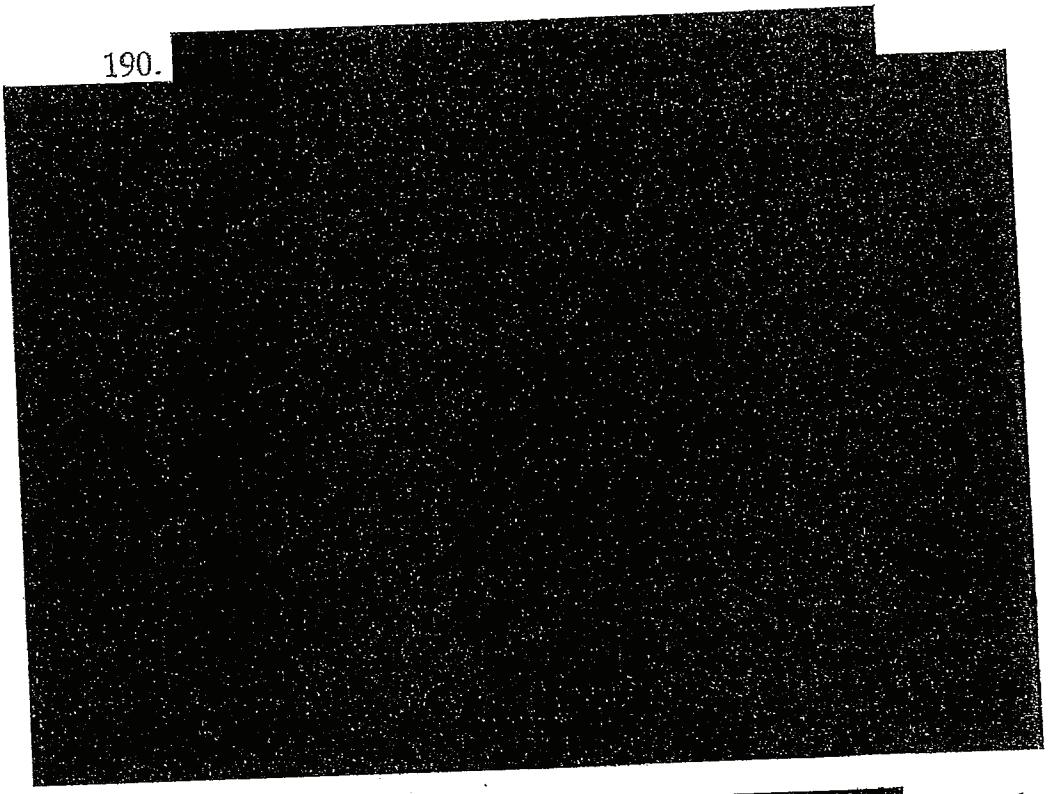
189. (TS/ [redacted] The DCI Guidelines do not mention water dousing as a technique. The 4 September 2003 draft OMS Guidelines, however, identify "water dousing" as one of 12 standard measures that OMS listed, in ascending degree of intensity, as the 11th standard measure. OMS did not further address "water dousing" in its guidelines.

[redacted]

73 (TS/ [redacted] reported water dousing as a technique used, but in a later paragraph used the term "cold water bath."

Hard Takedown

190. [redacted]



191. (TS/ [redacted] According to [redacted] the hard takedown was used often in interrogations at [redacted] as "part of the atmospherics." For a time, it was the standard procedure for moving a detainee to the sleep deprivation cell. It was done for shock and psychological impact and signaled the transition to another phase of the interrogation. The act of putting a detainee into a diaper can cause abrasions if the detainee struggles because the floor of the facility is concrete. The [redacted] stated he did not discuss the hard takedown with [redacted] managers, but he thought they understood what techniques were being used at [redacted] stated that the hard takedown had not been used recently [redacted] After taking the interrogation class, he understood that if

[redacted]

he was going to do a hard takedown, he must report it to Headquarters. Although the DCI and OMS Guidelines address physical techniques and treat them as requiring advance Headquarters approval, they do not otherwise specifically address the "hard takedown."

192. (TS/ [redacted] stated that he was generally familiar with the technique of hard takedowns. He asserted that they are authorized and believed they had been used one or more times at [redacted] in order to intimidate a detainee. [redacted] stated that he would not necessarily know if they have been used and did not consider it a serious enough handling technique to require Headquarters approval. Asked about the possibility that a detainee may have been dragged on the ground during the course of a hard takedown, [redacted] responded that he was unaware of that and did not understand the point of dragging someone along the corridor in [redacted]

Abuse [redacted] at Other Locations Outside of the CTC Program

193. (TS/ [redacted] Although not within the scope of the CTC Program, two other incidents [redacted] were reported in 2003. [redacted] As noted above, one resulted in the death of a detainee at Asadabad Base[76] [redacted]

194. (S//NF) In June 2003, the U.S. military sought an Afghan citizen who had been implicated in rocket attacks on a joint U.S. Army and CIA position in Asadabad located in Northeast Afghanistan. On 18 June 2003, this individual appeared at Asadabad Base at the urging of the local Governor. The individual was held in a detention facility guarded by U.S. soldiers from the Base. During

76 (S) For more than a year, CIA referred to Asadabad Base as [redacted]

the four days the individual was detained, an Agency independent contractor, who was a paramilitary officer, is alleged to have severely beaten the detainee with a large metal flashlight and kicked him during interrogation sessions. The detainee died in custody on 21 June; his body was turned over to a local cleric and returned to his family on the following date without an autopsy being performed. Neither the contractor nor his Agency staff supervisor had been trained or authorized to conduct interrogations. The Agency did not renew the independent contractor's contract, which was up for renewal soon after the incident. OIG is investigating this incident in concert with DoJ.[77]

195. (S//NF) In July 2003, [redacted] officer assigned to [redacted] assaulted a teacher at a religious school [redacted] This assault occurred during the course of an interview during a joint operation [redacted] The objective was to determine if anyone at the school had information about the detonation of a remote-controlled improvised explosive device that had killed eight border guards several days earlier.

196. (S//NF) A teacher being interviewed [redacted] reportedly smiled and laughed inappropriately, whereupon [redacted] used the butt stock of his rifle to strike or "buttstroke" the teacher at least twice in his torso, followed by several knee kicks to his torso. This incident was witnessed by 200 students. The teacher was reportedly not seriously injured. In response to his actions, Agency management returned the [redacted] to Headquarters. He was counseled and given a domestic assignment.

[redacted]

[redacted]

197. [redacted]

198. [redacted]

[redacted]

[redacted]

199. [redacted]

200. [redacted]

201. [redacted]

[redacted]

202. [redacted]

203. [redacted]

ANALYTICAL SUPPORT TO INTERROGATIONS

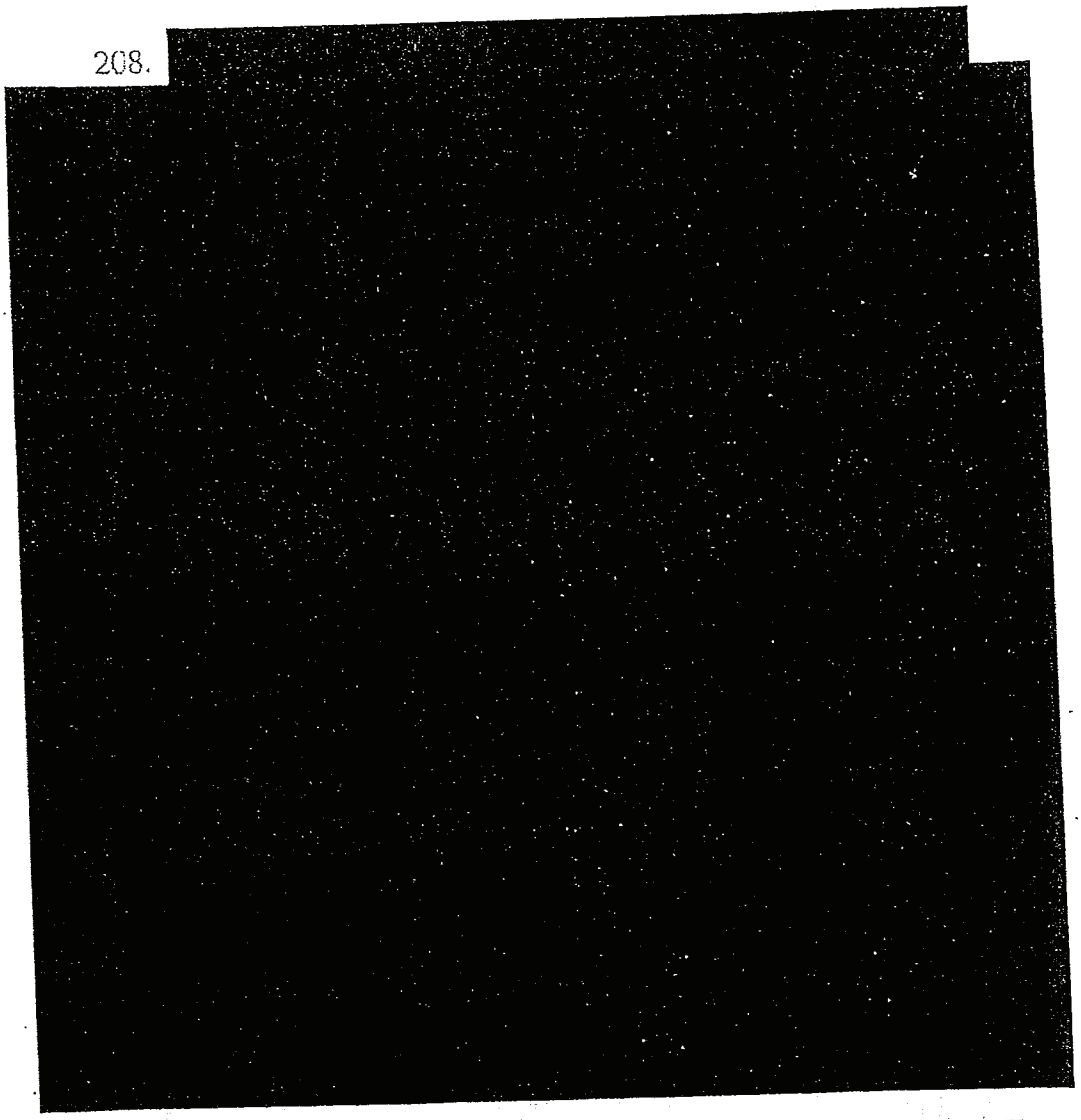
204. (TS[redacted]) Directorate of Intelligence analysts assigned to CTC provide analytical support to interrogation teams in the field. Analysts are responsible for developing requirements for the questioning of detainees as well as conducting debriefings in some cases. [redacted] Analysts, however, do not participate in the application of interrogation techniques.

205. (TS/[redacted]) According to a number of those interviewed for this Review, the Agency's intelligence on Al-Qa'ida was limited prior to the initiation of the CTC Interrogation Program. The Agency lacked adequate linguists or subject matter experts and had very little hard knowledge of what particular Al-Qa'ida leaders—who later became detainees—knew. This lack of knowledge led analysts to speculate about what a detainee "should know," vice information the analyst could objectively demonstrate the detainee did know. [redacted]

206. (TS [redacted] When a detainee did not respond to a question posed to him, the assumption at Headquarters was that the detainee was holding back and knew more; consequently, Headquarters recommended resumption of EITs.

207. [redacted]

208. [redacted]



209. (TS/) [redacted] is evidenced in the final waterboard session of Abu Zubaydah. According to a senior CTC officer, the interrogation team [redacted] considered Abu Zubaydah to be compliant and wanted to terminate EITs. [redacted] believed Abu Zubaydah continued to withhold information, [redacted] at the time it

generated substantial pressure from Headquarters to continue use of the EITs. According to this senior officer, the decision to resume use of the waterboard on Abu Zubaydah was made by senior officers of the DO [redacted] to assess Abu Zubaydah's compliance and witnessed the final waterboard session, after which, they reported back to Headquarters that the EITs were no longer needed on Abu Zubaydah.

210. [redacted]

EFFECTIVENESS

211. (TS [redacted]) The detention of terrorists has prevented them from engaging in further terrorist activity, and their interrogation has provided intelligence that has enabled the identification and apprehension of other terrorists, warned of terrorists plots planned for the United States and around the world, and supported articles frequently used in the finished intelligence publications for senior policymakers and war fighters. In this regard, there is no doubt that the Program has been effective. Measuring the effectiveness of EITs, however, is a more subjective process and not without some concern.

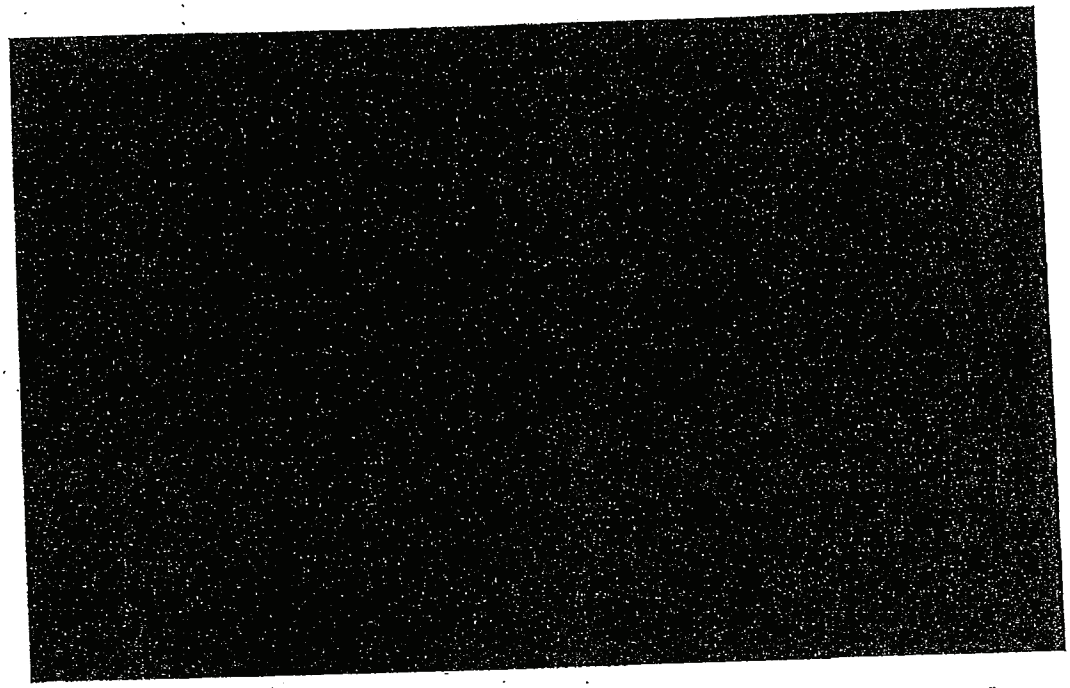
212. (TS [redacted]) When the Agency began capturing terrorists, management judged the success of the effort to be getting them off the streets, [redacted]

With the capture of terrorists who had access to much more significant, actionable information, the measure of success of the Program increasingly became the intelligence obtained from the detainees.

213. (TS Quantitatively, the DO has significantly increased the number of counterterrorism intelligence reports with the inclusion of information from detainees in its custody. Between 9/11 and the end of April 2003, the Agency produced over 3,000 intelligence reports from detainees. Most of the reports came from intelligence provided by the high value detainees at

214. (TS CTC frequently uses the information from one detainee, as well as other sources, to vet the information of another detainee. Although lower-level detainees provide less information than the high value detainees, information from these detainees has, on many occasions, supplied the information needed to probe the high value detainees further. the triangulation of intelligence provides a fuller knowledge of Al-Qa'ida activities than would be possible from a single detainee. For example, Mustafa Ahmad Adam al-Hawsawi, the Al-Qa'ida financier who was captured with Khalid Shaykh Muhammad, provided the Agency's first intelligence pertaining to —another participant in the 9/11 terrorist plot. Hawsawi's information to obtain additional details about role from Khalid Shaykh Muhammad

215. (TS Detainees have provided information on Al-Qa'ida and other terrorist groups. Information of note includes: the modus operandi of Al-Qa'ida, terrorists who are capable of mounting attacks in the United States,



216. (TS [redacted]) Detainee information has assisted in the identification of terrorists. For example, information from Abu Zubaydah helped lead to the identification of Jose Padilla and Binyam Muhammed—operatives who had plans to detonate a uranium-topped dirty bomb in either Washington, D.C., or New York City. Riduan "Hambali" Isomuddin provided information that led to the arrest of previously unknown members of an Al-Qa'ida cell in Karachi. They were designated as pilots for an aircraft attack inside the United States. Many other detainees, including lower-level detainees such as Zubayr and Majid Khan, have provided leads to other terrorists, but probably the most prolific has been Khalid Shaykh Muhammad. He provided information that helped lead to the arrests of terrorists including Sayfullah Paracha and his son Uzair Paracha, businessmen whom Khalid Shaykh Muhammad planned to use to smuggle explosives into the United States; Saleh Almari, a sleeper operative in New York; and Majid Khan, an operative who could enter the United States easily and was tasked to research attacks [redacted] Khalid Shaykh Muhammad's information also led to the investigation and prosecution of Iyman Faris, the truck driver arrested in early 2003 in Ohio. [redacted]

[redacted]

217. (TS [redacted]) Detainees, both planners and operatives, have also made the Agency aware of several plots planned for the United States and around the world. The plots identify plans to [redacted] attack the U.S. Consulate in Karachi, Pakistan; hijack aircraft to fly into Heathrow Airport [redacted] loosen track spikes in an attempt to derail a train in the United States; [redacted] blow up several U.S. gas stations to create panic and havoc; hijack and fly an airplane into the tallest building in California in a west coast version of the World Trade Center attack; cut the lines of suspension bridges in New York in an effort to make them collapse; [redacted] This Review did not uncover any evidence that these plots were imminent. Agency senior managers believe that lives have been saved as a result of the capture and interrogation of terrorists who were planning attacks, in particular Khalid Shaykh Muhammad, Abu Zubaydah, Hambali, and Al-Nashiri.

218. (TS/[redacted]) judge the reporting from detainees as one of the most important sources for finished intelligence. [redacted] viewed analysts' knowledge of the terrorist target as having much more depth as a result of information from detainees and estimated that detainee reporting is used in all counterterrorism articles produced for the most senior policymakers. [redacted] In an interview, the DCI

said he believes the use of EITs has proven to be extremely valuable in obtaining enormous amounts of critical threat information from detainees who had otherwise believed they were safe from any harm in the hands of Americans.

219. [redacted]

220. (TS [redacted]) Inasmuch as EITs have been used only since August 2002, and they have not all been used with every high value detainee, there is limited data on which to assess their individual effectiveness. This Review identified concerns about the use of the waterboard, specifically whether the risks of its use were justified by the results, whether it has been unnecessarily used in some instances, and whether the fact that it is being applied in a manner different from its use in SERE training brings into question the continued applicability of the DoJ opinion to its use. Although the waterboard is the most intrusive of the EITs, the fact that precautions have been taken to provide on-site medical oversight in the use of all EITs is evidence that their use poses risks.

221. (TS [redacted]) Determining the effectiveness of each EIT is important in facilitating Agency management's decision as to which techniques should be used and for how long. Measuring the overall effectiveness of EITs is challenging for a number of reasons including: (1) the Agency cannot determine with any certainty the totality of the intelligence the detainee actually possesses; (2) each detainee has different fears of and tolerance for EITs; (3) the application of the same EITs by different interrogators may have

different results; and

222. (TS/) The waterboard has been used on three detainees: Abu Zubaydah, Al-Nashiri, and Khalid Shaykh Muhammad. with the belief that each of the three detainees possessed perishable information about imminent threats against the United States.

223. (TS/) Prior to the use of EITs, Abu Zubaydah provided information for intelligence reports. Interrogators applied the waterboard to Abu Zubaydah at least 83 times during August 2002. During the period between the end of the use of the waterboard and 30 April 2003, he provided information for approximately additional reports. It is not possible to say definitively that the waterboard is the reason for Abu Zubaydah's increased production, or if another factor, such as the length of detention, was the catalyst. Since the use of the waterboard, however, Abu Zubaydah has appeared to be cooperative,

224. (TS/) With respect to Al-Nashiri, reported two waterboard sessions in November 2002, after which the psychologist/interrogators determined that Al-Nashiri was compliant. However, after being moved Al-Nashiri was thought to be withholding information. Al-Nashiri subsequently received additional EITs, but not the waterboard. The Agency then determined Al-Nashiri to be "compliant." Because of the litany of

techniques used by different interrogators over a relatively short period of time, it is difficult to identify exactly why Al-Nashiri became more willing to provide information. However, following the use of EITs, he provided information about his most current operational planning and [redacted] as opposed to the historical information he provided before the use of EITs.

225. (TS [redacted]) On the other hand, Khalid Shaykh Muhammad, an accomplished resistor, provided only a few intelligence reports prior to the use of the waterboard, and analysis of that information revealed that much of it was outdated, inaccurate, or incomplete. As a means of less active resistance, at the beginning of their interrogation, detainees routinely provide information that they know is already known. Khalid Shaykh Muhammad received 183 applications of the waterboard in March 2003 [redacted]

POLICY CONSIDERATIONS AND CONCERNS REGARDING THE DETENTION AND INTERROGATION PROGRAM

226. (TS [redacted]) The EITs used by the Agency under the CTC Program are inconsistent with the public policy positions that the United States has taken regarding human rights. This divergence has been a cause of concern to some Agency personnel involved with the Program.

Policy Considerations

227. (U//FOUO) Throughout its history, the United States has been an international proponent of human rights and has voiced opposition to torture and mistreatment of prisoners by foreign countries. This position is based upon fundamental principles that are deeply embedded in the American legal structure and jurisprudence. The Fifth and Fourteenth Amendments to the U.S. Constitution, for example, require due process of law, while the Eighth Amendment bars "cruel and unusual punishments."

228. (U//FOUO) The President advised the Senate when submitting the Torture Convention for ratification that the United States would construe the requirement of Article 16 of the Convention 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" as "roughly equivalent to" and "coextensive with the Constitutional guarantees against cruel, unusual, and inhumane treatment."[81] To this end, the United States submitted a reservation to the Torture Convention stating that the United States considers itself bound by Article 16 "only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the 5th, 8th and/or 14th Amendments to the Constitution of the United States." Although the Torture Convention expressly provides that no exceptional circumstances whatsoever, including war or any other public emergency, and no order from a superior officer, justifies torture, no similar provision was included regarding acts of "cruel, inhuman or degrading treatment or punishment."

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81 (U//FOUO) See Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Sen. Treaty Doc. 100-20, 100th Cong., 2d Sess., at 15, May 23, 1988; Senate Committee on Foreign Relations, Executive Report 101-30, August 30, 1990, at 25, 29, quoting summary and analysis submitted by President Ronald Reagan, as revised by President George H.W. Bush.

229. (U//FOUO) Annual U.S. State Department Country Reports on Human Rights Practices have repeatedly condemned harsh interrogation techniques utilized by foreign governments. For example, the 2002 Report, issued in March 2003, stated:

> [The United States] have been given greater opportunity to make good on our commitment to uphold standards of human dignity and liberty .... [N]o country is exempt from scrutiny, and all countries benefit from constant striving to identify their weaknesses and improve their performance .... [T]he Reports serve as a gauge for our international human rights efforts, pointing to areas of progress and drawing our attention to new and continuing challenges.
>
> In a world marching toward democracy and respect for human rights, the United States is a leader, a partner and a contributor. We have taken this responsibility with a deep and abiding belief that human rights are universal. They are not grounded exclusively in American or western values. But their protection worldwide serves a core U.S. national interest.

The State Department Report identified objectionable practices in a variety of countries including, for example, patterns of abuse of prisoners in Saudi Arabia by such means as "suspension from bars by handcuffs, and threats against family members, ... [being] forced constantly to lie on hard floors [and] deprived of sleep ...." Other reports have criticized hooding and stripping prisoners naked.

230. (U//FOUO) In June 2003, President Bush issued a statement in observance of "United Nations International Day in Support of Victims of Torture." The statement said in part:

> The United States declares its strong solidarity with torture victims across the world. Torture anywhere is an affront to human dignity everywhere. We are committed to building a world where human rights are respected and protected by the rule of law.

> Freedom from torture is an inalienable human right . . . . Yet torture continues to be practiced around the world by rogue regimes whose cruel methods match their determination to crush the human spirit . . . .
>
> Notorious human rights abusers . . . have sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors . . . .
>
> The United States is committed to the worldwide elimination of torture and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment . . . .

Concerns Over Participation in the CTC Program

231. (S//NF) During the course of this Review, a number of Agency officers expressed unsolicited concern about the possibility of recrimination or legal action resulting from their participation in the CTC Program. A number of officers expressed concern that a human rights group might pursue them for activities [redacted] Additionally, they feared that the Agency would not stand behind them if this occurred.

232. (S//NF) One officer expressed concern that one day, Agency officers will wind up on some "wanted list" to appear before the World Court for war crimes stemming from activities [redacted] Another said, "Ten years from now we're going to be sorry we're doing this . . . [but] it has to be done." He expressed concern that the CTC Program will be exposed in the news media and cited particular concern about the possibility of being named in a leak.

233. [redacted]

[redacted]

234. [redacted]

235. [redacted]

ENDGAME

236. [redacted]

[redacted]

237. (TS [redacted] The number of detainees in CIA custody is relatively small by comparison with those in U.S. military custody. Nevertheless, the Agency, like the military, has an interest in the disposition of detainees and particular interest in those who, if not kept in isolation, would likely divulge information about the circumstances of their detention.

238. [redacted]

239. [redacted]

82 [redacted]

240. [redacted]

241. [redacted]

242. [redacted]

243. [redacted]

244. [redacted]

[redacted]

245. (TS) [redacted] Policymakers have given consideration to prosecution as a viable possibility, at least for certain detainees. To date, however, no decision has been made to proceed with this option.

246. [redacted]

247. [redacted]

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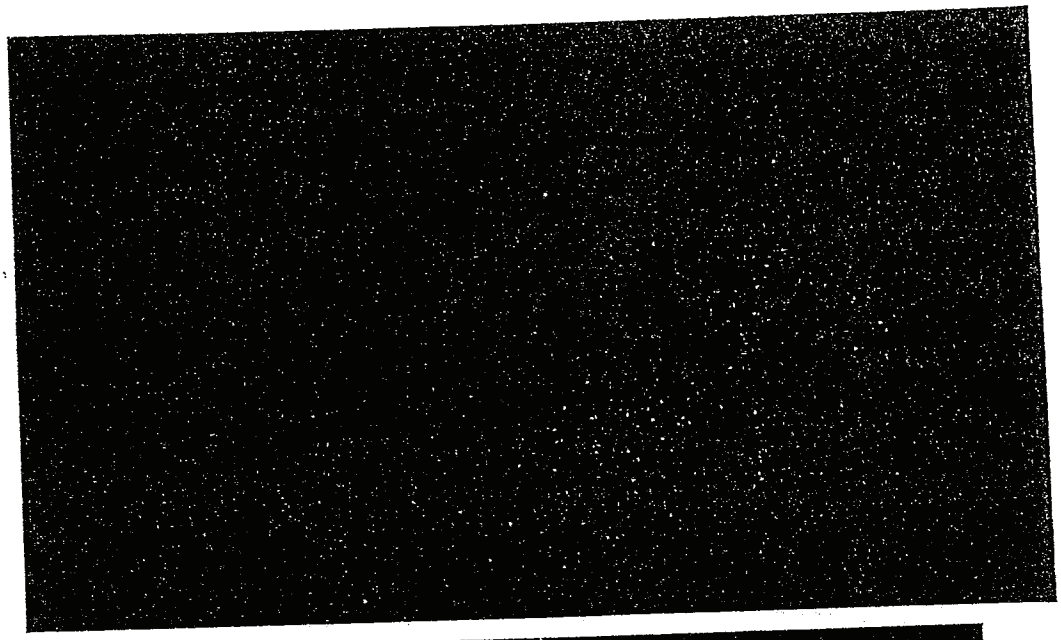
83 (U//FOUO) Memorandum for the Record, dated [redacted] August 2005, re closed meetings with the SSCI.



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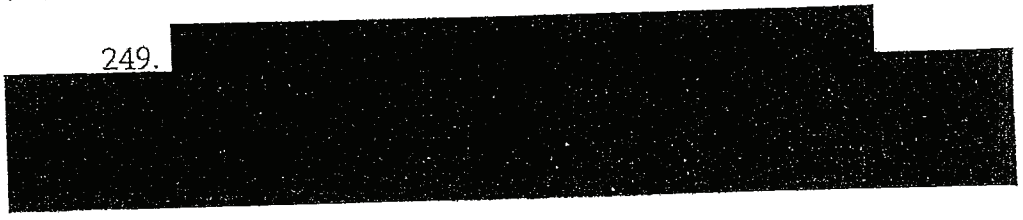


CONCLUSIONS

250. (TS/[redacted]) The Agency's detention and interrogation of terrorists has provided intelligence that has enabled the identification and apprehension of other terrorists and warned of terrorist plots planned for the United States and around the world. The CTC Detention and Interrogation Program has resulted in the issuance of thousands of individual intelligence reports and analytic products supporting the counterterrorism efforts of U.S. policymakers and military commanders. The effectiveness of particular interrogation techniques in eliciting information that might not otherwise have been obtained cannot be so easily measured, however.

251. (TS/[redacted]) After 11 September 2001, numerous Agency components and individuals invested immense time and effort to implement the CTC Program quickly, effectively, and within the law. The work of the Directorate of Operations, Counterterrorist Center (CTC), Office of General Counsel (OGC), Office of Medical Services (OMS), Office of Technical Service (OTS) [redacted] has been especially notable. In effect, they began with almost no foundation, as the Agency had discontinued virtually all involvement in interrogations after encountering difficult issues with earlier interrogation programs in Central America and the Near East. Inevitably, there also have been some problems with current activities.

252. (S//NF) OGC worked closely with DoJ to determine the legality of the measures that came to be known as enhanced interrogation techniques (EITs). OGC also consulted with White House and National Security Council officials regarding the proposed techniques. Those efforts and the resulting DoJ legal opinion of 1 August 2002 are well documented. That legal opinion was based, in substantial part, on OTS analysis and the experience and expertise of non-Agency personnel and academics concerning whether long-term psychological effects would result from use of the proposed techniques.

253. (S//NF) The DoJ legal opinion upon which the Agency relies is based upon technical definitions of "severe" treatment and the "intent" of the interrogators, and consists of finely detailed analysis to buttress the conclusion that Agency officers properly carrying out EITs would not violate the Torture Convention's prohibition of torture, nor would they be subject to criminal prosecution under the U.S. torture statute. The opinion does not address the separate question of whether the application of standard or enhanced techniques by Agency officers is consistent with the undertaking, accepted conditionally by the United States regarding Article 16 of the Torture Convention, to prevent "cruel, inhuman or degrading treatment or punishment."

254. (TS[redacted]) Periodic efforts by the Agency to elicit reaffirmation of Administration policy and DoJ legal backing for the Agency's use of EITs—as they have actually been employed—have been well advised and successful. However, in this process, Agency officials have neither sought nor been provided a written statement of policy or a formal signed update of the DoJ legal opinion, including such important determinations as the meaning and applicability of Article 16 of the Torture Convention. In July 2003, the DCI and the General Counsel briefed senior Administration officials on the Agency's expanded use of EITs. At that time, the Attorney General affirmed that the Agency's conduct remained well within the scope of the 1 August 2002 DoJ legal opinion.

255. (TS[redacted]) A number of Agency officers of various grade levels who are involved with detention and interrogation activities are concerned that they may at some future date be vulnerable to legal action in the United States or abroad and that the U.S. Government will not stand behind them. Although the current detention and interrogation Program has been subject to DoJ legal review and Administration political approval, it diverges sharply from previous Agency policy and practice, rules that govern interrogations by U.S. military and law enforcement officers, statements of U.S. policy by the Department of State, and public

statements by very senior U.S. officials, including the President, as well as the policies expressed by Members of Congress, other Western governments, international organizations, and human rights groups. In addition, some Agency officers are aware of interrogation activities that were outside or beyond the scope of the written DoJ opinion. Officers are concerned that future public revelation of the CTC Program is inevitable and will seriously damage Agency officers' personal reputations, as well as the reputation and effectiveness of the Agency itself.

256. (TS/[redacted]) The Agency has generally provided good guidance and support to its officers who have been detaining and interrogating high value terrorists using EITs pursuant to [redacted] In particular, CTC did a commendable job in directing the interrogations of high value detainees at [redacted] At these foreign locations, Agency personnel—with one notable exception described in this Review—followed guidance and procedures and documented their activities well.

257. (TS/[redacted]) By distinction, the Agency—especially in the early months of the Program—failed to provide adequate staffing, guidance, and support to those involved with the detention and interrogation of detainees in [redacted]

258. (TS[redacted]) Unauthorized, improvised, inhumane, and undocumented detention and interrogation techniques were used [redacted] referred to the Department of Justice (DoJ) for potential prosecution. [redacted] incident will be the

subject of a separate Report of Investigation by the Office of Inspector General. [redacted] unauthorized techniques were used in the interrogation of an individual who died at Asadabad Base while under interrogation by an Agency contractor in June 2003. Agency officers did not normally conduct interrogations at that location [redacted] the Agency officers involved lacked timely and adequate guidance, training, experience, supervision, or authorization, and did not exercise sound judgment.

259. (TS [redacted]) The Agency failed to issue in a timely manner comprehensive written guidelines for detention and interrogation activities. Although ad hoc guidance was provided to many officers through cables and briefings in the early months of detention and interrogation activities, the DCI Confinement and Interrogation Guidelines were not issued until January 2003, several months after initiation of interrogation activity and after many of the unauthorized activities had taken place. [redacted]

260. (TS [redacted]) Such written guidance as does exist to address detentions and interrogations undertaken by Agency officers [redacted] is inadequate. The Directorate of Operations Handbook contains a single paragraph that is intended to guide officers [redacted] Neither this dated guidance nor general Agency guidelines on routine intelligence collection is adequate to instruct and protect Agency officers involved in contemporary interrogation activities. [redacted]

261. (TS [redacted]) During the interrogations of two detainees, the waterboard was used in a manner inconsistent with the written DoJ legal opinion of 1 August 2002. DoJ had stipulated that

its advice was based upon certain facts that the Agency had submitted to DoJ, observing, for example, that "... you (the Agency) have also orally informed us that although some of these techniques may be used with more than once [*sic*], that repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions." One key Al-Qa'ida terrorist was subjected to the waterboard at least 183 times [redacted] and was denied sleep for a period of 180 hours. In this and another instance, the technique of application and volume of water used differed from the DoJ opinion.

262. (TS/[redacted]) OMS provided comprehensive medical attention to detainees [redacted] where EITs were employed with high value detainees, [redacted] OMS did not issue formal medical guidelines until April 2003. Per the advice of CTC/Legal, the OMS Guidelines were then issued as "draft" and remain so even after being re-issued in September 2003.

263: [redacted]

264. (TS/[redacted]) Agency officers report that reliance on analytical assessments that were unsupported by credible intelligence may have resulted in the application of EITs without justification. Some participants in the Program, particularly field interrogators, judge that CTC assessments to the effect that detainees are withholding information are not always supported by an objective

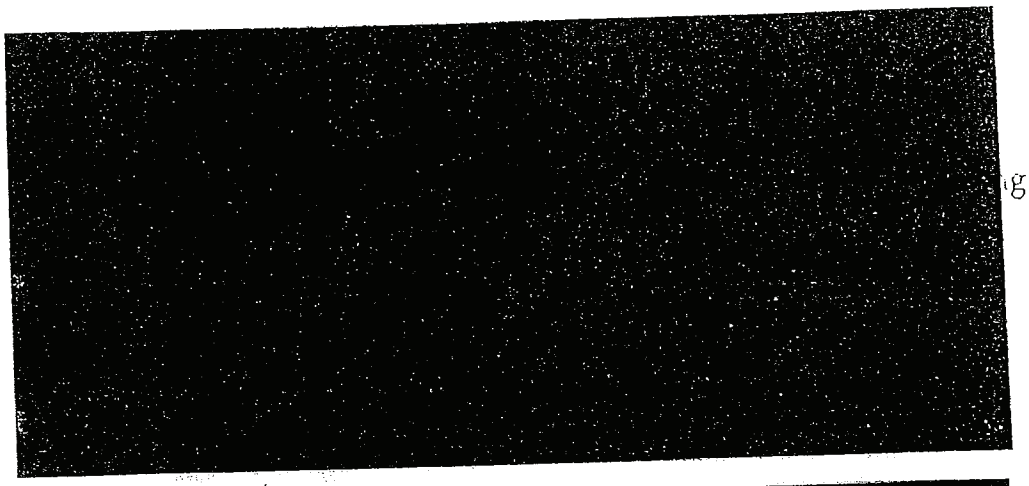
evaluation of available information and the evaluation of the interrogators but are too heavily based, instead, on presumptions of what the individual might or should know.

265. [redacted]

266. (TS [redacted]) The Agency faces potentially serious long-term political and legal challenges as a result of the CTC Detention and Interrogation Program, particularly its use of EITs and the inability of the U.S. Government to decide what it will ultimately do with terrorists detained by the Agency.

RECOMMENDATIONS

1. [redacted]



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2.

3.

[redacted]

4. [redacted]

5. [redacted]

6. [redacted]

7. [redacted]

[redacted]

8. [redacted]

9. [redacted]

10. [redacted]

Appendix A

PROCEDURES AND RESOURCES

1. (TS [redacted]) A team, led by the Deputy Inspector General, and comprising the Assistant Inspector General for Investigations, the Counsel to the Inspector General, a senior Investigations Staff Manager, three Investigators, two Inspectors, an Auditor, a Research Assistant, and a Secretary participated in this Review.

2. (TS [redacted]) OIG tasked relevant components for all information regarding the treatment and interrogation of all individuals detained by or on behalf of CIA after 9/11. Agency components provided OIG with over 38,000 pages of documents. OIG conducted over 100 interviews with individuals who possessed potentially relevant information. We interviewed senior Agency management officials, including the DCI, the Deputy Director of Central Intelligence, the Executive Director, the General Counsel, and the Deputy Director for Operations. As new information developed, OIG re-interviewed several individuals.

3. (TS [redacted]) OIG personnel made site visits to the [redacted] interrogation facilities. OIG personnel also visited [redacted] to review 92 videotapes of interrogations of Abu Zubaydah [redacted].

Appendix B

CHRONOLOGY: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES

Date	Events in Washington	[redacted]	[redacted]
2001 Sept	[redacted] CIA/OGC begins research on interrogations issues.		
2001 Nov		[redacted]	
2002 Mar			Abu Zubaydah captured in Pakistan on 27 March 02 [redacted]
2002 Apr			[redacted]
2002 Jul	CIA briefs selected policy makers on EITs in summer 2002. CIA seeks legal opinion from DoJ for use of EITs on Abu Zubaydah.		
2002 Aug	DoJ concludes that use of 10 EITs, as described by CIA, would not violate U.S. law.		Agency initiates use of EITs on Abu Zubaydah.
2002 Sept		[redacted]	
2002 Fall	CIA briefs leadership of Congressional oversight committees.		
2002 Nov	CTC implements training program for officers assigned to the Interrogation Program.	[redacted]	Al-Nashiri captured [redacted] EITs employed on Al-Nashiri.
2002 Dec	[redacted]		[redacted] Unauthorized interrogation techniques used on Al-Nashiri in late December or early January.
2003 Jan	OIG initiates review of interrogation activities. DCI issues Confinement and Interrogation Guidelines.		
2003 Feb-Mar	CIA briefs leadership of Congressional oversight committees.		
2003 Mar		Khalid Shaykh Muhammad captured [redacted]	[redacted] EITs employed on Khalid Shaykh Muhammad.
2003 Apr	OMS disseminates draft guidelines for treatment of detainees.		
2003 Jun	DDO Capture Guidelines require that subject pose a continuing serious threat.	Abdul Wali dies after being interrogated by CIA [redacted]	
2003 Jul	Attorney General reaffirms legality.	Teacher assaulted [redacted]	[redacted]
2003 Sep	OMS updates guidelines for detainee treatment.		

[redacted]

Appendix C

TOP SECRET

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

August 1, 2002

Memorandum for John Rizzo
Acting General Counsel of the Central Intelligence Agency

Interrogation of al Qaeda Operative

You have asked for this Office's views on whether certain proposed conduct would violate the prohibition against torture found at Section 2340A of title 18 of the United States Code. You have asked for this advice in the course of conducting interrogations of Abu Zubaydah. As we understand it, Zubaydah is one of the highest ranking members of the al Qaeda terrorist organization, with which the United States is currently engaged in an international armed conflict following the attacks on the World Trade Center and the Pentagon on September 11, 2001. This letter memorializes our previous oral advice, given on July 24, 2002 and July 26, 2002, that the proposed conduct would not violate this prohibition.

I.

Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here, and this opinion is limited to these facts. If these facts were to change, this advice would not necessarily apply. Zubaydah is currently being held by the United States. The interrogation team is certain that he has additional information that he refuses to divulge. Specifically, he is withholding information regarding terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas. Zubaydah has become accustomed to a certain level of treatment and displays no signs of willingness to disclose further information. Moreover, your intelligence indicates that there is currently a level of "chatter" equal to that which preceded the September 11 attacks. In light of the information you believe Zubaydah has and the high level of threat you believe now exists, you wish to move the interrogations into what you have described as an "increased pressure phase."

As part of this increased pressure phase, Zubaydah will have contact only with a new interrogation specialist, whom he has not met previously, and the Survival, Evasion, Resistance, Escape ("SERE") training psychologist who has been involved with the interrogations since they began. This phase will likely last no more than several days but could last up to thirty days. In this phase, you would like to employ ten techniques that you believe will dislocate his

expectations regarding the treatment he believes he will receive and encourage him to disclose the crucial information mentioned above. These ten techniques are: (1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard. You have informed us that the use of these techniques would be on an as-needed basis and that not all of these techniques will necessarily be used. The interrogation team would use these techniques in some combination to convince Zubaydah that the only way he can influence his surrounding environment is through cooperation. You have, however, informed us that you expect these techniques to be used in some sort of escalating fashion, culminating with the waterboard, though not necessarily ending with this technique. Moreover, you have also orally informed us that although some of these techniques may be used with more than once, that repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions. You have also informed us that Zabaydah sustained a wound during his capture, which is being treated.

Based on the facts you have given us, we understand each of these techniques to be as follows. The attention grasp consists of grasping the individual with both hands, one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the individual is drawn toward the interrogator.

For walling, a flexible false wall will be constructed. The individual is placed with his heels touching the wall. The interrogator pulls the individual forward and then quickly and firmly pushes the individual into the wall. It is the individual's shoulder blades that hit the wall. During this motion, the head and neck are supported with a rolled hood or towel that provides a c-collar effect to help prevent whiplash. To further reduce the probability of injury, the individual is allowed to rebound from the flexible wall. You have orally informed us that the false wall is in part constructed to create a loud sound when the individual hits it, which will further shock or surprise in the individual. In part, the idea is to create a sound that will make the impact seem far worse than it is and that will be far worse than any injury that might result from the action.

The facial hold is used to hold the head immobile. One open palm is placed on either side of the individual's face. The fingertips are kept well away from the individual's eyes.

With the facial slap or insult slap, the interrogator slaps the individual's face with fingers slightly spread. The hand makes contact with the area directly between the tip of the individual's chin and the bottom of the corresponding earlobe. The interrogator invades the individual's personal space. The goal of the facial slap is not to inflict physical pain that is severe or lasting. Instead, the purpose of the facial slap is to induce shock, surprise, and/or humiliation.

Cramped confinement involves the placement of the individual in a confined space, the dimensions of which restrict the individual's movement. The confined space is usually dark.

The duration of confinement varies based upon the size of the container. For the larger confined space, the individual can stand up or sit down; the smaller space is large enough for the subject to sit down. Confinement in the larger space can last up to eighteen hours; for the smaller space, confinement lasts for no more than two hours.

Wall standing is used to induce muscle fatigue. The individual stands about four to five feet from a wall, with his feet spread approximately to shoulder width. His arms are stretched out in front of him, with his fingers resting on the wall. His fingers support all of his body weight. The individual is not permitted to move or reposition his hands or feet.

A variety of stress positions may be used. You have informed us that these positions are not designed to produce the pain associated with contortions or twisting of the body. Rather, somewhat like walling, they are designed to produce the physical discomfort associated with muscle fatigue. Two particular stress positions are likely to be used on Zubaydah: (1) sitting on the floor with legs extended straight out in front of him with his arms raised above his head; and (2) kneeling on the floor while leaning back at a 45 degree angle. You have also orally informed us that through observing Zubaydah in captivity, you have noted that he appears to be quite flexible despite his wound.

Sleep deprivation may be used. You have indicated that your purpose in using this technique is to reduce the individual's ability to think on his feet and, through the discomfort associated with lack of sleep, to motivate him to cooperate. The effect of such sleep deprivation will generally remit after one or two nights of uninterrupted sleep. You have informed us that your research has revealed that, in rare instances, some individuals who are already predisposed to psychological problems may experience abnormal reactions to sleep deprivation. Even in those cases, however, reactions abate after the individual is permitted to sleep. Moreover, personnel with medical training are available to and will intervene in the unlikely event of an abnormal reaction. You have orally informed us that you would not deprive Zubaydah of sleep for more than eleven days at a time and that you have previously kept him awake for 72 hours, from which no mental or physical harm resulted.

You would like to place Zubaydah in a cramped confinement box with an insect. You have informed us that he appears to have a fear of insects. In particular, you would like to tell Zubaydah that you intend to place a stinging insect into the box with him. You would, however, place a harmless insect in the box. You have orally informed us that you would in fact place a harmless insect such as a caterpillar in the box with him. [redacted]

Finally, you would like to use a technique called the "waterboard." In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water

is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning. The individual does not breathe any water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated. The water is usually applied from a canteen cup or small watering can with a spout. You have orally informed us that this procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning. You have also orally informed us that it is likely that this procedure would not last more than 20 minutes in any one application.

We also understand that a medical expert with SERE experience will be present throughout this phase and that the procedures will be stopped if deemed medically necessary to prevent severe mental or physical harm to Zubaydah. As mentioned above, Zubaydah suffered an injury during his capture. You have informed us that steps will be taken to ensure that this injury is not in any way exacerbated by the use of these methods and that adequate medical attention will be given to ensure that it will heal properly.

II.

In this part, we review the context within which these procedures will be applied. You have informed us that you have taken various steps to ascertain what effect, if any, these techniques would have on Zubaydah's mental health. These same techniques, with the exception of the insect in the cramped confined space, have been used and continue to be used on some members of our military personnel during their SERE training. Because of the use of these procedures in training our own military personnel to resist interrogations, you have consulted with various individuals who have extensive experience in the use of these techniques. You have done so in order to ensure that no prolonged mental harm would result from the use of these proposed procedures.

Through your consultation with various individuals responsible for such training, you have learned that these techniques have been used as elements of a course of conduct without any reported incident of prolonged mental harm. [redacted] of the SERE school, [redacted] has reported that, during the seven-year period that he spent in those positions, there were two requests from Congress for information concerning alleged injuries resulting from the training. One of these inquiries was prompted by the temporary physical injury a trainee sustained as result of being placed in a

confinement box. The other inquiry involved claims that the SERE training caused two individuals to engage in criminal behavior, namely, felony shoplifting and downloading child pornography onto a military computer. According to this official, these claims were found to be baseless. Moreover, he has indicated that during the three and a half years he spent as [redacted] of the SERE program, he trained 10,000 students. Of those students, only two dropped out of the training following the use of these techniques. Although on rare occasions some students temporarily postponed the remainder of their training and received psychological counseling, those students were able to finish the program without any indication of subsequent mental health effects.

You have informed us that you have consulted with [redacted] who has ten years of experience with SERE training [redacted] He stated that, during those ten years, insofar as he is aware, none of the individuals who completed the program suffered any adverse mental health effects. He informed you that there was one person who did not complete the training. That person experienced an adverse mental health reaction that lasted only two hours. After those two hours, the individual's symptoms spontaneously dissipated without requiring treatment or counseling and no other symptoms were ever reported by this individual. According to the information you have provided to us, this assessment of the use of these procedures includes the use of the waterboard.

Additionally, you received a memorandum from the [redacted] which you supplied to us. [redacted] has experience with the use of all of these procedures in a course of conduct, with the exception of the insect in the confinement box and the waterboard. This memorandum confirms that the use of these procedures has not resulted in any reported instances of prolonged mental harm, and very few instances of immediate and temporary adverse psychological responses to the training. [redacted] reported that a small minority of students have had temporary adverse psychological reactions during training. Of the 26,829 students trained from 1992 through 2001 in the Air Force SERE training, 4.3 percent of those students had contact with psychology services. Of those 4.3 percent, only 3.2 percent were pulled from the program for psychological reasons. Thus, out of the students trained overall, only 0.14 percent were pulled from the program for psychological reasons. Furthermore, although [redacted] indicated that surveys of students having completed this training are not done, he expressed confidence that the training did not cause any long-term psychological impact. He based his conclusion on the debriefing of students that is done after the training. More importantly, he based this assessment on the fact that although training is required to be extremely stressful in order to be effective, very few complaints have been made regarding the training. During his tenure, in which 10,000 students were trained, no congressional complaints have been made. While there was one Inspector General complaint, it was not due to psychological concerns. Moreover, he was aware of only one letter inquiring about the long-term impact of these techniques from an individual trained

over twenty years ago. He found that it was impossible to attribute this individual's symptoms to his training. [redacted] concluded that if there are any long-term psychological effects of the United States Air Force training using the procedures outlined above they "are certainly minimal."

With respect to the waterboard, you have also orally informed us that the Navy continues to use it in training. You have informed us that your on-site psychologists, who have extensive experience with the use of the waterboard in Navy training, have not encountered any significant long-term mental health consequences from its use. Your on-site psychologists have also indicated that JPRA has likewise not reported any significant long-term mental health consequences from the use of the waterboard. You have informed us that other services ceased use of the waterboard because it was so successful as an interrogation technique, but not because of any concerns over any harm, physical or mental, caused by it. It was also reported to be almost 100 percent effective in producing cooperation among the trainees. [redacted] also indicated that he had observed the use of the waterboard in Navy training some ten to twelve times. Each time it resulted in cooperation but it did not result in any physical harm to the student.

You have also reviewed the relevant literature and found no empirical data on the effect of these techniques, with the exception of sleep deprivation. With respect to sleep deprivation, you have informed us that is not uncommon for someone to be deprived of sleep for 72 hours and still perform excellently on visual-spatial motor tasks and short-term memory tests. Although some individuals may experience hallucinations, according to the literature you surveyed, those who experience such psychotic symptoms have almost always had such episodes prior to the sleep deprivation. You have indicated the studies of lengthy sleep deprivation showed no psychosis, loosening of thoughts, flattening of emotions, delusions, or paranoid ideas. In one case, even after eleven days of deprivation, no psychosis or permanent brain damaged occurred. In fact the individual reported feeling almost back to normal after one night's sleep. Further, based on the experiences with its use in military training (where it is induced for up to 48 hours), you found that rarely, if ever, will the individual suffer harm after the sleep deprivation is discontinued. Instead, the effects remit after a few good nights of sleep.

You have taken the additional step of consulting with U.S. interrogations experts, and other individuals with oversight over the SERE training process. None of these individuals was aware of any prolonged psychological effect caused by the use of any of the above techniques either separately or as a course of conduct. Moreover, you consulted with outside psychologists who reported that they were unaware of any cases where long-term problems have occurred as a result of these techniques.

Moreover, in consulting with a number of mental health experts, you have learned that the effect of any of these procedures will be dependant on the individual's personal history, cultural history and psychological tendencies. To that end, you have informed us that you have

completed a psychological assessment of Zubadyah. This assessment is based on interviews with Zubaydah, observations of him, and information collected from other sources such as intelligence and press reports. Our understanding of Zubaydah's psychological profile, which we set forth below, is based on that assessment.

According to this assessment, Zubaydah, though only 31, rose quickly from very low level mujahedin to third or fourth man in al Qaeda. He has served as Usama Bin Laden's senior lieutenant. In that capacity, he has managed a network of training camps. He has been instrumental in the training of operatives for al Qaeda, the Egyptian Islamic Jihad, and other terrorist elements inside Pakistan and Afghanistan. He acted as the Deputy Camp Commander for al Qaeda training camp in Afghanistan, personally approving entry and graduation of all trainees during 1999-2000. From 1996 until 1999, he approved all individuals going in and out of Afghanistan to the training camps. Further, no one went in and out of Peshawar, Pakistan without his knowledge and approval. He also acted as al Qaeda's coordinator of external contacts and foreign communications. Additionally, he has acted as al Qaeda's counter-intelligence officer and has been trusted to find spies within the organization.

Zubaydah has been involved in every major terrorist operation carried out by al Qaeda. He was a planner for the Millennium plot to attack U.S. and Israeli targets during the Millennium celebrations in Jordan. Two of the central figures in this plot who were arrested have identified Zubaydah as the supporter of their cell and the plot. He also served as a planner for the Paris Embassy plot in 2001. Moreover, he was one of the planners of the September 11 attacks. Prior to his capture, he was engaged in planning future terrorist attacks against U.S. interests.

Your psychological assessment indicates that it is believed Zubaydah wrote al Qaeda's manual on resistance techniques. You also believe that his experiences in al Qaeda make him well-acquainted with and well-versed in such techniques. As part of his role in al Qaeda, Zubaydah visited individuals in prison and helped them upon their release. Through this contact and activities with other al Qaeda mujahedin, you believe that he knows many stories of capture, interrogation, and resistance to such interrogation. Additionally, he has spoken with Ayman al-Zawahiri, and you believe it is likely that the two discussed Zawahiri's experiences as a prisoner of the Russians and the Egyptians.

Zubaydah stated during interviews that he thinks of any activity outside of jihad as "silly." He has indicated that his heart and mind are devoted to serving Allah and Islam through jihad and he has stated that he has no doubts or regrets about committing himself to jihad. Zubaydah believes that the global victory of Islam is inevitable. You have informed us that he continues to express his unabated desire to kill Americans and Jews.

Your psychological assessment describes his personality as follows. He is "a highly self-directed individual who prizes his independence." He has "narcissistic features," which are evidenced in the attention he pays to his personal appearance and his "obvious 'efforts' to

demonstrate that he is really a rather 'humble and regular guy.'" He is "somewhat compulsive" in how he organizes his environment and business. He is confident, self-assured, and possesses an air of authority. While he admits to at times wrestling with how to determine who is an "innocent," he has acknowledged celebrating the destruction of the World Trade Center. He is intelligent and intellectually curious. He displays "excellent self-discipline." The assessment describes him as a perfectionist, persistent, private, and highly capable in his social interactions. He is very guarded about opening up to others and your assessment repeatedly emphasizes that he tends not to trust others easily. He is also "quick to recognize and assess the moods and motivations of others." Furthermore, he is proud of his ability to lie and deceive others successfully. Through his deception he has, among other things, prevented the location of al Qaeda safehouses and even acquired a United Nations refugee identification card.

According to your reports, Zubaydah does not have any pre-existing mental conditions or problems that would make him likely to suffer prolonged mental harm from your proposed interrogation methods. Through reading his diaries and interviewing him, you have found no history of "mood disturbance or other psychiatric pathology[,]" "thought disorder[,] . . . enduring mood or mental health problems." He is in fact "remarkably resilient and confident that he can overcome adversity." When he encounters stress or low mood, this appears to last only for a short time. He deals with stress by assessing its source, evaluating the coping resources available to him, and then taking action. Your assessment notes that he is "generally self-sufficient and relies on his understanding and application of religious and psychological principles, intelligence and discipline to avoid and overcome problems." Moreover, you have found that he has a "reliable and durable support system" in his faith, "the blessings of religious leaders, and camaraderie of like-minded mujahedin brothers." During detention, Zubaydah has managed his mood, remaining at most points "circumspect, calm, controlled, and deliberate." He has maintained this demeanor during aggressive interrogations and reductions in sleep. You describe that in an initial confrontational incident, Zubaydah showed signs of sympathetic nervous system arousal, which you think was possibly fear. Although this incident led him to disclose intelligence information, he was able to quickly regain his composure, his air of confidence, and his "strong resolve" not to reveal any information.

Overall, you summarize his primary strengths as the following: ability to focus, goal-directed discipline, intelligence, emotional resilience, street savvy, ability to organize and manage people, keen observation skills, fluid adaptability (can anticipate and adapt under duress and with minimal resources), capacity to assess and exploit the needs of others, and ability to adjust goals to emerging opportunities.

You anticipate that he will draw upon his vast knowledge of interrogation techniques to cope with the interrogation. Your assessment indicates that Zubaydah may be willing to die to protect the most important information that he holds. Nonetheless, you are of the view that his belief that Islam will ultimately dominate the world and that this victory is inevitable may provide the chance that Zubaydah will give information and rationalize it solely as a temporary

setback. Additionally, you believe he may be willing to disclose some information, particularly information he deems to not be critical, but which may ultimately be useful to us when pieced together with other intelligence information you have gained.

III.

Section 2340A makes it a criminal offense for any person "outside of the United States [to] commit[] or attempt[] to commit torture." Section 2340(1) defines torture as:

> an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody of physical control.

18 U.S.C. § 2340(1). As we outlined in our opinion on standards of conduct under Section 2340A, a violation of 2340A requires a showing that: (1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant's custody or control; (4) the defendant specifically intended to inflict severe pain or suffering; and (5) that the acted inflicted severe pain or suffering. *See* Memorandum for John Rizzo, Acting General Counsel for the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* at 3 (August 1, 2002) ("Section 2340A Memorandum"). You have asked us to assume that Zubayadah is being held outside the United States, Zubayadah is within U.S. custody, and the interrogators are acting under the color of law. At issue is whether the last two elements would be met by the use of the proposed procedures, namely, whether those using these procedures would have the requisite mental state and whether these procedures would inflict severe pain or suffering within the meaning of the statute.

Severe Pain or Suffering. In order for pain or suffering to rise to the level of torture, the statute requires that it be severe. As we have previously explained, this reaches only extreme acts. *See id.* at 13. Nonetheless, drawing upon cases under the Torture Victim Protection Act (TVPA), which has a definition of torture that is similar to Section 2340's definition, we found that a single event of sufficiently intense pain may fall within this prohibition. *See id.* at 26. As a result, we have analyzed each of these techniques separately. In further drawing upon those cases, we also have found that courts tend to take a totality-of-the-circumstances approach and consider an entire course of conduct to determine whether torture has occurred. *See id.* at 27. Therefore, in addition to considering each technique separately, we consider them together as a course of conduct.

Section 2340 defines torture as the infliction of severe physical or mental pain or suffering. We will consider physical pain and mental pain separately. *See* 18 U.S.C. § 2340(1). With respect to *physical* pain, we previously concluded that "severe pain" within the meaning of

Section 2340 is pain that is difficult for the individual to endure and is of an intensity akin to the pain accompanying serious physical injury. *See* Section 2340A Memorandum at 6. Drawing upon the TVPA precedent, we have noted that examples of acts inflicting severe pain that typify torture are, among other things, severe beatings with weapons such as clubs, and the burning of prisoners. *See id.* at 24. We conclude below that none of the proposed techniques inflicts such pain.

The facial hold and the attention grasp involve no physical pain. In the absence of such pain it is obvious that they cannot be said to inflict severe physical pain or suffering. The stress positions and wall standing both may result in muscle fatigue. Each involves the sustained holding of a position. In wall standing, it will be holding a position in which all of the individual's body weight is placed on his finger tips. The stress positions will likely include sitting on the floor with legs extended straight out in front and arms raised above the head, and kneeling on the floor and leaning back at a 45 degree angle. Any pain associated with muscle fatigue is not of the intensity sufficient to amount to "severe physical pain or suffering" under the statute, nor, despite its discomfort, can it be said to be difficult to endure. Moreover, you have orally informed us that no stress position will be used that could interfere with the healing of Zubaydah's wound. Therefore, we conclude that these techniques involve discomfort that falls far below the threshold of severe physical pain.

Similarly, although the confinement boxes (both small and large) are physically uncomfortable because their size restricts movement, they are not so small as to require the individual to contort his body to sit (small box) or stand (large box). You have also orally informed us that despite his wound, Zubaydah remains quite flexible, which would substantially reduce any pain associated with being placed in the box. We have no information from the medical experts you have consulted that the limited duration for which the individual is kept in the boxes causes any substantial physical pain. As a result, we do not think the use of these boxes can be said to cause pain that is of the intensity associated with serious physical injury.

The use of one of these boxes with the introduction of an insect does not alter this assessment. As we understand it, no actually harmful insect will be placed in the box. Thus, though the introduction of an insect may produce trepidation in Zubaydah (which we discuss below), it certainly does not cause physical pain.

As for sleep deprivation, it is clear that depriving someone of sleep does not involve severe physical pain within the meaning of the statute. While sleep deprivation may involve some physical discomfort, such as the fatigue or the discomfort experienced in the difficulty of keeping one's eyes open, these effects remit after the individual is permitted to sleep. Based on the facts you have provided us, we are not aware of any evidence that sleep deprivation results in severe physical pain or suffering. As a result, its use does not violate Section 2340A.

Even those techniques that involve physical contact between the interrogator and the

individual do not result in severe pain. The facial slap and walling contain precautions to ensure that no pain even approaching this level results. The slap is delivered with fingers slightly spread, which you have explained to us is designed to be less painful than a closed-hand slap. The slap is also delivered to the fleshy part of the face, further reducing any risk of physical damage or serious pain. The facial slap does not produce pain that is difficult to endure. Likewise, walling involves quickly pulling the person forward and then thrusting him against a flexible false wall. You have informed us that the sound of hitting the wall will actually be far worse than any possible injury to the individual. The use of the rolled towel around the neck also reduces any risk of injury. While it may hurt to be pushed against the wall, any pain experienced is not of the intensity associated with serious physical injury.

As we understand it, when the waterboard is used, the subject's body responds as if the subject were drowning—even though the subject may be well aware that he is in fact not drowning. You have informed us that this procedure does not inflict actual physical harm. Thus, although the subject may experience the fear or panic associated with the feeling of drowning, the waterboard does not inflict physical pain. As we explained in the Section 2340A Memorandum, "pain and suffering" as used in Section 2340 is best understood as a single concept, not distinct concepts of "pain" as distinguished from "suffering." *See* Section 2340A Memorandum at 6 n.3. The waterboard, which inflicts no pain or actual harm whatsoever, does not, in our view inflict "severe pain or suffering." Even if one were to parse the statute more finely to attempt to treat "suffering" as a distinct concept, the waterboard could not be said to inflict severe suffering. The waterboard is simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering.

Finally, as we discussed above, you have informed us that in determining which procedures to use and how you will use them, you have selected techniques that will not harm Zubaydah's wound. You have also indicated that numerous steps will be taken to ensure that none of these procedures in any way interferes with the proper healing of Zubaydah's wound. You have also indicated that, should it appear at any time that Zubaydah is experiencing severe pain or suffering, the medical personnel on hand will stop the use of any technique.

Even when all of these methods are considered combined in an overall course of conduct, they still would not inflict severe physical pain or suffering. As discussed above, a number of these acts result in no physical pain, others produce only physical discomfort. You have indicated that these acts will not be used with substantial repetition, so that there is no possibility that severe physical pain could arise from such repetition. Accordingly, we conclude that these acts neither separately nor as part of a course of conduct would inflict severe physical pain or suffering within the meaning of the statute.

We next consider whether the use of these techniques would inflict severe *mental* pain or suffering within the meaning of Section 2340. Section 2340 defines severe mental pain or suffering as "the prolonged mental harm caused by or resulting from" one of several predicate

acts. 18 U.S.C. § 2340(2). Those predicate acts are: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that any of the preceding acts will be done to another person. *See* 18 U.S.C. § 2340(2)(A)–(D). As we have explained, this list of predicate acts is exclusive. *See* Section 2340A Memorandum at 8. No other acts can support a charge under Section 2340A based on the infliction of severe mental pain or suffering. *See id.* Thus, if the methods that you have described do not either in and of themselves constitute one of these acts or as a course of conduct fulfill the predicate act requirement, the prohibition has not been violated. *See id.* Before addressing these techniques, we note that it is plain that none of these procedures involves a threat to any third party, the use of any kind of drugs, or for the reasons described above, the infliction of severe physical pain. Thus, the question is whether any of these acts, separately or as a course of conduct, constitutes a threat of severe physical pain or suffering, a procedure designed to disrupt profoundly the senses, or a threat of imminent death. As we previously explained, whether an action constitutes a threat must be assessed from the standpoint of a reasonable person in the subject's position. *See id.* at 9.

No argument can be made that the attention grasp or the facial hold constitute threats of imminent death or are procedures designed to disrupt profoundly the senses or personality. In general the grasp and the facial hold will startle the subject, produce fear, or even insult him. As you have informed us, the use of these techniques is not accompanied by a specific verbal threat of severe physical pain or suffering. To the extent that these techniques could be considered a threat of severe physical pain or suffering, such a threat would have to be inferred from the acts themselves. Because these actions themselves involve no pain, neither could be interpreted by a reasonable person in Zubaydah's position to constitute a threat of severe pain or suffering. Accordingly, these two techniques are not predicate acts within the meaning of Section 2340.

The facial slap likewise falls outside the set of predicate acts. It plainly is not a threat of imminent death, under Section 2340(2)(C), or a procedure designed to disrupt profoundly the senses or personality, under Section 2340(2)(B). Though it may hurt, as discussed above, the effect is one of smarting or stinging and surprise or humiliation, but not severe pain. Nor does it alone constitute a threat of severe pain or suffering, under Section 2340(2)(A). Like the facial hold and the attention grasp, the use of this slap is not accompanied by a specific verbal threat of further escalating violence. Additionally, you have informed us that in one use this technique will typically involve at most two slaps. Certainly, the use of this slap may dislodge any expectation that Zubaydah had that he would not be touched in a physically aggressive manner. Nonetheless, this alteration in his expectations could hardly be construed by a reasonable person in his situation to be tantamount to a threat of severe physical pain or suffering. At most, this technique suggests that the circumstances of his confinement and interrogation have changed. Therefore, the facial slap is not within the statute's exclusive list of predicate acts.

Walling plainly is not a procedure calculated to disrupt profoundly the senses or personality. While walling involves what might be characterized as rough handling, it does not involve the threat of imminent death or, as discussed above, the infliction of severe physical pain. Moreover, once again we understand that use of this technique will not be accompanied by any specific verbal threat that violence will ensue absent cooperation. Thus, like the facial slap, walling can only constitute a threat of severe physical pain if a reasonable person would infer such a threat from the use of the technique itself. Walling does not in and of itself inflict severe pain or suffering. Like the facial slap, walling may alter the subject's expectation as to the treatment he believes he will receive. Nonetheless, the character of the action falls so far short of inflicting severe pain or suffering within the meaning of the statute that even if he inferred that greater aggressiveness was to follow, the type of actions that could be reasonably be anticipated would still fall below anything sufficient to inflict severe physical pain or suffering under the statute. Thus, we conclude that this technique falls outside the proscribed predicate acts.

Like walling, stress positions and wall-standing are not procedures calculated to disrupt profoundly the senses, nor are they threats of imminent death. These procedures, as discussed above, involve the use of muscle fatigue to encourage cooperation and do not themselves constitute the infliction of severe physical pain or suffering. Moreover, there is no aspect of violence to either technique that remotely suggests future severe pain or suffering from which such a threat of future harm could be inferred. They simply involve forcing the subject to remain in uncomfortable positions. While these acts may indicate to the subject that he may be placed in these positions again if he does not disclose information, the use of these techniques would not suggest to a reasonable person in the subject's position that he is being threatened with severe pain or suffering. Accordingly, we conclude that these two procedures do not constitute any of the predicate acts set forth in Section 2340(2).

As with the other techniques discussed so far, cramped confinement is not a threat of imminent death. It may be argued that, focusing in part on the fact that the boxes will be without light, placement in these boxes would constitute a procedure designed to disrupt profoundly the senses. As we explained in our recent opinion, however, to "disrupt profoundly the senses" a technique must produce an extreme effect in the subject. *See* Section 2340A Memorandum at 10–12. We have previously concluded that this requires that the procedure cause substantial interference with the individual's cognitive abilities or fundamentally alter his personality. *See id.* at 11. Moreover, the statute requires that such procedures must be calculated to produce this effect. *See id.* at 10; 18 U.S.C. § 2340(2)(B).

With respect to the small confinement box, you have informed us that he would spend at most two hours in this box. You have informed us that your purpose in using these boxes is not to interfere with his senses or his personality, but to cause him physical discomfort that will encourage him to disclose critical information. Moreover, your imposition of time limitations on the use of either of the boxes also indicates that the use of these boxes is not designed or calculated to disrupt profoundly the senses or personality. For the larger box, in which he can

both stand and sit, he may be placed in this box for up to eighteen hours at a time, while you have informed us that he will never spend more than an hour at time in the smaller box. These time limits further ensure that no profound disruption of the senses or personality, were it even possible, would result. As such, the use of the confinement boxes does not constitute a procedure calculated to disrupt profoundly the senses or personality.

Nor does the use of the boxes threaten Zubaydah with severe physical pain or suffering. While additional time spent in the boxes may be threatened, their use is not accompanied by any express threats of severe physical pain or suffering. Like the stress positions and walling, placement in the boxes is physically uncomfortable but any such discomfort does not rise to the level of severe physical pain or suffering. Accordingly, a reasonable person in the subject's position would not infer from the use of this technique that severe physical pain is the next step in his interrogator's treatment of him. Therefore, we conclude that the use of the confinement boxes does not fall within the statute's required predicate acts.

In addition to using the confinement boxes alone, you also would like to introduce an insect into one of the boxes with Zubaydah. As we understand it, you plan to inform Zubaydah that you are going to place a stinging insect into the box, but you will actually place a harmless insect in the box, such as a caterpillar. If you do so, to ensure that you are outside the predicate act requirement, you must inform him that the insects will not have a sting that would produce death or severe pain. If, however, you were to place the insect in the box without informing him that you are doing so, then, in order to not commit a predicate act, you should not affirmatively lead him to believe that any insect is present which has a sting that could produce severe pain or suffering or even cause his death. [redacted] so long as you take either of the approaches we have described, the insect's placement in the box would not constitute a threat of severe physical pain or suffering to a reasonable person in his position. An individual placed in a box, even an individual with a fear of insects, would not reasonably feel threatened with severe physical pain or suffering if a caterpillar was placed in the box. Further, you have informed us that you are not aware that Zubaydah has any allergies to insects, and you have not informed us of any other factors that would cause a reasonable person in that same situation to believe that an unknown insect would cause him severe physical pain or death. Thus, we conclude that the placement of the insect in the confinement box with Zubaydah would not constitute a predicate act.

Sleep deprivation also clearly does not involve a threat of imminent death. Although it produces physical discomfort, it cannot be said to constitute a threat of severe physical pain or suffering from the perspective of a reasonable person in Zubaydah's position. Nor could sleep deprivation constitute a procedure calculated to disrupt profoundly the senses, so long as sleep deprivation (as you have informed us is your intent) is used for limited periods, before hallucinations or other profound disruptions of the senses would occur. To be sure, sleep deprivation may reduce the subject's ability to think on his feet. Indeed, you indicate that this is

the intended result. His mere reduced ability to evade your questions and resist answering does not, however, rise to the level of disruption required by the statute. As we explained above, a disruption within the meaning of the statute is an extreme one, substantially interfering with an individual's cognitive abilities, for example, inducing hallucinations, or driving him to engage in uncharacteristic self-destructive behavior. *See infra* 13; Section 2340A Memorandum at 11. Therefore, the limited use of sleep deprivation does not constitute one of the required predicate acts.

We find that the use of the waterboard constitutes a threat of imminent death. As you have explained the waterboard procedure to us, it creates in the subject the uncontrollable physiological sensation that the subject is drowning. Although the procedure will be monitored by personnel with medical training and extensive SERE school experience with this procedure who will ensure the subject's mental and physical safety, the subject is not aware of any of these precautions. From the vantage point of any reasonable person undergoing this procedure in such circumstances, he would feel as if he is drowning at very moment of the procedure due to the uncontrollable physiological sensation he is experiencing. Thus, this procedure cannot be viewed as too uncertain to satisfy the imminence requirement. Accordingly, it constitutes a threat of imminent death and fulfills the predicate act requirement under the statute.

Although the waterboard constitutes a threat of imminent death, prolonged mental harm must nonetheless result to violate the statutory prohibition on infliction of severe mental pain or suffering. *See* Section 2340A Memorandum at 7. We have previously concluded that prolonged mental harm is mental harm of some lasting duration, e.g., mental harm lasting months or years. *See id.* Prolonged mental harm is not simply the stress experienced in, for example, an interrogation by state police. *See id.* Based on your research into the use of these methods at the SERE school and consultation with others with expertise in the field of psychology and interrogation, you do not anticipate that any prolonged mental harm would result from the use of the waterboard. Indeed, you have advised us that the relief is almost immediate when the cloth is removed from the nose and mouth. In the absence of prolonged mental harm, no severe mental pain or suffering would have been inflicted, and the use of these procedures would not constitute torture within the meaning of the statute.

When these acts are considered as a course of conduct, we are unsure whether these acts may constitute a threat of severe physical pain or suffering. You have indicated to us that you have not determined either the order or the precise timing for implementing these procedures. It is conceivable that these procedures could be used in a course of escalating conduct, moving incrementally and rapidly from least physically intrusive, e.g., facial hold, to the most physical contact, e.g., walling or the waterboard. As we understand it, based on his treatment so far, Zubaydah has come to expect that no physical harm will be done to him. By using these techniques in increasing intensity and in rapid succession, the goal would be to dislodge this expectation. Based on the facts you have provided to us, we cannot say definitively that the entire course of conduct would cause a reasonable person to believe that he is being threatened

with severe pain or suffering within the meaning of section 2340. On the other hand, however, under certain circumstances—for example, rapid escalation in the use of these techniques culminating in the waterboard (which we acknowledge constitutes a threat of imminent death) accompanied by verbal or other suggestions that physical violence will follow—might cause a reasonable person to believe that they are faced with such a threat. Without more information, we are uncertain whether the course of conduct would constitute a predicate act under Section 2340(2).

Even if the course of conduct were thought to pose a threat of physical pain or suffering, it would nevertheless—on the facts before us—not constitute a violation of Section 2340A. Not only must the course of conduct be a predicate act, but also those who use the procedure must actually cause prolonged mental harm. Based on the information that you have provided to us, indicating that no evidence exists that this course of conduct produces any prolonged mental harm, we conclude that a course of conduct using these procedures and culminating in the waterboard would not violate Section 2340A.

Specific Intent. To violate the statute, an individual must have the specific intent to inflict severe pain or suffering. Because specific intent is an element of the offense, the absence of specific intent negates the charge of torture. As we previously opined, to have the required specific intent, an individual must expressly intend to cause such severe pain or suffering. *See* Section 2340A Memorandum at 3 *citing Carter v. United States*, 530 U.S. 255, 267 (2000). We have further found that if a defendant acts with the good faith belief that his actions will not cause such suffering, he has not acted with specific intent. *See id.* at 4 *citing South Atl. Limtd. Ptrshp. of Tenn. v. Riese*, 218 F.3d 518, 531 (4th Cir. 2002). A defendant acts in good faith when he has an honest belief that his actions will not result in severe pain or suffering. *See id. citing Cheek v. United States*, 498 U.S. 192, 202 (1991). Although an honest belief need not be reasonable, such a belief is easier to establish where there is a reasonable basis for it. *See id.* at 5. Good faith may be established by, among other things, the reliance on the advice of experts. *See id.* at 8.

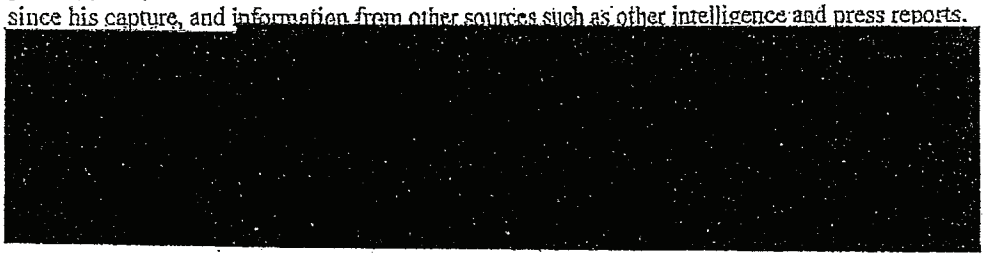
Based on the information you have provided us, we believe that those carrying out these procedures would not have the specific intent to inflict severe physical pain or suffering. The objective of these techniques is not to cause severe physical pain. First, the constant presence of personnel with medical training who have the authority to stop the interrogation should it appear it is medically necessary indicates that it is not your intent to cause severe physical pain. The personnel on site have extensive experience with these specific techniques as they are used in SERE school training. Second, you have informed us that you are taking steps to ensure that Zubaydah's injury is not worsened or his recovery impeded by the use of these techniques.

Third, as you have described them to us, the proposed techniques involving physical contact between the interrogator and Zubaydah actually contain precautions to prevent any serious physical harm to Zubaydah. In "walling," a rolled hood or towel will be used to prevent

whiplash and he will be permitted to rebound from the flexible wall to reduce the likelihood of injury. Similarly, in the "facial hold," the fingertips will be kept well away from the his eyes to ensure that there is no injury to them. The purpose of that facial hold is not injure him but to hold the head immobile. Additionally, while the stress positions and wall standing will undoubtedly result in physical discomfort by tiring the muscles, it is obvious that these positions are not intended to produce the kind of extreme pain required by the statute.

Furthermore, no specific intent to cause severe mental pain or suffering appears to be present. As we explained in our recent opinion, an individual must have the specific intent to cause prolonged mental harm in order to have the specific intent to inflict severe mental pain or suffering. *See* Section 2340A Memorandum at 8. Prolonged mental harm is substantial mental harm of a sustained duration, e.g., harm lasting months or even years after the acts were inflicted upon the prisoner. As we indicated above, a good faith belief can negate this element. Accordingly, if an individual conducting the interrogation has a good faith belief that the procedures he will apply, separately or together, would not result in prolonged mental harm, that individual lacks the requisite specific intent. This conclusion concerning specific intent is further bolstered by the due diligence that has been conducted concerning the effects of these interrogation procedures.

The mental health experts that you have consulted have indicated that the psychological impact of a course of conduct must be assessed with reference to the subject's psychological history and current mental health status. The healthier the individual, the less likely that the use of any one procedure or set of procedures as a course of conduct will result in prolonged mental harm. A comprehensive psychological profile of Zubaydah has been created. In creating this profile, your personnel drew on direct interviews, Zubaydah's diaries, observation of Zubaydah since his capture, and information from other sources such as other intelligence and press reports.



As we indicated above, you have informed us that your proposed interrogation methods have been used and continue to be used in SERE training. It is our understanding that these techniques are not used one by one in isolation, but as a full course of conduct to resemble a real interrogation. Thus, the information derived from SERE training bears both upon the impact of the use of the individual techniques and upon their use as a course of conduct. You have found that the use of these methods together or separately, including the use of the waterboard, has not resulted in any negative long-term mental health consequences. The continued use of these methods without mental health consequences to the trainees indicates that it is highly improbable

that such consequences would result here. Because you have conducted the due diligence to determine that these procedures, either alone or in combination, do not produce prolonged mental harm, we believe that you do not meet the specific intent requirement necessary to violate Section 2340A.

You have also informed us that you have reviewed the relevant literature on the subject, and consulted with outside psychologists. Your review of the literature uncovered no empirical data on the use of these procedures, with the exception of sleep deprivation for which no long-term health consequences resulted. The outside psychologists with whom you consulted indicated were unaware of any cases where long-term problems have occurred as a result of these techniques.

As described above, it appears you have conducted an extensive inquiry to ascertain what impact, if any, these procedures individually and as a course of conduct would have on Zubaydah. You have consulted with interrogation experts, including those with substantial SERE school experience, consulted with outside psychologists, completed a psychological assessment and reviewed the relevant literature on this topic. Based on this inquiry, you believe that the use of the procedures, including the waterboard, and as a course of conduct would not result in prolonged mental harm. Reliance on this information about Zubaydah and about the effect of the use of these techniques more generally demonstrates the presence of a good faith belief that no prolonged mental harm will result from using these methods in the interrogation of Zubaydah. Moreover, we think that this represents not only an honest belief but also a reasonable belief based on the information that you have supplied to us. Thus, we believe that the specific intent to inflict prolonged mental is not present, and consequently, there is no specific intent to inflict severe mental pain or suffering. Accordingly, we conclude that on the facts in this case the use of these methods separately or a course of conduct would not violate Section 2340A.

Based on the foregoing, and based on the facts that you have provided, we conclude that the interrogation procedures that you propose would not violate Section 2340A. We wish to emphasize that this is our best reading of the law; however, you should be aware that there are no cases construing this statute, just as there have been no prosecutions brought under it.

Please let us know if we can be of further assistance.

Jay S. Bybee
Assistant Attorney General

Appendix D

Guidelines on Confinement Conditions For CIA Detainees

These Guidelines govern the conditions of confinement for CIA Detainees, who are persons detained in detention facilities that are under the [redacted] control of CIA ("Detention Facilities"). [redacted] These Guidelines recognize that environmental and other conditions, as well as particularized considerations affecting any given Detention Facility, will vary from case to case and location to location.

1. Minimums

Due provision must be taken to protect the health and safety of all CIA Detainees, including basic levels of medical care [redacted]

2. Implementing Procedures

a. [redacted]

[redacted]

Guidelines on Confinement Conditions for CIA Detainees

b. [redacted]

c. [redacted]

3. Responsible CIA Officer

The Director, DCI Counterterrorist Center shall ensure (a) that, at all times, a specific Agency staff employee (the "Responsible CIA Officer") is designated as responsible for each specific Detention Facility, (b) that each Responsible CIA Officer has been provided with a copy of these Guidelines and has reviewed and signed the attached Acknowledgment, and (c) that each Responsible CIA Officer and each CIA officer participating in the questioning of individuals detained pursuant to [redacted] has been provided with a copy of the "Guidelines on Interrogation Conducted Pursuant [redacted] and has reviewed and signed the Acknowledgment attached thereto. Subject to operational and security considerations, the Responsible CIA Officer shall be present at, or visit, each Detention Facility at intervals appropriate to the circumstances.

4. [redacted]

APPROVED:

George J. Tenet

Director of Central Intelligence

1/28/03

Date

Guidelines on Confinement Conditions for CIA Detainees

ACKNOWLEDGMENT

I, _____, am the Responsible CIA Officer for the Detention Facility known as _____. By my signature below, I acknowledge that I have read and understand and will comply with the "Guidelines on Confinement Conditions for CIA Detainees" of _____, 2003.

ACKNOWLEDGED:

_____ _____

Name Date

Appendix E

Guidelines on Interrogations Conducted Pursuant to the [redacted]

These Guidelines address the conduct of interrogations of persons who are detained pursuant to the authorities set forth in [redacted]

These Guidelines complement internal Directorate of Operations guidance relating to the conduct of interrogations. In the event of any inconsistency between existing DO guidance and these Guidelines, the provisions of these Guidelines shall control.

1. Permissible Interrogation Techniques

Unless otherwise approved by Headquarters, CIA officers and other personnel acting on behalf of CIA may use only Permissible Interrogation Techniques. Permissible Interrogation Techniques consist of both (a) Standard Techniques and (b) Enhanced Techniques.

Standard Techniques are techniques that do not incorporate physical or substantial psychological pressure. These techniques include, but are not limited to, all lawful forms of questioning employed by US law enforcement and military interrogation personnel. Among Standard Techniques are the use of isolation, sleep deprivation not to exceed 72 hours, reduced caloric intake (so long as the amount is calculated to maintain the general health of the detainee), deprivation of reading material, use of loud music or white noise (at a decibel level calculated to avoid damage to the detainee's hearing), and the use of diapers for limited periods (generally not to exceed 72 hours, [redacted]

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[redacted]

Guideline on Interrogations Conducted Pursuant to the [redacted]

Enhanced Techniques are techniques that do incorporate physical or psychological pressure beyond Standard Techniques. The use of each specific Enhanced Technique must be approved by Headquarters in advance, and may be employed only by approved interrogators for use with the specific detainee, with appropriate medical and psychological participation in the process. These techniques are, the attention grasp, walling, the facial hold, the facial slap (insult slap), the abdominal slap, cramped confinement, wall standing, stress positions, sleep deprivation beyond 72 hours, the use of diapers for prolonged periods, the use of harmless insects, the water board, and such other techniques as may be specifically approved pursuant to paragraph 4 below. The use of each Enhanced Technique is subject to specific temporal, physical, and related conditions, including a competent evaluation of the medical and psychological state of the detainee.

2. Medical and Psychological Personnel

Appropriate medical and psychological personnel shall be [redacted] readily available for consultation and travel to the interrogation site during all detainee interrogations employing Standard Techniques, and appropriate medical and psychological personnel must be on site during all detainee interrogations employing Enhanced Techniques. In each case, the medical and psychological personnel shall suspend the interrogation if they determine that significant and prolonged physical or mental injury, pain, or suffering is likely to result if the interrogation is not suspended. In any such instance, the interrogation team shall immediately report the facts to Headquarters for management and legal review to determine whether the interrogation may be resumed.

3. Interrogation Personnel

The Director, DCI Counterterrorist Center shall ensure that all personnel directly engaged in the interrogation of persons detained pursuant [redacted] have been appropriately screened (from the medical, psychological, and security standpoints), have reviewed these Guidelines, have received appropriate training in their implementation, and have completed the attached Acknowledgment.

Guideline on Interrogations Conducted Pursuant to the [redacted]

4. Approvals Required

Whenever feasible, advance approval is required for the use of Standard Techniques by an interrogation team. In all instances, their use shall be documented in cable traffic. Prior approval in writing (e.g., by written memorandum or in cable traffic) from the Director, DCI Counterterrorist Center, with the concurrence of the Chief, CTC Legal Group, is required for the use of any Enhanced Technique(s), and may be provided only where D/CTC has determined that (a) the specific detainee is believed to possess information about risks to the citizens of the United States or other nations, (b) the use of the Enhanced Technique(s) is appropriate in order to obtain that information, (c) appropriate medical and psychological personnel have concluded that the use of the Enhanced Technique(s) is not expected to produce "severe physical or mental pain or suffering," and (d) the personnel authorized to employ the Enhanced Technique(s) have completed the attached Acknowledgment. Nothing in these Guidelines alters the right to act in self-defense.

5. Recordkeeping

In each interrogation session in which an Enhanced Technique is employed, a contemporaneous record shall be created setting forth the nature and duration of each such technique employed, the identities of those present, and a citation to the required Headquarters approval cable. This information, which may be in the form of a cable, shall be provided to Headquarters.

APPROVED:

George J. Tenet

Director of Central Intelligence

January 28, 2003

Date

Guideline on Interrogations Conducted Pursuant to the [redacted]

ACKNOWLEDGMENT

I, _____, acknowledge that I have read and understand and will comply with the "Guidelines on Interrogations Conducted Pursuant to [redacted]" of _____, 2003.

ACKNOWLEDGED:

_____ _____

Name Date

Appendix F

DRAFT OMS GUIDELINES ON MEDICAL AND PSYCHOLOGICAL SUPPORT TO DETAINEE INTERROGATIONS

September 4, 2003

The following guidelines offer general references for medical officers supporting the detention of terrorists captured and turned over to the Central Intelligence Agency for interrogation and debriefing. There are three different contexts in which these guidelines may be applied: (1) during the period of initial interrogation, (2) during the more sustained period of debriefing at an interrogation site, and (3) [redacted]

INTERROGATION SUPPORT

Captured terrorists turned over to the C.I.A. for interrogation may be subjected to a wide range of legally sanctioned techniques, all of which are also used on U.S. military personnel in SERE training programs. These are designed to psychologically "dislocate" the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist our efforts to obtain critical intelligence.

Sanctioned interrogation techniques must be specifically approved in advance by the Director, CTC in the case of each individual case. They include, in approximately ascending degree of intensity:

- Standard measures (i.e., without physical or substantial psychological pressure)
  - Shaving
  - Stripping
  - Diapering (generally for periods not greater than 72 hours)
  - Hooding
  - Isolation
  - White noise or loud music (at a decibel level that will not damage hearing)
  - Continuous light or darkness
  - Uncomfortably cool environment
  - Restricted diet, including reduced caloric intake (sufficient to maintain general health)
  - Shackling in upright, sitting, or horizontal position
  - Water Dousing
  - Sleep deprivation (up to 72 hours)
- Enhanced measures (with physical or psychological pressure beyond the above)
  - Attention grasp
  - Facial hold
  - Insult (facial) slap

Abdominal slap
Prolonged diapering
Sleep deprivation (over 72 hours)
Stress positions
--on knees, body slanted forward or backward
--leaning with forehead on wall
Walling
Cramped confinement (Confinement boxes)
Waterboard

In all instances the general goal of these techniques is a psychological impact, and not some physical effect, with a specific goal of "dislocat[ing] his expectations regarding the treatment he believes he will receive...." The more physical techniques are delivered in a manner carefully limited to avoid serious physical harm. The slaps for example are designed "to induce shock, surprise, and/or humiliation" and "not to inflict physical pain that is severe or lasting." To this end they must be delivered in a specifically circumscribed manner, e.g., with fingers spread. Walling is only against a springboard designed to be loud and bouncy (and cushion the blow). All walling and most attention grasps are delivered only with the subject's head solidly supported with a towel to avoid extension-flexion injury.

OMS is responsible for assessing and monitoring the health of all Agency detainees subject to "enhanced" interrogation techniques, and for determining that the authorized administration of these techniques would not be expected to cause serious or permanent harm.[1] "DCI Guidelines" have been issued formalizing these responsibilities, and these should be read directly.

Whenever feasible, advance approval is required to use any measures beyond standard measures; technique-specific advanced approval is required for all "enhanced" measures and is conditional on on-site medical and psychological personnel[2] confirming from direct detainee examination that the enhanced technique(s) is not expected to produce "severe physical or mental pain or suffering." As a practical matter, the detainee's physical condition must be such that these interventions will not have lasting

---

[1] The standard used by the Justice Department for "mental" harm is "prolonged mental harm," i.e., "mental harm of some lasting duration, e.g., mental harm lasting months or years." "In the absence of prolonged mental harm, no severe mental pain or suffering would have been inflicted." Memorandum of August 1, 2002, p. 15.

[2] [redacted]
Unless the waterboard is being used, the medical officer can be a physician or a PA; use of the waterboard requires the presence of a physician.

effect, and his psychological state strong enough that no severe psychological harm will result.

The medical implications of the DCI guidelines are discussed below.

General intake evaluation

New detainees are to have a thorough initial medical assessment, with a complete, documented history and physical addressing in depth any chronic or previous medical problems. [redacted]

Vital signs and weight should be recorded, and blood work drawn [redacted]

Documented subsequent medical rechecks should be performed on a regular basis, [redacted]

Although brief, the data should reflect what was checked and include negative findings. [redacted]

Medical treatment

It is important that adequate medical care be provided to detainees, even those undergoing enhanced interrogation. Those requiring chronic medications should receive them, acute medical problems should be treated, and adequate fluids and nutrition provided. [redacted]

[redacted]

The basic diet during the period of enhanced interrogation need not be palatable, but should include adequate fluids and nutrition. Actual consumption should be monitored and recorded. Liquid Ensure (or equivalent) is a good way to assure that there is adequate nutrition. [redacted] Individuals refusing adequate liquids during this stage should have fluids administered at the earliest signs of dehydration. [redacted] If there is any question about adequacy of fluid intake, urinary output also should be monitored and recorded.

Uncomfortably cool environments

Detainees can safely be placed in uncomfortably cool environments for varying lengths of time, ranging from hours to days. [redacted]

Core body temperature falls after more than 2 hours at an ambient temperature of 10°C/50°F. At this temperature increased metabolic rate cannot compensate for heat loss. The WHO recommended minimum indoor temperature is 18°C/64°F. The "thermoneutral zone" where minimal compensatory activity is required to maintain core temperature is 20°C/68°F to 30°C/86°F. Within the thermoneutral zone, 26°C/78°F is considered optimally comfortable for lightly clothed individuals and 30°C/86°F for naked individuals. [redacted]

If there is any possibility that ambient temperatures are below the thermoneutral range, they should be monitored and the actual temperatures documented. [redacted]

At ambient temperatures below 18°C/64°F, detainees should be monitored for the development of hypothermia. [redacted]

White noise or loud music

As a practical guide, there is no permanent hearing risk for continuous, 24-hours-a-day exposures to sound at 82 dB or lower; at 84 dB for up to 18 hours a day; 90 dB for up to 8 hours, 95 dB for 4 hours, and 100 dB for 2 hours. If necessary, instruments can be provided to measure these ambient sound levels. [redacted]

Shackling

Shackling in non-stressful positions requires only monitoring for the development of pressure sores with appropriate treatment and adjustment of the shackles as required. [redacted]

[redacted]

Assuming no medical contraindications are found, extended periods (up to 72 hours) in a standing position can be approved if the hands are no higher than head level and weight is borne fully by the lower extremities.

[redacted]

[redacted]

Sleep deprivation

[redacted]

The standard approval for sleep deprivation, per se (without regard to shackling position) is 72 hours. Extension of sleep deprivation beyond 72 continuous hours is considered an enhanced measure, which requires D/CTC prior approval. [redacted]

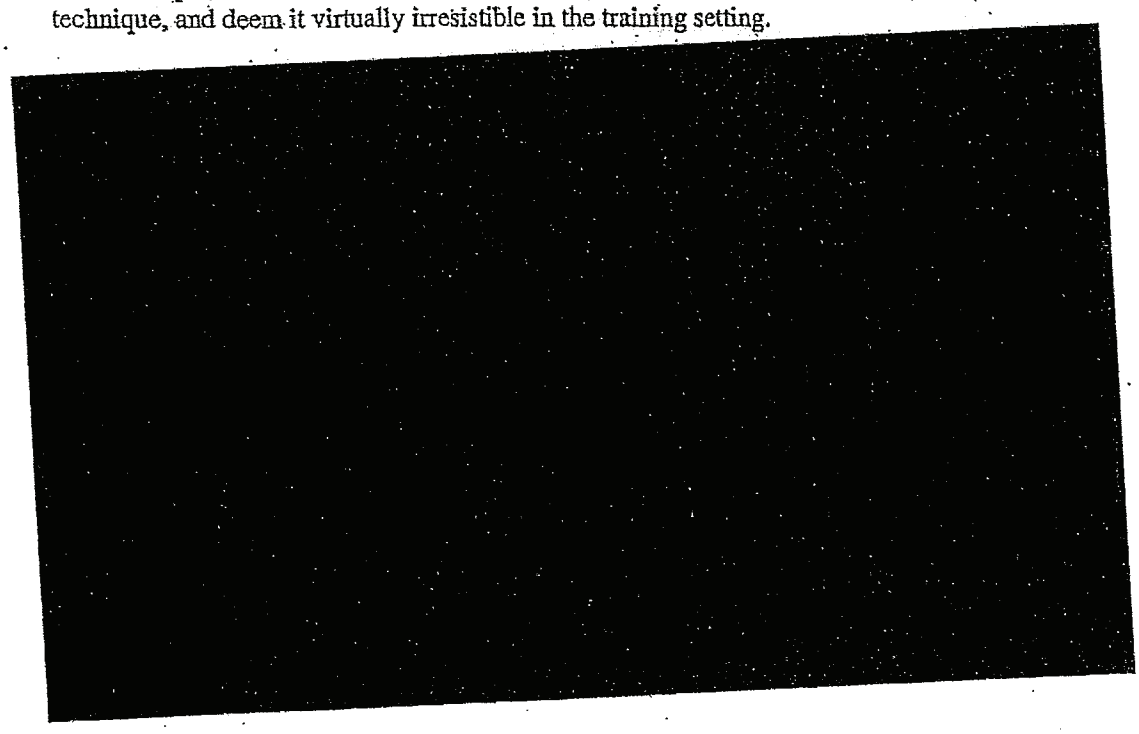
NOTE: Examinations performed during periods of sleep deprivation should include the current number of hours without sleep; and, if only a brief rest preceded this period, the specifics of the previous deprivation also should be recorded.

Cramped confinement (Confinement boxes)

Detainees can be placed in awkward boxes, specifically constructed for this purpose, [redacted] confinement in the small box is allowable up to 2 hours. Confinement in the large box is limited to 8 consecutive hours, [redacted]

Waterboard

This is by far the most traumatic of the enhanced interrogation techniques. The historical context here was limited knowledge of the use of the waterboard in SERE training (several hundred trainees experience it every year or two). In the SERE model the subject is immobilized on his back, and his forehead and eyes covered with a cloth. A stream of water is directed at the upper lip. Resistant subjects then have the cloth lowered to cover the nose and mouth, as the water continues to be applied, fully saturating the cloth, and precluding the passage of air. Relatively little water enters the mouth. The occlusion (which may be partial) lasts no more than 20 seconds. On removal of the cloth, the subject is immediately able to breathe, but continues to have water directed at the upper lip to prolong the effect. This process can continue for several minutes, and involve up to 15 canteen cups of water. Ostensibly the primary desired effect derives from the sense of suffocation resulting from the wet cloth temporarily occluding the nose and mouth, and psychological impact of the continued application of water after the cloth is removed. SERE trainees usually have only a single exposure to this technique, and never more than two; SERE trainers consider it their most effective technique, and deem it virtually irresistible in the training setting.



The SERE training program has applied the waterboard technique (single exposure) to trainees for years, and reportedly there have been thousands of applications without significant or lasting medical complications. The procedure nonetheless carries some risks, particularly when repeated a large number of times or when applied to an individual less fit than a typical SERE trainee. Several medical dimensions need to be monitored to ensure the safety of the subject.

In our limited experience, extensive sustained use of the waterboard can introduce new risks. Most seriously, for reasons of physical fatigue or psychological resignation, the subject may simply give up, allowing excessive filling of the airways and loss of consciousness. An unresponsive subject should be righted immediately, and the interrogator should deliver a sub-xyphoid thrust to expel the water. If this fails to restore normal breathing, aggressive medical intervention is required. Any subject who has reached this degree of compromise is not considered an appropriate candidate for the waterboard, and the physician on the scene can not approve further use of the waterboard without specific C/OMS consultation and approval.

A rigid guide to medically approved use of the waterboard in essentially healthy individuals is not possible, as safety will depend on how the water is applied and the specific response each time it is used. The following general guidelines are based on very limited knowledge, drawn from very few subjects whose experience and response was quite varied. These represent only the medical guidelines; legal guidelines also are operative and may be more restrictive.

A series (within a "session") of several relatively rapid waterboard applications is medically acceptable in all healthy subjects, so long as there is no indication of some emerging vulnerability [redacted] Several such sessions per 24 hours have been employed without apparent medical complication. The exact number of sessions cannot be prescribed, and will depend on the response to each. If more than 3 sessions of 5 or more applications are envisioned within a 24 hours period, a careful medical reassessment must be made before each later session.

By days 3-5 of an aggressive program, cumulative effects become a potential concern. Without any hard data to quantify either this risk or the advantages of this technique, we believe that beyond this point continued intense waterboard applications may not be medically appropriate. Continued aggressive use of the waterboard beyond this point should be reviewed by the HVT team in consultation with Headquarters prior to any further aggressive use. [redacted]

NOTE: In order to best inform future medical judgments and recommendations, it is important that every application of the waterboard be thoroughly documented: how long each application (and the entire procedure) lasted, how much water was used in the process (realizing that much splashes off), how exactly the water was applied, if a seal was achieved, if the naso- or oropharynx was filled, what sort of volume was expelled, how long was the break between applications, and how the subject looked between each treatment.

[redacted]

[redacted]

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT M

The New York Times nytimes.com WATCH TRAILER

November 9, 2005

Report Warned C.I.A. on Tactics In Interrogation

By DOUGLAS JEHL

WASHINGTON, Nov. 8 - A classified report issued last year by the Central Intelligence Agency's inspector general warned that interrogation procedures approved by the C.I.A. after the Sept. 11 attacks might violate some provisions of the international Convention Against Torture, current and former intelligence officials say.

The previously undisclosed findings from the report, which was completed in the spring of 2004, reflected deep unease within the C.I.A. about the interrogation procedures, the officials said. A list of 10 techniques authorized early in 2002 for use against terror suspects included one known as waterboarding, and went well beyond those authorized by the military for use on prisoners of war.

The convention, which was drafted by the United Nations, bans torture, which is defined as the infliction of "severe" physical or mental pain or suffering, and prohibits lesser abuses that fall short of torture if they are "cruel, inhuman or degrading." The United States is a signatory, but with some reservations set when it was ratified by the Senate in 1994.

The report, by John L. Helgerson, the C.I.A.'s inspector general, did not conclude that the techniques constituted torture, which is also prohibited under American law, the officials said. But Mr. Helgerson did find, the officials said, that the techniques appeared to constitute cruel, inhuman and degrading treatment under the convention.

The agency said in a written statement in March that "all approved interrogation techniques, both past and present, are lawful and do not constitute torture." It reaffirmed that statement on Tuesday, but would not comment on any classified report issued by Mr. Helgerson. The statement in March did not specifically address techniques that could be labeled cruel, inhuman or degrading, and which are not explicitly prohibited in American law.

The officials who described the report said it discussed particular techniques used by the C.I.A. against particular prisoners, including about three dozen terror suspects being held by the agency in secret locations around the world. They said it referred in particular to the treatment of Khalid Sheikh Mohammed, who is said to have organized the Sept. 11 attacks and who has been detained in a secret location by the C.I.A. since he was captured in March 2003. Mr. Mohammed is among those believed to have been subjected to waterboarding, in which a prisoner is strapped to a board and made to believe that he is drowning.

In his report, Mr. Helgerson also raised concern about whether the use of the techniques could expose agency officers to legal liability, the officials said. They said the report expressed skepticism about the Bush administration view that any ban on cruel, inhuman and degrading treatment under the treaty does not apply to C.I.A. interrogations because they take place overseas on people who are not citizens of the United States.

The current and former intelligence officials who described Mr. Helgerson's report include supporters and critics of his findings. None would agree to be identified by name, and none would describe his conclusions in specific detail. They said the report had included 10 recommendations for changes in the agency's handling of terror suspects, but they would not say what those recommendations were.

Porter J. Goss, the C.I.A. director, testified this year that eight of the report's recommendations had been accepted, but did not describe them. The inspector general is an independent official whose auditing role at the agency was established by Congress, but whose reports to the agency's director are not binding.

Some former intelligence officials said the inspector general's findings had been vigorously disputed by the agency's general counsel. To date, the Justice Department has brought charges against only one C.I.A. employee in connection with prisoner abuse, and prosecutors have signaled that they are unlikely to bring charges against C.I.A. officers in several other cases involving the mishandling of prisoners in Iraq and Afghanistan.

But the current and former intelligence officials said Mr. Helgerson's report had added to apprehensions within the agency about gray areas in the rules surrounding interrogation procedures.

"The ambiguity in the law must cause nightmares for intelligence officers who are engaged in aggressive interrogations of Al Qaeda suspects and other terrorism suspects," said John Radsan, a former assistant general counsel at the agency who left in 2004. Mr. Radsan, now an associate professor at William Mitchell College of Law in St. Paul, would not comment on Mr. Helgerson's report.

Congressional officials said the report had emerged as an unstated backdrop in the debate now under way on Capitol Hill over whether the C.I.A. should be subjected to the same strict rules on interrogation that the military is required to follow. In opposing an amendment sponsored by Senator John McCain, Republican of Arizona, Mr. Goss and Vice President Dick Cheney have argued that the C.I.A. should be granted an exemption allowing it extra latitude, subject to presidential authorization, in interrogating high-level terrorists abroad who might have knowledge about future attacks.

The issue of the agency's treatment of detainees arose shortly after the attacks of Sept. 11, after C.I.A. officers became involved in interrogating

prisoners caught in Afghanistan, and the agency sought legal guidance on how far its employees and contractors could go in interrogating terror suspects, current and former intelligence officials said.

The list of 10 techniques, including feigned drowning, was secretly drawn up in early 2002 by a team that included senior C.I.A. officials who solicited recommendations from foreign governments and from agency psychologists, the officials said. They said officials from the Justice Department and the National Security Council, which is part of the White House, were involved in the process.

Among the few known documents that address interrogation procedures and that have been made public is an August 2002 legal opinion by the Justice Department, which said that interrogation methods just short of those that might cause pain comparable to "organ failure, impairment of bodily function or even death" could be allowable without being considered torture. The administration disavowed that classified legal opinion in the summer of 2004 after it was publicly disclosed.

A new opinion made public in December 2004 and, signed by James B. Comey, then the deputy attorney general, explicitly rejected torture and adopted more restrictive standards to define it. But a cryptic footnote to the new document about the "treatment of detainees" referred to what the officials said were other still-classified opinions. Officials have said that the footnote meant that coercive techniques approved by the Justice Department under the looser interpretation of the torture statutes were still lawful even under the new, more restrictive standards.

It remains unclear whether all 10 of the so-called enhanced procedures approved in early 2002 remain authorized for use by the C.I.A. In an unclassified report this summer, the Senate Intelligence Committee referred briefly to Mr. Helgerson's report and said that the agency had fully put in effect only 5 of his 10 recommendations. But in testimony before Congress in February Mr. Goss said that eight had.

Some former intelligence officials have said the C.I.A. imposed tighter safeguards on its interrogation procedures after the abuses at Abu Ghraib prison came to light in May 2004. That was about the same time Mr. Helgerson completed his report.

The agency issued its earlier statement on the legality of approved interrogation techniques after Mr. Goss, in testimony before Congress on March 17, said that all interrogation techniques used "at this time" were legal but declined, when asked, to make the same broad assertion about practices used over the past few years.

On March 18, Jennifer Millerwise Dyck, the agency's director of public affairs, said that "C.I.A. policies on interrogation have always followed legal guidance from the Department of Justice."

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FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT N

UNITED
NATIONS

CAT

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.
GENERAL

CAT/C/USA/CO/2
25 July 2006

Original: ENGLISH

COMMITTEE AGAINST TORTURE
Thirty-sixth session
1-19 May 2006

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Conclusions and recommendations of the Committee against Torture

UNITED STATES OF AMERICA

1. The Committee against Torture considered the second report of the United States of America (CAT/C/48/Add.3/Rev.1) at its 702nd and 705th meetings (CAT/C/SR.702 and 705), held on 5 and 8 May 2006, and adopted, at its 720th and 721st meetings, on 17 and 18 May 2006 (CAT/C/SR.720 and 721), the following conclusions and recommendations.

A. Introduction

2. The second periodic report of the United States of America was due on 19 November 2001, as requested by the Committee at its twenty-fourth session in May 2000 (A/55/44, para. 180 (f)) and was received on 6 May 2005. The Committee notes that the report includes a point-by-point reply to the Committee's previous recommendations.

3. The Committee commends the State party for its exhaustive written responses to the Committee's list of issues, as well as the detailed responses provided both in writing and orally to the questions posed by the members during the examination of the report. The Committee expresses its appreciation for the large and high-level delegation, comprising representatives from relevant departments of the State party, which facilitated a constructive oral exchange during the consideration of the report.

4. The Committee notes that the State party has a federal structure, but recalls that the United States of America is a single State under international law and has the obligation to implement the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention") in full at the domestic level.

5. Recalling its statement adopted on 22 November 2001 condemning utterly the terrorist attacks of 11 September 2001, the terrible threat to international peace and security posed by acts of international terrorism and the need to combat by all means, in accordance with the Charter of the United Nations, the threats caused by terrorist acts, the Committee recognizes that these attacks caused profound suffering to many residents of the State party. The Committee acknowledges that the State party is engaged in protecting its security and the security and freedom of its citizens in a complex legal and political context.

B. Positive aspects

6. The Committee welcomes the State party's statement that all United States officials, from all government agencies, including its contractors, are prohibited from engaging in torture at all times and in all places, and that all United States officials from all government agencies, including its contractors, wherever they may be, are prohibited from engaging in cruel, inhuman or degrading treatment or punishment, in accordance with the obligations under the Convention.

7. The Committee notes with satisfaction the State party's statement that the United States does not transfer persons to countries where it believes it is "more likely than not" that they will be tortured, and that this also applies, as a matter of policy, to the transfer of any individual, in the State party's custody, or control, regardless of where they are detained.

8. The Committee welcomes the State party's clarification that the statement of the United States President on signing the Detainee Treatment Act on 30 December 2005 is not to be interpreted as a derogation by the President from the absolute prohibition of torture.

9. The Committee also notes with satisfaction the enactment of:

(a) The Prison Rape Elimination Act of 2003, which addresses sexual assault of persons in the custody of correctional agencies, with the purpose, inter alia, of establishing a "zero-tolerance standard" for rape in detention facilities in the State party; and

(b) That part of the Detainee Treatment Act of 2005 which prohibits cruel, inhuman, or degrading treatment and punishment of any person, regardless of nationality or physical location, in the custody or under the physical control of the State party.

10. The Committee welcomes the adoption of National Detention Standards in 2000, which set minimum standards for detention facilities holding Department of Homeland Security detainees, including asylum-seekers.

11. The Committee also notes with satisfaction the sustained and substantial contributions of the State party to the United Nations Voluntary Fund for the Victims of Torture.

12. The Committee notes the State party's intention to adopt a new Army Field Manual for intelligence interrogation, applicable to all its personnel, which, according to the State party, will ensure that interrogation techniques fully comply with the Convention.

C. Subjects of concern and recommendations

13. Notwithstanding the statement by the State party that "every act of torture within the meaning of the Convention is illegal under existing federal and/or state law", the Committee reiterates the concern expressed in its previous conclusions and recommendations with regard to the absence of a federal crime of torture, consistent with article 1 of the Convention, given that sections 2340 and 2340 A of the United States Code limit federal criminal jurisdiction over acts of torture to extraterritorial cases. The Committee also regrets that, despite the occurrence of cases of extraterritorial torture of detainees, no prosecutions have been initiated under the extraterritorial criminal torture statute (arts. 1, 2, 4 and 5).

The Committee reiterates its previous recommendation that the State party should enact a federal crime of torture consistent with article 1 of the Convention, which should include appropriate penalties, in order to fulfil its obligations under the Convention to prevent and eliminate acts of torture causing severe pain or suffering, whether physical or mental, in all its forms.

The State party should ensure that acts of psychological torture, prohibited by the Convention, are not limited to "prolonged mental harm" as set out in the State party's understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration.

The State party should investigate, prosecute and punish perpetrators under the federal extraterritorial criminal torture statute.

14. The Committee regrets the State party's opinion that the Convention is not applicable in times and in the context of armed conflict, on the basis of the argument that the "law of armed conflict" is the exclusive *lex specialis* applicable, and that the Convention's application "would result in an overlap of the different treaties which would undermine the objective of eradicating torture" (arts. 1 and 16).

The State party should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction and that the application of the Convention's provisions are without prejudice to the provisions of any other international instrument, pursuant to paragraph 2 of its articles 1 and 16.

15. The Committee notes that a number of the Convention's provisions are expressed as applying to "territory under [the State party's] jurisdiction" (arts. 2, 5, 13, 16). The Committee reiterates its previously expressed view that this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised. The Committee considers that the State party's view that those provisions are geographically limited to its own de jure territory to be regrettable.

The State party should recognize and ensure that the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.

16. The Committee notes with concern that the State party does not always register persons detained in territories under its jurisdiction outside the United States, depriving them of an effective safeguard against acts of torture (art. 2).

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.

17. The Committee is concerned by allegations that the State party has established secret detention facilities, which are not accessible to the International Committee of the Red Cross. Detainees are allegedly deprived of fundamental legal safeguards, including an oversight mechanism in regard to their treatment and review procedures with respect to their detention. The Committee is also concerned by allegations that those detained in such facilities could be held for prolonged periods and face torture or cruel, inhuman or degrading treatment. The Committee considers the "no comment" policy of the State party regarding the existence of such secret detention facilities, as well as on its intelligence activities, to be regrettable (arts. 2 and 16).

The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a violation of the Convention. The State party should investigate and disclose the existence of any such facilities and the authority under which they have been established and the manner in which detainees are treated. The State party should publicly condemn any policy of secret detention.

The Committee recalls that intelligence activities, notwithstanding their author, nature or location, are acts of the State party, fully engaging its international responsibility.

18. The Committee is concerned by reports of the involvement of the State party in enforced disappearances. The Committee considers the State party's view that such acts do not constitute a form of torture to be regrettable (arts. 2 and 16).

The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention.

19. Notwithstanding the State party's statement that "[u]nder U.S. law, there is no derogation from the express statutory prohibition of torture" and that "[n]o circumstances whatsoever … may be invoked as a justification or defense to committing torture", the Committee remains concerned at the absence of clear legal provisions ensuring that the Convention's prohibition against torture is not derogated from under any circumstances, in particular since 11 September 2001 (arts. 2, 11 and 12).

The State party should adopt clear legal provisions to implement the principle of absolute prohibition of torture in its domestic law without any possible derogation. Derogation from this principle is incompatible with paragraph 2 of article 2 of the Convention, and cannot limit criminal responsibility. The State party should also ensure that perpetrators of acts of torture are prosecuted and punished appropriately.

The State party should also ensure that any interrogation rules, instructions or methods do not derogate from the principle of absolute prohibition of torture and that no doctrine under domestic law impedes the full criminal responsibility of perpetrators of acts of torture.

The State party should promptly, thoroughly, and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates.

20. The Committee is concerned that the State party considers that the non-refoulement obligation, under article 3 of the Convention, does not extend to a person detained outside its territory. The Committee is also concerned by the State party's rendition of suspects, without any judicial procedure, to States where they face a real risk of torture (art. 3).

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*.

21. The Committee is concerned by the State party's use of "diplomatic assurances", or other kinds of guarantees, assuring that a person will not be tortured if expelled, returned, transferred or extradited to another State. The Committee is also concerned by the secrecy of such procedures including the absence of judicial scrutiny and the lack of monitoring mechanisms put in place to assess if the assurances have been honoured (art. 3).

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.

22. The Committee, noting that detaining persons indefinitely without charge constitutes per se a violation of the Convention, is concerned that detainees are held for protracted periods at Guantánamo Bay, without sufficient legal safeguards and without judicial assessment of the justification for their detention (arts. 2, 3 and 16).

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 where they could face a real risk of being tortured, in order to comply with its obligations under the Convention.

23. The Committee is concerned that information, education and training provided to the State party's law-enforcement or military personnel are not adequate and do not focus on all provisions of the Convention, in particular on the non-derogable nature of the prohibition of torture and the prevention of cruel, inhuman and degrading treatment or punishment (arts. 10 and 11).

The State party should ensure that education and training of all law-enforcement or military personnel, are conducted on a regular basis, in particular for personnel involved in the interrogation of suspects. This should include training on interrogation rules, instructions and methods, and specific training on how to identify signs of torture and cruel, inhuman or degrading treatment. Such personnel should also be instructed to report such incidents.

The State party should also regularly evaluate the training and education provided to its law-enforcement and military personnel as well as ensure regular and independent monitoring of their conduct.

24. The Committee is concerned that in 2002 the State party authorized the use of certain interrogation techniques that have resulted in the death of some detainees during interrogation. The Committee also regrets that "confusing interrogation rules" and techniques defined in vague and general terms, such as "stress positions", have led to serious abuses of detainees (arts. 11, 1, 2 and 16).

The State party should rescind any interrogation technique, including methods involving sexual humiliation, "waterboarding", "short shackling" and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.

25. The Committee is concerned at allegations of impunity of some of the State party's law-enforcement personnel in respect of acts of torture or cruel, inhuman or degrading treatment or punishment. The Committee notes the limited investigation and lack of prosecution in respect of the allegations of torture perpetrated in areas 2 and 3 of the Chicago Police Department (art. 12).

The State party should promptly, thoroughly and impartially investigate all allegations of acts of torture or cruel, inhuman or degrading treatment or punishment by law-enforcement personnel and bring perpetrators to justice, in order to fulfil its obligations under article 12 of the Convention. The State party should also provide the Committee with information on the ongoing investigations and prosecution relating to the above-mentioned case.

26. The Committee is concerned by reliable reports of acts of torture or cruel, inhuman and degrading treatment or punishment committed by certain members of the State party's military or civilian personnel in Afghanistan and Iraq. It is also concerned that the investigation and prosecution of many of these cases, including some resulting in the death of detainees, have led to lenient sentences, including of an administrative nature or less than one year's imprisonment (art. 12).

The State party should take immediate measures to eradicate all forms of torture and ill-treatment of detainees by its military or civilian personnel, in any territory under its jurisdiction, and should promptly and thoroughly investigate such acts, prosecute all those responsible for such acts, and ensure they are appropriately punished, in accordance with the seriousness of the crime.

27. The Committee is concerned that the Detainee Treatment Act of 2005 aims to withdraw the jurisdiction of the State party's federal courts with respect to habeas corpus petitions, or other claims by or on behalf of Guantánamo Bay detainees, except under limited circumstances. The Committee is also concerned that detainees in Afghanistan and Iraq, under the control of the Department of Defense, have their status determined and reviewed by an administrative process of that department (art. 13).

The State party should ensure that independent, prompt and thorough procedures to review the circumstances of detention and the status of detainees are available to all detainees, as required by article 13 of the Convention.

28. The Committee is concerned at the difficulties certain victims of abuses have faced in obtaining redress and adequate compensation, and that only a limited number of detainees have filed claims for compensation for alleged abuse and maltreatment, in particular under the Foreign Claims Act (art. 14).

The State party should ensure, in accordance with the Convention, that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture or abuse, including sexual violence, perpetrated by its officials.

29. The Committee is concerned at section 1997 e (e) of the 1995 Prison Litigation Reform Act which provides "that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury" (art. 14).

The State party should not limit the right of victims to bring civil actions and amend the Prison Litigation Reform Act accordingly.

30. The Committee, while taking note of the State party's instruction number 10 of 24 March 2006, which provides that military commissions shall not admit statements established to be made as a result of torture in evidence, is concerned about the implementation of the instruction in the context of such commissions and the limitations on detainees' effective right to complain. The Committee is also concerned about the Combatant Status Review Tribunals and the Administrative Review Boards (arts. 13 and 15).

The State party should ensure that its obligations under articles 13 and 15 are fulfilled in all circumstances, including in the context of military commissions and should consider establishing an independent mechanism to guarantee the rights of all detainees in its custody.

31. The Committee is concerned at the fact that substantiated information indicates that executions in the State party can be accompanied by severe pain and suffering (arts. 16, 1 and 2).

The State party should carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering.

32. The Committee is concerned at reliable reports of sexual assault of sentenced detainees, as well as persons in pretrial or immigration detention, in places of detention in the State party. The Committee is concerned that there are numerous reports of sexual violence perpetrated by detainees on one another, and that persons of differing sexual orientation are particularly vulnerable. The Committee is also concerned by the lack of prompt and independent investigation of such acts and that appropriate measures to combat these abuses have not been implemented by the State party (arts. 16, 12, 13 and 14).

The State party should design and implement appropriate measures to prevent all sexual violence in all its detention centres. The State party should ensure that all allegations of violence in detention centres are investigated promptly and independently, perpetrators are prosecuted and appropriately sentenced and victims can seek redress, including appropriate compensation.

33. The Committee is concerned at the treatment of detained women in the State party, including gender-based humiliation and incidents of shackling of women detainees during childbirth (art. 16).

The State party should adopt all appropriate measures to ensure that women in detention are treated in conformity with international standards.

34. The Committee reiterates the concern expressed in its previous recommendations about the conditions of the detention of children, in particular the fact that they may not be completely segregated from adults during pretrial detention and after sentencing. The Committee is also concerned at the large number of children sentenced to life imprisonment in the State party (art. 16).

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.

35. The Committee remains concerned about the extensive use by the State party's law-enforcement personnel of electroshock devices, which have caused several deaths. The Committee is concerned that this practice raises serious issues of compatibility with article 16 of the Convention.

The State party should carefully review the use of electroshock devices, strictly regulate their use, restricting it to substitution for lethal weapons, and eliminate the use of these devices to restrain persons in custody, as this leads to breaches of article 16 of the Convention.

36. The Committee remains concerned about the extremely harsh regime imposed on detainees in "supermaximum prisons". The Committee is concerned about the prolonged isolation periods detainees are subjected to, the effect such treatment has on their mental health, and that its purpose may be retribution, in which case it would constitute cruel, inhuman or degrading treatment or punishment (art. 16).

The State party should review the regime imposed on detainees in "supermaximum prisons", in particular the practice of prolonged isolation.

37. The Committee is concerned about reports of brutality and use of excessive force by the State party's law-enforcement personnel, and the numerous allegations of their ill-treatment of vulnerable groups, in particular racial minorities, migrants and persons of different sexual orientation which have not been adequately investigated (art. 16 and 12).

The State party should ensure that reports of brutality and ill-treatment of members of vulnerable groups by its law-enforcement personnel are independently, promptly and thoroughly investigated and that perpetrators are prosecuted and appropriately punished.

38. The Committee strongly encourages the State party to invite the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, in full conformity with the terms of reference for fact-finding missions by special procedures of the United Nations, to visit Guantánamo Bay and any other detention facility under its de facto control.

39. The Committee invites the State party to reconsider its express intention not to become party to the Rome Statute of the International Criminal Court.

40. The Committee reiterates its recommendation that the State party should consider withdrawing its reservations, declarations and understandings lodged at the time of ratification of the Convention.

41. The Committee encourages the State party to consider making the declaration under article 22, thereby recognizing the competence of the Committee to receive and consider individual communications, as well as ratifying the Optional Protocol to the Convention.

42. 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. 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. 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.

43. The Committee requests the State party to provide, within one year, information on its response to its recommendations in paragraphs 16, 20, 21, 22, 24, 33, 34 and 42 above.

44. The Committee requests the State party to disseminate its report, with its addenda and the written answers to the Committee's list of issues and oral questions and the conclusions and recommendations of the Committee widely, in all appropriate languages, through official websites, the media and non-governmental organizations.

45. The State party is invited to submit its next periodic report, which will be considered as its fifth periodic report, by 19 November 2011, the due date of the fifth periodic report.

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT O

United States

Ghost Prisoner

Two Years in Secret CIA Detention

HUMAN RIGHTS WATCH

HUMAN RIGHTS WATCH

FEBRUARY 2007 VOLUME 19, NO. 1(G)

Ghost Prisoner

Two Years in Secret CIA Detention

Summary

When Marwan Jabour opened his eyes, after a blindfold, a mask, and other coverings were taken off him, he saw soldiers and, on the wall behind them, framed photographs of King Hussein and King Abdullah of Jordan. He was tired and disoriented from his four-hour plane flight and subsequent car trip, but when a guard confirmed that he was being held in Jordan, he felt indescribable relief. In his more than two years of secret detention, nearly all of it in US custody, this was the first time that someone had told him where he was. The date was July 31, 2006.

A few weeks later, in another first, the Jordanians allowed several of Jabour's family members to visit him. "My father cried the whole time," Jabour later remembered.

Marwan Jabour was arrested by Pakistani authorities in Lahore, Pakistan, on May 9, 2004. He was detained there briefly, then moved to the capital, Islamabad, where he was held for more than a month in a secret detention facility operated by both Pakistanis and Americans, and finally flown to a Central Intelligence Agency (CIA) prison in what he believes was Afghanistan. During his ordeal, he later told Human Rights Watch, he was tortured, beaten, forced to stay awake for days, and kept naked and chained to a wall for more than a month. Like an unknown number of Arab men arrested in Pakistan since 2001, he was "disappeared" into US custody: held in unacknowledged detention outside of the protection of the law, without court supervision, and without any contact with his family, legal counsel, or the International Committee of the Red Cross.

The secret prison program under which Jabour was held was established in the wake of the September 11, 2001 terrorist attacks, when US President George W. Bush signed a classified directive authorizing the CIA to hold and interrogate suspected terrorists. Because the entire program was run outside of US territory, it required the support and assistance of other governments, both in handing over detainees and in allowing the prisons to operate.

Pakistan's help was crucial to the program, more crucial than that of any other country. The Pakistani authorities delivered hundreds of prisoners to the United

States—some ending up in military custody, others in CIA custody—and it also allowed the United States and other countries to interrogate many of them on Pakistani soil. As the US State Department's annual human rights report for 2004 describes, security forces in Pakistan "held prisoners incommunicado and refused to provide information on their whereabouts, particularly in terrorism and national security cases." What the report does not say is that the Pakistani authorities carried out these abuses with the full knowledge and participation of American intelligence agents. Indeed, the degree of US control may have been so great, in some cases, that it constituted a form of proxy detention.

The possible use of proxy detention facilities is of especial concern now. In early September 2006, 14 detainees were transferred from secret CIA prisons to military custody at Guantanamo Bay. In a televised speech on September 6, President Bush announced that with those 14 transfers, "there are now no terrorists in the CIA program." But he said nothing about what had happened to a number of other prisoners who, up until that point, were believed to have been in the unacknowledged custody of the CIA.

One concern is that the US might have transferred some of the remaining prisoners to foreign prisons where for practical purposes they remain under CIA control. Another worrying possibility is that prisoners were transferred to places where they face a serious risk of torture: indeed, some of the missing prisoners are from Algeria, Egypt, Libya, and Syria.

In a letter to President Bush published in conjunction with this report, Human Rights Watch has provided a list of 16 people who were believed to have been held at one time in secret CIA prisons, and whose whereabouts are currently unknown. Jabour saw or spoke to a number of those people while he was held. The letter also includes a list of 22 people who were possibly held in such prisons, and whose whereabouts are similarly unknown. A copy of the letter is included as an appendix to this report.

Human Rights Watch has called upon the Bush administration to provide a full accounting of every person that the CIA has held since 2001, including their names,

the dates that they left US custody, and their current locations. If they are being held in proxy detention in a third country, the US government should either transfer them to the United States for prosecution in US courts, or order their release.

To leave these men in hidden limbo violates fundamental human rights norms. It is also extraordinarily cruel to their families. The wife of a man who has not been seen since he was believed to have been taken into CIA custody told Human Rights Watch that she has had to lie to her four children about her husband's absence. She explained that she could not bear telling them that she did not know where he was: "[W]hat I'm hoping is if they find out their father has been detained, that I'll at least be able to tell them what country he's being held in, and in what conditions."[1]

The fate of the missing detainees is one of the main unanswered questions about the CIA's secret prison program, but it is not the only one. Much is still unknown about the scope of the program, the precise locations of the detention facilities, the treatment of detainees, and the cooperation and complicity of other governments. Although confidential sources, including CIA personnel, have described some aspects of the program to journalists, and a small number of former detainees have recounted their experiences, many details of the program remain hidden.

What follows is the most comprehensive account to date of life in a secret CIA prison. Human Rights Watch interviewed Marwan Jabour over several days in December 2006, less than a month after he regained his freedom. He spoke clearly, precisely and in great detail about his experiences, although it was evident that he found some memories upsetting. His testimony is extremely valuable both in describing his own experience of secret detention and in providing information about others who were held with him.

Jabour was arrested in Lahore, he believes by the Pakistani intelligence services, and the worst physical abuses he endured took place while he was in their custody. He alleges that they beat him severely, burnt him with a red hot iron, and tied a tight rubber string around his penis, causing enormous pain. On this third day in Pakistani custody, three people he believes were Americans questioned him; the

[1] Communication to Human Rights Watch, January 24, 2007.

following day he was transferred to a secret facility in Islamabad. This facility had both US and Pakistani personnel, but the Americans seemed to be in charge.

Both in the Lahore facility and in Islamabad, Jabour endured many days of forced sleeplessness and forced standing, with little respite. Twice he collapsed, falling unconscious.

After a month in Islamabad he was flown to a secret prison, which he believes was in Afghanistan, where all of the personnel (except possibly the interpreters) were American. There, he was held completely naked for a month and a half, filmed naked, and interrogated naked. He was chained tightly to the wall of his small cell so he could not stand up, placed in painful stress positions so that he had difficulty breathing, and warned that if he did not cooperate he would be put in a suffocating "dog box."

As the months went by, some aspects of Jabour's treatment improved: his clothes were slowly returned; the physical mistreatment ended; he was placed in a larger cell; he got better food. Other aspects, however, changed slowly or not at all. He spent nearly all of his time alone in a windowless cell. He went a year and a half without a glimpse of sunlight. He wore leg irons for a year and a half. Worst of all, he spent more than two years with almost no contact with any human being besides his captors. Although he worried incessantly about his wife and three young daughters, he was not even allowed to send them a letter to reassure them that he was alive.

Jabour acknowledges that in 1998 he trained in a militant camp in Afghanistan in the hope of fighting in Chechnya, and in 2003 he helped Arab militants and others who had fled Afghanistan for Pakistan. But whether he violated the law should have been a matter for the courts; it was not a justification for abuse.

International human rights law prohibits enforced disappearance: basically, the holding of persons in unacknowledged, incommunicado detention. Such persons, who remain "disappeared" until their fate or whereabouts become known, are also more likely to be subjected to torture and other cruel, inhuman or degrading treatment.

The US government has long condemned these abusive practices in its policy statements and annual human rights reports; its own use of them severely undermines its moral authority on human rights. Even in wholly practical terms, its reliance on secret detention and abusive interrogation is wrong. The use of these techniques taints any testimony obtained from the persons held, making it difficult to prosecute the perpetrators of terrorist acts in fair proceedings, and to provide the public accounting of these crimes that the victims of terrorism deserve.

Key Recommendations

The US government should:

- Repudiate the use of secret detention and coercive interrogation as counterterrorism tactics and permanently discontinue the CIA's detention and interrogation program;

- Disclose the identities, fate and whereabouts of all detainees previously held at facilities operated or controlled by the CIA since 2001.

Other governments should:

- Refuse to assist or cooperate in any way with CIA detention, interrogation and rendition operations, and disclose any information that they may have about such operations.

The Case of Marwan Jabour

Marwan Ibrahim Ali al-Jabour is a 30-year-old Palestinian who was born in Amman, Jordan, and grew up in Saudi Arabia. In 1994, he moved to Pakistan to continue his studies, and in 1999 he got married. He and his wife have three young daughters.

Detention in Lahore

> The beatings were difficult, but they weren't the worst part .... [The worst] was the fear that I would never see my family.
> —Marwan Jabour, describing how he felt when he was taken into detention

Jabour was arrested after having dinner in Lahore, Pakistan, at the home of a friend, a professor at a university in Lahore, on May 9, 2004. At about 9 p.m., when he was pulling his car out of his friend's garage, a man on the street asked him about his friend. As Jabour responded, he was suddenly surrounded by a large group of Pakistani men in civilian clothing. The men grabbed him and cuffed his hands. They put him in a car and tried to put a sack over his head, but he fought back and they left the sack off.

They also arrested the friend whose house he was visiting, and another friend who was there. All three men were taken to what Jabour believes to be a Lahore station of Pakistan's Inter Services Intelligence (ISI), the country's powerful military intelligence agency; the station was close to the Panorama Centre.[2]

Jabour said that as soon as the men got him inside the station, they started beating him badly. "There were seven or eight officers in the room with me," Jabour told Human Rights Watch. "If I said I didn't know anything, they beat me: they slapped me, kicked me, and hit me with a stick. They insulted and threatened me. They kept me awake all night long."

[2] Panorama Centre is a well known market in Lahore.

Jabour said that the men also used an electric prod on him, continually questioning him about the whereabouts of suspected terrorists.

At about 6 a.m., he said, they sent him to a cell, leaving him there with shackles on his legs. There were three small cells in a row together. Jabour was alone in his cell, and his two friends were in the other cells. "They had been beaten too, but not as badly as I was," Jabour said. "I was bruised from the beating."

From the questions that Jabour was asked, he knew that his contacts with Arab militants had aroused official interest. Jabour told Human Rights Watch that he had trained in a militant camp in Afghanistan for three months in 1998, had returned to Afghanistan for a couple of weeks after the American bombing campaign started, and in 2003 had assisted Arabs and others who had fled Afghanistan for Pakistan. Because he had lived in Pakistan since 1994 and had studied at a university there, he spoke Urdu fluently and had local contacts. His knowledge of the local environment meant that he was able to arrange for people to get medical care and stay in local homes. Jabour claims that he assisted "unaffiliated mujahideen" —those who did not belong to al Qaeda or other armed groups—and that he was never a member of a terrorist group or in any way involved in terrorist activities.[3]

When the interrogators returned to his cell an hour or two later, they wanted the details of Jabour's activities, including the names of militants he had met, and the addresses where those who had fled Afghanistan were staying. They had already found his cell phone and a diary with phone numbers. They took Jabour back to the interrogation room, where an interrogator was waiting for him. They told him to start making phone calls for them. The police began shouting and beating him. They threatened to arrest his wife. Jabour said: "They told me: 'We'll keep her on her knees in front of you.'" He described the scene:

> We were in a specially made room with iron rings on the wall, and they chained my hands to the ceiling. They also tied a rubber string on my penis that didn't allow me to pee. They left it on the whole time I was

[3] Although Human Rights Watch cannot corroborate these statements, the fact that in 2006 the US authorities released Jabour without charge suggests that they did not believe he was implicated in acts of terrorism.

with them, except sometimes they would briefly undo it. It was terribly painful.

Jabour said that because he was kept from urinating for nearly four days, except for few brief moments of respite, he now has a problem with his kidneys. He has to urinate frequently, and sometimes there is blood in his urine.

Early in the morning on his third day of detention in Lahore, Jabour said, three people who he believes were Americans came to interrogate him: two women and a man. He was blindfolded the whole time they interrogated him, but he said that their American accents were unmistakable. (They interrogated him in English.) "They told me, 'Marwan, you're at a crossroads: you could spend the rest of your life in prison, or you could cooperate with us against the terrorists. You could be a rich man.'"

Jabour said that nobody physically abused him while the Americans were present, although sometimes he was made to kneel on the floor while he was being questioned. When the Americans once asked him about the bruises on his face, caused from his beating by the Pakistani police, he told them sarcastically, "Oh, we spent a very nice night together, your friends and I."

During the interrogation, the two women did most of the talking. One was friendly, and made some suggestive comments to him; the other was very angry and swore a lot. The angry woman told him that there was a huge American man waiting for him in prison.

The Americans stayed at the police station until about midnight. After the Americans had left, the Pakistani police removed his clothes and showed him a red hot metal rod.

One of them asked me: "Where do you want to be hit with it?" I begged him not to. He burnt my left arm, just above the elbow, and my left leg. I got no medical care for the burns, which bubbled up. They took a month or so to heal. But this seemed minor compared to all the other things in my life at the time.[4]

[4] A Human Rights Watch researcher was shown the light scars on Jabour's arm and leg when she interviewed him in December 2006.

Jabour said that on the morning of the fourth day, the Pakistanis transferred him by car to another facility. He had been kept awake nearly the whole time he was detained in Lahore. He estimated that he was allowed a total of about three to four hours' sleep during the nearly four days he was held.[5]

Islamabad: Proxy Detention

> I think it had once been a private home. It was a place of secret detention . . . . It seemed to me that this place was controlled by Americans. They were in charge.
> —Marwan Jabour, recalling his detention in Islamabad.

Jabour described the detention facility he was transferred to as a "villa": a large private compound that had been renovated to hold prisoners.[6] He was blindfolded when he arrived so he did not see it from the outside, but he heard the Pakistanis who were in the car with him say that they were going to Islamabad.[7] The drive from Lahore took three-and-a-half to four hours.[8]

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[5] Moazzam Begg, a British citizen who was imprisoned for two years at Guantanamo, described how when he was in ISI detention in early 2002, he witnessed other prisoners being beaten and deprived of sleep for days. Moazzam Begg, *Enemy Combatant: A British Muslim's Journey to Guantanamo and Back* (London: The Free Press, 2006), pp. 15-17.

[6] He was held on the ground floor, but he was under the impression that the building had a second story.

[7] The other prisoners who Jabour met in the facility confirmed that it was in Islamabad. Moreover, there are many other accounts of "disappeared" prisoners have been held in Islamabad or brought there for questioning. For example, a recent letter describing people recently released from secret detention in Pakistan states that among the detention centers where people were held was "a Safe House near Islamabad Airport." Letter from Amina Masood, Defense of Human Rights, to the Honorable Chief Justice of Pakistan, December 19, 2006. See also "FBI questions al-Qa'eda man in Pakistan," *Daily Telegraph* (U.K.), March 17, 2003 ("[Officials] said Yasir al-Jaziri, a Moroccan educated in America, was moved to the capital, Islamabad, for questioning after he was captured in a raid"); and "2 aides to Osama Yousaf arrested," *Daily Times* (Pakistan), August 12, 2005 ("Sources also said Osama Bin Yousaf had been taken to Islamabad where a foreign investigation team would see him").

Abdullah Khadr, a Canadian citizen arrested in Pakistan in October 2004, states that he too was held in secret detention in Islamabad, and was interrogated by both American and Pakistani personnel. See Affidavit of Abdullah Khadr, United States v. Khadr, Action No. EX0037/05, Superior Court of Justice, Toronto, 2006, pp. 25-27.

Moazzam Begg states that immediately after being arrested in early 2002 he was held in a house in Islamabad. He described it as a "very grand" house, like the house of a wealthy person, in what he thought was the G10 district of the city. Although he was held in a room, he saw several cells in another part of the house. Moazzam Begg, *Enemy Combatant*, pp. 6-13.

Finally, at least one detainee who is currently being held at Guantanamo stated in an administrative hearing that after being arrested he and a few others were brought to Lahore, interrogated there by American civilians, and then brought to Islamabad, where they spent two months in detention before being transported to Bagram air base in Afghanistan. Fahmi Abdullah Ahmed (ISN 688), Combatant Status Review Tribunal Transcript, US Department of Defense, set 4, pp. 425-26 (released March 3, 2006). Ahmed was arrested some time after February 2002; it is unclear when.

[8] This is roughly the time it takes to make the trip using the Lahore-Islamabad motorway.

The forced sleeplessness that Jabour endured in Lahore continued in Islamabad. Jabour told Human Rights Watch that during his first seven days in Islamabad his captors did not allow him to sleep, except for the occasional hour-long doze. “It was a continuous investigation,” he said.

“The Americans were almost always around,” he told Human Rights Watch. “I wasn’t wearing a blindfold after I arrived there, so I could see them. I saw three American women and a man, plus about five or six Pakistanis.” Speaking of the Americans, he said: “I think it was the same man who questioned me in Lahore, and at least one different woman.” Jabour said that the Americans were dressed in regular Western clothes, and one of the women said that her name was Mary. They did not say what government agency they were from.

Jabour said that the Americans appeared to be in charge of the facility. They would question him during the day, sometimes showing him photos of suspected militants, and after midnight the Pakistanis would take over. At first Jabour was held alone in a cell that was like a room, and was attached to the wall by a chain about two meters long.

“The Pakistanis beat me almost every night,” he said. “Once they threatened to pull out my fingernails. Other times they would be friendly, and promise to release me if I talked.” He was forced to stand for long periods.

The Americans did not beat Jabour, but they made him stay awake. “They would say: ‘If you cooperate, we’ll let you sleep.’ And: ‘If you work with us, we’ll make you really rich.’ They never threatened to take me to Guantanamo, but they did say that I’d be taken away somewhere and would never see my children again. I was thinking that my life was finished.”

“I was thinking about my oldest daughter the whole time,” he said. “I thought that I’d never see her again. I was afraid that I’d be sent to Guantánamo.”

Jabour told Human Rights Watch that all of the Americans he saw at the facility were relatively young: in their late twenties or early thirties. He said that the man who questioned him was about age 28-30, with thinning hair, and the woman who called

herself Mary was tall, with medium length, light colored hair. Another woman was always angry and swore a lot. (Jabour believes this is the same woman who swore at him in Lahore.) Once, in Arabic, she told Jabour "Fuck Allah in the ass."

Jabour collapsed twice during this first week in Islamabad; he believes that he had two heart attacks. The first time was on his fourth day of detention; the second time was at the end of seven days. "I fell unconscious both times, with my heart pounding out of my chest," he said. The doctor, a Pakistani, checked his heart and gave him something called "glivet."

After Jabour's first collapse, they moved him to a cell with another prisoner, an Algerian named Adnan, who took care of him. (Jabour knew him as Adnan "al-Jazeeri," or Adnan the Algerian.) Jabour was in such bad shape that he could not walk or feed himself. He was allowed to sleep for about four hours.

After his second collapse, three days later, he was allowed an entire day's rest. "After the second collapse, I was hysterical," he said.

A number of other prisoners were held in the cell block with him, which he described as a new addition to the main house. The cell block was stiflingly hot and the air was stale. There were two facing rows of three cells, each of which had a barred door facing the corridor. In front of the barred doors were wooden doors, but they were almost always left open. When the prisoners were walked down the corridor to use the toilet, they could see each other.

Jabour said that one cell held a 16-year-old boy named Khalid. Khalid, who was Egyptian, said that he had been arrested six months previously during military operations in Waziristan, in northwest Pakistan bordering Afghanistan. He was apparently badly injured during his arrest, and Jabour could hear him crying and moaning in pain at night. "He was suffering badly," Jabour recalled. Another 16-year-old who was held in the facility was an Iraqi named Tha'er, who said that he had been arrested in mid-2003. Tha'er told Jabour that he had an Australian travel document, and that the Australians had visited him the previous year, interrogating

him and making a video of the interrogation. Tha'er also said that Abu Zubaydah and members of his group had been held in this same facility.[9]

The facility also held a Yemeni detainee who had been arrested in late 2003; a Libyan named Ayoub who had been arrested in early 2004; an Afghan known as Mohammed al Afghani, who was born in Saudi Arabia, and a Palestinian who had been arrested in early 2004. The latter two prisoners had been transferred from Peshawar prison to Islamabad the same day that Jabour had arrived. There were also three Pakistanis who were accused of involvement in the attempted kidnapping of an ISI general; they said that they had been held for a year without being charged. A fourth Pakistani was also held there; he was released a few days after Jabour arrived. Jabour said that this fourth man had been badly tortured: "you can't imagine how much they were hurting him."

Jabour said that the Pakistani prisoners told him that a Pakistani named Majid Khan had previously been held there with them.[10]

Jabour was held in the Islamabad facility for more than a month. He was never brought before a judge, charged with any offense, or allowed to see a lawyer. While he was there, another prisoner, the Yemeni, was moved from the facility, supposedly for Yemen. The day before Jabour was transferred, three other prisoners—the two 16-year-old boys, and the Algerian man—were taken away.

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[9] Zine Abd el Dine, aka Abu Zubaydah, is currently incarcerated at Guantanamo. He was among the 14 detainees transferred from CIA custody in early September 2006. It is believed that he was badly tortured during his detention. See, for example, Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of its Enemies since 9/11* (New York: Simon & Schuster, 2006), pp. 115-18.

[10] Majid Khan is currently incarcerated at Guantanamo. He was among the 14 detainees transferred from CIA custody in early September 2006.

Secret CIA Detention

> It was a grave.
> —Marwan Jabour, recalling his two years in secret CIA detention.

Jabour was transferred out of the Islamabad facility on the evening of June 16, 2004. The Pakistanis brought Jabour and three other prisoners (the Palestinian, the Afghan, and the Libyan) to the airport. The prisoners were blindfolded; their hands were cuffed, and their legs shackled. Jabour said that the drive to the airport took less than 20 minutes.

Before he was put on the plane, Jabour was led to the bathroom, where the Americans took off his blindfold. "I saw Americans in front of me, talking in sign language. A doctor was there, and he took my blood pressure and gave me an injection. I knew it was the end of my life." Then the Americans put a sack over his head and changed his handcuffs. The injection made him a bit woozy, but he did not pass out.

Jabour said everyone entered the plane through the back, using what seemed like the door of a military plane. The plane seemed fairly small, like it could hold perhaps 20 to 30 people. The prisoners were on one side, with a seat between them. Their hands were cuffed behind their backs, and their legs were cuffed and shackled to the floor. There were four prisoners and about a dozen other people on the plane.

Jabour believes that the secret prison facility he was brought to was located in Afghanistan. He enumerated several reasons for this belief. First, the time spent flying: the flight lasted a maximum of two hours.[11] Second, the food served at the prison: during the Eid al-Fitr holiday,[12] the prisoners were given typical Afghan food, and near the end of his stay they were fed typical Afghan bread with regular meals. Third, facts gleaned from his captors: an officer at the prison once let slip that after

[11] This is more than enough time to get to Kabul from Islamabad.

[12] The Muslim holiday of Eid al-Fitr (the Festival of Fast-Breaking) is a three-day celebration at the end of Ramadan.

the earthquake in Pakistan relief supplies were flown "from here" to Pakistan.[13] Fourth, the weather: it was extremely cold in the winter (colder than in most parts of Pakistan); one wall of his cell would be freezing to the touch. Fifth, the languages: the first director of the prison spoke fluent Farsi (Persian), suggesting that the prison was in a region where such language skills were useful.[14]

Jabour said he thinks that everyone at the prison was American—the guards, interrogators, prison directors, and medical personnel—except possibly the Arabic-speaking translators. Not only did the prison staff say they were American—informing Jabour that he was in U.S. custody—they spoke American-accented English.

The First Six Months

After the plane landed, the transfer team put Jabour and another prisoner in the back of a jeep, handling them roughly. The jeep then drove down an unpaved road to the prison.

When the group reached the prison, two guards brought Jabour inside. After they put him in a cell, by himself, they cut off all his clothes, leaving him naked. They released one of his hands from the handcuffs, and cuffed the other hand to a ring in the cell wall. It wasn't possible for him to stand because the ring was near the floor, and he was attached to it via a short chain.

The cell was just over 1 meter wide by almost 2 meters long. It was roughly the size of a single mattress, but it did not have a mattress. The only objects inside the cell were a bucket and two coarse blankets.

The cell had two video cameras near the ceiling, too high for a standing person to reach. There were also speakers and a listening device built into the wall.

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[13] The US military sent relief flights from Afghanistan to assist people affected by the 2005 earthquake in Pakistan. See Embassy of the United States in Islamabad, Press Release, "250th Relief Flight Unloaded by the U.S. Military," November 29, 2005.

[14] Farsi and closely related languages are spoken in much of Afghanistan in addition to Iran.

This cell, as well as other cells that Jabour saw later, had double steel doors that were very close to each other. (In other words, to exit the cell it was necessary to go through one door and then the next.) The door that opened into the cell had a small glass window (about 40 cm by 30 cm) and a food slot below. Except for the door, the cell had no windows, but the lights were left on all the time, including at night.

Jabour said that he thought the structure of the building was old, but the cells were new and modern. Everything was metal and seemed very new.

The guards let Jabour sleep the first night (or let him try to sleep) and returned early in the morning. No one said a word to him, but they shaved his head, and also shaved off his beard and moustache. Then, without giving him any clothes to wear, they took him to an interrogation room. In retrospect, Jabour finds it hard to believe that he was paraded around naked in front of a group of men and women, but at the time he was so disoriented and upset that his lack of clothing seemed relatively minor.

The interrogation room was a relatively big room and it held about ten people, including guards and people who appeared to be doctors. Some members of the group were women. They put him a chair, shackling his hands and legs to the chair. A doctor came and another person made a video recording of Jabour's body.

A bearded man, whom Jabour had seen at the airport in Islamabad, began to talk in American-accented English. He said he was the "emir" (director) of the facility. He said Jabour had only one option: to cooperate. He promised that if Jabour cooperated, he would be treated well.

During this interrogation and countless future interrogations, his questioners asked about Jabour's activities in Pakistan, the people he had met, and his knowledge of terrorist groups. He was shown many hundreds of photos, some of people who were obviously in detention (they were wearing prison jumpsuits and showing a plaque with numbers).

During the first six months that Jabour was being interrogated, a huge, muscular man—whom Jabour called a "Marine" because of his build—would sometimes stand

behind the interrogator and act intimidating. Jabour was also frightened by an object that the interrogators called the "dog box." It was a wooden box, about 1 meter by 1 meter in size, and the Americans told him that they put people inside it. "They said that KSM [Khalid Sheikh Mohammed] had spent some time in the dog box and then he talked. They kept threatening me: 'We could do this to you.'"[15]

Jabour said that he was slapped a few times at the beginning of his stay, but was not beaten while held in the secret facility. Instead, when the interrogators felt he was not cooperating, they would chain him up in extremely uncomfortable positions, which would become painful over time.[16] His hands would be attached to his ankles, and to the floor, and he would be left like that for a half hour to an hour. "At times it was difficult to breathe," he explained. In all, he estimates that he was put in these stress positions a total of 15 to 20 times.

Jabour said that during the first six months he was held at the secret prison they would sometimes play rock music at ear-blasting levels, which could last an hour, a day, a few days, or even a week. "It was loud, awful music," he said, "like the soundtrack from a horror movie."

Besides the music, there was also a constant, low-level, white noise; Jabour said that it sounded like a generator. Jabour thinks that one of the main reasons for the noise was to prevent prisoners from communicating with each other.

Two weeks after Jabour arrived at the prison, he was provided with a Koran. After three-and-a-half months, he was given a prayer mat.

Jabour said that the food was awful. It was almost all canned food (often tuna or sardines): uncooked, very bland and bad-smelling. "It was like dog food," he

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[15] KSM is a shorthand used by US officials for Khalid Sheikh Mohammed, alleged to be the architect of the September 11 attacks. Mohammed was held in secret CIA custody for three-and-a-half years. He was among the 14 detainees transferred from CIA custody to Guantanamo in early September 2006.

[16] Numerous detainees at Guantanamo and elsewhere have reported being put in "stress positions" as punishment. In December 2002, Secretary of Defense Donald Rumsfeld issued new interrogation rules for Guantanamo, authorizing "stress positions," removal of clothing, prolonged isolation, sensory deprivation, and forced grooming (like forced shaving of facial hair), among other interrogation techniques. In September 2003, Army Lt. Gen. Ricardo Sanchez authorized new interrogation techniques for use in Iraq, including the use of stress positions. Memorandum from Lt. Gen. Ricardo Sanchez to Commander, US Central Command, regarding "CJTF-7 Interrogation and Counter-Resistance Policy," September 14, 2003.

remembered. During his first several months at the prison, his weight dropped considerably. Whereas he had previously weighed 93 kilograms, his weight fell to 58 kilograms. (They weighed him every week.) "I felt weak, dizzy, unbalanced all the time, like I was on a ship."

Jabour received his clothes back piece by piece over time. First, after a month and a half at the prison, he was given a pair of pants. Then, after about three-and-a-half months, he was given a tee-shirt. Finally, after about eight months, he was given a pair of shoes.

Jabour told Human Rights Watch that his legs were left shackled to each other for one and a half years. During the time his legs were shackled, he could only take small steps; the chain running from one of his ankles to the other was about 75 centimeters long. Whenever he was taken out of the cell and brought to another room for interrogation, he was blindfolded.

The Remaining 19 Months

Jabour's treatment improved considerably after the initial six-month period of detention, and continued improving in stages after that. The first major change was a transfer to a much larger cell.

To bring Jabour to the new cell, the guards blindfolded him and walked him around a long, complicated route, in and out of different rooms, confusing his sense of direction. When they reached the cell and removed his blindfold, Jabour found himself in a room that was about 5 meters by 7 meters in size, with a mattress, a pillow, a sink, some books of Koranic interpretation, and some strawberries. The big cell was also quieter than his previous, small cell, and the lights were turned off from 11 p.m. to 4 a.m.

Jabour was kept in the new cell for three days, then he was sent back briefly to his previous cell. "They told me I could take one thing with me," Jabour recalled. "I wanted both the mattress and a book, but I chose the book."

On December 18, 2004, Jabour was moved to a large cell in a separate building. When the guards moved him to that building, they took him outside; he estimates that the second building was 70 meters from the first one. His new cell number was B1.[17] Like his first cell, it had no windows and no natural light.

While he stayed in the second building, he was allowed to shower once a week, on Saturdays.

Not long after he was moved into the second building he was given a watch, a calendar and a prayer schedule. He remembers that in summer the dawn prayers would be held as early as 3:25 a.m., whereas in winter the dawn prayers would be as late as 5:15 or 5:25 a.m., times that correspond to prayer times in Afghanistan.[18]

Except for interrogations, solo exercise, and his weekly shower, Jabour spent all his time confined within the four walls of his cell. With nothing else to occupy his mind, Jabour poured his energy into decorating his cell. After a year had gone by, the Americans gave him a map of the world, and later they gave him pictures of fish and animals. "I had asked them for a plant, which they didn't give me, so I drew a big tree, with leaves colored on it," he remembered. "I cut it out and taped it up on the wall." He also made grass out of strips of paper. "I drew flowers, and I stood on my chair and stuck them to the ceiling." Sometimes the Americans would take photos of his cell.

A year into his detention, the Americans started allowing Jabour to watch a movie once a week. The facility had a list of 200-250 films, including big-budget Hollywood films, documentaries, cartoons, sports, horror movies, and wrestling.

After a year and a half, an officer taught Jabour how to play chess. Jabour drew a chess board and made chess pieces out of paper. He also played checkers and cards with some of the women interrogators. About four months before he left, he was given a computer chess set, and a small video game.

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[17] He was never told the cell number of his first cell.

[18] See Islamic Finder (http://www.islamicfinder.org/) (providing prayer times around the world).

Jabour spent much of his time reading. The prison had a big library with hundreds of books and finally, by the time he left, more than a thousand books in a variety of languages. The majority were in Arabic, but there were also books in languages such as Urdu, Persian, Indonesian and English.

One of the most momentous occasions for Jabour was when he was allowed to see sunlight. He had spent a year and a half in captivity without even a glimpse of natural light. One day the Americans opened up a skylight in his building. "They brought me a chair and let me sit under the skylight," he remembered. "I was so happy. I joked with them, pretending to call outside, 'Help! Someone help me! Let me out!'"

The second building he was held in had an exercise area, about 5 by 6 meters in size, in which Jabour was allowed to kick a soccer ball by himself. Near the very end of Jabour's captivity, he was allowed to use a large gymnastics room: about 8 by 15 meters in size. The ceiling of the room was quite high up, and for a short while one of the prison subdirectors uncovered windows on the ceiling, through which Jabour could see sunlight and the sky. Jabour expressed warm feelings for the person who instituted these improvements, describing him as "a very good man."

The food also improved toward the end of his more than two-year confinement. He started receiving Afghan bread with his meals, and toward the very end his meal would arrive heated. He was also very occasionally given Western food like pizza and hamburgers, as well as cookies and candy.[19]

Jabour was never permitted to contact his family, the hope for which never left him. "I told the kind 'emir' [a prison subdirector] that I was worried about my family," Jabour recalled. "He said, 'There's some things we can do, but some things we can't do.' He said he couldn't allow me to contact them."

[19] He remembers receiving chocolate bars like Snickers, Twix, Bounty, and Kit-Kats.

Secret Prison Staff

Jabour estimates that in the more than two years he was held at the prison, he saw a total of about 70 staff, consisting of some 25 guards and 45 civilian staff, including interrogators, supervisory staff, three or four doctors, and a few psychologists. He said everyone was American except for the translators, who he said were mostly Arabs. (They could have been Arab-Americans.) He said there was an Iraqi translator, three Egyptians, and a Lebanese woman.

The prison had three "emirs," or directors, during this period. The first was a bearded man, who Jabour estimates was about 40 years old; the second was a man with a shaved head who was about 38 years old (with whom Jabour played chess on occasion); and the third was an older man, about 55, who arrived in May 2006. There were also five people who seemed to have the position of subdirector. Two of them called themselves Mr. Charlie and Mr. Warren.

Jabour said that every few months he would see a psychologist. One was a man about 50 years old. Another was a woman about 55 years old; Jabour said that he spent an hour with her on one occasion.

The translators, the doctors, and the interrogators all wore normal civilian clothing. The guards, who were all men, wore black uniforms and gloves, and had black plastic masks covering their eyes. They did not carry weapons and they did not speak, except at the very end of Jabour's imprisonment, when they spoke to him in American-accented English.

Other Prisoners

Given the size of the prison where he was held, Jabour estimates that it had a capacity of 30-35 detainees. His estimate is further supported by the hundreds of books and videos in the prison library, and the large number of personnel who worked there.

Nearly all of Jabour's contact with other prisoners occurred in the first month of his captivity. He estimates that there were about 12-15 detainees held in the same area

as him during that time. "They used to bang hard on our cell doors when they brought our meals," he said. "At the beginning, they knocked on about 12-15 doors."

Jabour found a name written on the wall in his cell: Marwan al-Adeni. He also heard what he described as "terrible shouting"—"someone saying 'Help! Help!'"—during the first three days. On the third day, in a brief moment when the white noise had stopped (Jabour believes that it was a break between two generators), Jabour heard someone call out to him in Arabic: "Who are you? Don't be afraid, talk." Although Jabour had been warned not to talk to anyone, he conversed with this prisoner whenever the generator was quiet. The man said his name was Marwan al-Adeni, and that he had been held there for two months. He said that he had been arrested the previous year, and that the Americans had kept him in a secret prison that had Russian guards.[20] He said that he and six other prisoners had been brought together from that prison to the present one.

Jabour said that the two of them spoke every day for three days, until a guard came and punished them: he left Jabour shackled for an hour is a painful stress position. Jabour never spoke to Marwan al-Adeni again, but a year later, he found his name written on a mattress, and once he found his name written on a shirt. Also, during an interrogation when Jabour was first in custody, an interrogator showed him a photo that he said was of al-Adeni.[21]

Jabour also heard other prisoners talking during this time, again in the brief moment when it seemed like the generators were being switched. Several people gave their names, including Hudaifa, Adnan, Abdul Basit, and Abu Yassir al-Jazeeri. And once, during that first month, Jabour heard Ayoub al-Libi (whom he had been held with in Pakistan) calling him.

Another prisoner with whom Jabour had more indirect contact was Majid Khan, currently incarcerated at Guantanamo.[22] On December 18, 2004, the day Jabour was

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[20] It should be noted that unless the prisoners spoke Russian themselves, they might have mistaken a related language for Russian. Also, there could be Russian-speaking guards in certain countries in Central Asia.

[21] Human Rights Watch has not found other sources with information about this prisoner.

[22] See discussion above.

transferred to the large cell, he found an inscription below the cell's sink. It said: "Majid Khan, 15 December 2004, American-Pakistani." He also received a book in May 2006 from the prison library that may have been meant for Khan. He had not requested the book, and believes it was given him by accident; inside it had a note written in good English that said: "I'm feeling depressed and upset. I want to go home to Pakistan. And I want the newspaper every day."

Cell B1, where Jabour was held for about a year and a half, was on a corridor with two other cells. For nearly a year, Jabour said—from December 2004 until late the following year—two Somalis were held in the cells next to his. He could sometimes hear them speaking to each other in Somali. When the two Somalis were moved, at least one other prisoner replaced them, but that prisoner never spoke and Jabour does not know who he was.

Twice when he was confined in that cell he heard a prisoner yelling, sounding very upset.[23] Jabour believes that both times it was a prisoner who was being led down the corridor: the sound approached and then it receded.

Jabour saw only a single other prisoner during his entire time at the secret prison. The circumstances of his meeting were surprising. At the end of February 2006, the prison subdirector, whom Jabour liked, told Jabour that he had good news. "He said they'd let me sit with another brother," Jabour recalled. "I said I don't believe you. He asked me who did I want to sit with: Someone religious? Someone funny? … I said I wanted a funny guy who likes to joke. He said they had just the guy for me, a good guy: Yassir al-Jazeeri."[24]

He met al-Jazeeri the next day. Al-Jazeeri told Jabour that he had arrived at the prison in April 2004. "I think he was part of the group of six prisoners who were transferred with Marwan al-Adeni," said Jabour. Al-Jazeeri told Jabour that he had been in a place where they beat him badly, doing permanent damage to his arm. Once they

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[23] He remembers that one of those instances was in February or March 2006.

[24] Yassir al-Jazeeri was among the 26 people on Human Rights Watch's November 2005 list of "ghost prisoners" believed to be in CIA custody. Human Rights Watch, "List of 'Ghost Prisoners' Possibly in CIA Custody," November 30, 2005 (http://hrw.org/english/docs/2005/11/30/usdom12109.htm).

played loud music for four months straight.[25] He said that the guards were Russian but the interrogators were American. He also said that there were a lot of prisoners at that prison, and the prisoners could speak to each other.

Jabour was allowed to sit and talk to Yassir al-Jazeeri about eight times, sometimes once a week, sometime once a month. Once their meetings were suspended for a month after al-Jazeeri told Jabour that some Americans had entered his room at 3 a.m. to show him photos of Abu Musaab al-Zarqawi, who was dead.[26] The two were not supposed to talk about such things. The last time Jabour spoke to al-Jazeeri was in July 2006, a week before Jabour left the facility.

Jabour also learned of other detainees in US custody via his interrogations. An interrogator showed him a photo of a Somali man whom Jabour had known previously; the photo had been taken in Jabour's cell (the first small cell). Also in US custody was an African man named Speen Ghul; the Americans showed Jabour photos of him both before and after his arrest. Other detainees that Jabour remembers seeing photos of were two men named Retha al-Tunisi and Talaha.[27]

One photo that surprised Jabour was of a boy named Talha, who appeared to be nine or ten years old.[28] His father was said to be Hamza al-Jofi, a militant leader in Waziristan.[29] When Jabour saw the photo of Talha, who was apparently in custody, he expressed amazement that the United States was holding someone so young.

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[25] Al-Jazeeri also reportedly told Jabour that once, when a Lebanese interrogator visited that prison, they played Arab music for a full day.

[26] Abu Musab al-Zarqawi was the Jordanian who led Al-Qaeda in Iraq until his death in June 2006.

[27] From Jabour's description of Talaha, it seems very likely that he is Mohammed Naeem Noor Khan, also known as Abu Talaha. Jabour said that Talaha was in his mid-to-late 20s, that he was a Pakistani but had lived in Britain; that he was quite tall, and somewhat heavy-set; that he spoke Urdu, English, and Arabic; and that he was originally from Karachi. He also said that he thought Talaha was arrested in about July 2004, because that's when the Americans began asking Jabour about him. All of these characteristics describe Noor Khan, who was on Human Rights Watch's November 2005 list of 26 people who were possibly in CIA custody. More than two-and-a-half years after his arrest, Noor Khan's whereabouts are still unknown; his father has filed suit in Pakistan demanding information about what happened to him.

[28] This is a different person than the man named Talaha, mentioned above.

[29] American interrogators allegedly questioned Abdullah Khadr about al-Jofi while Khadr was being held in secret detention in Islamabad in October 2004. See Affidavit of Abdullah Khadr, United States v. Khadr, Action No. EX0037/05, Superior Court of Justice, Toronto, 2006, pp. 25-27. Human Rights Watch has no information about his son.

Release

As the months and years passed, Jabour lost all hope of leaving prison. But on the evening of July 30, 2006, without warning, the subdirector of the prison informed Jabour that Jabour would be leaving the following day. Notably, this announcement came just one month after the US Supreme Court's landmark ruling in *Hamdan v. Rumsfeld*, in which the Court held that detainees held as enemy combatants were protected under the Geneva Conventions.[30]

Transfer to Jordan

The prison subdirector said he knew where Jabour was going to be sent, but that he could not tell him. He said there was no toilet in the plane so Jabour would have to wear diapers, and that they would make a video of his naked body to show that his body had not been harmed. He told Jabour to be ready to leave at 6 p.m.

The transfer team picked him up the next evening. They put cotton over his eyes, cotton in his ears, and rubber over that. Then they put a band around his head, a mask over his face, and head phones over his ears. His hands were cuffed in front and his legs were shackled. A belt was put around his legs, above the knees, and his handcuffs were attached to it. "I felt like a mummy," Jabour said.

They brought Jabour outside to a car, and laid him down in it. Jabour is fairly certain that another prisoner was next to him. The car drove for about an hour.

Jabour was brought outside and put in a chair, and he heard three shots. "I was afraid," he said. "I thought they were shooting people." The team was very aggressive with him, increasing his fear.

Suddenly they removed all of his wrappings and took off all his clothes. When his eyes opened, he saw a man pointing a video camera at him. Then the transfer team put a diaper on him, and put the same outfit back on, except this time they used plastic handcuffs.

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[30] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

He could only feel the airplane; he could not see it, but it seemed to him to be a small civilian jet. The seats faced forward, as in a normal passenger aircraft. In the plane, during the flight, a doctor took his blood pressure. The flight lasted about three-and-a-half to four hours.

Detention in Jordan and Israel

After the plane landed, Jabour was driven in a car for about 40 minutes and then brought inside a building. His handlers sat him down and began taking off the wrappings that covered him. Someone said to him in Arabic, "Keep your eyes closed. Now open them slowly."

When Jabour opened his eyes he saw uniformed soldiers as well as men in civilian clothing. He could also see framed photos of King Hussein and King Abdullah, and he guessed that he was in Jordan. After questioning, he was sent to a cell, where a guard finally told him that he was in Amman, Jordan. Jabour later found out that he was being held at the headquarters of the Jordanian intelligence services.

A couple of weeks later, on about August 14, he was visited by a representative of the International Committee of the Red Cross (ICRC). The ICRC representative was the first independent monitor that Jabour had seen in two-and-a-half years of imprisonment. "He was very surprised by my story," Jabour said. Jabour gave the ICRC representative the contact information for relatives who lived in Jordan. Two weeks later, a group of Jabour's family members, some of whom had flown in from abroad, came to the detention facility on visiting day and were allowed to speak to Jabour for a short while. "I was overjoyed to see them," Jabour later told Human Rights Watch.

While in Jordanian custody, Jabour was also allowed to send letters to his wife and children, his first contact with them in more than two years.

On September 18, 2006, the Jordanians transferred Jabour to Israeli custody. That morning, they told Jabour that he was being released. "They said congratulations, I was free," Jabour said. "But I was still in handcuffs. And then they took me to a car and drove me to the King Hussein Bridge [on the border of Jordan and the Israeli-

occupied West Bank].” Israeli agents were waiting for Jabour at the bridge, and the Jordanians handed him over to them.

A few days after his transfer to Israel, Jabour was allowed to see a lawyer, and soon after that he was brought before a judge. After six weeks in Israeli custody, he was released into Gaza, where some of his family members lived. Two-and-a-half years after he was first arrested, he was finally able to speak to his wife and children on the phone.

The CIA's Secret Detention Program

The detention and interrogation program in which Jabour was held was operated by the US Central Intelligence Agency (CIA). It was authorized under a classified September 17, 2001 presidential directive, and operated in close secrecy for nearly five years.[31]

As Jabour's case illustrates, prisoners in the CIA program have been "disappeared," held in acknowledged detention in secret facilities, and barred from communicating with family members, legal counsel, or anyone outside. Although the International Committee of the Red Cross has repeatedly expressed concern about being denied access to detainees in CIA custody, the US government has refused to allow them to visit such facilities.[32]

In a televised speech in September 2006, just before the anniversary of the September 11 terrorist attacks, President George W. Bush publicly acknowledged that the CIA had been secretly detaining suspected terrorists in facilities outside of the United States. The president said that he could not reveal "the specifics of this program, including where these detainees have been held and the details of their confinement." Instead, he dedicated most of the speech to lauding the program's accomplishments. While making the increasingly hollow claim that "the United States does not use torture," he described several cases where the CIA used "an alternative set of procedures" to obtain information from detainees who were resisting interrogation. Bush said: "I cannot describe the specific methods used—I think you understand why—if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks

[31] In response to a lawsuit filed by the American Civil Liberties Union (ACLU), the US government recently acknowledged the existence of the September 17 directive, after having for several years refused to confirm or deny that such a document existed. See ACLU, "CIA Finally Acknowledges Existence of Presidential Order on Detention Facilities Abroad," November 14, 2006. It has refused to make the document public, however, or even provide it to members of Congress. See "Leahy 'brushed off' on secret terror docs," UPI, January 3, 2007.

[32] See "US bars access to terror suspects," BBC News, December 9, 2005; ICRC, "Developments in US policy and legislation towards detainees: the ICRC position," October 19, 2006 (ICRC President Jakob Kellenberger stating that "the ICRC had repeatedly expressed concern about detainees in undisclosed detention and had requested access to them").

on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary."[33]

As discussed below, interrogation methods reportedly used in CIA secret prisons included torture and other cruel and inhuman treatment—and were anything but lawful.

Discovering the Program

President Bush's speech was the most important official acknowledgement of the CIA's detention program, but it was not the first time that information about secret CIA detention had been made public. Indeed, reports that suspected al Qaeda operatives were being held by the CIA in "undisclosed locations abroad" began circulating in 2002.[34]

The first official acknowledgement that such reports were true came with the federal prosecution of Zacarias Moussaoui for the September 11 attacks.[35] In February 2003, the federal district judge hearing the Moussaoui case ruled that the government had to allow Moussaoui's lawyers to question Ramzi bin al-Shibh, who was allegedly a key figure in the September 11 attacks, and who had information that tended to exculpate Moussaoui from responsibility in the attacks. Because defendants have a constitutional right of access to exculpatory witnesses in the government's custody, the government had to admit that it was holding bin al-Shibh in a secret location overseas. The government argued, however, that allowing Moussaoui's counsel to question bin al-Shibh would seriously interfere with bin al-Shibh's interrogation. Although the district court rejected the government's claim, ruling that questioning via closed-circuit video should be allowed, the Court of Appeals for the Fourth Circuit

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[33] White House, Office of the Press Secretary, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," September 6, 2006.

[34] See, for example, "Getting al Qaeda to talk," CNN.com, September 17, 2002 (discussing the detention of Ramzi bin al-Shibh and Omar al-Faruq); "'Appropriate pressure' being put on al Qaeda leader," CNN.com, March 3, 2003 (stating that CIA had brought Khalid Shaikh Mohammed, who was arrested in Pakistan, to an undisclosed location outside of the United States).

[35] Moussaoui, a French citizen of Moroccan descent, was indicted in December 2001 on charges of conspiring with other members of al Qaeda to hijack planes and fly them into the World Trade Center and the Pentagon. He later pleaded guilty and was sentenced to life in prison.

later reversed the district court's decision and barred all access to bin al-Shibh.[36] A similar issue later arose in the federal prosecution of Uzair Paracha.[37]

More detailed and direct accounts of the CIA's secret detention and interrogation program emerged in 2004 and 2005 from former detainees. Most notably, in June 2004, Khaled el-Masri, a German citizen of Lebanese descent, told German police about his kidnapping, abuse, and secret detention. El-Masri was arrested by Macedonian agents on December 31, 2003, on the Serbia-Macedonia border, held secretly for nearly a month in a hotel in Skopje, then picked up by US agents and flown to Afghanistan, where he spent four months in unacknowledged detention. At the time the story was made public, el-Masri's lawyer said that he believed el-Masri had been held by the CIA. When journalists interviewed CIA officials regarding el-Masri's claims, the officials refused to either confirm or deny that he had been held.[38]

Later in 2005, three Yemeni former detainees told Amnesty International about their experiences in CIA detention, and a number of Guantanamo detainees told their legal counsel that prior to their transfer to Guantanamo they had been held in a secret "dark prison" in Kabul, Afghanistan.[39] All of these accounts had certain common characteristics, including descriptions of interrogators and prison directors who spoke American-accented English, black uniformed and masked guards, flights in which the detainee was placed in diapers and wrapped up like a package, and various forms of physical and mental abuse.

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[36] The access question eventually involved several other suspected members of al Qaeda (including Khalid Sheikh Mohammed and Tawfiq bin Attash), all of whom were transferred to Guantanamo in September 2006. The US government was so worried that the courts might grant Moussaoui's counsel some form of access to these detainees that it cited the Mousaoui case as a reason for denying detainee access to the 9/11 Commission. See Thomas H. Kean and Lee H. Hamilton, *Without Precedent: The Inside Story of the 9/11 Commission* (New York: Alfred A. Knopf, 2006), p. 121.

[37] In the Paracha prosecution, the defendant sought access to Majid Khan and Ammar al-Baluchi, both of whom were transferred to Guantanamo in September 2006. The defendant was convicted in November 2005 of providing material support to al Qaeda.

[38] Don Van Natta Jr. and Souad Mekhennet, "German's Claim of Kidnapping Brings Investigation of US Link," *New York Times*, January 9, 2005.

[39] Amnesty International issued a series of reports based on the Yemenis' description of their experiences. See, for example, Amnesty International, "USA/Yemen: Secret Detention in CIA 'Black Sites,'" AMR 51/177/2005 (November 2005). And Human Rights Watch issued a press release about the "dark prison." Human Rights Watch, "US Operated Secret 'Dark Prison' in Kabul," December 19, 2005.

Relying on flight logs and information from plane spotters (people who watch aircraft arrivals and departures at airports), journalists and human rights investigators were able to trace a number of the flights by which the CIA allegedly transported prisoners.[40]

Yet, despite mounting evidence of the CIA's secret prison program, the Bush administration refused to discuss its operations. Indeed, it was reported that the administration did not describe the program in any real detail to the congressional intelligence committees tasked with providing oversight of the CIA's activities.[41] Even when the *Washington Post* published a front-page news story describing the history and scope of the detention program in November 2005—a piece reportedly based on accounts by current and former intelligence officials—not a single administration official spoke about the program on the record.[42]

According to the *Washington Post*, the secret detention program had at various times included sites in eight countries, including Thailand, Afghanistan and several democracies in Eastern Europe. Although at the request of the US government the *Washington Post* did not name the Eastern European countries where the prisons were located, Human Rights Watch released information pointing to Poland and Romania as among the sites of detention facilities.[43] A few weeks later, ABC News reported that at least 11 "High Value Targets" had been held in CIA custody in Poland.[44]

Based on information from current and former intelligence sources, a number of journalists have described the interrogation methods used in CIA facilities. These

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[40] The plane that brought el-Masri from Skopje to Kabul, for example, was a Boeing Business Jet whose registration number was N313P. For detailed accounts of how the CIA used civilian jets to transport prisoners both to its own prisons and to foreign prisons, see Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St. Martin's Press, 2006), and Trevor Paglen and A.C. Thompson, *Torture Taxi: On the Trail of the CIA's Rendition Flights* (Hoboken, Melville House Publishing, 2006).

[41] Congressional intelligence committees were reportedly briefed about the existence of the CIA detention program, but they were not, for example, informed of the locations of the prisons. "Bush defends secret prisons, harsh interrogations," Asheville Global Report, September 14-20, 2006. Notably, in response to President Bush's September 6, 2006 speech, Senator John D. Rockefeller IV, vice-chairman of the Senate Intelligence Committee, complained that Bush had "withheld details of the CIA detention and interrogation program from the congressional intelligence committees." Press Statement, "Rockefeller Responds to President's Decision to Bring Captured Al-Qaeda Terrorists to Trial," September 6, 2006.

[42] Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *Washington Post*, November 2, 2005. Priest later won a Pulitzer prize for her reporting on the CIA's secret prison program.

[43] Human Rights Watch, "Statement on US Secret Detention Facilities in Europe," November 7, 2005.

[44] See "List of 12 Operatives Held in CIA Prisons," ABC News, December 5, 2005 (stating that, among others, Khalid Sheikh Mohammed, Hassan Ghul, and Mohammed Omar Abdel-Rahman were held in Poland).

"enhanced interrogation techniques," as the CIA reportedly called them, included extended sleep deprivation combined with forced standing, as well as exposure to extreme cold.[45] The CIA also reportedly employed waterboarding, a torture method by which the prisoner is strapped to a board and made to feel like he is drowning. It is believed that several of the 14 prisoners transferred to Guantanamo in September were subject to waterboarding.[46]

The Pakistan Connection

Jabour's experience of arrest in Pakistan and subsequent "disappearance" into CIA custody was far from unique. Indeed, it appears that a large majority of the prisoners held by the CIA were originally arrested in Pakistan, often during joint U.S.-Pakistani operations. Of the 14 high-level CIA detainees transferred to Guantanamo in September 2006, for example, nine were picked up in Pakistan.[47] And most of the other people who are thought to have been in CIA custody were arrested in Pakistan.

The Pakistani authorities have made no secret of the fact that they have handed over several hundred terrorism suspects to the United States, boasting of the arrests and transfers as proof of Pakistan's cooperation in US counterterrorism efforts.[48] While the majority of these detainees were transferred into US military custody in Afghanistan or at Guantanamo,[49] or were transported to third countries via the CIA's rendition program,[50] some substantial number of them disappeared into CIA

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[45] See Brian Ross and Richard Esposito, "CIA's Harsh Interrogation Techniques Described," ABC News, November 15, 2005. ABC News reported that these techniques were first authorized in mid-March 2002.

[46] See ibid.; Suskind, *The One Percent Doctrine*, p. 115.

[47] They are: Zine Abd El Dine (aka Abu Zubaydah), Ramzi bin al-Shibh, Mustafa Ahmad al-Hawsawi, Khalid Sheikh Mohammed, Majid Khan, Ali Abd al-Aziz Ali (aka Ammar al-Baluchi), Walid bin Attash (aka Khallad), Ahmed Khalfan Ghailani, and Abu Faraj al-Libbi.

[48] Available information indicates that somewhere between 400 and 800 people were transferred from Pakistani to US custody between late 2001 and the end of 2005. See, for example, South Asia Terrorism Portal, "443 Al Qaeda suspects handed over to US," January 7, 2003; Dr. Shoaib Suddle, Director General, National Police Bureau of Pakistan, "Fighting International Terrorism: The Role of Pakistan as a Frontline State," February 13-14, 2006. President Pervez Musharraf himself has acknowledged that Pakistan handed over 369 detainees. Pervez Musharraf, *In the Line of Fire* (New York: Free Press, 2006).

[49] According to one study, at least 36 percent of the detainees brought to Guantanamo (that is, 270 people) were arrested in Pakistan, and possibly as many as half (i.e., 380 or more people) were arrested there. Mark Denbeaux and Joshua Denbeaux, "Report on Guantanamo Detainees," Seton Hall Public Law Research Paper No. 46, February 2006, p. 14.

[50] Much has been written about the CIA's rendition program (its program of delivering detainees without legal process to countries where they often face torture), which is closely related to its secret prison program. See, for example, Stephen Grey, *Ghost Plane*; Jane Mayer, "Outsourcing torture: The secret history of America's 'extraordinary rendition' program," *New Yorker*,

custody.[51] Family members have filed suit in the Pakistani courts in some cases, but without knowing whether their relatives remain in Pakistani custody, are in US custody, or are being held elsewhere.[52]

February 14, 2005; Amnesty International, "Below the radar: Secret flights to torture and 'disappearance,'" AMR 51/051/2006, April 5, 2006; Editorial, "Torture by Proxy," *New York Times*, March 8, 2005.

[51] Human Rights Watch has the names of dozens of people who were arrested in Pakistan and may have been handed over to the CIA.

[52] Some cases have involved more than one missing person, including people who were believed to have "disappeared" into CIA custody, at least for a time, people in Pakistani custody, and people who have since turned up at Guantanamo. For example, the sister of Khalid Sheikh Mohammed filed suit seeking information about her brother Khalid, her son Ali Abdul Aziz Ali, her nephew Musab Aruchi (aka Abdul Karim Mehmood), and other family members. The first two men are now known to be at Guantanamo, after having spent years in CIA custody. Aruchi's whereabouts are unknown, although it is thought that he was in CIA detention for a time. See "Interior ministry not aware of Khalid Sheikh's whereabouts," *The News* (Pakistan), January 26, 2007.

Former Detainees: Where Are They Now?

It is not known precisely how many detainees had been held in the CIA's secret prison program at some point prior to September 2006, but it is certain that there were many more than 14 of them.

Estimates of the number of detainees held by the CIA over the course of the program vary. The *Washington Post* described a two-tier system of detention, with some 30 "major terrorism suspects" being held at high-security prisons operated exclusively by CIA personnel, and an additional 70 less important suspects being transferred to prisons run by other countries' intelligence services.[53] The major suspects, also known as "High Value Targets," were alleged top al-Qaeda leaders, not "foot soldiers."[54]

The picture emerging from detainee accounts, however, suggests that these numbers are understated, and that the true picture is more complex. For example, at the prison in Afghanistan where Khaled el-Masri was held, the guards were Afghan, but the interrogators, the main director, and the people in charge of prisoner transport appeared to be CIA.[55] So while the prisoners had daily contact with Afghan personnel, all of the important decisions regarding detention, treatment, and release were made by Americans.

And at the so-called Dark Prison in Afghanistan, which appears to have been operated solely by CIA personnel, there were a substantial number of detainees who were not top terrorism suspects. Human Rights Watch knows of some 20 prisoners previously held at that facility who are currently held at Guantanamo, as well as a former detainee who was released from Guantanamo in 2004.[56] The majority of

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[53] Stephen Grey estimates that hundreds of detainees were handed over to other countries, while "less than three dozen at any time" were held in CIA prisons. *Ghost Plane*, p. 240.

[54] High Value Target (HVT) is a US military term. The loss of High-Value Targets "would be expected to seriously degrade important enemy functions throughout the friendly commander's area of interest." Defense Technical Information Center (undated) (available at: http://www.dtic.mil/). Most of the 14 detainees in CIA custody who were transferred to Guantanamo in September 2006 had been deemed High Value Targets.

[55] Human Rights Watch interview with Khaled el-Masri, Ulm, Germany, May 26, 2006.

[56] This group includes Mohammad Nasir Yahya Khusruf (who is about 60 years old), Abd al-Salam al-Hila, Musab Omar Ali Al Mudwani, and Bashir Nasir Ali Al Marwalah, among others.

these prisoners (and obviously the one who was released) would not be considered major suspects.

Similarly, prisoners such as Marwan Jabour and the three Yemeni former detainees interviewed in 2005 by Amnesty International were far from top suspects—they were eventually released without charge. Yet they too were held in prisons that seemed to have only American staff, as well as the extreme high-security arrangements characteristic of the CIA.

Missing Detainees

There is no comprehensive accounting of CIA detainees. But based on detainee testimony, press articles, and other sources, Human Rights Watch has put together a list of 16 people whom we believe were once held in CIA prisons and whose current whereabouts are unknown. We have also compiled a separate list of 22 people who were possibly once held in CIA prisons and whose current whereabouts are unknown.[57]

The people listed below—by name, nationality, and presumed place and date of arrest—are believed to have once been held in secret CIA prisons:

1. Ibn al-Shaykh al-Libi (Libyan) (Pakistan, 11/01)[58]
2. Mohammed Omar Abdel-Rahman (aka Asadallah) (Egyptian) (Quetta, Pakistan, 2/03)
3. Yassir al-Jazeeri (Algerian) (Lahore, Pakistan, 3/03)
4. Suleiman Abdalla Salim (Kenyan) (Mogadishu, Somalia, 3/03)
5. Marwan al-Adeni (Yemeni) (arrested in approximately 5/03)
6. Ali Abd al Rahman al Faqasi al Ghamdi (aka Abu Bakr al Azdi) (Saudi) (Medina, Saudi Arabia, 6/03)
7. Hassan Ghul (Pakistani) (northern Iraq, 1/04)
8. Ayoub al-Libi (Libyan) (Peshawar, Pakistan, 1/04)
9. Mohammed al Afghani (Afghan born in Saudi Arabia) (Peshawar, Pakistan, 5/04)
10. Abdul Basit (probably Saudi or Yemeni) (arrested before 6/04)

[57] It should be emphasized that the level of secrecy surrounding the CIA's prison program remains extremely high, and the obstacles to obtaining this type of information are daunting. In short, there may well be many other former CIA detainees of whose existence nobody outside the program knows.

[58] It is believed that al-Libi was transferred from CIA custody to Libya in early 2006, but this has not been confirmed.

11. Adnan (arrested before 6/04)
12. Hudeifa (arrested before 6/04)
13. Mohammed Naeem Noor Khan (aka Abu Talaha) (Pakistani) (Lahore, Pakistan, 7/04)
14. Muhammad Setmarian Naser (Syrian/Spanish) (Quetta, Pakistan, 11/05)
15. Unnamed Somali (possibly Shoeab as-Somali or Rethwan as-Somali)
16. Unnamed Somali (possibly Shoeab as-Somali or Rethwan as-Somali)

In addition, the following people may have once been held in secret CIA prisons:

1. Abd al-Hadi al-Iraqi (presumably Iraqi) (1/02)
2. Anas al-Liby (Libyan) (Khartoum, Sudan, 2/02)
3. Retha al-Tunisi (Tunisian) (Karachi, Pakistan, early- to mid-2002)
4. Sheikh Ahmed Salim (aka Swedan) (Tanzanian) (Kharadar, Pakistan, 7/02)
5. Saif al Islam el Masry (Egyptian) (Pankisi Gorge, Georgia, 9/02)
6. Amin al-Yafia (Yemeni) (Iran, 2002)
7. _ al-Rubaia (Iraqi) (Iran, 2002)
8. Aafia Siddiqui (Pakistani) (Karachi, Pakistan, 3/03)
9. Jawad al-Bashar (Egyptian) (Vindher, Balochistan, Pakistan, 5/03)
10. Safwan al-Hasham (aka Haffan al-Hasham) (Saudi) (Hyderabad, Pakistan, 5/03)
11. Abu Naseem (Tunisian) (Peshawar, Pakistan, 6/03)
12. Walid bin Azmi (unknown nationality) (Karachi, Pakistan, 1/04)
13. Ibad Al Yaquti al Sheikh al Sufiyan (Saudi) (Karachi, Pakistan, 1/04)
14. Amir Hussein Abdullah al-Misri (aka Fazal Mohammad Abdullah al-Misri) (Egyptian) (Karachi, Pakistan, 1/04)
15. Khalid al-Zawahiri (Egyptian) (South Waziristan, Pakistan, 2/04)
16. Musaab Aruchi (aka al-Baluchi) (Pakistani) (Karachi, Pakistan, 6/04)
17. Qari Saifullah Akhtar (Pakistani) (arrested in the UAE, 8/04)
18. Mustafa Mohamed Fadhil (Kenyan/Egyptian) (eastern Punjab, Pakistan, 8/04)
19. Sharif al-Masri (Egyptian) (Pakistan border, 8/04)
20. Osama Nazir (Pakistani) (Faisalabad, Pakistan, 11/04)
21. Osama bin Yousaf (Pakistani) (Faisalabad, Pakistan, 8/05)
22. Speen Ghul (from Africa) (Pakistan)

The crucial, unanswered question is: where are all these detainees now? One concern is that the US may have transferred some of them to foreign prisons where for practical purposes they remain under CIA control. Another worrying possibility is that prisoners were transferred from CIA custody to places where they face a serious risk of torture, in violation of the fundamental prohibition on returns to torture. On the latter question, it is worth noting that some of the missing prisoners are from Algeria, Egypt, Libya, and Syria, countries where the torture of terrorism suspects is common.

The CIA Program and Human Rights Violations

In his September 6, 2006 speech, President Bush stated that the CIA's detention and interrogation program had been "subject to multiple legal reviews by the Department of Justice and CIA lawyers," and had "received strict oversight by the CIA's Inspector General." But if the CIA program passed scrutiny, as the President suggested, then that raises serious questions about the legal review provided by the responsible government agencies on matters of national and international consequence. By international human right or humanitarian law standards, the CIA program was illegal to its core.

In secretly detaining and abusing prisoners like Marwan Jabour, the US government violated a host of fundamental human rights norms. Enforced disappearance—encompassing arbitrary, secret and incommunicado detention—and torture and other cruel, inhuman and degrading treatment are all prohibited under international human rights law.

Enforced Disappearance

The International Convention for the Protection of All Persons from Enforced Disappearance (the Convention on Enforced Disappearance) defines "enforced disappearance" as:

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[59]

[59] International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the U.N. General Assembly on December 20, 2006, opened for signature on February 6, 2007, art. 2. The treaty will enter into force 30 days after 20 states have ratified it.

Although the newly adopted convention has yet to enter into force, its definition of enforced disappearance is consistent with definitions contained in a number of earlier international instruments.[60]

When the Convention on Enforced Disappearance was opened for signature on February 6, 2007, 57 countries signed immediately. Yet, although it had actively participated in the drafting of the convention, the United States was not among the signatories. State Department spokesman Sean McCormack said that the United States had not signed because the convention as adopted "was not one that met our needs and expectations," but he did not further elaborate.[61]

International law bans "disappearances" in all circumstances. The Convention on Enforced Disappearance states that, "No exceptional circumstances whatsoever, whether a state of war or a threat of war . . . or any other public emergency, may be invoked as a justification for enforced disappearance." The convention bars secret detention and requires states parties to hold all detainees in officially recognized places of detention, maintain detailed official records of all detainees, authorize detainees to communicate with their families and legal counsel, and give competent authorities access to detainees.

The practice of enforced disappearance constitutes a grave threat to a number of human rights, including the right to life, the prohibition on torture and cruel, inhuman, and degrading treatment, the right to liberty and security of the person, and the right to a fair and public trial.[62] The UN Working Group on Enforced

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[60] See "Report Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, pursuant to Paragraph 11 of Commission Resolution 2001/46" (Geneva: United Nations, 2002) E/CN.4/2002/71. For example, the Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the U.N. General Assembly in 1992, states that enforced disappearances occur when:

> persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government … followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.

[61] US State Department, Daily Press Briefing, February 6, 2007.

[62] See International Covenant on Civil and Political Rights, articles 6(1), 7, 9, and 14(1). For a detailed discussion of the human rights violations committed by "disappearances," see United Nations Commission on Human Rights, "Report submitted January 8, 2002, by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, pursuant to paragraph 11 of Commission resolution 2001/46," E/CN.4/2002/71, p. 36.

Disappearances has long recognized that the crime of enforced disappearance "is a continuous crime until the fate or whereabouts of the disappeared person becomes known."[63] Therefore, persons "disappeared" in US custody who have since been transferred elsewhere remain the legal obligation of the United States so long as their fate or whereabouts remain unknown.

Moreover, enforced disappearance not only violates the basic rights of the "disappeared" person, it inflicts severe mental pain and suffering on members of that person's family.[64] Besides harming Jabour himself, his secret detention meant that his three children were left not knowing whether they still had a father, and his wife not knowing whether she still had a husband. This uncertainty compounds the impact of the loss.

Notably, the UN Working Group on Arbitrary Detention has expressed grave concern about the US government's use of secret prisons to hold suspected terrorists, concluding that detention under such conditions is "a serious denial of [the detainees'] basic human rights and is incompatible with both international humanitarian law and human rights law."[65]

To help guarantee their protection from abuse, detainees should be held in officially recognized places of detention. The prisoners' names and the place of their detention, as well as the names of the persons responsible for their detention, should be kept in registers readily available and accessible to concerned persons, including relatives and friends. In addition, "accurate information on [the prisoners'] custody and whereabouts, including transfers, [should be] made promptly available to their relatives and lawyers or other persons of confidence."[66] Finally, the time and place of all interrogations should

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[63] See, for example, Report of the Working Group on Enforced or Involuntary Disappearances, Commission on Human Rights, E/CN.4/2006/56, December 27, 2005, para. 10.

[64] For this reason, the Human Rights Committee, the U.N. body charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), has found that enforced disappearances violate article 7 of the ICCPR, which prohibits torture and cruel, inhuman or degrading treatment or punishment. See *Elena Quinteros Almeida v. Uruguay*, Communication No. 107/1981, para. 14 (July 21, 1983). Similarly, the European Court of Human Rights found that the extreme pain and suffering experienced by the mother of a "disappeared" person constituted a violation of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits torture and inhuman or degrading treatment. *Kurt v. Turkey*, Judgment, Eur. Ct. Hum. Rts, Case No. 15/1997/799/1002, para. 134 (May 25, 1998).

[65] Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2006/7, December 12, 2005.

[66] Principle 6 of the U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

be recorded, together with the names of all those present, and this information should be available for purposes of judicial or administrative proceedings.[67]

International law also bars incommunicado detention, even when it does not constitute "disappearance."[68] And according to the Restatement (Third) of Foreign Relations Law of the United States, a state violates international law if, as a matter of state policy, it practices, encourages, or condones prolonged arbitrary detention.[69]

Torture and Other Ill-Treatment

International human rights law prohibits torture and other mistreatment of persons in custody in all circumstances, during wartime as well as peacetime. Among the relevant treaties are the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), both of which the United States has ratified.

Prohibitions on torture and other ill-treatment are also found in other international documents, such as the Universal Declaration of Human Rights, the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the UN Standard Minimum Rules for the Treatment of Prisoners.

International humanitarian law (the laws of war) also prohibits torture and coerced interrogations at all times during armed conflict. This prohibition, which is found in the Geneva Conventions[70] as well as customary laws of war,[71] is reflected in US military field manuals and training manuals.[72]

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[67] "ICCPR General Comment 20 (Forty-fourth Session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment," A/47/40 (1992) 193, para. 11.

[68] "ICCPR General Comment 20 (Forty-fourth Session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment," A/47/40 (1992) 193, para. 11.

[69] Restatement (Third) of Foreign Relations Law, § 702, comment a.

[70] See, for example, Common Article 3 to the Geneva Conventions of 1949.

[71] See International Committee of the Red Cross, *Customary International Humanitarian Law,* (Cambridge: Cambridge Univ. Press, 2005), rule 90.

[72] See, for example, US Army Field Manual 27-10, Law of Land Warfare (1956), secs. 11 and 502.

On December 2, 2002, Secretary of Defense Donald Rumsfeld approved 16 methods for use in interrogations at Guantánamo Bay, including "stress positions," hooding, isolation, stripping, deprivation of light, removal of religious items, forced grooming (shaving of facial hair), and use of dogs. On January 15, 2003, following criticism from the Navy general counsel, Rumsfeld rescinded the December 2 guidelines, stating that the harsher techniques in those guidelines could be used only with his approval. Rumsfeld then established a working group to examine which interrogation techniques should be allowed for prisoners in Guantánamo. This study led to Rumsfeld's promulgation, on April 16, 2003, of a memo outlining techniques that could only be applied to interrogations of "unlawful combatants" held at Guantánamo. Stress positions, stripping and the use of dogs were no longer authorized.[73]

These interrogation techniques "migrated" —in the words of the Schlesinger report—to Iraq and Afghanistan, where they were regularly applied by US personnel to detainees.[74] After the Abu Ghraib photos were made public in April 2004, the Bush administration repudiated and eventually replaced the August 1, 2002 Department of Justice memo that had provided the legal rationale for the approved interrogation methods.

Nevertheless, such restrictions on interrogation methods apparently did not apply to the CIA. The Bush administration and the Justice Department reportedly gave the CIA the authority to use additional techniques, including "waterboarding" (mock drowning).[75] In January 2005, Attorney General-designate Alberto Gonzales claimed in a written response during confirmation hearings that the international legal prohibition on cruel, inhuman or degrading (CID) treatment did not apply to US personnel in the treatment of non-citizens abroad, indicating that no law would prohibit the CIA from engaging in CID treatment when it interrogates non-Americans outside the United States.

In December 2005 Congress enacted—over the Bush administration's objections—the Detainee Treatment Act, which included the "McCain amendment" that prohibits the use of cruel, inhuman, or degrading treatment by any US official operating

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[73] See generally, Human Rights Watch, "Getting Away with Torture?," vol. 17, no. 1(G), pp. 11-13.

[74] James R. Schlesinger, Harold Brown, Tillie K. Fowler, Gen. Charles A. Homer, and Dr. James A. Blackwell, Jr., *Final Report of the Independent Panel to Review DoD Detention Operations* ("Schlesinger report"), August 2004, p. 7.

[75] Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004; James Risen, David Johnston and Neil A. Lewis, "Harsh CIA Methods Cited in Top Qaeda Interrogations," *The New York Times*, May 13, 2004.

anywhere in the world. And in June 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the US government was required to treat al Qaeda detainees humanely in accordance with the provisions of Common Article 3 to the Geneva Conventions.

The Defense Department then ordered the military to ensure that all its practices complied with these standards and announced new rules repudiating many abusive interrogation methods, including "waterboarding," painful stress positions, and prolonged sleep deprivation or exposure to cold. However, the Bush administration simultaneously proposed legislation effectively rewriting the humane treatment standards of Common Article 3 to permit the CIA to continue using the abusive interrogation techniques now banned by the Pentagon. Congress ultimately rejected the administration's proposal, but with mixed results. In the Military Commissions Act of 2006, Congress retained most of the War Crimes Act of 1996, which exposes interrogators to criminal prosecution for torture and "cruel and inhuman treatment" (defined as conduct that causes serious physical or mental pain or suffering). However, the law narrowed prosecutable offenses under the War Crimes Act by creating a higher threshold for inflicting serious physical pain or suffering, preventing prosecution of interrogators for non-prolonged mental abuse occurring prior to the new law.

Notably, even though the US authorities have claimed that detainees in CIA custody were treated in accordance with the law, they have been taking aggressive steps to ensure that the details of their treatment are not disclosed. The government has, to date, barred legal access to Majid Khan, one of the 14 detainees transferred to Guantanamo last September, claiming that because he was previously in CIA custody he may have "come into possession of [classified] information, including locations of detention, conditions of detention, and alternative interrogation techniques."[76] Similarly, the Military Commissions Act of 2006 and its Rules of Evidence and Procedure contain a number of provisions meant to protect the CIA's "methods and activities" from disclosure: methods and activities that are known to include "disappearance," torture, and other abuses.

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[76] In other words, the government is claiming that because Khan was held in a secret detention center, and "alternative" interrogation techniques were used on him, he should be barred from telling his lawyer about his experiences.

Conclusion

When President Bush announced in September 2006 that, as of that moment, there were no prisoners in CIA custody, he did not say that the CIA's prison program was closing permanently. Indeed, the apparent purpose of his speech was the opposite: he argued that "as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical—and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information."[77] And when he signed the Military Commissions Act into law a few weeks later, he asserted that the legislation would "allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives."[78]

President Bush is wrong on the law. Under any reasonable reading of the Detainee Treatment Act and the Military Commissions Act, the abusive treatment of detainees that characterized the CIA's detention and interrogation program is illegal. But perhaps as worrying as the President's misinterpretation of legal standards is his disregard of basic principles.

The CIA program—and the civilian leaders who created it—have inflicted tremendous harm on the reputation, moral standing, and integrity of the United States. It is time, now, to repudiate that program, and to take steps to repair the damage it has caused.

[77] The White House, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," September 6, 2006.

[78] Office of the Press Secretary, The White House, "President Bush Signs Military Commissions Act of 2006," October 17, 2006. The President also said: "When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test."

Recommendations

The US government should:

- Repudiate the use of secret detention and coercive interrogation as tactics in fighting terrorism, and announce that the CIA's detention and interrogation program is being permanently discontinued;

- Disclose the location and current status of the detention facilities where Marwan Jabour was held, as well as the location and current status of all other secret detention facilities used by the CIA since 2001;

- Disclose the identities, fate, and current whereabouts of all prisoners held for any period of time at facilities operated or controlled by the CIA since 2001, and, for prisoners transferred to the custody of another government, disclose the date and location of the transfer;

- Order the release of any prisoner held in another country's prisons at the behest of the United States, or, if evidence exists of a prisoner's involvement in criminal offenses, transfer the prisoner to the United States for prosecution in US courts in accordance with internationally recognized fair trial standards;

- Hold terrorist suspects only in officially recognized places of detention where they are registered and have access to family members, lawyers, and courts; treat them in accordance with international standards on the treatment of prisoners, and either charge them promptly or release them;

- Acknowledge publicly that US domestic law (including the Detainee Treatment Act, the Military Commissions Act, and the *Hamdan* decision) bars the use of abusive interrogation techiques such as

"waterboarding," extended sleep deprivation, and forced exposure to extremes of heat and cold;

- Sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance;

- Ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other mistreatment.

The US Congress should:

- Hold hearings to investigate the CIA's secret detention program, with the goal of ascertaining the scope of the program, the manner in which detainees were treated (including the interrogation methods employed on them), and the fate and current whereabouts of every person ever held in the program;

- Compel the White House to provide the House and Senate intelligence committees with the September 17, 2001 presidential finding that authorized the CIA to initiate its program of secret detention and interrogation;

- Repeal the Military Commissions Act of 2006 or, at a minimum, amend it to:

    - ensure that all detainees in US custody, whether held on US territory or abroad, are guaranteed the right to habeas corpus;

    - reform the law's protections on classified "methods and activities" so that these provisions cannot be used to protect the CIA's coercive interrogation methods against disclosure;

- bar the use of statements obtained as result of coercion from military commission trials.

- Pass legislation to ensure that all secret detention centers are shut down permanently and that no one is forcibly disappeared into US custody or otherwise held incommunicado;

- Pass legislation to prohibit the return or transfer of persons to countries where they are at risk of torture or other abusive treatment, and to bar the government from relying on "diplomatic assurances" to justify such transfers;

- Press the Department of Justice to vigorously prosecute civilians—including those at high levels of authority—who are responsible for engaging in, authorizing or condoning the mistreatment of detainees.

The government of Pakistan should:

- Close any secret detention facilities that may be operating in Pakistan, register all prisoners in Pakistani custody (including those in the custody of the intelligence services), and ensure that all prisoners are brought before a judge within a short time of their arrest;

- Transfer prisoners to the US authorities in accordance with Pakistani law and only after obtaining written assurances that the prisoners will be brought before US courts, promptly charged or released, and will not be placed in indefinite detention at Guantanamo or elsewhere;

- Initiate a parliamentary investigation of the government's role in supporting and assisting CIA abuses in Pakistan.

The Italian, German, Spanish, and Portuguese judicial authorities should:

- Continue their investigations of CIA activities in their countries, focusing not only on the actions of low-level operatives, but also on the responsibility of higher-level officials who formulated detention, interrogation, and rendition policies and signed off on operations.

All governments should:

- Refuse to assist or cooperate in any way with CIA detention, interrogation, and rendition operations that violate international human rights norms;

- Disclose any information that they may have about CIA detention, interrogation, and rendition operations.

Acknowledgments

This report was written by Joanne Mariner, terrorism and counterterrorism program director at Human Rights Watch. It is based on research conducted by Mariner and John Sifton, senior terrorism and counterterrorism researcher. Additional research assistance was provided by Ali Dayan Hasan, South Asia researcher, and Matthew Goldfeder, an intern with the terrorism and counterterrorism program.

The report was reviewed and edited by Jen Daskal, US advocacy director; James Ross, senior legal advisor, and Joseph Saunders, deputy program director of Human Rights Watch.

Additional assistance was provided by Human Rights Watch associates Leeam Azulay-Yagev, Thodleen Dessources, and Tarek Radwan. Veronica Matushaj, creative director and photo editor, assisted with photography. Andrea Holley, publications director, and Grace Choi, publications specialist, prepared the report for publication. Fitzroy Hepkins, mail manager extraordinaire, handled the production of the report.

Human Rights Watch gratefully acknowledges the generous support of Atlantic Philanthropies, as well as several individual donors who made this project possible.

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Ghost Prisoner

Two Years in Secret CIA Detention

In a televised speech on September 6, 2006, US President George W. Bush publicly acknowledged that the Central Intelligence Agency (CIA) had been secretly detaining suspected terrorists in facilities abroad. He refused to discuss the detainees' treatment in detail, however, stating only that they were subject to an "alternative set of [interrogation] procedures."

Ghost Prisoner fills in much of the detail that President Bush left out. Recounting the experiences of Marwan Jabour, a 30-year-old Palestinian, it provides the most comprehensive account to date of life in a secret CIA prison. Jabour—who was arrested by Pakistani authorities in May 2004—was detained briefly in Lahore, Pakistan, then moved to Islamabad, where he was held for more than a month in a secret detention facility operated by both Pakistanis and Americans, and finally flown to a CIA prison in what he believes was Afghanistan. He told Human Rights Watch that during his ordeal he was tortured, beaten, forced to stay awake for days, and kept naked for more than a month. Like an unknown number of Arab men arrested in Pakistan since 2001, he was "disappeared" into US custody: held in unacknowledged detention outside of the protection of the law.

President Bush stated in September that the CIA's prisons had been emptied. This report asks what happened to people who were believed to have been in CIA custody and who remain "disappeared." One concern is that some of them may have transferred to foreign prisons where for practical purposes they remain under CIA control. Another worrying possibility is that they were returned to countries where they face a serious risk of torture: indeed, some of the missing prisoners are from Algeria, Egypt, Libya, and Syria.

Human Rights Watch calls upon the Bush administration to provide a full accounting of every person that the CIA has held since 2001, including their names, the dates that they left US custody, and their current locations.

US President George W. Bush with George Tenet, then-director of the Central Intelligence Agency (CIA), at CIA headquarters in Langley, Virginia.

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FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

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USA: A case to answer

From Abu Ghraib to secret CIA custody:

The case of Khaled al-Maqtari

AI Index: AMR 51/013/2008 March 2008 Amnesty International

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From Abu Ghraib to secret CIA custody: The case of Khaled al-Maqtari

Introduction

On 6 September 2006, US President George W Bush announced the transfer of 14 men from secret Central Intelligence Agency (CIA) custody to military detention at the US Naval Base in Guantánamo Bay in Cuba. This was the first time that the US program of clandestine interrogation and detention, long an open secret, had been publicly acknowledged. Although the President noted that no-one was then being held by the CIA, he emphasized that the secret detention program would "continue to be crucial". Indeed, the transfer of a 15th so-called "high value" detainee, 'Abd al-Hadi al-Iraqi, from CIA custody to Guantánamo in April 2007 demonstrated the continuing operation of the CIA's program. In June 2007, President Bush issued an executive order effectively re-authorizing the CIA's use of secret detention and interrogation.[1] That order remains in force.

In September 2007 CIA Director General Michael Hayden defended the program, including on the grounds that "fewer than 100 people" had been subjected to it. "These programs are targeted and selective," he added. "They were designed for only the most dangerous terrorists and those believed to have the most valuable information, such as knowledge of planned attacks." He and other US officials have used similar reasoning to defend the CIA's use of torture and other cruel, inhuman or degrading treatment. In testimony to the US Senate Intelligence Committee on 5 February 2008, for example, General Hayden tried to justify the torture technique of "waterboarding", simulated drowning, against three detainees in 2002 and 2003 as a means to obtain information from detainees at a time of perceived threat to public safety, and because the intelligence community "had limited knowledge about al-Qa'ida and its workings."[2] Such justifications fly in the face of the absolute prohibition of torture and other ill-treatment under international law.

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[1] See below, and Amnesty International, *USA: Law and executive disorder; President gives green light to secret detention program*, AI Index AMR 51/135/2007, August 2007, http://www.amnesty.org/en/report/info/AMR51/135/2007.

[2] *USA: Impunity and injustice in the 'war on terror'*, AI Index: AMR 51/012/2008, 12 February 2008, http://www.amnesty.org/en/library/info/AMR51/012/2008.

The same goes for secret detention. No matter how carefully targeted the program is, the bottom line is that secret detention, in and of itself, violates international human rights and humanitarian law, as contained in treaties binding on the USA. Torture and enforced disappearance, which frequently accompany the use of secret incommunicado detention, are both crimes under international law. The illegality of the CIA's secret program has been accompanied by a complete absence of accountability for such crimes.

The CIA has operated its secret detention program in covert prisons outside the USA, known as "black sites". The locations of these sites are unknown, their operations are classified at the highest level of secrecy, they are not open to any scrutiny or inspection, the identity of those detained is not disclosed to family members, lawyers, or humanitarian organizations such as the International Committee of the Red Cross (ICRC), and detainees are isolated from each other and from the outside world. According to a November 2005 report in the Washington Post, there had been "black sites" in at least eight countries at various times since 2002,[3] although CIA facilities in Thailand and Guantánamo, along with one of several sites in Afghanistan, had since closed. The facilities tended to be used in rotation, with some detainees transferred from site to site together, although several sites were in operation at any given time. The Washington Post also noted that "black sites" had been located in unspecified Eastern European countries.

In June 2007, the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights released the second report of its inquiry, led by Swiss Senator Dick Marty, into secret detention and renditions in Europe. The report concluded that there is "now enough evidence to state that secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland and Romania." The report also found that the governments of these countries were aware of, and may have authorized, CIA-run secret detention centres on their territories.

The detailed investigations carried out by the Council of Europe, together with the statements of the handful of men who have emerged from the secret prisons – released as anonymously as they were apprehended – have helped to construct a detailed picture of the regime and the conditions of confinement, demonstrating conclusively that the USA has carried out a range of human rights violations through the use of the secret detention program.

Khaled Abdu Ahmed Saleh al-Maqtari is one of those most recently released. He was held in CIA "black sites" in Afghanistan and in an unknown country until days before President Bush's 6 September 2006 announcement, when the CIA network of secret jails appears to have been at least temporarily cleared. Khaled al-Maqtari has been held both at the notorious hard site at Abu Ghraib[4] – where he has described a regime of beatings, sleep deprivation, suspension upside down in stressful positions, intimidation by dogs, induced hypothermia and other forms

[3] Dana Priest, CIA Holds Terror Suspects in Secret Prisons, *Washington Post*, 2 November 2005

[4] The Abu Ghraib "hard site" was a cell block inside the facility, where detainees felt to have high intelligence value were housed (most other detainees at Abu Ghraib were held in tents). The Abu Ghraib detainee abuse photographs were taken inside the hard site.

Khaled Abdu Ahmed Saleh al-Maqtari, Yemen, October 2007. **© Amnesty International**

of torture – and in CIA "black sites" in Afghanistan and an unidentified third country, where he spent nearly three years in complete isolation, the victim of an enforced disappearance.

Khaled al-Maqtari's name was first given to Amnesty International by another ex-detainee in late 2005, nearly a year before his transfer out of CIA custody. Attempts to locate him then failed, and the organization was unable to confirm his whereabouts until after he had been transferred to Yemen in September 2006. His case intersects with those of others who have been released from CIA custody, and with those of detainees still held in Guantánamo and in third countries. It illustrates the global reach of the secret detention network and the degree of coordination between the US military and intelligence agencies, and between the US and other governments, as well as the secret detention program's apparent propensity to apply the given criteria for inclusion in the program in a less carefully targeted manner than CIA Director Hayden has suggested.

Iraq: Arrest in Fallujah, detention in Abu Ghraib

When I was in Abu Ghraib they kept me naked for nine days, and this was not a respectful way to pray, so I prayed with my head only

Khaled al-Maqtari is now 31 years old, but appears older, a stocky, solemn looking man, with short black hair and beard. He was born in Tabuk in Saudi Arabia, but has lived most of his life in Hodeidah, a small city on the Red Sea coast of Yemen. He was returned to Yemen after 32 months of CIA detention in September of 2006, and held by the Yemeni authorities in Sana'a and Hodeidah until May 2007, when he was unconditionally released. At no stage during this 40-month period was his detention ever reviewed by a judicial authority, and he was never charged with any criminal offence.

Khaled al-Maqtari said that he left Yemen for Iraq in early 2003, travelling overland and arriving in spring. He stayed first in a valley near Ramadi and then in Mosul before arriving in Fallujah in October of 2003, seven months after the US-led invasion of Iraq. In Fallujah, he

says, he sometimes worked at an internet café, in a two-story shopping market called al-Ghufran near the centre of town.

Mishahdah, Iraq: Soldiers from the US Army's 4th Infantry Division round up detainees during a July 2003 operation aimed at pro-Saddam Hussein insurgents. All of the men in the village were reportedly detained during the operation. © AP/PA Photo/John Moore

He had been in Fallujah for about three months when US forces with armoured vehicles and tanks raided the al-Ghufran market and arrested many people, described by Khaled al-Maqtari as shop workers and shoppers. Khaled Al-Maqtari himself was apprehended at about 1.30pm, and like the others, was cuffed and hooded. The plastic handcuffs were pulled so tight, he said, that they dug furrows into his wrists.[5] He could hear and feel dozens of other detainees jostling around him, until they were all loaded onto a column of US trucks with helicopters overhead protecting them, and taken to a military camp outside of Fallujah.

At the camp, soldiers pulled him from the truck and dragged him to an interrogation room by his plastic cuffs, so that he was forced to crawl or try to run, all the while, he said, being kicked and beaten. "And I learned that this was how I would always be moved, both in this place and later in Abu Ghraib". When the hood was removed, an interrogator demanded to know where he was from. Although he said he was an Iraqi, the interpreter recognised by his accent that he was foreign and guessed that he was a Yemeni. This news angered the interrogator, an "American" man with grey hair and civilian clothing, who started shouting at Khaled al-Maqtari, who was only able to catch the phrase "what the hell is this" amidst the torrent of unfamiliar English words.

[5]The cuffs were so tight that they could not be snipped off, but had to be cut out of the grooves they had dug into his wrists. In a leaked 2004 report on violations of the Geneva Conventions by US forces in Iraq, the ICRC raised, among many other forms of ill-treatment *"handcuffing with flexi-cuffs, which were sometimes made so tight and used for such extended periods that they caused skin lesions and long-term after-effects on the hands (nerve damage), as observed by the ICRC".* Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during arrest, internment and interrogation, [ICRC Iraq report], February 2004.

An hour or two later, Khaled al-Maqtari was again hooded, and taken to another cell, where he was periodically visited by a US soldier with a powerful voice. "He was just shouting at me like a beast, I don't think he was saying words, just shouting." Khaled Al-Maqtari was kept standing in the room, still hooded, cuffed and disoriented, and every few minutes – or if al-Maqtari tried to sit down – the soldier would creep into the room and scream or laugh maniacally into Khaled al-Maqtari's ear. [6]

January 2004: during a raid in Fallujah, a soldier with the 346th Tactical Psychological Operations Company carries a confiscated computer from a shop
©US Army, Staff Sgt. Charles B Johnson

Later in the evening, Khaled al-Maqtari was taken to a helicopter with at least two other detainees. He suspects that they were Yemenis or other non-Iraqis, as he had overheard that the Iraqi prisoners were being processed separately. From the degree of commotion, shouting and other noise he heard at the camp, he estimated that up to 100 people had been detained.

According to the US Army, the 13 January 2004 operation in Fallujah was known as "Operation Market Sweep" and was aimed at arms dealers operating out of a notorious city centre market. In the course of the raid, "the soldiers confiscated more than 100 rifles, two heavy machine guns, 6,500 round of ammunition, 18 rockets, 244 grenades, 150 mortars and various explosive devices, including 17 pre-manufactured improvised explosive devices. During the operation more than 60 people were captured."[7]

Khaled al-Maqtari and the others in the helicopter were transferred to the Abu Ghraib Detention Facility. A US military official at the information offices of the Multi-National Forces in Iraq told Amnesty International that individuals detained in the field, and determined to be "an imperative risk to the security and safety of Iraq", should have been brought to a Coalition Theater Internment Facility, like Abu Ghraib, be assigned an Internment Serial Number (ISN) and entered into a database. Khaled al-Maqtari was apparently never assigned an ISN[8], which

[6] The ICRC's leaked 2004 report also raised the issue of hooding, "used to prevent people from seeing and to disorient them, and also to prevent them breathing freely…Hooding was sometimes used in conjunction with beatings thus increasing anxiety as to when blows would come. The practice of hooding also allowed the interrogators to remain anonymous and thus to act with impunity." The ICRC report also raised, *inter alia*, the use of "exposure while hooded to loud noise and music", "stress positions", sleep deprivation cause by the playing of loud music or constant light", and subjection of detainees to forced nudity, ICRC Iraq report, *op. cit*.

[7] Justin A Carmack, 'Op Market Sweep' captures Fallujah arms dealers, *Army News Service*, 13 January 2004

[8] The Multi-National Force's Task Force on Detention Operations in Iraq searched their database at Amnesty International's request, but did not find any record of Khaled al-Maqtari

suggests that he was turned directly over to Military Intelligence (MI) on suspicion of being a foreign fighter.

At Abu Ghraib, he was immediately brought to a small room, where there were at least three "Americans" and an interpreter, all dressed in fatigue trousers and shirts without uniform insignia. One of the first questions they asked him was whether he was a Sunni or a Shia. "I had to think," he told Amnesty International, "I didn't know which answer would make them hit me harder, so finally I just said that I am a Muslim." His clothes were cut off "from his feet to his neck" with scissors, and he was again hooded and shackled in chains.

Khaled al-Maqtari said that his interrogators did not identify themselves to him, other than to say that they were "Americans". He was likely to have been interrogated at Abu Ghraib by members of the US Army's 205th Military Intelligence Brigade, which was then operating there, or by the CACI contractors working with them, rather than by CIA officials and contractors on site.[10] A former military interrogator has told Amnesty International that it would be normal procedure for a suspected foreign fighter detained by the Army to be first turned over to MI before being assessed for possible transfer to CIA custody.[11]

[P]ersons deprived of their liberty supervised by the military intelligence were subjected to a variety of ill-treatments ranging from insults and humiliation to both physical and psychological coercion that in some cases might amount to torture in order to force them to cooperate with their interrogators. In certain cases, such as in Abu Ghraib military intelligence section, methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and extract information. Several military intelligence officers confirmed to the ICRC that it was part of the military intelligence process to hold a person deprived of his liberty naked in a completely dark and empty cell for a prolonged period to use inhumane and degrading treatment, including physical and psychological coercion, against persons deprived of their liberty to secure their cooperation.... These methods of physical and psychological coercion were used by the military intelligence in a systematic way to gain confessions and extract information or other forms of cooperation from persons who had been arrested in connection with suspected security offences or deemed to have an 'intelligence value'.

ICRC report on US violations of the Geneva Conventions in Iraq[9]

[9] See ICRC Iraq report, op. cit.

[10] CACI International supplied contract interrogators to the US Army in Iraq between 2003 and 2005. At the time of Khaled al-Maqtari's detention in January 2004, CACI said that it had up to 10 contract interrogators at Abu Ghraib, all of whom would have reported to the US military, and not to the CIA. See http://www.caci.com/iraq/Truth_and_Error_in_Media_Portrayal_of_CACI_in_Iraq.doc

[11] Al-Maqtari reported that when he was being prepared for transfer to Afghanistan, his captors told him more than once that "the CIA is waiting for you", suggesting that he was not yet in their custody. However, it is also possible that he was interrogated by both CIA and MI personnel. US Army Major General George Fay's "Investigation of the Abu Ghraib detention facility and 205th Intelligence Brigade" notes at 2.b.(4) that: *"The CIA conducted unilateral and joint interrogation operations at Abu Ghraib. The CIA's detention and interrogation practices contributed to a loss of accountability and abuse at Abu Ghraib. ... CIA detainees in Abu Ghraib, known locally as "Ghost Detainees," were not accounted for in the detention system. With these detainees unidentified or unaccounted for, detention operations at large were impacted because personnel at the operations level were uncertain how to report or classify detainees."*

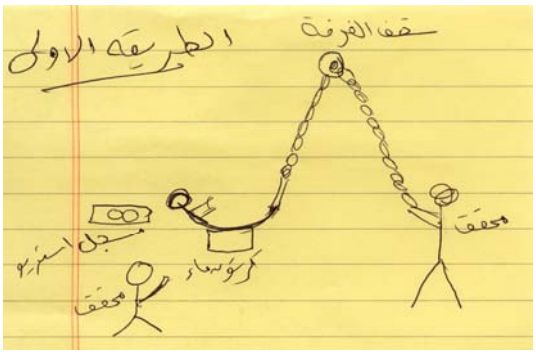
The men dragged him to a larger room, measuring about three by four metres, which he calls "the torture room". There was always water on the floor, he said, "just enough to make it slippery and too uncomfortable to sit or lie down on, and to make it worse when I fell down on it."[12] Once inside, he said, he was beaten again by the three men, who hit him with fists and sticks, "taking turns, as though it was a children's game. There was a CD machine, playing some kind of terrorising music to create a frightening atmosphere, and it was very loud." He was still hooded, and said he could not judge where the wall was, so kept smashing into it, especially after they swung him in circles to increase his disorientation.

After a while, according to Khaled al-Maqtari, his assailants sat down to rest while making him stand on a chair in front of a powerful air conditioner, holding up a full case of bottled water. They removed his hood and periodically poured cold water over his head, so that the air conditioning blasted against his wet skin and naked body, and made him shiver so hard that he could barely remain standing. When his arms began to shake so that he could not support the heavy box, he was beaten with a stick to keep him standing, but he eventually could not even stand to stop the beating and collapsed. They continued to beat him with a stick, he said, and every time he was about to pass out they would put some kind of smelling salts under his nose, so he would not lose consciousness, or they would put a mentholated ointment[13] in his eyes, which was so painful that he was afraid he would lose his vision. Sometimes when he was about to pass out an interpreter would come in and shout "wake up" in Arabic and then the "Americans" would resume the beating.

Khaled al-Maqtari thought they had finished with him, but instead, he said, a chain was hung from the ceiling of the room, and he was suspended upside down by his feet, with his arms still cuffed behind his back, while a pulley was used to lower him up and down over the water crate. As they lowered him down over the box, his torso was distorted, causing both pain and fear. "All of my muscles were tensed up to stop me from collapsing down, and I was terrified if I let go it would have broken my back." When they pulled him up again, he explained, he had to tense up different muscles, and this too caused incredible pressure on his back and legs. His interrogators, he said, kept moving him up and down slightly "so that I could experience all the different kinds of pain", and when he was lowered onto the box they beat him with sticks and put the CD player alongside his head at full volume.

[12] A former contract interrogator who was stationed at Abu Ghraib in January 2004, Eric Fair, has told AI that the water on the floor was not an interrogation tactic, but a reflection of conditions. Most rooms in Abu Ghraib had water on the floor in the winter of 2004, he said, as it "rained constantly, and the entire prison leaked."

[13] Described as a vapour rub, of they type usually used for opening blocked nasal passages



Khaled al-Maqtari's description of his suspension from the ceiling at Abu Ghraib

While he was on the box, Khaled al-Maqtari said, one of the interrogators used him as a footstool, sitting in a chair nearby and resting his feet on Khaled al-Maqtari's head or back, and once putting a cigarette out on his shoulder. This interrogator kept shouting at him: "you know where I'm from? I'm from New York, the place you Arab [...][14] tried to destroy". Khaled al-Maqtari describes the New Yorker as being "not fat" and of medium height, with a triangular face, dark hair and eyes, aged between 40 and 45, and wearing a pair of military-style trousers with multiple pockets. "He beat me and trampled on my face when I was suspended..... Once he brought with him a woman translator, and I am sure she was either American or British. She spoke broken Arabic. Her hair was dark with some red in it and was tied like how all the female interrogators tied their hair."

After what seemed like several hours, Khaled al-Maqtari said, he was brought to a room divided by wooden partitions into "small boxes", with a door at one end, where it was just about possible to lie down in a hunched position.[15] On this occasion, and throughout his stay in Abu Ghraib, he was brought there between sessions, but found it impossible to rest because guards sometimes kicked the door, or threw water and food at him. "It was some kind of dried thing, not real food, and not cooked or hydrated, so it was very hard to eat. They did just enough to keep us alive for the next interrogation."

At dawn of his second day at Abu Ghraib, Khaled al-Maqtari was taken out of the box, still naked and shackled. When he asked to go to the toilet, he said, they dragged him there by his feet, banging his head against the wall on both sides of the narrow corridor, before returning him to the "torture room". An Iraqi interpreter was there, along with three men in fatigues and the interrogator from New York, who began to question him about houses he had stayed in

[14] Khaled al-Maqtari said that this word was not translated to him, the interpreter just told him it was "a very bad name".

[15] Referring to an ICRC visit to Abu Ghraib in January 2004, in which the ICRC delegates were denied access to eight detainees, the Fay report notes at 3.k.(8) that: *Of particular interest was the status of DETAINEE-14, a Syrian national and self-proclaimed Jihadist, who was in Iraq to kill coalition troops. DETAINEE-14 was detained in a totally darkened cell measuring about 2 meters long and less than a meter across, devoid of any window, latrine or water tap, or bedding. On the door the ICRC delegates noticed the inscription "the Gollum," and a picture of the said character from the film trilogy "Lord of the Rings."*

while in Mosul and Fallujah. He was in enormous pain, and unable to concentrate, and says the interrogator offered to sign a paper promising not to torture him anymore if he just answered the questions. Khaled al-Maqtari said he told his captors that such a paper would have no meaning, because they could tear it up any time.

All that day and the next, still naked and shackled, he was taken in and out of the "torture room", never being allowed to sleep for more than a few minutes at a time in the box room. He describes being repeatedly drenched and put in front of the air conditioner, until he could not speak at all because his teeth were chattering so hard and uncontrollably, and he collapsed. The interrogators brought him hot tea, and said they would bring him clothes if he answered their questions. Khaled al-Maqtari began to tell them which houses he had been staying in, and they brought him a long striped shirt. "It covered me, but not very well." Once he had put it on, they took him to a helicopter and brought him back to Fallujah.

He rode in the helicopter with his hands cuffed and secured above his head; the skin around his wrists had already worn raw. In Fallujah, he said, they put him into a white minivan, which was dented and dirty to make it look like a civilian vehicle, but with a hidden camera on the outside. He was shackled to the floor, between two seats. He was the only detainee in the van, and there was an Iraqi driver and two translators, both armed with automatic weapons. The grey-haired interrogator from the base was there, in a *kefiyah*. "I think he was a high-ranking one, as all the others seemed to fear him." There was also an "American" woman, wearing a *hijab*, and both she and the grey-haired interrogator had laptop computers. "They were all trying to appear like normal Iraqis," Khaled al-Maqtari said, "and there were curtains on the windows, so people could not see them too well." The laptop received images from the camera outside, so that Khaled al-Maqtari could see where they were driving without being able to see outside the vehicle directly, and without anyone being able to see him. When they passed the house, Khaled al-Maqtari pointed it out, and they marked it on the screen. "We will take care of it," they told him.

He was returned to Abu Ghraib, where the promise not to torture him further was ignored. At about dusk they came and told him that the house he had shown them had been raided and that one US soldier had been killed. Khaled al-Maqtari says they started beating him again, shouting that he was an accomplice in the death of an American, and accusing him of plotting with those inside the house. He tried to argue with them, asking "how can I be getting information to them when I am in here with you?"

Once again he was stripped, beaten, drenched with cold water, and blasted with the air conditioner. He was then taken to an outdoor area covered in gravel, and told to cross it. He had to crawl because of the cuffs and chains, and the stones dug into his hands and knees. When he got to the middle of the area, he said, they brought the dogs, three of them, from three different directions. It was cold and dark, and Khaled al-Maqtari was still naked, wet and shivering. "The dogs came and put their noses right against me and made terrible noises. I had no defence, not even any clothes. Later I thought that they were very well trained because they only made the noises and showed me their teeth, but it was very, very frightening because I never knew that they were not going to bite me. I still have dreams about this."

According to Khaled al-Maqtari, the interrogators kept telling him to admit to involvement in anti-US operations, but he told them he had nothing to confess. "Then they took me back and beat me and tortured me to the maximum I could bear, until even they started to be convinced that I could not tell them more about operations, so they asked about houses in Mosul. They threatened me during the interrogation that they would bring the Mossad and the Jews to rape me, and sometimes they threatened to hand me to the Shia.[16] When I was still shivering from the water, they brought strong lamps like football lights and shined them right in my face until finally I fainted." He was taken back to one of the boxes, and his guards told him: "This time we will let you sleep for one whole hour, if you show us the houses in Mosul." Khaled al-Maqtari said he was so desperate for even that one hour of sleep that he agreed to try, but felt it was only a few minutes before they came to take him to Mosul by helicopter.

In Mosul he was put into the same kind of vehicle as in Fallujah, containing the same grey-haired man and the woman in *hijab*, as well as two other "Americans", one of whom was acting as the driver, and was dressed like an Iraqi. In Mosul, Khaled al-Maqtari saw them actually mounting the camera on the van, and so figured out how the system worked. After he had found the house and they marked it on the screen, they asked him many questions about the house and the positions of the rooms inside.

The day after his return to Abu Ghraib, he was stripped and taken back to the interrogation room, where the torture resumed. This time, he said, they accused him of not having told them that there was a weapons stash in the house in Mosul. He tried to tell them that he had not been there for four months, so would not have known about it, but they began torturing him again, and asking him about a house in the al-Amriya, a district in western Baghdad, where he had spent a few hours on arrival in Iraq.

This time, the interrogators told him, he would go with "the Brits" to locate the house. That evening, a team that Amnesty International believes were likely to have come from United Kingdom Special Forces (UKSF), collected him from US custody. The interrogator was British but spoke good Arabic, Khaled al-Maqtari said, adding that he had green eyes, and wore a *kefiyah* and black clothes. This search operation was markedly less technical than his outings in the US surveillance van; Khaled al-Maqtari was put in the back seat of an unmarked black jeep and chained to the interrogator. The driver and another man, both westerners, both armed, rode in the front. Khaled al-Maqtari sensed that the driver was the officer in charge. They took him out of Abu Ghraib, past a guard at the gate, and out into the city. It was late at night and there were few people in the streets. He said he could not see well, did not know the district, and could not find the house. He was frightened that they would beat him, but when it was clear that he could not provide the information they sought, he was brought back to Abu Ghraib. On return, the driver shook his head "no" at the US interrogators; Khaled al-Maqtari felt that he was letting them know that their search mission had failed, and that he had not cooperated.

[16] Such threats were "standard tactics", according to a former interrogator, as were threats about sending detainees to Guantánamo Bay.

Khaled al-Maqtari said he was not abused by the UKSF team, although he is sure that they were aware that he had been tortured. He said he was brought to meet them directly from the "torture room", and was still huddled in a wet blanket, with the marks of the beatings clearly visible on his body. They did not ask him any questions about his treatment.

Former Special Air Service (SAS) trooper Ben Griffin, who was stationed in Baghdad in early 2005, told Amnesty International that an SAS squadron had been working in a joint US-UK special forces group in Baghdad, carrying out surveillance and intelligence operations against insurgents and foreign Arab fighters, since the beginning of the occupation.[17] The group shared information, he said, and it would not have been out of the ordinary for an SAS team to take a prisoner directly from US custody on the kind of search mission Khaled al-Maqtari has described. The SAS squadron, he explained, also carried out its own arrest operations; there were a number of Arabic speakers in the squadron, so they were able to carry out assessment interrogations in the field, while other detainees were brought back to the SAS base for further questioning. The SAS did not have a holding facility, and if the detainee was felt to have further intelligence value, he would be turned over to US custody. As a rule, the SAS troopers did not participate in interrogations; Griffin said that these were carried out "behind closed doors". However, they were aware of the methods likely to be employed against those who were sent to Abu Ghraib for further questioning.

Towards the end of his first week in custody, Khaled al-Maqtari said, a medic came and examined his wounds, and gave him antibiotics and pills for the pain. His ribs, back and legs were severely bruised, he was spitting blood, and he had deep gouges in his wrists from the cuffs. The Iraqi interpreter came with the medic, and Khaled al-Maqtari recalls that "he acted very gentle and concerned, saying things like 'oh, I wonder how this could have happened to you?' when this interpreter had been there almost the whole time and knew very well what had caused my injuries." The medic asked Khaled al-Maqtari how he had come by his injuries, but he was too frightened to answer through the interpreter.

Nine days after his arrest, Khaled al-Maqtari recalls, "one of the interrogators came and said: 'the Mossad and the CIA are waiting for you', then they put me in a small room, in the dark, and I was without clothes, shaking and crying." Alone in the dark, al-Maqtari began to hallucinate: "someone with an Iraqi accent came to me and asked me if I wanted water, and at first I thought it was a man, but she was a woman and she gave me a drink of water and said to read the Quran and disappeared. My dreams were nightmares. Always someone was shouting, I dreamed of bizarre things, like dogs, all through the little half hour when they allowed us to sleep. I still have these nightmares."

Former contract interrogator Eric Fair, who was in Abu Ghraib in January of 2004, has reviewed Khaled al-Maqtari's account of his treatment there. Although he did not corroborate all of the details provided by Khaled al-Maqtari – he has noted, for instance, that he never saw

[17] Interview with Ben Griffin, January 2008. Ben Griffin was honourably discharged from the UK Army's Special Air Service in 2005, after refusing to take further part in a war he regarded as illegal: "I did not join the British Army to conduct American foreign policy," he said. *See* Sean Rayment, SAS soldier quits Army in disgust at 'illegal' American tactics in Iraq, *Telegraph* (UK), 11 March 2006

any detainee being suspended upside down by his feet – Eric Fair told Amnesty International: "I've pored over this report, hoping to find major inconsistencies and gross exaggerations. It is to this nation's shame that I cannot. My time at Abu Ghraib and Fallujah offers no concrete evidence to refute many of the things Khaled has said."

Although coalition forces were entitled to detain civilians suspected of criminal activities, including insurgency, such detainees would still be entitled to humane treatment and due process, including registration and visitation by the ICRC. At no time during his detention in Abu Ghraib was Khaled al-Maqtari registered, documented or charged with any crime.[18] He did not see anyone from the ICRC, nor was he ever allowed to contact a lawyer or his family. "They did not say what the accusation was. They asked about the house, and the Iraqis, and if I know where there are others Yemenis, these types of questions. Also for example, who carries out suicide bombing, 'for sure you must know them, you must be one of them', these types of things... But they never said when they will release me. Hours before I would leave, perhaps half a day before it, they told me to expect the CIA. After six or four hours, the *ninjas* came for me."

In a procedure which has also been described to Amnesty International by other detainees transported by the CIA, a three- or four-person removal team, dressed completely in black, with black gloves and facemasks, came to prepare Khaled al-Maqtari for his departure. They put him in a diaper, socks, short trousers, and a shirt without buttons, then covered his eyes and stuffed his ears with cotton, taped firmly into place, before hooding him and topping it off with noise-reducing headphones. "They do not talk, said Khaled al-Maqtari, "not even a word, the

[18] The UN Human Rights Committee, in an authoritative statement on the prohibition on torture and cruel, inhuman and degrading treatment, has stated that *"to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention... to be kept in registers readily available and accessible to those concerned, including relatives and friends"*. Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 30 (1994), para. 11. Accurate and detailed registers of detainees are required under international law and standards, including the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), Articles 122 to 125 and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Articles 136 to 141. See also Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: United States*, July 25, 2006, at para 16: The Committee notes with concern that the State party does not always register persons detained in territories under its jurisdiction outside the United States, depriving them of an effective safeguard against acts of torture (art. 2). 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.

same as the *ninjas* in the secret prisons."[19] "It is clear", he said, "that they have a lot of experience. They know what they are doing, and each of them had a specific role. I mean if I wanted to get dressed myself, I wouldn't be able to do it so fast."

"Whenever they put on or take off the chains, they grab you harshly, so that we do not escape. They were very strong, everything was horrifying, they even closed the doors violently to terrify us. I was not able to see anything, everything was black. They did not want you to be comfortable; they wanted us to be in an atmosphere of terror all the way there".

He was brought to the airstrip in the back of a jeep or truck, and felt that at least one other prisoner, possibly two, was transported with him. He thinks the other detainee transferred with him out of Iraq might have been a Saudi Arabian, whose name, or nickname was Khaled al-Sharif.[20] In Abu Ghraib, they had shown Khaled al-Maqtari a photo showing al-Sharif in Iraq; later, in Afghanistan, they showed him another photos of al-Sharif, this time taken inside the detention facility there.

He described the plane that brought him to Afghanistan as small and fast and quiet; the engines were barely audible through his headphones. He felt little vibration from the engines either before or after boarding the plane, which he entered via a short set of about five stairs, and this and the proximity of other passengers lead him to think it was a small jet. "This one was a modern plane and very nice. Although I was covered, I felt that the floor was very soft and like carpet. I fell on to it as soon as I got in the plane."

He said that he lay on the floor because he was in so much pain from the beatings. "I even think they feared that I was dead or something, because they brought equipment to measure the oxygen and the blood pressure." No matter what position he sought, the pain was too excruciating to allow him to sleep for long, and if he moved, he said, someone would kick him. "At first I couldn't believe that I found a place to lie down, I so wanted to sleep, I just wanted to rest because I was in pain all over, but then I couldn't sleep because the pain was so strong. My hands were tied around my back, and if I tried to move my hands to ease the pain, they kicked me."

At the time of Khaled al-Maqtari's detention, US forces in Iraq were bound by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), article 49 of which prohibits the transfer of protected persons, including

[19] A similar process was described by Swedish police officers who witnessed a US-led renditions team preparing two men for transfer in December 2001; the renditions team told them that the procedures had become policy for transporting terrorist suspects "post 9/11". Inquiry registration number 2169-2004, conducted by Swedish Parliamentary Ombudsman Mats Melin, date of adjudication: 22 March 2005, p20. A Swedish national security police director also told the investigation: *"I can say that we were surprised when a crew stepped out of the plane that seemed to be very professional, that had obviously done this before."*

[20] A Libyan by this name, aka Hazim, was detained with Khaled al-Maqtari in the prison in Afghanistan, although is unlikely to be the same person, as he was reportedly already in the Afghanistan facility from late 2003.

insurgents who are not part of the military, from the occupied territory.[21] Unlawful deportation or transfer or unlawful confinement, as well as torture and other inhuman treatment, in violation of the Geneva Conventions, are war crimes, and prosecutable as such under US and international law.[22] In addition, international human rights law applies, even in time of war.

The former head of the US Justice Department's Office of Legal Counsel has written that soon after taking up the post in October 2003, he was told by the then White House Counsel, Alberto Gonzales, that the administration had need for legal advice on the question of whether the Fourth Geneva Convention "protects terrorists in Iraq".[23] Former Assistant Attorney General Jack Goldsmith asserts that "near the end of my first week on the job, the lawyers around the government reached a consensus: the convention protected all Iraqis, including those who were members of al Qaeda or any other terrorist group, but not al Qaeda terrorists from foreign countries who entered Iraq after the occupation began… I agreed."[24]

A few months later, then Assistant Attorney General Goldsmith drafted a memorandum to Alberto Gonzales and circulated it to the head lawyers at the CIA, the Departments of State and Defense, and the National Security Council. This draft memorandum, dated 19 March 2004, "elaborates on interim guidance provided in October 2003 concerning the permissibility under [article 49 of the Fourth Geneva Convention] of relocating certain 'protected persons' detained in occupied territory to places outside that country."[25] The memorandum concluded that the USA could, "consistent with article 49", (1) remove from Iraq under local immigration law "protected persons" who were "illegal aliens"; and (2) "relocate 'protected persons' (whether illegal aliens or not) from Iraq to another country to facilitate interrogation, for a brief but not indefinite period", as long as the individual concerned had not been "accused of offences" within the meaning of article 76 of the Convention.

What role such advice may have played in the transfer of Khaled al-Maqtari out of Iraq is impossible to judge, due to the secrecy surrounding the CIA's rendition, detention and interrogation program, and the fact that most documents relating to it remain classified. For his part, Jack Goldsmith has written that he never finalized the March 2004 memorandum and "it never became operational, and it was never relied on to take anyone outside of Iraq".[26] He further states that "I do not know whether the request for legal advice about relocating Iraqi prisoners outside Iraq for questioning was associated with a broader rendition program. But I do know that the draft opinion could not have been relied upon to abuse anyone, not only

[21] Article 49 states, in part, "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of motive".
[22] Article 8, Rome Statute of the International Criminal Court.
[23] Jack Goldsmith, *The Terror Presidency: Law and judgment inside the Bush administration*. W. W. Norton (2007), page 32.
[24] *Ibid*. page 40.
[25] Permissibility of relocating certain 'protected persons' from occupied Iraq. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack Goldsmith III, Assistant Attorney General, US Department of Justice, Office of Legal Counsel, Draft, 19 March 2004.
[26] *The Terror Presidency, op. cit.*, pages 172-173

because it was never finalized, but more importantly because it stated that the suspect's Geneva Convention protections must travel with him outside Iraq."[27]

Whether the US authorities concluded that Khaled al-Maqtari's nationality and their suspicion that he was involved with *al-Qa'ida* left him unprotected by the Geneva Conventions, or whether they considered that the advice articulated in the draft Office of Legal Counsel memorandum gave them a green light to remove him from Iraq to Afghanistan and into the CIA's secret program, the upshot is that their conduct and his treatment violated international law. Moreover, while US authorities have never charged Khaled al-Maqtari with any crime, his account of his treatment at the hands of the US government points to crimes having been committed against him for which no one has been held to account. The US authorities have a case to answer.

From hard site to "black site": CIA custody in Afghanistan

CIA operated Gulfstream V, widely known to be used for the transport of CIA detainees, including Khaled al-Maqtari. It was registered as N379P in February 2000 by Premier Executive Transport Services, a CIA front company; it was re-registered as N8068V at the beginning of 2004; and again re-registered as N44982 in December 2004 by Bayard Foreign Marketing, a phantom company registered in 2003.

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Amnesty International has obtained flight records that corroborate Khaled al-Maqtari's recollections, at least to the extent that a Gulfstream V jet, operated by a CIA front company and widely known to be used for the transport of CIA detainees[28], left Baghdad International

[27] *Ibid.* (footnote 14 of the draft memorandum stated that the relocation of a "protected person" from Iraq did not mean that he or she would "forfeit the benefits" of that status.) See also, Dana Priest, Memo Lets CIA Take Detainees Out of Iraq: Practice Called Serious Breach of Geneva Conventions, *Washington Post*, 24 October 2004 ("A US government official who has been briefed on the CIA's detention practices said some detainees are probably taken to other countries because 'that's where the agency has the people, expertise and interrogation facilities, where their people and programs are in place'.")

[28] This Gulfstream V executive jet, successively registered as N379P, N8068V and N44982, has been the plane most frequently identified with known cases of rendition. It was registered in February 2000 by Premier Executive Transport Services, a CIA front company; it was re-registered as N8068V at the

Airport on 21 January 2004, nine days after Khaled al-Maqtari's arrest, heading for Khwaja Rawash airport in Kabul. Khaled Al-Maqtari says he was transferred by vehicle to a secret facility in Afghanistan, which he believes was Bagram Air Base, and he refers to it throughout his interviews as Bagram.[29] Other detainees in Afghanistan later told him that he had arrived at about the same time as two other prisoners.[30]

His arrival at the new facility followed a pattern familiar to Amnesty International. He was brought to see a doctor or medic, who took blood and a urine sample, photographs were taken of his naked body, and wounds and marks were recorded on a diagram. The same process has been described to Amnesty International by other former black site detainees[31]. "I felt they were checking a lot, as they were scared that I might die if they hit me any more times." He was then given a blue shirt and trousers and brought to see a man he was told was a psychologist.

All of the prison staff wore black clothes, he said, and the guards were gloved and masked, although the medical personnel did not cover their faces. He described the psychologist as "American", white, short and fat, with glasses and thinning black hair combed back at the sides, aged between 40 and 45 years. The same psychologist also treated Khaled al-Maqtari in the second secret prison, and was present during some of his interrogations[32]. "He said I was in a bad state because of my fear of dogs." The doctor then told him that he "had it in his own hands to make this either a better or a worse place... If you cooperate with the investigators, they will give you a prayer mat and a Quran, otherwise you may be in a worse position than in the past."

Khaled al-Maqtari was placed in a small cell, close to the bathroom, where he stayed for about two weeks before being moved to a larger cell in the same corridor. Inside both cells, there were cameras that he felt were following his movements, as even in the dark he could see the red light moving back and forth. He initially remained handcuffed and shackled, the cell was kept dark for the first four or five days, and sounds were played over a speaker inside the cell.

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beginning of 2004; and again re-registered as N44982 in December 2004 by Bayard Foreign Marketing, a phantom company registered in Oregon State since August 2003. No other aircraft were registered by Bayard Foreign Marketing. The aircraft, which by then had become known as the "Torture Taxi" to journalists and plane spotters around the world, was sold in early 2006. Until 15 October 2005, Premier Executive Transport Services aircraft were permitted to land at US bases worldwide. The plane had an average range of 5,800 nautical miles at 459/585 knots (non-stop Washington Dulles-Kabul in 12 hours, for example), and could be configured for eight to 18 passengers.

[29] Other information suggests that it could have been a different CIA facility, sometimes known as the "dark prison", which was closer to Kabul, see below.

[30] The two may have been Riyadh al Sharqawi [Al-Haj Abdu Ali Sharqawi] and Umayr bin Attash [Hassan Muhammad bin Attash], who reportedly arrived at this Afghanistan facility in January 2004

[31] See, for example, Amnesty International, *USA/Yemen: Secret Detention in CIA 'Black Sites'*, AI Index AMR 51/177/2005, November 2005; Amnesty International, *Below the Radar: secret flights to torture and 'disappearance'*, AI Index AMR 51/051/2006, April 2006; Amnesty International, *Partners in Crime: Europe's role in US renditions*, AI Index EUR 01/008/2006, June 2006.

[32] A former CIA field officer confirmed to Amnesty International in January 2008 that psychologists were routinely present at interrogations

"It was not really music," Khaled al-Maqtari explained, "but noise to scare you, like from one of those scary movies. You feel your veins pumping and you become nervous. I was very nervous all the time I was in the room. Every time you think you are getting used to it, they would change it. I was scared, there were no dogs but there was noise there. Whenever you try to sleep, they bang on the door loudly and violently. There was music and shouting.

"There was a metal window in the cell, but there was no light from it. This window was within the building, not facing outside, and it was near the ground. I heard the guards walk past it, but mostly it was covered with cardboard. Ants and mice entered the room from there."

The cell also contained what Khaled al-Maqtari described as a large grey plastic bucket to urinate in, similar to the portable plastic toilets used in Bagram before flush toilets were installed for the troops in 2003[33]. "There was water in the bottom half of it, and you sit on it to urinate, then you cover it." Moazzam Begg, who was held in Bagram throughout most of 2002, told Amnesty International that he was provided with similar facilities from July 2002, adding that the toilet was mobile and purpose built, with a conventional toilet seat and cover.[34]

Interrogation and cooperation

Two days after Khaled al-Maqtari arrived, guards came and took him to see a "tall and thin" interrogator, who gave him bread and tuna. "This was how they do it," he said, "when they want to talk to you, they give you food." Experts on the CIA program, quoted by the *New Yorker* magazine, explained that offering and withholding food, and varying portion sizes, is part of the "psychological arsenal" available to the interrogators. "It's all calibrated to develop dependency."[35]

Khaled al-Maqtari asked where he was, and the interrogator told him that "you are in a place that maybe you will be able to get out of, but there are others who will never be able to get out, so you need to choose which you will be." Khaled al-Maqtari said he then asked "what did I do?", and the interrogator replied: "you were in Iraq and you may know where some Arab fighters are and you have not told us, or you may know suicide bombers and those who carry out suicide bombings."

Interrogations took place nearly every afternoon. The guards would come to the cell, and Khaled al-Maqtari had to stand well away from the door as they entered. His arms were then chained, he was masked and hooded, and taken to the interrogation room, where the hood, but not the chains, was removed.

All of the interrogators were from the US and used interpreters; the interpreters rotated, so that he never had the same ones for more than a week at a time. A former interrogator told Amnesty

[33]A US Air Force publication described the portable toilets as "molded plastic nightmares built in some Middle East country": *Airman: the magazine of America's Air Force*, May 2003
[34] Email from Moazzam Begg, 19 January 2008
[35] Jane Mayer, The Black Sites: a rare look inside the CIA's secret interrogation program, *New Yorker,* August 2007

International that this "good practice", aimed at ensuring that no interpreter develops a sympathetic relationship with a detainee. Khaled al-Maqtari met only male interpreters in Afghanistan. Interrogators also rotated, although less frequently. Khaled al-Maqtari said he was questioned by the tall, thin interrogator for about two weeks, followed by another with green or blue eyes, and the distinctive habit of wearing what Khaled al-Maqtari believed was a swimming cap during interviews. He was later interrogated by a woman who said her name was Sarah; she wore glasses and covered her hair. In the interrogation room, there was also a curtained off area, where someone else was always sitting. Khaled al-Maqtari was only ever able to see this person's feet.

He asked the interrogator with the swimming cap when he would be released, and was told: "there are three kinds of answers – there are things we can tell you, things we can't tell you and things that even we don't know, that only the big officials can determine."

The interrogators were nothing if not thorough. "They wanted every detail of my life, from the time I was born until I was arrested. They asked where I studied, where I travelled, who I spoke to. I mean in great and boring detail. Who are my brothers and sisters, what are their names and birth dates, who are their husbands and wives and children, who are my parents and uncles and friends. Who are all the people I have ever met. Of course they showed me many photos of people and many in Guantánamo Bay, I could see from the clothes, and asked 'do you know this one and that one'. If I knew one of them, they would take some time talking about him, if he is important to them. If he is not, or if he is dead or killed, that would be it."

"This was their method of interrogation: in the first place [Abu Ghraib] they tortured you so much that when you move to a new place and the treatment is better you start to feel that they are very kind. But in the first stage they asked about important questions, like where the houses of the fighters were. In the three months and some days I was in Bagram, they made me tell my whole life story fully many times. Later, in the secret detention, they asked the same questions over and over again, in many different ways to make sure that you are telling the truth."

On several occasions, Khaled al-Maqtari said that he heard detainees screaming and crying. The detainee in the cell next to his, Adnan al-Libi, was once taken away for three days, and Khaled al-Maqtari thought he might have been transferred. "But from the interrogation room, I heard very loud music and I wondered how the Americans can stand such loud music. When Adnan was brought back to his cell, he was tired and barely able to move or talk, and he said: 'I was in that place, suspended, and they were beating me and the loud music was playing and I was being interrogated.'" Muhammad Bashmilah, who was being held in the same facility at the same time, has said that he heard the screams of Adnan al-Libi being tortured in the interrogation room.[36]

[36] Center for Human Rights and Global Justice, *Surviving the Darkness: Testimony from the US Black Sites*, December 2007, p 24. See also

Medical care

On arrival in Afghanistan, Khaled al-Maqtari says he was suffering from internal bleeding and extensive bruising, and was in constant pain. Although he saw a doctor, who photographed and recorded his injuries, it was several weeks before he was given any medical treatment, and he believed that provision of care was linked to his degree of cooperation during interrogation. "They started to give me treatment after a while," he said, "when they knew I was telling the truth. They started to treat the bruises and wounds. They gave me an ointment and 'Vicks' for the breathing. Of course they gave us these things for the interrogation, I know this was for the sake of information. The proof for that is that when they got the information, they took the 'Vicks' and everything else from me."

Being allowed brief time outdoors was likewise contingent on cooperation. After two weeks, "when they had the information", he was taken out to a yard, and sat on a chair facing directly into a wall, inches away from his face. "It was a high wall, but there was fresh air… You are not allowed to turn your head a millimetre to the left or right, and you could stay for no more than 10 to 15 minutes, completely chained. Then they cover you and take you back. They didn't ever remove my mask, until I was in front of the wall sitting down. The first time I saw some remains of snow and heard some car noises.[37] I felt cold. There was also a lot of rain. I often heard the sounds of rain in Bagram. But later, in the secret jail, you would never hear, see or feel anything."

Conditions of confinement

The guards brought food to the cells, but did not enter except to bring detainees out for interrogation or for a shower. They would often bang on the door or wall when they passed, and although this meant that the detainees could rarely sleep without interruption, the noise from further down the corridor gave them warning of approaching guards. According to Khaled al-Maqtari, Adnan al-Libi would alert them when the guards were approaching, saying: "the fox is here".

A five-minute shower was allowed once a week, although Khaled al-Maqtari said that the water was scarce and cold: "There was a boiler but they never switched it on, except once, when they needed information… I was not able to wash because I was ill."

Who was in the secret prison?

As soon as interrogations finished, Khaled al-Maqtari was returned to his cell, always hooded, so as not to see any of the other detainees or any details of the building he was in. The position of the interior window and the sounds made by passing guards from all sides of the room, led him to suspect that the cells were discrete box-like structures, rather than rooms, although they had rendered walls like ordinary prison cells. By listening to other detainees who would speak during any lapses in the music or sound effects, he worked out that there were

[37] There was a substantial snowfall at Bagram and outside Kabul on 8 February 2004

two rows of 10 cells each. The lapses were never more than a few seconds, unless the generators stopped working, but Khaled al-Maqtari said that for detainees held in isolation, starved of communication, those brief interludes "were like a lifetime".[38]

Khaled al-Maqtari stayed in cell 19 for about two weeks. During his first few days the music in his room was excruciatingly loud, but during a break he heard a voice calling in Arabic to a prisoner called Riba'i. "When I heard it I was so happy, because I was not imprisoned alone." Then he heard the same voice calling out for "Mu'ath", "Naseem", "Marwan" and "Hazim". "I later found out that the person calling was Adnan al-Libi, he had a strong voice. He kept saying 'number 19, talk to us, number 19' but I didn't know that I was number 19 yet."

"Adnan was always calling others. He was always trying to find out who was there, who was new. At first I was scared and didn't know that he was calling me. And I was not able to get close to the door at first, I was handcuffed to the window. Days later they undid my handcuffs which allowed me to go near the door. There I heard again 'number 19, number 19' and this time I told them who I was. They were saying 'Allah Akbar' [God is great] and Adnan told me there were now six Yemenis there – Riyadh al-Sharqawi, from Ta'iz, and Umayr bin Attash, the brother of Khallad, were also new. They were both arrested in Karachi and sent to Jordan by the Americans. Umayr was 13 months in Jordan and Riyadh was there for nearly two years and they were tortured horribly."[39]

After about two weeks, Khaled al-Maqtari was moved to cell 13, which was next to Adnan al-Libi, and closer to the other prisoners, so he was able to ask questions during the infrequent breaks in the noise. Adnan al-Libi and the others told him more about the prisoners who had been held there before Khaled al-Maqtari's arrival. Ibn al-Sheikh al Libi, they said, had been taken away a few weeks before; he had been there only a few months, having spent the summer in a "medieval prison" and the previous year in Egypt.[40] Khaled al-Maqtari was also told that Abdulsalam al-Hela had been detained there earlier in 2003; he was later transferred to Guantánamo, where he remains today. Sheikh Saleh al Libi, who moved to cell 20 in April, said he had originally been detained in Mauritius and rendered through Morocco, and that he had previously been held in one cell outside, and one cell at the other end of the row. His given name and current whereabouts are unknown.[41]

[38] Other former "black site" detainees held in Afghanistan have described a similar facility, including Muhammad Bashmilah, Salah 'Ali Qaru, Muhammad al-Assad, and Binyam Muhammad.

[39]The six were Khaled al-Maqtari, Muhammad Bashmilah, and Salah 'Ali Qaru, who have since been released, and Riyadh al Sharqawi [Al-Haj Abdu Ali Sharqawi], Sanaad al-Qasemi and Umayr [Hassan Muhammad] bin Attash, who are currently held in Guantánamo (Hassan Muhammad bin Attash is a Saudi national from a Yemeni family, who was 17 years old when he was detained). A seventh Yemeni, Muhammad al-Assad, was also being held there; he has told Amnesty International that he did not speak in this prison, and al-Maqtari recalls that there were one or two prisoners on the row who never responded to any queries.

[40] Ibn al-Sheikh al-Libi [Ali Abdul-Hamid al-Fakhiri] reportedly told another Libyan detainee that the "medieval prison" he had been held in after he was returned from Egyptian custody was Pul-e-charki, an Afghan prison.

[41] Muhammad Bashmilah also reports spending some time in a cell outside the main row, see *Surviving the Darkness*, op cit, p 22.

At least three "high value" detainees had recently been detained at this site: Khallad [Tawfiq bin Attash], a Yemeni, and Ammar Baluchi [Ali Abdul Aziz Ali],a Pakistani raised in Kuwait, said they had been arrested in Pakistan together; Ramzi bin al-Shibh, a Yemeni, told the others that he had been in "a prison in Kabul" but was transferred out because the ICRC had learned he was there and had tried to see him. All three were said to have been transferred out in September 2003, and reappeared three years later, among the 14 "high value" detainees transferred to Guantánamo. Two of the other "high value" detainees, Mukhtar [Khalid Sheikh Mohammed] and Hambali [Riduan bin Isomuddin], had reportedly been held there earlier in the year.[42]

In cell 13, the light was left on constantly, and the names of what Khaled al-Maqtari surmised were two of the cell's previous occupants were scratched on the wall: Badr al-Madni and Abu Nasser al-Qahtani. He said he added his own name and nickname (Firas) on the wall below.[43]

Through conversations with Adnan al-Libi and the other detainees, Khaled al-Maqtari began to mentally map the names, or at least the nicknames, and cell numbers of those on his corridor. He could converse with the detainees closest to him, but any other messages had to be passed down through other prisoners, and could become garbled in the process.

"I think Riba'i may have been Tunisian, but he was very far away[44]; Hazim is Libyan; Naseem is Tunisian; Adnan is Libyan of course; Marwan al-Adenni is a Yemeni from Aden, he is here now [meaning here in Yemen], and so is Shumilla [Muhammad Bashmilah][45]. I am Yemeni of

[42] Where appropriate in this report, the name used by Khaled al-Maqtari or other former detainees is given in the text, with the given name of the individual, where known, in brackets. There is no standard means of transliterating Arabic names into the Roman alphabet, so the same given name is often represented by a number of different spellings. The name Muhammad, for instance, is commonly written in at least four ways. Moreover, a full Arabic name may consist of up to five parts, not all of which are always used. This has led to enormous confusion and complication in identifying persons detained by the US, who may be listed under several versions of their name. In a recent request to the US Army for information about a former detainee, lawyers provided 66 possible spelling variations for the name of a single person. In addition, many WOT detainees have aliases or nicknames, and in some cases are so well known by these aliases that their real names are hard to ascertain. Yasser al-Jaza'iri, for instance, simply means "Yasser the Algerian", yet he has been cited by this name in official US documents (where the name is usually spelled al-Jazeeri), while his given name has never been listed. Detainees would generally have heard only the alias or nickname of other detainees, or a mixed version of their name (ie, "Umayr" bin Attash, instead of Hassan bin Attash) and would not be likely to know the given names of other detainees, unless told by their interrogators.

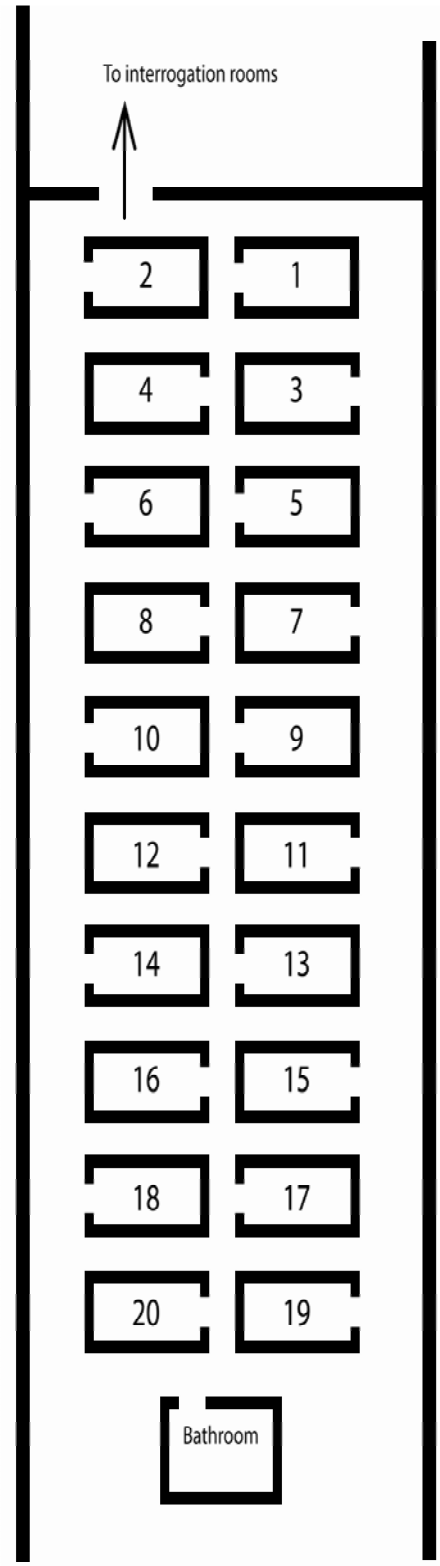
[43] Detainees with similar names, currently held in Guantánamo, had previously been held in Afghanistan. Saad Iqbal al-Madni was held in Afghanistan from April 2002 until March of 2003. He had been arrested in Jakarta in January 2002, and rendered to Egypt on the CIA's Gulfstream V, where he was held for 92 days before being rendered to Afghanistan via Pakistan in April of 2002. He was held in Afghanistan for nearly a year before being sent Guantánamo in March of 2003. At least five detainees called al-Qahtani have been held at Guantánamo, most of whom were previously detained in Afghanistan.

[44] In a later interview, Khaled al-Maqtari indicated that he thought Riba'i was probably Libyan. Other detainees have said that they were held with a Libyan called Riba'i in this facility.

[45] "Shumilla" is a diminutive of Bashmilah

course, and so are Umayr bin Attash and Riyadh Haitham al-Sharqawi – they were calling him Riyadh. And Abu Malik al-Qasemi was another Yemeni. Also there was Abu Ahmed, who was called Abu Ahmed 'the Malaysian. 'Abu Mu'ath al-Suri was very near me, and Abu Yasser al-Jaza'iri was near to Ahmed. There were many of them. Later came Majid Khan, from Pakistan, with Abu Abdullah al-Saudi. There were other ones who did not respond when Adnan was calling him out, and saying to him 'we are your friends'."

Majid Khan, a Pakistani who was one of the 14 detainees transferred from the CIA program to Guantánamo in September 2006, arrived in the facility in Afghanistan about six to eight weeks after Khaled al-Maqtari. Khan, who spoke little Arabic, told another detainee that he "had been here before, was transferred to another prison in Kabul and then was returned to this prison". At the prison in Kabul, Majid Khan had said, there had been both Arab and Afghan prisoners, who were able to communicate more freely with one another, although their general conditions of detention were worse. Abu Abdullah al-Saudi, who said he had been arrested in Iraq the month before, and had apparently been a "ghost detainee" like Khaled al-Maqtari, arrived at the same time.



Detainees reportedly held in secret facility in Afghanistan from January – April 2004; listed by cell number and name known to other detainees [given name in brackets]

1. Ahmed the Malaysian: current whereabouts unknown

2. Riba'i [Hassan LNU]: transferred to CIA "black site" in 2004, reportedly transferred to Libya in 2006, whereabouts unconfirmed

3. Yasser al Jaza'iri: transferred to CIA "black site" in 2004, current whereabouts unknown

4. Riyadh al-Sharqawi [Al-Haj Abdu Ali Sharqawi]: transferred to Guantánamo in September 2004

5. Umayr bin Attash [Hassan Muhammad bin Attash]: arrived late January 2004, transferred to Guantánamo in September 2004

Ibn al-Sheikh al-Libi [Ali Abdul-Hamid al-Fakhiri]: transferred out of this facility in early January 2004, apparently to CIA "black site", reportedly transferred to Libya in 2005, current whereabouts unconfirmed

6. Shumilla [Muhammad Faraj Ahmed Bashmilah]: transferred to CIA "black site" in April 2004, returned to Yemen in May 2005, released from custody in March 2006

7. Naseem al Tunisi: current whereabouts unknown

8. Hazim al-Libi [Khaled al-Sharif]: transferred to CIA "black site" in 2004, reportedly transferred to Libya in 2006, whereabouts unconfirmed

9. Abu Malik al Qasemi [Sanaad Yislam al Kazimi]: transferred to Guantánamo in September 2004

10. Abu Abdullah al Saudi: arrested in Iraq in February or March 2004, transferred to Afghanistan facility in April 2004, current whereabouts unknown

11. Marwan al-Adenni [Salah Nasser Salim 'Ali Qaru]: transferred to CIA "black site" in April 2004, returned to Yemen in May 2005, released from custody in March 2006

12. Mu'ath al-Suri, aka Abu Abdullah: current whereabouts unknown

13. Khaled al-Maqtari: transferred to CIA "black site" in April 2004, returned to Yemen in September 2006, released from custody in May 2007

14. a Somali man, name unknown

15. Adnan al Libi [Majid LNU]: transferred to CIA "black site" in 2004, current whereabouts unknown

16. Muhammad al Assad: transferred to CIA "black site" in April 2004, returned to Yemen in May 2005, released from custody in March 2006

17. Binyam Mohammed [based on his own statement, Khaled al-Maqtari said this was one of the cells occupied by someone who did not speak]: transferred to Guantánamo September 2004

18. Majid Khan: transferred to CIA "black sites", transferred to Guantánamo September 2006

19. Laid Saidi [based on his own statement: Khaled al-Maqtari says that someone arrived in this cell a day or two before the April 2004 transfer]: Laid Saidi himself reports having been moved from one detention facility in Afghanistan to another in late April 2004

20. Sheikh Saleh al-Libi: current whereabouts unknown

One of the Yemenis held with Khaled al-Maqtari in Afghanistan, "Abu Malik al Qasemi", appears to be the same person as a Yemeni now being held at Guantánamo, Sanaad Yislam al Kazimi. Al Kazimi reported that he was in the "Dark Prison" from September 2003 until May 2004, with other Yemenis including Muhammad Bashmilah and Salah 'Ali Qaru, and that he was in the cell next to Binyam Mohammed, an Ethiopian who is also now being held in Guantánamo. Binyam Mohammed, who had been arrested in Pakistan and rendered by US agents to Morocco, has said that he was taken from Morocco to Afghanistan in January 2004, and was held in "the Dark Prison" for five months. His description of this facility is similar to Khaled al-Maqtari's description of "Bagram". Both had 20 cells in two rows of 10, numbered in the same way, with double metal doors and low interior windows. Binyam Mohammed also explicitly mentions the ghostly sounds and music that had so disturbed Khaled al-Maqtari: "They used horror sounds, like they were from the movies, 24 hours a day for maybe two weeks. There was hardly any way to sleep. It was like a perpetual nightmare."[46] Binyam Mohammed estimated that there were up to 20 people in the prison, and that these had previously included "the Yemeni businessman from Sana'a named Abdulsalam Hiera" (presumably Abdulsalam al-Hela).

A statement from al-Sharqawi, in which he confirms that he was transferred to Afghanistan from Jordan in January 2004, describes the prison as "a pitch dark place, with extremely loud scary sounds". Other elements of his description are consistent with Khaled al-Maqtari's, particularly his account of being allowed to sit on a chair in front of a high wall once a week, where he too noticed snow cover[47]. All of these details strongly suggest that Khaled al-Maqtari, al-Sharqawi and the other Yemenis were held in the same place, and that it could have been the "Dark Prison", rather than Bagram.

Khaled al-Maqtari thought he was in Bagram primarily because the words "Welcome to Hotel Bagram" were inscribed on the wall of his cell, in English. He also said that other detainees who knew Afghanistan, including one who had been arrested in Khost and transferred by car, had told him that they "must be" in Bagram, because of the distance of the car journey. Other evidence is likewise equivocal: when Khaled al-Maqtari arrived in Kabul, he was transferred by vehicle from the airport to the prison, and he estimates that the trip took 30 to 45 minutes. He thought the vehicle travelled quickly, without stopping or starting, which led him to believe that they were not moving through traffic, but on a fairly deserted road. If the plane indeed landed in Kabul, 30-45 minutes at consistent speed would be about the time needed to reach Bagram. However, Muhammad Bashmilah, who was held in the same detention centre at the same time, recalls a journey of less than half an hour, more consistent with a site closer to Kabul.[48]

Both Khaled al-Maqtari and Salah 'Ali Qaru have said that there was at least one disused Russian truck in the yard of the facility, and Muhammad Bashmilah reports that he was able to see a prison guard tower, both of which suggest a purpose-built prison or military base.[49]

[46] Unclassified statement of Binyam Mohammed, August 2005
[47] Unclassified statement of Al-Haj Ali Sharqawi, April 2006
[48] Interview with Muhammad Bashmilah, May 2006. See also *Surviving the Darkness*, op cit, p 32.
[49] Interviews with Salah 'Ali Qaru, February 2006. See also *Surviving the Darkness*, op cit, p 26

Bagram is littered with Russian wrecks and guard towers, but so are other sites near Kabul. The "Dark Prison" is rumoured to have been located in a complex near Kabul airport, but the precise location is not known, nor is it clear whether or not it contained guard towers and abandoned military vehicles.

Given the extreme measures taken to insulate "black site" detainees from the outside world, their conclusions about the location of the detention site are bound to be speculative. To complicate matters further, there was at least one other CIA facility in operation at the same time. Abdulsalam al-Hela has described being held in at least four detention centres in Afghanistan, including Bagram airbase and the "dark prison" as well as facilities apparently run by Afghans[50]. Khalid el-Masri who was rendered to Afghanistan from Macedonia one day after Khaled al-Maqtari was transferred from Iraq, was taken to a detention centre close to the airport, where he saw Afghan guards in Afghan dress. His attorneys have concluded that he was held in a facility known as the "Salt Pit", an abandoned brick factory complex at an isolated site north of Kabul, a short distance from the airport. Khalid el-Masri has said that he was held with Laid Saidi, an Algerian handed over to US custody after being expelled from Tanzania to Malawi in May 2003. Laid Saidi, who has since been released, was held in at least three different facilities in Afghanistan, including a place he described as "filthy, not even suitable for animals", where he says he spoke to Khalid el-Masri[51], and a "very dark prison" near Kabul airport, where "there was very loud Western music being played".[52] Another CIA detainee who was moved into Afghanistan in January 2004 was also likely to have been held there: Muhammad al-Assad told Amnesty International that he had first been taken to a facility where the sounds of aircraft were regular, and which had Afghan or Pakistani guards in their native dress. His cell was old and had a window high up on one wall. After a few weeks there, he was driven to another facility about 20-40 minutes away. His descriptions of his new surroundings and of his eventual transfer make it clear that he had gone to the facility where Muhammad Bashmilah, Khaled al-Maqtari and the others were being held.

Whatever its precise location, this facility seemed to function as a transit and evaluation centre; some detainees had been brought there directly from arrest in Pakistan or Afghanistan, others had been held in other facilities in Afghanistan or abroad, and some had been "extraordinarily rendered" and were in the process of being transferred back from Jordanian or Egyptian custody. Of some 23 detainees thought to have been held there in late 2003 and early 2004, 14 were apparently transferred to other CIA "black sites" (four of whom were "high value" detainees who then transferred to Guantánamo in September 2006), at least three joined the regular detainee population at Guantánamo, and the fate of six others remains unknown.[53]

[50] Declassified notes of interview with Abdulsalem al-Hela, June 2005

[51] Craig Smith and Souad Mekhennet, Algerian Tells of Dark Term in US Hands, *New York Times*, 7 July 2006

[52] Interview with Laid Saidi, January 2007, by Thomas H Nelson, attorney.

[53] Through Khaled al-Maqtari and other former detainees, Amnesty International has identified 24 individuals who were held at this site in late 2003 and early 2004. There may well have been others held there whose names were not known, or who did not communicate with other detainees. In several cases we have not been able to determine a detainee's given name, so some of them may have been released or transferred to Guantánamo.

CIA 'black site': whereabouts unknown

In April 2004, probably around the 24th, Khaled al-Maqtari and a number of his fellow detainees were moved out of the Afghanistan facility.[54] He was given no warning of the impending move; two guards simply came to his room after lunch, at about 2pm, and brought him to the doctor for a medical check. The doctor's examination room was on a raised platform inside the hangar or warehouse; Khaled al-Maqtari remembers that he went up three steps to a floor, then up one additional step to enter the examination room. Once inside, his blindfold and clothes were removed, and each mark or injury on his body was numbered and recorded on the same chart he had seen the doctor use before.

Khaled al-Maqtari counted nine separate body charts on the doctor's desk, indicating to him that at least nine detainees were being prepared for removal.[55] The medical check itself took about half an hour, and Khaled al-Maqtari was then brought to another room, where the transfer team was waiting. The three-man team, dressed entirely in black, quickly put him into a nappy, knee-length trousers and a shirt, blocked his ears and covered and taped his eyes, finishing off with sound-deadening headphones, handcuffs and shackles. He was then brought to another area where he was pushed down to the ground in a sitting position. Unable to see or to talk, he could still feel that other detainees were seated on either side of him, and over the next two to three hours, he could periodically hear the sounds of other detainees being brought in.

Late in the afternoon, Khaled al-Maqtari and the other detainees were put into a vehicle, lying down, with others lying next to him. The drive to the airport took about 30 minutes, and once

[54] Other detainees have said about 12 people were moved. Why this group of detainees were moved at this particular time is unknown. Amnesty International has documented a pattern of detainee transfers in the USA's "war on terror" that seems to correlate to key moments in litigation in the US courts and to indicate an administration bent on ensuring that detentions abroad of foreign nationals remain as far from the scrutiny of the courts as possible. These transfers from Afghanistan to the unknown "black site" occurred a few days after oral arguments were held in the US Supreme Court on 20 April 2004 on the landmark question of whether the US courts had jurisdiction to consider habeas corpus petitions from foreign nationals held in Guantánamo, arguments which touched on detentions in Afghanistan and resulted in the *Rasul v. Bush* ruling against the government (dissenting from the *Rasul* ruling, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, warned that "the Court boldly extends the scope of the habeas statute to the four corners of the earth"). Two years later, the timing of the eventual transfer of Khaled al-Maqtari and others from this "black site" appears to have been linked to the Supreme Court's 2006 *Hamdan v. Rumsfeld* ruling, which President Bush described as putting the secret detention program in jeopardy, and after which, exploiting the cases of 14 "high-value" detainees held in the CIA program, he obtained the Military Commissions Act, which he interpreted as allowing the secret detention program to continue. See Section 4 and Appendix 2 of USA: No substitute for habeas corpus – six years without judicial review in Guantánamo, AI Index: AMR 51/163/2007, November 2007, http://www.amnesty.org/en/report/info/AMR51/163/2007

[55] Amnesty International believes that the nine included: Khaled al-Maqtari, Muhammad Bashmilah, Salah 'Ali Qaru, Muhammad al-Assad, Laid Saidi, Riba'i, Yasser al-Jaza'iri and Adnan al Libi.

there, they waited another hour in the car. His impression was that they were waiting for another carload of detainees to arrive.

At around sunset, he was loaded into a plane, apparently larger than the Gulfstream jet that had brought him to Afghanistan. Hooded and chained, he could not move as fast as the guards wanted, and so he was carried part of the way up the gangway. "There were two of them, one on each side, and sometimes one in front of me pulling me. If you are too weak to stand, they carry you."

"From the loud noise and rough ride and the way we sat," said Khaled al-Maqtari, "I felt it might have been a plane used for cargo." The plane seemed to have bench seats along the side, rather than in rows. The journey lasted "about three hours", although Khaled al-Maqtari acknowledges that this is only his best guess[56]: "I was very tired and couldn't count how long it took exactly. I don't think I slept because if you try to sleep, the guards kick you, but maybe I did and the time is hard to judge when one is very ill."

"After we landed, we were taken from the plane to a helicopter. The distance between them was maybe 200 metres, and the air was cool and fresh, definitely not hot. The helicopter journey was for one-and-a-half to two hours approximately. It was shorter than the plane trip, anyway. We were put into a vehicle, lying down as before. At first the road was asphalt, then it was bumpy, as if it was not paved. It took about 30 minutes to get there. The road was one level, neither going up nor going down."

On arrival at their final destination, a CIA "black site" in which Khaled al-Maqtari was to spend the next 28 months, he and the other detainees were brought into a large building like a warehouse, where he was chained in a sitting position to a ring in what seemed like some kind of trailer or container "like being in the back of a truck". He was there for several hours, and again felt that they were waiting for other detainees to arrive and be processed.

The size and location of this "black site" remains the subject of speculation. Amnesty International has reported extensively on the cases of three other Yemenis who were apparently held in the same site, and two of these men told Amnesty International in October 2005 that they believed this detention centre was in Europe. Khaled al-Maqtari himself firmly believes that the site was not in the Middle East or Afghanistan, citing the food, the distance they had travelled, and the orientation of the toilets (which were facing Mecca). The Council of Europe's June 2007 report confirmed the existence of secret detention centres in Poland and Romania up until the end of 2005, when these sites were closed down, but Khaled al-Maqtari and several other detainees who arrived at this site in 2004 were held until mid-2006, and evidence suggests that some of the "high value" detainees may have been moved from Poland and/or Romania to this site prior to their transfer to Guantánamo in September 2006.

[56] Others on the same flight have estimated three to five hours (*Below the Radar*, op cit, p 12). Laid Saidi, who appears to have been transferred out of Afghanistan on the same flights, said he believed the flight took five to six hours and the helicopter transfer two (interview with Laid Saidi, January 2007, op cit)

In the cells themselves, there were no windows and no natural light of any kind seeping in. When the lights were off, the room went completely black. The detainees were never able to hear any sounds of wind, rainfall, thunder or lightning, which made it difficult to get any sense of the climate in their location. Both heat and air conditioning were available in the cells, although they were more often used as reward and punishment than to maintain a constant temperature, so Khaled al-Maqtari was able to tell that there was significant variation between winter and summer. When he arrived, at the end of April 2004, he felt that the weather was cool and fresh. The winters were harsh and cold, and when he was briefly allowed outside during the summer months, towards the end of his stay, he described the direct sunlight as being warm enough to make him sweat, but not hot. Such a vague description would fit many locations in Europe and elsewhere, but would rule out locations in the desert or the tropics.

The duration of his transfer flights provides very general indications of where Khaled al-Maqtari might have been, but without knowing the size, speed and route of the aircraft, as well as the exact duration of the flights, no specific location can be pinpointed. The flight that returned Khaled al-Maqtari to Yemen in September 2006 was described as a non-stop journey of at least six hours in a "good plane"[57]. Given that cruise speeds for likely aircraft vary from about 250 to well over 500 knots, the final flight could have been anywhere from around 2,500 to more than 5,000 kilometres.[58] However, the triangulation between this flight and the shorter plane and helicopter journeys from Afghanistan appears to rule out locations in Western Europe and the Middle East.[59]

The facility in which Khaled al-Maqtari was held from April 2004 until September 2006 was new or refurbished, and carefully designed and operated to ensure maximum security and secrecy, as well as disorientation, dependence and stress for the detainees.[60] Well-staffed and resourced, and highly organized, the system in operation there would not have been maintained solely for the purpose of interrogating low-level suspects.

Intake procedures, for instance, consisted of being photographed naked from all angles, and having fingerprints and eye scans taken[61], before being examined by the doctor, and having all marks and injuries recorded. Khaled al-Maqtari then spent the first days of his time in this

[57] *Below the Radar*, op cit, p 15

[58] A Beech B300 has a maximum cruise speed of 311 knots, while certain models of the Gulfstream V can cruise at up to 585 knots. There are also turboprop planes with the capacity to fly seven hours non-stop; the CASA CN 235, for instance, has a cruising speed of about 246 knots. One nautical mile is equal to 1852 metres.

[59] The initial flight from Afghanistan could have reached Azerbaijan, Armenia, Turkey or Georgia or coastal Bulgaria or Romania, among other destinations; an additional helicopter flight of 120 minutes from such locations would have been unlikely to have gone more than 350 nautical miles. Aviation experts note that it is not common for helicopter flights to cross international borders, although technically possible. Assuming that the flight from Afghanistan had reached Turkey, eastern Bulgaria or Romania, possible sites for the final detention centre could have included Turkey, Bulgaria, Romania, Albania, Bosnia and Herzegovina and the Slovak Republic.

[60] *Secret Detention in CIA "Black Sites"*, op cit, pp 12-14.

[61] Khaled al-Maqtari reports that his eyes were scanned with a machine, which could have been either a retina scanner, or iris recognition technology

facility in his cell, naked and chained so close to the wall that he could barely reach the toilet. There were two video cameras in the cell, with red lights that blinked whenever he moved, and a mesh-covered speaker in the wall. The interior of the double cell door was heavy metal, and appeared to be new, and the toilet was likewise new and made of stainless steel.

Khaled al-Maqtari remained in this cell for four months, then moved to a nearby cell for about a year and finally to a third cell, which was some distance away, possibly in an adjoining building, for the remainder of his 28-month incarceration. Security levels and procedures in the new prison were even tighter than before, and communication between prisoners was almost impossible. The guards, like those in the previous facility, were dressed entirely in black, with their faces and hands also covered, and communicated by hand gestures, or simply by pushing him in the direction they wanted him to go.

The interrogators appeared to be preoccupied with maintaining the secrecy of the site. Khaled al-Maqtari was frequently asked how many cells he thought there were in the facility, and where he thought it was. Sometimes, he said "they bring a piece of paper and ask you to write down how many prisoners you think there are. I would say I didn't know, but I did, I think there were 15 cells in my section." The cells were divided into small blocks of three, each with a double steel entry door leading onto a small hallway, and a similar door from the block to the outside corridor.[63] Khaled al-Maqtari also felt there was another section; he explained that on one occasion guards covered him with a blanket, and took him down stairs into a long corridor, where he heard detainees shouting. "You felt that those there are tortured even more."

Majid Khan, seized at his brother's home in Karachi in March 2003, has alleged that he was tortured during his more than three years in secret CIA custody. His lawyers, who finally had access to him in Guantánamo in late 2007, a year after his transfer to the base, have filed Declarations in US federal court detailing the alleged torture against Majid Khan and other detainees held in CIA custody. All such detail has been redacted (censored) from the public record on the grounds of national security. His lawyers have stated the following:

"Khan's torture was decidedly not a mistake, an isolated occurrence, or even the work of 'rogue' CIA officials or government contractors operating outside their authority or chain of command. To the contrary, as detailed in the Dixon Declaration, Khan [redacted] prisoners who were similarly abducted, imprisoned and tortured by US personnel at CIA 'black sites' around the world. The collective experiences of these men, who were forcibly disappeared by the government and became ghost prisoners, reveal a sophisticated, refined program of torture operating with impunity outside the boundaries of any domestic or international law".[62]

Otherwise, interrogation practice followed much the same pattern as in Afghanistan. Conditions were initially harsh, so that it was some days before Khaled al-Maqtari was given even basic clothing, and several months before he had any blankets. Very gradually, he said, "they improved the situation as they got

[62] See Amnesty International, USA: *To be taken on trust? Extraditions and diplomatic assurances in the 'war on terror'*, AI Index: AMR 51/009/2008, March 2008.
[63] Muhammad Bashmilah describes a similar cluster of cells in this facility, see Out of the Darkness, op cit, p 40.

information from us." In the second year he was given access to books and writing materials, and started to be taken out for exercise and to view DVDs.[64] In the last two months, he was even able to use a white board in his cell to write requests for the air conditioning be turned down.

During the interrogations themselves, Khaled al-Maqtari did not suffer the kind of physical abuse he had been subjected to in Abu Ghraib, although he said he was regularly handled roughly and pushed around, particularly by the guards. The first few times he was questioned, he said, "I was not able to speak a single word. I was shaking whenever I was brought to them. I think they thought if we torture him any more he will go mad. But they kept me there for six hours, with the air very cold, until I got seizures. This happened until the doctor came to me. They put up the air conditioning sometimes, until all of my bones hurt me, but if they had put much more pressure on me I would have gone mad."

Amnesty International has interviewed a number of former "black site" detainees, all of whom have described years spent in mind-numbing isolation, broken only by interrogation sessions which seemed to them to have very little to do with alleged terrorist activities. Those interviewed by the organization have all been released – presumably because they were not found to pose a threat to the USA, or to be the "dangerous terrorists" CIA Director Hayden has insisted the secret detention program was designed for. Their interrogations were therefore likely to have been fundamentally different from those carried out with detainees thought to be high-level *al-Qa'ida* operatives. During his interrogations in the "black site" Khaled al-Maqtari was once again invited to recount his life story in excruciating detail, and to answer questions about the lives of his friends, family and acquaintances. He said he was shown thousands of photographs, including many of prisoners in Guantánamo, and told to provide any information – first or second hand – he had about those he recognised. Sometimes he had trouble concentrating, describing himself as "mentally exhausted" and unable to talk, and said the interrogators would give him questions on a piece of paper, to think about and answer in his cell. Another detainee described the process as collecting pieces of a puzzle before knowing what the puzzle would turn out to be.

[64] Muhammad Bashmilah, Muhammad al-Assad and Salah Ali Qaru, who were held in this facility from April 2004 until May 2005, have also described to Amnesty International gaining access to books, writing materials and exercise facilities. See *Below the Radar*, op cit, pp 13-14, and *Secret Detention in CIA custody*, op cit, pp 12-13.

The years of interrogation endured by Khaled al-Maqtari and other detainees who were never charged by the US, could perhaps best be characterised as a broad information fishing exercise. Indeed, the current CIA Director has indicated that the methods used in the secret detention program, at least in the initial years, were at least in part motivated by the US government's intelligence gap in relation to *al-Qa'ida*. In testimony to the Senate Intelligence Committee on 5 February 2008, for example, General Hayden tried to justify the water torture he admitted had been used in 2002 and 2003 as a means to obtain information from detainees at a time of perceived threat to public safety, and on the grounds that the intelligence community "had limited knowledge about *al-Qa'ida* and its workings."[65]

In February 2008 the CIA admitted to having "waterboarded" Khalid Sheikh Mohammed, Abu Zubaydah and 'Abd al-Rahim al-Nashiri. The latter was arrested in November 2002 in the United Arab Emirates, and was held in secret CIA custody until he was transferred to Guantánamo in September 2006. At his Combatant Status Review Tribunal hearing on 14 March 2007, 11 months before the CIA's admitted to having "waterboarded" him, 'Abd al-Nashiri testified that he had been tortured in CIA custody. Through a translator, he said: "From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way." Clarification was then sought by the CSRT President, but in the publicly available transcript of the hearing, 'Abd al-Nashiri's relevant responses have been withheld:
President: Please describe the methods that were used.
Detainee: [**Redacted**]. What else do I want to say? [**Redacted**]. Many things happened. They were doing so many things. What else did they did? [**Redacted**]. They do so many things. So so many things. What else did they did? [**Redacted**]. After that another method of torture began [**Redacted**].

Whatever its motivation, prolonged secret incommunicado detention, which itself constitutes torture or other cruel, inhuman or degrading treatment, is unlawful. It violates universal standards of human rights, facilitates other forms of torture, and amounts to enforced disappearance. It jeopardizes the prospect of fair trials, erodes the rule of law, and potentially breeds widely-felt resentment at such injustice, thereby undermining rather than nurturing long-term security.

Khaled al-Maqtari said that he repeatedly asked his interrogators why he was there, and what his crime was: "I said to them: 'For justification you say human rights and democracy, but what right to do you have to torture someone when you have nothing against him. Has anyone seen me killing an American or doing anything like that?' When they arrested me, I did not have any weapons. I told this many times to the psychologists, they used to listen to me, but the interrogators never even asked about my arrest."

[65] USA: *Impunity and injustice in the 'war on terror',* AI Index: AMR 51/012/2008, 12 February 2008, http://www.amnesty.org/en/library/info/AMR51/012/2008.

Khaled al-Maqtari was subjected to many of the techniques described by Professor Alfred McCoy, an authority on the history of CIA interrogation, as "no-touch torture".[66] He endured prolonged solitary confinement, sensory deprivation and overload (eg, with lighting and loud music), and has described the use of stress positions, sleep deprivation, forced nudity, exposure to extremes of hot and cold, prolonged shackling, and withdrawal of medication. The abuses that have affected him most, he said, were the years of endless isolation, the complete absence of any control over or knowledge about his future, the constant monitoring by cameras, and his segregation from the outside world, particularly the lack of contact with or news about his family.

According to an expert body of health care professionals experienced in detention issues, between one third and 90 percent of those held in solitary confinement experience serious psychological and physiological effects, ranging from insomnia and confusion to hallucinations and psychosis.[67] "When the element of psychological pressure is used on purpose as part of isolation regimes such practices become coercive and can amount to torture."[68] Physicians for Human Rights has noted that "systematic, repetitive infliction of psychological trauma establishes control over another person," and that methods of psychological control, including (but not limited to) sleep deprivation, solitary confinement and severe humiliation, "are designed to instil terror, pain and helplessness and destroy a detainee's sense of autonomy without use of physical violence."[69]

The detention conditions described by former 'black site' detainees could be said to constitute a form of controlled sensory deprivation, in which various stimuli were added incrementally. Khaled al-Maqtari believed that his treatment improved as his interrogators became convinced that they had all the information they could get from him, and others have echoed that their treatment improved as they were closer and closer to release.

Sensory deprivation can cause irreparable psychological damage in less than a week.[70] Ironically, given that this is an interrogation tactic, one of the effects seen in sensory deprivation of little more than a single day was to sharply increase levels of suggestibility. Professor Ian Robbins, a clinical psychologist at St George's Hospital in London who has studied the effects of sensory deprivation, has noted that "the evidence that is accumulated in

[66] "No-touch torture" relies on the two pillars of extreme sensory deprivation – inflicted by prolonged isolation, hooding, manipulation of light and dark, heat and cold, noise and silence -- and self-inflicted pain, which can be caused by stress positions, sleep deprivation, extended shackling, or being forced to hold heavy objects. The combination causes victims to feel responsible for their own suffering, and the trauma created by the fusion of these techniques, McCoy notes, "is a hammer blow to the fundamentals of personal identity". See Albert McCoy, *A Question of Torture: CIA interrogation from the cold war to the war on terror,* Henry Holt and Company, New York, 2006, p 21-60

[67] The Istanbul statement on the use and effects of solitary confinement, adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul, Turkey

[68] Ibid.

[69] *Leave no Marks, Enhanced Interrogation Techniques and the Risk of Criminality*, Physicians for Human Rights and Human Rights First, 2007.

[70] McCoy, *A Question of Torture*, op cit, p 39.

those places [that use sensory deprivation] must be considered very unreliable because people will after a while start to take on board the views of their interrogators."[71]

During his 28 months in this "black site", most of Khaled al-Maqtari's limited contact with other human beings was with interrogators. These interrogators, with one exception, worked with interpreters – both men and women – who spoke "better Arabic" than in the previous facilities, and Khaled al-Maqtari believed that most of them were native speakers, although some of them told him that they had been brought up in the USA. He heard Lebanese, Syrian and Egyptian accents, and said that one who was familiar with Yemeni expressions and sayings tried to "cheer him up" sometimes by using them.

Communication between prisoners in the secret detention centre was strictly forbidden, and the tight and ever-present security made it almost impossible in practice. Even when Khaled al-Maqtari tried to write on his cell wall, he said, he was usually caught by the cameras, and he would then be subjected to extremely loud music as a punishment. He did eventually manage to leave his name on the walls of the second and third cells he stayed in, and saw in his first cell the names of Muqaatil al-Madni, from Pakistan, and Khalil al-Uzbeki scratched into the wall. Detainees also attempted to communicate by writing on articles of clothing, which were changed every week. On several occasions he was given clothing which contained the name of "Marwan al-Adenni".[72]

Khaled al-Maqtari met several of the facility's officials, including one who called himself the "*Amir*" [meaning leader or commander]. Khaled al-Maqtari described him as "a giant, bold American who was sent from Washington". The "*Amir*" and/or his deputy would come in person to the cell if there was something important to explain, including instructions on procedure or any change of routine, or sometimes when Khaled al-Maqtari had been particularly ill. The "bold one" remained at the facility until early 2006, when a new "*Amir*" came to introduce himself to Khaled al-Maqtari. He believed that these "*Amirs*" were in charge of his area, but that there was another, more senior official in charge of the whole facility. Another senior official, a Lebanese-American who did not use an interpreter, arrived at the facility in about May 2006, Khaled al-Maqtari had first met him in Afghanistan, and believed that he was in charge of the other interrogators.

Other prisoners at the 'black site'

In his third cell, where he stayed for most of his final year in secret detention, Khaled al-Maqtari believes that the prisoner beside him towards the end of his detention was Majid Khan, a Pakistani, with whom he had been held in Afghanistan. One day they delivered a book written in Urdu to Khaled al-Maqtari, then took it back and handed it in to the cell next door. "I used to hear Majid's voice sometimes, too, because when I was calling for prayers I heard him say, *al-salam alikum* [peace be upon you]; he really could not speak much [Arabic], but he

[71] BBC television, *Horizon*, Total Isolation, broadcast on 22 January 2008
[72] Marwan al-Adenni [Salah 'Ali Qaru], told Amnesty International in interviews in 2005 and 2006 that he wrote his name in articles of clothing and books while in the secret prison.

used to say *salam*, and I knew his voice." The guards heard him trying to communicate, and took Khaled al-Maqtari's books and writing materials away as a punishment. "They took me to the interrogation room, and said 'you did something very serious, we took from you these things as a punishment. If you repeat it, other things will happen to you'." A short time later, during one of the weekly clothing changes, he was given a jacket that had the name "Majid Khan" written inside.

About six months before his release, the "*Amir*" told Khaled al-Maqtari that he would be allowed to meet with another detainee. They would get half an hour together, and if they did not break any rules – the main one being that they were not to discuss where they thought they were – the meetings would continue.

The detainee they brought told Khaled al-Maqtari that his name was Ahmed Abdel Rashid, sometimes known as Abu Ahmed. He was originally from Somalia, Khaled al-Maqtari said, but he had been living in Islamabad teaching Islamic studies for many years.[73] Ahmed Abdul Rashid has not previously been identified as a "black site" detainee or appeared on any previous lists of prisoners who have "disappeared" in US custody, although Marwan Jabour, a Palestinian who may have been held in this detention centre between 2004 and 2006, said that two Somalis were held in the cells in his three-cell block during 2005, although he did not know their names.[74] Ahmed Rashid told Khaled al-Maqtari that his wife and three children were still in Islamabad, where he had been arrested about 16 months before. Pakistan's Inter-Services Intelligence had held him for two weeks before turning him over to US custody, and then he came directly to the secret detention centre from Pakistan. As soon as he mentioned these details about his detention and transfer, the door was opened and they were told that they must not speak of this.

Anxious for the meetings to continue, Khaled al-Maqtari said that he and Ahmed Rashid spoke mostly about their childhoods in Somalia and Yemen, and their families, or they read the Quran together. As Ahmed Rashid was a teacher of Islamic studies, Khaled al-Maqtari began to save up questions about religion to ask him during their weekly meetings, although occasionally the interpreters told him that the meeting had been cancelled, as "the situation does not allow it". During one meeting, they began talking about noises they had both been hearing, but once again the doors burst open and the guards told them they must not speak of this. In total they met about eight times, sometimes for up to one hour.

Towards the end of his detention, Khaled al-Maqtari says he was issued a blanket on which was written: "To Cuba, to Morocco, to Romania and to this place – Abu Ubeidah al Hadrami". Abu Ubeidah al-Hadrami is an alias for Ramzi bin al-Shibh, one of the 14 "high-value" detainees transferred from secret CIA custody to military detention in Guantánamo in

[73] Amnesty International, CagePrisoners, Centre for Constitutional Rights, Center for Human Rights and Global Justice, Human Rights Watch, and Reprieve, *Off the Record: US responsibility for enforced disappearances in the 'war on terror',* AI Index: AMR 51/093/2007, June 2007, p 10.
[74] Interview with Marwan Jabour, November 2006. Jabour also described similar meetings with another detainee – Yasser al Jazeeri – starting in the early part of 2006.See also *Ghost Prisoner: Two Years in CIA Detention*, Human Rights Watch, February 2007.

September 2006, and one of the six charged by the US authorities in February 2008 for capital trial by military commission. If accurate, this tiny account suggests that during the four years in which he was "disappeared", Ramzi bin al-Shibh was held at the CIA interrogation facility at Guantánamo, which was reportedly closed in 2004[75], and that he was either rendered to Morocco, or held in a CIA "black site" there. The reference to his being held in Romania, and then "this place", is also intriguing. Reports confirming the existence of CIA "black sites" in Romania and Poland have emphasised that they closed by the end of 2005. If this is the case, then inmates from those facilities, who reportedly included both Ramzi Bin al-Shibh and Majid Khan, may then have been moved to the facility in which Khaled al-Maqtari had been since April 2004. It also seems likely that this facility closed down in September 2006, and that Khaled al-Maqtari and others were transferred back to their home countries while the 14 "high value" detainees were sent to Guantánamo, enabling President Bush to assure the public that "the current transfers mean that there are now no terrorists in the CIA program."[76]

Cooperation and conditions of detention

Khaled al-Maqtari felt that all of his conditions of confinement, including the provision of food, were calibrated to his behaviour and level of cooperation. In the beginning, he said, the food was so bad, and his stomach pain so severe, that he often could not eat what they brought. "I was ill from the time I got there," he said. "We got rice stuck together in a lump, sometimes not well cooked and hard. Later, I sometimes ate a few triangles of cheese with honey." There was also sliced bread, and some kind of tinned meat, which he did not eat because he was afraid it may have contained pork.

For long periods of time, Khaled al-Maqtari was unable to keep solid food down. His weight fell alarmingly low, and after a few weeks in which he says he ate scarcely at all, they began to feed him bottles of "Ensure", a food substitute drink. "Each bottle had 350 grams, and it had things like vitamins and iron and magnesium in it. Three times a day, one for every meal; there was vanilla, chocolate and strawberry."

As time went on, the food slowly improved, so that in the last year of his stay he was sometimes given special food, including rice with sultanas and nuts. On one occasion, he said, "I asked for food, because I was fed up with that Ensure, and my stomach was hurting me, and they brought me something close to Muhalbiya [a mild white pudding]."

The diet also seemed designed to offer no clue to their location, as there was little fresh food, and nothing distinctively regional; Khaled al-Maqtari described it all as "western". Much of it was food that would have been pre-packaged and easy to store, and although the labels and wrappers were always removed, it was sometimes possible to read manufacturers marks.

[75] Dana Priest, CIA Holds Terror Suspects in Secret Prisons**:** Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11, *Washington Post*, 2 November 2005
[76] President discusses creation of military commissions to try suspected terrorists. White House, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.

"They use things from all different places," Khaled al-Maqtari said, "chocolate bars from America, the juice from the Emirates, the water from Oman, the medicine from Lahore, the blanket from Mexico, the paper cups from Saudi Arabia. But always different. They do to this to confuse you, so that you don't know which country you are close to."

Other aspects of their treatment also improved over the course of his incarceration in the "black site". After some months he was given a Quran and a watch so that he could follow prayer times; initially the watch was taped outside the cell door, so that he could see it through the small viewing window, but a few months later he was allowed to have it inside his cell. His guards told him that the watch was set to the time at Mecca. Later still, they sometimes played Quranic readings over the speaker in his cell, and towards the end of his stay he was given a handheld electronic football game.

After about a year, Khaled al-Maqtari was allowed to use an exercise room once a week, for about 30 minutes at a time. The room, which was next to one of the interrogation rooms, was large, about 20 metres square, and usually contained a basketball and an exercise bicycle. There was a net partitioning the room, and he had to stay on one side of it while he played. The guards removed his chains and shackles, but remained on their side of the net.

At the very end of his detention, Khaled al-Maqtari was finally allowed to see the sky. He was taken outside, into a narrow yard or courtyard, where he could hear planes and car horns, and most importantly, he could see the sun. "It was almost hot," he said, "but not very hot. It was mild. I was so happy I just lay down under the sun so it would shine on all of my body." But at his next session, he arrived to find that the open area had been covered with a net. "I was ill, and I needed the sun. I shouted at them, I said 'you don't want me to get better. Why did you cover it?' First they said, 'we can't tell you', but one of them later told met 'it was covered so you don't see anything or hear anything passing by'."

Medical care

Khaled al-Maqtari's ill-health continued during the 28 months he spent in this facility. He claims to have been in excellent health at the time of his arrest, and attributes his ailments to the physical effects of the torture in Abu Ghraib and the other facilities, and the psychological impact of his enforced disappearance and isolation. At the secret facility, he says he saw at least five doctors or medics and a dentist[77], as well as half a dozen psychologists.

"I think I was the most ill there. I had many illnesses and many doctors. I asked them but they refused to say what diseases I have got." During his interviews with Amnesty International, Khaled al-Maqtari continually coughed up mucus and blood, a condition that started, he said, while he was in secret detention. "I had to spit and cough all the time. I asked them [the doctors] where is this coming from? One said 'maybe this is because of the weather and you are in the room on your own', and another said 'maybe because of the place

[77] Muhammad Bashmilah also reports seeing a dentist, *Surviving the Darkness*, op cit, p 51

you left your toothbrush', and another says, 'this is discharge from your nose'. Everyone said a different thing, and they couldn't find treatment for these illnesses."[78]

He said he was usually given four or five different medications a day, and that he needed a doctor at least once or twice a week. He suffered from seizures, panic attacks, fits of hysteria, stomach pain, vomiting blood, passing blood from his bladder or bowels, back and knee pain, and kidney stones. He still has trouble breathing today, and said he cannot stand on one of his feet. "Some of the damage was from the beatings… but I think the suspension was the worst. I have been examined by an expert here and he told me that there was a hole where a piece [of bone] broke off in my shoulder and another in my side. Afterwards I always had pain all over my body, and I cannot turn from side to side. I think this was from the suspending, it was painful. I could not bear the pain."

Later in his second year at the "black site", he was provided with a white board and a marker pen, and taught a code. If he needed a doctor urgently, he would write the letter "E" on the board, there were other codes if it was not urgent, or if he wanted the psychologists or interrogators. The board was fixed to the wall, in view of the cell cameras, so that the guards would be able to see on the video link what he had written.

Before he was given the board, he would simply scream until someone came. "I knew only a few words of English," he said, "so I would point at myself and look in the camera and shout 'sick, sick'." Sometimes they would tell him that the doctor was not "in the building" but that they would call him, and this gave Khaled al-Maqtari the impression that the facility had at least two buildings. He also had the sense that there was always a doctor on duty and one on call. Under US Federal guidelines for care of prisoners, an acceptable ratio of doctors to prisoners would be in the region of 500 to one, again indicating that this particular facility was unusually well staffed and equipped.[79]

Khaled al-Maqtari said that there were five male doctors or medics in the detention centre at various times, although he saw one of them more frequently than any of the others. He described him as an older man, about 60, with a round face and white beard, who wore a heavy gold ring. Another doctor was small, clean-shaven and black haired, "about 45 years old, always wearing a tight t-shirt and carrying a travel bag." None of the doctors gave him their names or encouraged much conversation, but one – who was trying to calm Khaled al-Maqtari down enough to put a drip in his arm – did talk briefly about his medical training and background, telling Khaled al-Maqtari that he had studied for 13 years in the USA. All of the other doctors, Khaled al-Maqtari believed, were also from the USA.

There were also four men and one woman, again from the USA, whom Khaled al-Maqtari identified as psychologists. The woman, he said, sometimes tried to cheer him up. He once

[78] Two detainees who had allegedly been held in secret detention by the US contracted tuberculosis while in custody, one of whom – Saud Memon – died shortly after his release in April 2007.
[79] In order for a facility to receive a federal designation of suffering from a "Health Professional Shortage", it must have more than 250 inmates, and an inmate:physician ratio greater than 1000:1.

asked her age, and she told him she was 34, then said she should not have told him this because she was not allowed to give him any personal information about herself.

Khaled al-Maqtari felt that the psychologists were of little help. "I was always screaming, crying, thinking, and constantly dazed," he said. He was given medication, which he believes were tranquilizers, "for the seizures and the screaming." The psychologists helpfully told him that his psychological turmoil was because he was detained and isolated, and suggested he should "put up with it and forget".

"They always advised me not to think," he continued. "Some said maybe I was ill because I was chained with a one metre chain for four months, and only moved to go to the bathroom. What made me even angrier is that they said 'you should run'. How could I run when I was chained? I asked them to just unchain me.... I felt better when I tried to break dishes or banged on the metal doors, that is, when I did something."

Khaled al-Maqtari said that he was monitored very carefully by means of his cell cameras, and that he was thought to be a suicide risk. On several occasions, he said, when he had vomited blood, guards burst into his room and chained him to the wall: "maybe they thought I was doing something to myself to make this happen."

Transfer for medical treatment

Khaled al-Maqtari's stomach pain and bleeding left him largely unable to eat solid food, and he continued to fail to respond to drug treatment. In early August 2006, he was taken by plane from the secret detention centre to a distant hospital facility, where he had what he was told was an endoscopy.

There were few clues as to the location of the medical facility, but it was likely to have been a considerable distance away from the "black site". Khaled al-Maqtari first flew on one plane for about five or six hours, then transferred to a second plane, which seemed to fly for some eight hours before landing. He felt that the second plane, in particular, was "modern", rather than a cargo jet, and the seats would have been comfortable if he hadn't been so firmly tied and unable to move.

Another detainee, who was taken with him on both flights, was coughing, perhaps due to his condition, although Khaled al-Maqtari felt he was also trying to make his presence known. Khaled al-Maqtari started reciting verses from the Quran, and the other detainee responded before they were both told to be quiet. Khaled al-Maqtari believes by his accent that he was probably a Saudi Arabian.

Khaled al-Maqtari thought he might even have been taken to the USA for treatment, because the flight was so long. When he complained, and wondered why he had not been sent somewhere closer, one of the interpreters told him: "don't think it is easy to take you to the hospital, the hospitals are far away and you need a very special one."

His captors took no chances with security. The area of the facility to which the detainees were brought had either been emptied before they landed, or was a disused section of some kind of medical facility. Their flight arrived by night, and both men were put on a bus and taken directly to the hospital, about 30 minutes away. Khaled al-Maqtari remained blindfolded throughout, but noticed that the air and the floor in the hospital were very cool, and completely silent – there were no sounds of any other patients, staff or equipment: "I only heard the chains of the person next to me, the one who was with me and was coughing. There was no one else there."

Khaled al-Maqtari waited about 45 minutes while the other detainee was taken away, and was then taken through to the treatment room by a Lebanese-accented interpreter, who had travelled with them from the secret detention centre. He was not anesthetized or sedated for the hour-long procedure – which would have been normal medical practice – and so felt it was "very painful". The interpreter calmed him down by talking to him throughout, telling him that he was doing well, and to be patient. As soon as it was over, there was no recovery period, the two detainees were taken straight back to the plane.

After the first leg of the return flight, they again changed planes, and Khaled al-Maqtari felt that they waited while food or other goods were loaded onto the plane heading back to the "black site". One of the interrogators had told him that "it was difficult to bring food daily to this place, we bring food and store it and when it is finished we order more food."

Khaled al-Maqtari said that they never gave him the results of the tests, and never managed to find a medication regime that alleviated his pain and other symptoms. In the end, he said, he thought that his ailments had been "a gift from God… to scare them into handing me back, because the treatment they gave me did not work, because I was so ill, and was going mad. They didn't want to have me then, because they had all the information from me." About three weeks after his hospital visit, he was taken from the secret detention centre and returned to Yemen.

Transfer to Yemen

From the early part of 2006, Khaled al-Maqtari said, his captors had been telling him that he would not stay with them for long, and that they would transfer him somewhere else. He was resigned to being transferred to another secret site, but said he asked them anyway, nearly every day, when and where he would be taken. There was no answer until the morning of what he believes was 31 August or 1 September 2006, when an interrogator came to his cell at 10am, to say that they would transfer him "somewhere else" that afternoon. "I asked if it was a better place," Khaled al-Maqtari said, "and he told me 'almost'. I asked him whether I could take the books I had or were there books there. I was scared that they might transfer me somewhere worse. He brought me a plastic bag, and allowed me to put in it some sticks [used for cleaning teeth], the Quran, prayer hat, and some rose-berry beads I had."

It was late in the afternoon when the interrogator returned with guards, and gave him some clean clothes to put on. For the first time during any of his flight transfers, they also brought

him shoes, made of white cotton, which he described as "Egyptian" although they were made in Germany.[80] He began to believe he would be returning to Yemen, as before he left, one of the interrogators told him "now you can start your life again".

He was hooded and taken in the back of a truck or small bus to what he described as a "container", where they waited about 45 minutes for the plane to arrive. He could hear "airport" sounds while they were waiting. He heard a plane landing and taxiing toward them, then three men came to the container and stripped him and took photos, fingerprints and a retina scan. He was then put back in the same clothes and shoes before being blindfolded and hooded and brought by car to the waiting plane. It was a small plane, he said, as he only had to go up about four steps, and when he got to the top they lowered his head. The flight was direct, and he said it took about six hours.

In Yemen, he was held first in the Political Security prison in Sana'a for 16 days, then transferred to a jail in Hodeidah. The Yemeni authorities assured him he would be released, but that "he had to be patient". He was finally released in May 2007, with a group of other prisoners, as part of the celebrations for the day commemorating the unification of north and south Yemen.

The human cost of rendition and secret detention is all too often ignored. Amnesty International first spoke to Khaled al-Maqtari weeks after his release, but he was then emotionally unable to carry out a comprehensive interview. It took him several months to recover to the point of being able to discuss his experiences. As described above, his physical condition remains poor, and he is not able to afford to pay for medical treatment. Specialised medical and psychological care for the victims of torture is not available in Yemen, and Khaled al-Maqtari is afraid to travel to any country where he might be able to receive such treatment. He is currently surviving largely because of the generosity of his family, but says that the strain on his relatives is unsustainable. Even if he were able to work, he says, no one would hire him, as although he was never charged with a terrorist offence, he remains stigmatized because he was detained by the USA. In desperate financial straits, under suspicion by any potential employers, monitored by the security and intelligence service, and unable to secure treatment for the physical and psychological effects of his treatment in US custody, he fears he will never again be able to lead a normal life.

Afterword: Assuring the future of the CIA detention program

On 20 July 2007, President Bush issued an executive order giving his authorization to the continuation of the CIA's secret detention and interrogation program, referred to as the "High Value Terrorist Detainee Program".[81] In the order, the president asserted that the CIA program:

[80] Laid Saidi, an Algerian released from secret detention in 2004, also describes being given a pair of white shoes. See Craig Smith and Souad Mekhennet, *Algerian Tells of Dark Term in U.S. Hands*, *New York Times,* 7 July 2006

[81] For a comprehensive discussion of the ramifications of the June 2007 Executive Order, and the background to the development of the secret CIA program, see: Amnesty International, *USA: Law and*

"fully complies with the obligations of the United States under Common Article 3" (of the four Geneva Conventions), provided that "the conditions of confinement and interrogation practices of the program" remain within the limits set out in the executive order. The US authorities, including the President, have repeatedly emphasised that the CIA program and the techniques used in it have been cleared as lawful by administration lawyers. Clearly, then, the USA is interpreting its international obligations in a way that renders them meaningless and perpetuates an absence of accountability for a program in which the international crimes of torture and enforced disappearance have been committed.

Common Article 3 of the Geneva Conventions reflects customary international law applicable in armed conflict. Like international human rights law, which is applicable at all times, it requires fair trials and prohibits, among other things, torture and cruel treatment. Common Article 3 also explicitly prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment". For detainees held by the CIA who were not detained in the context of an armed conflict, international human rights law, not common article 3, provides the appropriate international legal framework governing their treatment. Treaties including the International Covenant on Civil and Political Rights and the Convention against Torture, to which is the US is a party, similarly proscribe torture and other cruel, inhuman or degrading treatment.

Under the program, however, the CIA has held detainees entirely incommunicado in secret locations, often for years on end, while denying them access to lawyers, courts, relatives, international human rights monitors and the ICRC. The order thus authorizes and endorses secret incommunicado detention, a practice that violates international law, and itself amounts to torture or other cruel, inhuman or degrading treatment. Former detainees have alleged that they were subjected to treatment including prolonged solitary confinement, beatings, suspension in chains, sleep deprivation, forced nudity, exposure to extremes of hot and cold, prolonged shackling, and withdrawal of medication. The secret detentions carried out by the CIA thus far have also amounted to enforced disappearance, which, like torture, is a crime under international law.

In contrast to the absolute prohibition of torture and other ill-treatment under international law, the executive order interprets US and international law in such a way as to facilitate a sliding scale of unlawfulness in relation to torture or other ill-treatment against detainees viewed by the CIA as potential sources of "high-value" intelligence. Furthermore, it contains loopholes that may allow further ill-treatment of detainees held in the CIA program, including in relation to humiliating and degrading treatment. It fails to rule out the use of the kinds of "enhanced interrogation techniques" used on Khaled al-Maqtari. It seeks to block accountability for the abuses already carried out under the program, including for officials and agents who have authorized, condoned or carried out enforced disappearances, abductions, secret detentions, and torture or other ill-treatment.

executive disorder; President gives green light to secret detention program, AI Index AMR 51/135/2007, August 2007, http://www.amnesty.org/en/report/info/AMR51/135/2007

Enforced disappearance & secret detention violate international law

Secret detention is in and of itself a violation of international human rights and humanitarian law, as set out in treaties binding on the USA. The practice typically contravenes the prohibition against arbitrary detention, and the prohibition against torture or cruel, inhuman or degrading treatment.[82] Its specific practice by the USA has been condemned by two treaty-monitoring bodies, the UN Human Rights Committee and the UN Committee against Torture. The Human Rights Committee stated:

> "The State party should immediately abolish all secret detention and secret detention facilities...It should only detain persons in places in which they can enjoy the full protection of the law." [83]

In similar vein, the Committee Against Torture stated:

> "The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a violation of the Convention... The State party should publicly condemn any policy of secret detention."[84]

In confirming the existence of the secret detention and interrogation program in September 2006, and endorsing its continuation, the President was admitting to having authorized enforced disappearances, which are recognized as a crime under international law by a succession of international instruments.[85]

On 6 February 2007, the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by consensus by the UN General Assembly in December 2006, opened for signature. The preamble of this treaty reiterates the "extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity". Fifty-seven countries (not including the USA) signed the Convention on 6 February. Under the Convention, enforced disappearance is:

> "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support

[82] ICCPR articles 16, 9 and 7; the Convention against Torture
[83] Human Rights Committee, United States of America: Concluding observations, UN Doc. CCPR/C/USA/Q/3/CRP.4, 27 July 2006.
[84] Conclusions and recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, 18 May 2006.
[85] Including the 1994 Inter-American Convention on the Forced Disappearance of Persons, which refers to forced disappearance as "an affront to the conscience of the Hemisphere", and the 1998 Rome Statute of the International Criminal Court, Article7(2)(i), which defines the crime against humanity of "enforced disappearance of persons" as "*the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.*"

> or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".

Individuals were held in the CIA's secret program for up to four and a half years before President Bush confirmed the existence of the program in September 2006. The prior refusal or failure to clarify the fate or whereabouts of the detainees, leaving them outside the protection of the law for a prolonged period, placed them squarely within the agreed definitions of enforced disappearance. Fourteen of the detainees held in the program were identified and transferred to Guantánamo in early September 2006, a 15th joined them in April 2007, and Amnesty International knows of at least 10 other men who have been released from the program, after having "disappeared" for periods of up to three years. Some three dozen others believed to have been held in the CIA program remain unaccounted for, their fate and whereabouts unconfirmed.[86]

Secret detention facilitates torture or other ill-treatment, as well as amounting to such treatment in and of itself. As the UN Working Group on Arbitrary Detention stated recently in its severe criticism of the CIA program, such detention

> "falls outside of all national and international legal regimes pertaining to the safeguards against arbitrary detention. In addition the secrecy surrounding the detention and the interstate transfer of suspected terrorists may expose the persons affected to torture, forced disappearance, extra judicial killing and in case they are prosecuted against, to the lack of the guarantees of a fair trial."[87]

The CIA's secret detention program, in which "alternative" interrogation procedures are employed, is supposed to be limited to individuals believed to be in possession of high-value information. According to President Bush's executive order of 20 July 2007, for a detainee to qualify for detention in the program the Director of the CIA must determine that he or she is "likely to be in possession of information that could assist in detecting, mitigating, or preventing terrorist attacks" or "could assist in locating the senior leadership of al Qaeda, the Taliban, or associated forces".

No indication is given of how the CIA Director is meant to make this determination as to who is to be held in secret custody. For example, will information coerced from one detainee under torture or other ill-treatment be used as the basis for pulling another detainee into the CIA program?[88] In a statement about President Bush's executive order and the secret detention

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[86] Amnesty International, CagePrisoners, Center for Constitutional Rights, Center for Human Rights and Global Justice, Human Rights Watch, and Reprieve, *Off the Record: US responsibility for enforced disappearances in the 'war on terror',* AI Index: AMR 51/093/2007, June 2007, http://www.amnesty.org/en/report/info/AMR51/093/2007.

[87] Opinion No. 29/2006 (United States of America), Concerning: the case of Mr. Ibn Al-Shaykh al-Libi and 25 other persons, adopted 1 September 2006, para. 21.

[88] For example, the torture or other ill-treatment of Mohamedou Ould Slahi in Guantánamo, possibly in Defense Intelligence Agency custody while denied access to the ICRC for more than a year on grounds of "military necessity", reportedly followed the naming of Slahi during the interrogation of Ramzi bin al-

program, the Director of the CIA, General Hayden, asserted that "fewer than 100 hardened terrorists have gone through the program since it began in 2002, and, of those, less than a third have required any special methods of questioning."[89] Why the US has released without charge so many "hardened terrorists" is a matter for speculation, while the assurance that "fewer than a third" of the CIA's detainees were subjected to techniques amounting to cruel, inhuman or degrading treatment rings hollow in the face of the statements of Khaled al-Maqtari and other former "black site" detainees about the treatment they endured.

The wording of the executive order allows it to cast a much broader net than General Hayden suggests. Under the order, a detainee in the CIA program must be a foreign national who the Director of the CIA determines is a "member or part of or supporting al Qaeda, the Taliban, or associated organizations" and "likely to be in possession of information" that "could assist in detecting, mitigating, or preventing terrorist attacks" or "could assist in locating the senior leadership of al Qaeda, the Taliban, or associated forces". This could arguably draw in family members of individuals sought by the USA if such relatives are deemed by the CIA Director to be "supporting" one of the named organizations or "associated forces" and to have knowledge of the wanted person's whereabouts. In September 2002, for instance, Yusuf and Abed al-Khalid aged nine and seven respectively, were reportedly taken into custody by Pakistani security forces looking for their father, Khalid Sheikh Mohammed. The two were apparently still being detained in March 2003, when a press report confirmed that the CIA was holding the boys. One US official was quoted as saying:

> "We are handling them with kid gloves. After all, they are only little children...but we need to know as much about their father's recent activities as possible. We have child psychologists on hand at all times and they are given the best of care."[90]

Impunity

The executive order makes it possible for the CIA to continue to hold detainees in secret custody – to continue to carry out enforced disappearances – and offers little if any protection against the additional human rights violations that stem from secret incommunicado detention. Moreover, it reinforces the enormous accountability gap that persists in relation to past abuses, and seeks to ensure that this lack of accountability continues. Instead of carrying out its obligation to investigate credible allegations of enforced disappearance, including in the case of Khaled al-Maqtari, the US administration has sought to bend the rules, or simply ignore them. The obsessive secrecy that protects the operation of the CIA's "high value terrorist detainee program" leaves it immune to political or legal scrutiny, ensuring continued impunity for the human rights violations it entails.

Shibh in secret CIA detention at an unknown location. See USA: *Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi*, AI Index: AMR 51/149/2006, September 2006, http://www.amnesty.org/en/report/info/AMR51/149/2006.

[89] 5 October 2007 Statement to Employees by Director of the Central Intelligence Agency, General Michael V. Hayden on the CIA's Terrorist Interrogation Program, https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/terrorist-interrogation-program.html

[90] *See* Olga Craig, CIA Holds Young Sons of Captured al-Qaeda Chief, *Sunday Telegraph* (UK), 9 March 2003

The record is no better when it comes to accountability for torture. To date, as far as Amnesty International can ascertain, no CIA personnel have been brought to justice in relation to acts of torture or other ill-treatment, despite reports indicating that a pattern of such abuses exists, and despite agency personnel allegedly being involved in a number of deaths in custody in Iraq and Afghanistan.[91] The administration has chosen to ignore its obligations by the simple expedient of pretending that they do not exist. Yet no matter how many times the president says that the secret detention program complies with international obligations, including under Common Article 3, the fact remains that it does not.

While the military investigation into intelligence activities at Abu Ghraib concluded that "the CIA's detention and interrogation practices contributed to a loss of accountability and abuse" at the prison,[92] neither this nor other investigations conducted outside of the CIA Inspector General's office have had the scope to examine the CIA's secret program.[93] The Office of the Director of National Intelligence has stated that the CIA program "has been investigated and audited by the CIA's Office of the Inspector General (OIG), which was given full and complete access to all aspects of the program." [94] No details or findings relating to any such investigations have been made public. International standards require that investigations into torture and other cruel, inhuman or degrading treatment be prompt and effective, carried out by independent, competent and impartial investigators, and that their findings be made public.[95]

In its March 2005 statement asserting that its agents "do not torture" (while remaining silent on whether or not they engage in cruel, inhuman or degrading treatment), the CIA noted that

[91] David Passaro, a CIA contractor, was convicted in 2006 for assault in the case of an Afghan national who died in US custody Afghanistan in 2003. The CIA Director responded to the conviction by stating that "Passaro's actions were unlawful, reprehensible, and neither authorized nor condoned by the Agency... As abhorrent as this situation was, it is a fact that we, as an Agency, did not sweep it under a rug. We addressed it head-on and dealt with it swiftly." Statement to the CIA workforce by Director Hayden on the conviction of former CIA contractor David Passaro, 17 August 2006, https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2006/pr08172006.htm. In the case of Manadel al-Jamadi who died in CIA and Navy SEAL custody in Abu Ghraib on 4 November 2003, for example, nine members of the Navy SEAL team were given "non-judicial punishment" by their commanding officer. None of the CIA personnel allegedly involved has been charged or prosecuted, despite being a case in which the CIA Inspector General found a "possibility of criminality". Statement by Senator Patrick Leahy, US Senate Committee on the Judiciary, on the nomination of Paul McNulty to the position of Deputy Attorney General, 2 February 2006.

[92] AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, August 2004.

[93] The global review conducted by the Naval Inspector General, for example, noted that "the CIA cooperated with our investigation, but provided information only on activities in Iraq." Vice Admiral Albert Church's report added that "it was beyond the scope of our tasking to investigate the existence, location or policies governing detention facilities that may be exclusively operated by [other government agencies], rather than the [Department of Defense]" Unclassified executive summary of the Church Report, March 2005. The "independent" Schlesinger Panel global report similarly stated that "we are aware of the issue of unregistered detainees, but the Panel did not have sufficient access to CIA information to make any determinations in this regard".

[94] Summary of the High Value Terrorist Detainee Program, *op. cit.*

[95] UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

"CIA policies on interrogation have always followed legal guidance from the Department of Justice. If an individual violates the policy, then he or she will be held accountable".[96] The absence of prosecutions of CIA personnel suggests that the policy remains out of compliance with international law, and indeed that the secret detention policy goes hand in hand with one of impunity.

[96] Statement by CIA Director of Public Affairs Jennifer Millerwise, 18 March 2005, *op.cit*.

Recommendations

Amnesty International calls on the US administration to:

1. Cease the use of secret, incommunicado or unacknowledged detention, and ensure that all government agencies adhere to a strict policy of registering and acknowledging all detentions;
2. Make known the names, fate, and whereabouts of all individuals the US has detained in the context of the "war on terror", even if they have been released, transferred to the custody of another state, or are dead;
3. Provide immediate access by the ICRC to all detainees now held, or previously held, in secret detention, either in direct US custody or in the custody of another government to whom US agents have access;
4. Charge detainees with recognizable criminal offences and bring them to trial within a reasonable time in independent courts, with full adherence to international fair trial standards, or else release them. There should be no recourse to the death penalty;
5. Allow detainees access to lawyers and to communicate with family members;
6. Withdraw all requests or demands to foreign governments for the continued detention of persons transferred from US custody, including from the CIA program;
7. Ensure that all allegations of enforced disappearance, torture and other ill-treatment carried out in the context of the CIA program are fully, independently and transparently investigated, and that anyone responsible for such human rights violations is brought to justice;
8. Explicitly prohibit interrogation techniques that violate the international prohibition on torture and other cruel, inhuman or degrading treatment and give clear guidance that anyone responsible for using or ordering the use of such techniques will be prosecuted;
9. Declassify all government documents providing authorization or legal clearance or discussion of secret detention, rendition, and enhanced interrogation by the CIA or other agencies;
10. Ensure that all those who have been subjected to enforced disappearance, secret detention, torture or other cruel, inhuman or degrading treatment are provided access to effective remedy, including compensation;
11. Ensure that Khaled al-Maqtari's allegations of torture and other cruel, inhuman or degrading treatment by US personnel, including members of the armed forces and the CIA, are subject to prompt, thorough, independent and impartial civilian investigation in strict conformity with international law and standards concerning investigations of human rights violations;
12. In view of evidence that Khaled al-Maqtari was the victim of an enforced disappearance, the US authorities should initiate prompt, thorough and impartial investigations into the allegations by a competent and independent state authority, as set out in Article 12 of the International Convention for the Protection of All Persons

from Enforced Disappearance, and Article 13 of the UN Declaration on the Protection of All Persons from Enforced Disappearance;

13. Ensure that appropriate reparation is provided to Khaled al-Maqtari. This should include restitution, compensation and rehabilitation, as well as full and public disclosure of the truth, public acknowledgement of the facts, and acceptance of responsibility.

Amnesty International calls on the US Congress to:

1. Hold hearings into the establishment and operation of the CIA's secret detention program, including examining the decision-making process by which detainees were included in the program and their interrogation and treatment, and to establish the identity, fate and whereabouts of everyone who has been or is being held in secret detention;
2. Legislate to make the human rights violation of enforced disappearance as defined in international law a criminal offence punishable by penalties commensurate with the gravity of the offence;
3. Legislate to ensure that the CIA secret detention program is ended, and that no similar program can be established in future;
4. Ensure that no further enforced disappearances are carried out by any government agency, and that all secret detention facilities under US control are shut down;
5. Legislate to ensure that no interrogation techniques or detention conditions which would violate international law can be used by, or on behalf of, any US agent against anyone held anywhere;
6. Establish sufficient oversight of the CIA, other US intelligence agencies, and special operations forces to ensure that none of their activities are carried out in violation of US or international law, and that "state secrecy" provisions cannot be used to shield unlawful activities from Congressional scrutiny.

Amnesty International calls on all other governments:

1. End any cooperation or assistance with secret detention operations, and disclose any information held about such operations, including past operations;
2. Desist from transferring a person to US custody where there are substantial grounds for believing that he or she would be in danger of being subjected to secret detention or enforced disappearance, torture or other cruel, inhuman or degrading treatment or punishment;
3. Ensure that anyone transferred from US custody is held in a recognized place of detention, that their family is notified and allowed visits and other communications with the detainee, that any such detainees are given access to the ICRC and to legal counsel, and that they are released promptly, unless they are charged with a recognizably criminal offence, and a court has determined that they should be kept in custody

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT Q

United States of America / Yemen
Secret Detention in CIA "Black Sites"

"They came to take our father at night, like thieves…"

Fatima al-Assad, age 12, daughter of Muhammad al-Assad,
who "disappeared" after his arrest in 2003

"Brother, what is your name, what village are you from?" It was distinctive Yemeni Arabic that greeted Muhammad al-Assad as he stumbled, still hooded and shackled, from the plane at Sana'a. For the first time in nearly 18 months he knew what country he was in. He heard the question repeated twice more, as Salah Nasser Salim 'Ali and Muhammad Faraj Ahmed Bashmilah emerged onto the hot tarmac. He still could not see them, and had not known they were on the plane with him, but he could hear one of them shouting over and over again: "I am Bashmilah, I am Bashmilah, I am from Aden".

The three, all Yemeni nationals, had "disappeared" in 2003, and had been kept in complete isolation – even from each other – in a series of secret detention centres apparently run by US agents. Senior Yemeni officials have told Amnesty International that they first heard of the men in May 2005, when the US Embassy in Yemen informed them that the three would be flown to Sana'a and transferred to Yemeni custody the following day. No further information or evidence against the men was provided, but the Yemenis say they were instructed by the US to keep them in custody. All three continue to be held in a kind of extralegal limbo; they have not been charged with any offence, given any sentence, or brought before any court or judge. The only improvement in their situation, they say, is that their families now know that they are alive.

Muhammad al-Assad's odyssey began on the night of 26 December 2003, in Dar-es Salaam, Tanzania, where he had lived since 1985. As he told Amnesty International, he had just sat down to dinner with his Tanzanian wife, Zahra Salloum, and her brother and uncle. An immigration officer and two men from the state security forces came to the door, and ordered Muhammad al-Assad to surrender his passport and mobile phone. As he crossed over to his office to get the passport, he was grabbed from behind, a hood was forced over his head, and his hands were cuffed behind his

back. He was thrown into the back of a car, which sped away. "I was very frightened," he said, "very frightened, and kept asking what was happening to me."

His captors did not reply. They took him to a flat, and questioned him for some four hours about his passport. He was then taken directly to a waiting airplane. Still hooded, he could see nothing, but heard the roar of the engines. As he was pushed up the stairs he asked where he was going. The guard told him: "we don't know, we are just following orders, there are high-ranking ones who are responsible".

Muhammad al-Assad thought it was probably a small plane, his head was pushed down as he went through the door. He told Amnesty International he was too frightened to ask any further questions, instead he prayed to have patience, until the authorities discovered their mistake and let him go home. He is still waiting.

Muhammad al-Assad calculates that he is about 45 years old. He has a short beard, and a perpetually anxious expression. His father described him as a "very gentle man, who is always laughing". When Amnesty International interviewed him, in his cell at the political security prison in al-Ghaydah, in the governate of al-Mahra in eastern Yemen, he was solemn, and so soft-spoken in his replies that he was sometimes hard to hear, but there was never even the ghost of a smile on his face.

Tanzanian immigration authorities initially told Zahra Salloum that her husband had been deported to Yemen because his passport was not valid, and this story was repeated in the local media.[1] When she phoned Muhammad al-Assad's 75-year-old father, Abdullah al-Assad, in Yemen, he traveled the 1,300 km from al-Ghaydah to the capital, Sana'a, to find his son. The Yemeni government gave him written assurances, which Amnesty International has seen, that his son had never entered the country. He carried on to Dar es Salaam, where he filed a *habeas corpus* petition with the Tanzanian courts. He was eventually told by Tanzanian officials that his son had been turned over to US custody, and that no one knew where he was.

Two months earlier, in October 2003, Salah 'Ali Nasser Salim 'Ali and Muhammad Faraj Ahmed Bashmilah had been arrested in Jordan[2], and held there briefly before they too were turned over to US custody. Their cases were first documented by Amnesty International in a report released in August 2005.[3]

[1] 'Dar deports 2,367 aliens', Daily News (Tanzania), 30 December 2003; 'Yemeni, Italians expelled', The Guardian (Tanzania), 30 December 2003.
[2] Both were initially detained in Indonesia, see below.
[3] USA/Jordan/Yemen: Torture and secret detention: Testimony of the "disappeared" in the "war on terror", AI Index: AMR 51/108/2005

Illegal detentions, rendition and reverse rendition

All three had entered the USA's network of illegal detentions, secret transfers and unacknowledged prisons, where suspects are arbitrarily shuttled in and out of US custody, in what journalist Stephen Grey called "a worldwide traffic in prisoners".[4] According to a former senior US intelligence official, the rules of this game were simple: "Grab whom you must. Do what you want."[5]

The goal of the network is not just to hold terrorist suspects and their supporters, but to collect intelligence through long-term interrogation, free from any legal restrictions or judicial oversight. The bulk of the work is carried out at facilities under US military control in Afghanistan, Guantánamo Bay in Cuba and Iraq, which together hold at least 11,000 people.[6] Most of them were detained in Afghanistan, Pakistan and Iraq, but others were transferred from countries including Albania, Bosnia, Croatia, Gambia, Indonesia, Italy, Jordan, Kenya, Libya, Pakistan, Macedonia, Malaysia, Sudan, Tanzania, and Zambia.[7]

Long before Guantánamo opened its gates to "war on terror" detainees, however, the USA had been secretly transferring terror suspects into the custody of other states, states where physical and psychological brutality feature prominently in interrogations. Known to the US Administration as "extraordinary rendition," and to its critics as the "outsourcing of torture", the program has expanded considerably, reportedly under a classified directive signed by President Bush in late September 2001.[8] It has been estimated that the US Central Intelligence Agency (CIA), often

[4] Stephen Grey, 'United States: trade in torture', *Le Monde Diplomatique*, April 2005

[5] Seymour Hersh, Chain of Command : The Road from 9/11 to Abu Ghraib, Harper Perennial, August 2005, p. 51.

[6] Figures from the Second Periodic Report of the United States of America to the Committee Against Torture, Submitted by the United States of America to the Committee Against Torture, May 6, 2005. See also Dana Priest and Joe Stephens, 'Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light', Washington Post, May 11, 2004, Page A01

[7] See Grey op cit, and AI Index: AMR 51/114/2003, *United States of America : The threat of a bad example - Undermining international standards as "war on terror" detentions continue.*

[8]See pages 107-116 of USA: Human dignity denied, *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, AMR 51/145/2004, 27 October 2004. "Extraordinary rendition" is proving increasingly controversial even within the US Congress. Congressman Edward Markey argued in an editorial in the Boston Globe (12/03/2005) that: "Sending prisoners overseas to extract information through water torture, removal of toenails and fingernails, beatings, and electrocution at the request of US officials is inhumane and must be stopped." However, bills in the House and Senate which would curtail the practice of obtaining perfunctory diplomatic assurances from countries with an established record of torture stalled this year. Although Congressman Markey was successful in attaching a number of spending restrictions on various bills to prohibit the funds distributed by the spending bills from being spent on renditions, neither the House nor the Senate has addressed the substantive issue of diplomatic assurances. On 5 October 2005, by a vote of 90 to 9, the US Senate

using covert airplanes leased by fictional front companies,[9] has flown hundreds of war on terror suspects to countries including Egypt, Jordan, Morocco, Pakistan, Qatar, Saudi Arabia, and Syria.[10]

In another variation, sometimes called "reverse rendition", US agents have abducted suspects on foreign soil, or assumed custody of detainees from other countries, in transfers that completely bypass any legal process or human rights protections. Some of the victims of reverse rendition have later turned up in Guantánamo, but the most sinister and least well-documented cases are those of the detainees who have simply "disappeared" after being detained by the USA or turned over to US custody.

It has been widely reported that the US is holding a small coterie of some two to three dozen "high-value" detainees at secret CIA-run facilities outside the USA.[11] The US admits that these men are in custody, but no one knows for sure where the likes of alleged al-Qa'ida leaders Ramzi bin al-Shibh, Khalid Shaikh Mohammed, and Abu Zubaida are being held. The locations are deemed to be too sensitive even to be revealed to the leaders of the US House and Senate intelligence committees. [12]

The cases of the three "disappeared" Yemenis documented in this report, however, suggest that the network of clandestine interrogation centres is not reserved solely for high-value detainees, but may be larger, more comprehensive and better organized than previously suspected.

These three men were kept in at least four different secret facilities, which were likely to have been in different countries, judging by the length of their connecting flights. There have been persistent reports that the USA operates secret detention centres in Afghanistan, Iraq, Jordan, Pakistan, Qatar, Thailand, Uzbekistan and other locations in Eastern Europe[13], as well as on the British Indian Ocean territory of Diego Garcia[14]. The UK government has denied that there is a detention centre on Diego

passed an amendment sponsored by Senator John McCain, requiring humane treatment of detainees in US custody or control. However, even if the amendment is agreed by the House and the Senate, President Bush has threatened to veto the bill.

[9] Dana Priest and Joe Stephens, 'Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light', Washington Post, May 11, 2004, Page A01

[10] Jason Burke, 'Secret World of US Jails', in the Observer, June 13 2004.

[11] See pages 103-116 of 'Human Dignity Denied', op cit. See also, http://www.defenselink.mil/transcripts/2004/tr20040714-1002.html

[12] Yossi Melman, a security analyst for Israel's Haaretz newspaper, reported last year that the men were being held in Jordan. See "CIA holding Al-Qaida suspects in secret Jordanian lockup", Haaretz, 10/13/04.

[13] Dana Priest, 'CIA holds terror suspects in secret prisons', Washington Post, 2 November 2005

[14] Established as a territory of the UK in 1965, Diego Garcia contains a joint UK-US naval support facility.

Garcia, while the USA has been more equivocal. In a Defense Department Briefing in July 2004, Lawrence Di Rita, the Principal Deputy Assistant Secretary of Defense for Public Affairs, was questioned about the existence of US detention centres hidden from the ICRC. Di Rita said categorically that "the ICRC has access "to all detainee operations under our [Department of Defense] control. And beyond that, I'm just not prepared to discuss it." Pressed on whether detainees were held in secret on Diego Garcia by other US agencies, he replied: "I don't know. I simply don't know." The US State Department, the Federal Bureau of Investigation (FBI) and the CIA have all declined to comment on these reports.

As pressures mount on the US Administration to close Guantánamo, reform Abu Ghraib prison in Iraq, and turn detention centres in Afghanistan over to the Afghan government, there is a risk that the pervasive disregard for human rights protections at the heart of current detention policy will lead to more frequent recourse to secret measures, which can only lead to further grave violations of human rights.

The pattern of illegal arrests, covert transfers and secret and incommunicado detention described in this report violates the most fundamental rights of detainees: the right not to be arbitrarily arrested, the right of access to lawyers, families, doctors, the right to have families informed of arrest or place of detention, the right to be promptly brought before a judge or other judicial official, the right to challenge the lawfulness of detention and the right to be free from torture and cruel, inhuman or degrading treatment, as guaranteed by a battery of international human rights standards, as well as the US Constitution.

Detention by proxy: arrests in Indonesia, Jordan and Tanzania

The process by which the three men were screened for transfer into secret detention suggests that US agencies are placing considerable reliance on foreign security and intelligence services, most of which have been roundly criticized for their methods in the US State Department's own Country Reports on Human Rights Practices. Each one of the men – Muhammad al-Assad in Tanzania, and Salah 'Ali and Muhammad Bashmilah in Indonesia – was initially detained and questioned by immigration officials. A retired intelligence official has told Amnesty International that this is a common investigative tactic, even within the USA. It is often the case, he said, that foreign nationals have some visa irregularity that can justify questioning, and immigration regulations in most countries are so arcane and confusing that even those with legitimate visas and passports can be made to think there might be some problem with their status. Moreover, he added, "it's a good opportunity to check the passport, both to try and confirm the identity and to give you a chance to see where they've

been. It also helps if you can have a look at their cellphones and see who they've been talking to."[15]

In the case of Muhammad al-Assad, the connection that seems to have led to his long detention was a tenuous link to a blacklisted charity. Muhammad al-Assad ran a small business in Dar es Salaam importing diesel engine parts, and renting out offices in a small building he owned. Some six years before his arrest, he had leased space to the Al-Haramain Islamic Foundation, a Saudi Arabian charity identified by the USA after 9/11 as a possible link in terrorist funding. Muhammad al-Assad also signed a guarantee for the charity's registration in Tanzania, but said that his only contact with them after that was to collect the rent.[16]

In the summer of 2003, he was in Dubai on business when his brother-in-law called to tell him that the authorities had been asking questions about the charity. Muhammad al-Assad returned to Tanzania, but was not contacted by the police. In October, the immigration authorities summoned him to their offices, telling him to bring his Tanzanian passport and mobile phone. They did not question him about his immigration status, only asked him about a man with a red car, who had recently visited the Al-Haramain offices. Muhammad al-Assad said he had not seen him, and they asked him to leave his passport, and return for it the following day. This he did, and heard nothing more until he was arrested in December.

The detentions of Salah 'Ali and Muhammad Bashmilah seem to have been automatically triggered when they admitted to having visited Afghanistan. Salah 'Ali was first taken into custody by Indonesian immigration officials in Jakarta in August 2003, ostensibly for questioning about his visa, although he was initially detained in an intelligence services centre. He remained chained to the wall in a cell there, without food, for three days. His wife Aisha tried three times to visit him, but was refused access. He knew she was trying to call him, he told Amnesty International, because his mobile had been left outside his cell, just out of reach, and it rang incessantly until the batteries went dead.

[15] Amnesty International interview, October 2005. The official did not wish to be named.

[16] In January 2004, the Kingdom of Saudi Arabia and the U.S. Department of the Treasury jointly designated four additional Al Haramain branches -- Indonesia, Tanzania, Kenya and Pakistan -- as being supporters of terrorism. http://japan.usembassy.gov/e/p/tp-20040220-04.html, accessed 6 October 2005. CBS news reported in June 2004 that "U.S. officials have privately conceded that only a small percentage of the total [funding] was diverted and that few of those who worked for Al-Haramain knew money was being funneled to Osama bin Laden's terrorist organization.", http://www.cbsnews.com/stories/2004/06/07/terror/main621621.shtml, accessed 7 October 2005.

Salah 'Ali was transferred to a deportation centre, where he was held for three weeks, then given a ticket to Yemen via Thailand and Jordan. Aisha, an Indonesian national, was in her last month of pregnancy and could not travel with him. In Jordan, he was taken off the plane, and questioned by the General Intelligence Department, *Da'irat al-Mukhabarat al-'Ammah* (GID), who asked him right away if he had ever been in Afghanistan. He answered yes (there was already a stamp was in his passport, he told us), and was taken into custody and interrogated for 10 days about "*jihad* in Afghanistan". He told Amnesty International that the questions made no sense to him, because they didn't relate to the same period he had spent there, so "I was tortured horribly. It was very bad."

Salah 'Ali described being suspended from the ceiling and having the soles of his feet beaten so badly that when they took him down from the hooks he had to crawl back to his cell.[17] He was stripped and beaten by a ring of masked soldiers with sticks. "When one got tired of hitting me, they would replace him," he told Amnesty International. "They tried to force me to walk like an animal, on my hands and feet, and I refused, so they stretched me out on the floor and walked on me and put their shoes in my mouth". Another time, he said, a guard noticed he had a bad foot, and forced him to stand on it throughout the night while they interrogated him: sometimes during interrogation they held plates of food near his face while they ate, although he was not fed; sometimes they put cigarettes out on his arm.

After about 10 days the Jordanian guards hooded and shackled him, and stuffed foam into his ears before driving him to an airstrip. He was taken onto a plane and laid out on his back on the floor or a stretcher, his arms chained to the floor. He flew for about three or four hours, he says, and when he arrived, he was taken to see an English-speaking doctor, and then by English-speaking guards to his cell.

Muhammad Bashmilah had first been arrested in Indonesia in August 2003, as he and his wife stepped off a train in Surabaya; in his case too, his captors identified themselves as immigration officials. Zahra, his Indonesian wife, was allowed to go, while Muhammad Bashmilah was moved to Jakarta to be questioned about his passport and identity card, and more extensively about his movements since leaving Yemen in 1999, including his three-month visit to Afghanistan in 2000.

He was released in September, and he and his wife travelled to Jordan to meet his mother, who had gone to Amman to have a heart operation. On arrival in Jordan, his passport was taken and he was told to report to the GID to collect it. He went several times, but did not get his passport back. On his fourth visit, on 19 October 2003, he was asked if he had ever been to Afghanistan; as soon as he said yes, he was handcuffed and taken to the intelligence detention centre.

[17] A form of torture known as *falaqa*

Muhammad Bashmilah is a small, vibrant man, about 38 years old, who speaks openly, if caustically, about most aspects of his detention. On both occasions he has been interviewed by Amnesty International, however, he has broken down in tears in the attempt to describe his treatment in the GID's cells in Jordan. A prison official in Yemen told Amnesty International that he believed Muhammad Bashmilah had been tortured even more severely than Salah 'Ali.

After three days in custody, Muhammad Bashmilah said that he was allowed to see his mother for 10 minutes. She later told him that she had returned the following day only to be told "your son is a terrorist", and that he had been removed to Saudi Arabia or Iraq.

In fact, he says, he had been taken in the early hours of the morning from his cell to an airstrip about 30 minutes away. Already hooded, his clothes were cut "very harshly" from his body and replaced with blue clothing, and he was shackled and cuffed. He says he felt completely disoriented, still in shock over his treatment in Jordan, and very frightened for his wife and mother.

Although Muhammad Bashmilah and Salah 'Ali were friends from Aden and Indonesia, they had not been held together in Jordan, and neither knew that the other was in custody.

Amnesty International first raised the case of Muhammad Bashmilah's "disappearance" in a letter to the Jordanian authorities in April of 2005, before he had re-appeared in Yemen. There was no response, and no acknowledgement that he had ever been in Jordanian custody. Following the release of Amnesty International's report in August 2005, which included accounts from both Salah 'Ali and Muhammad Bashmilah of their detention in Jordan, the Jordanian GID claimed: "…the recent allegations on torturing Yemeni citizens (Saleh Naser Salm Ali and Mohammad Faraj Bashmela) highlighted the size of false allegations targeting Jordan, noting that the abovementioned Yemenis were NEVER detained at the GID detention center, however, they were merely deported for exceeding their residence permit, and left to Iraq."[18] As subsequent events make clear, however, neither of the men was deported from Jordan, although both were transferred from Jordanian custody.

[18] emails to Amnesty International members, who had written to the GID about the cases of the two men.

Transferred to US custody

The men do not know where they were taken. They may well have been transferred out on the same plane, as they left at about the same time, both describe a small plane with US guards, and both say they travelled some three to four hours. From Amman they could have reached Iraq in that time, although they could just as easily have ended up in Sudan, Turkey or parts of Eastern Europe. In any case, it is clear that they arrived in the same place, on or about the same day. In separate interviews with Amnesty International, they both described a windowless, underground facility. Each was kept in isolation, in a cell measuring about 1.5 x 2m, containing a bucket for a toilet, a foam mattress and a Qur'an.

During the six months they spent there, they left their cells only to be interrogated. They were asked over and over again about their activities in Afghanistan and Indonesia, and were shown dozens of photos, including of each other.

If they found anyone they recognised in the photos, they were brought back for more questioning, otherwise, they remained alone in their empty cells. Muhammad Bashmilah says that he was once shown a photo of Taysir Alluni, the al-Jazeera journalist, and told that if he said he knew him, his situation would improve[19]. "I did know him," he told Amnesty International with a grin, "but they found out it was only from the television, and there were no favours for me." Neither one ever saw any other detainee, although both believe that others were held there. Muhammad Bashmilah said there were several interrogators, both men and women: all of them were white, wore Western clothing, and spoke English with US accents. There were also a number of different interpreters, some of them native Arabic speakers. "They were not all there for us", he said.

The third man, Muhammad al Assad, estimates that his initial flight from Dar es Salaam took about two to three hours. He recalls that they landed in a hot place, and he thinks that one of the jailers who took him to the interrogation room spoke Arabic with a Somali or Ethiopian accent, and that the bread he was given was typical of East Africa. But of his arrival, less than 12 hours after being dragged from his home, he remembers only fear and confusion. The guards brought him from the plane, and left him, still hooded and shackled, in what turned out to be his cell. "I was so afraid that I couldn't move," he said, "so I stood very still there for a very long time until finally someone looked in and shouted in Arabic: 'sit down'."

[19] Taysir Alluni was arrested at his home in Spain in 2003 on suspicion of having links with al- Qa'ida. In September 2005 he was convicted of acting as financial courier to the al- Qa'ida network, and sentenced to seven years.

When they removed his cuffs and hood, he found he was in a large, dirty room, bare except for a foam mattress and some matting on the floor. He saw two small windows up near the ceiling, about 20cm square, and there was a little hole in the door for his food to be handed through. He would be there for about two weeks. In what was to become a familiar pattern, no one spoke a word to him but his interrogator and translator.

His interrogator at this location was a white, English-speaking woman, her translator a white Western man; both appeared to be in their 30s and were dressed in civilian clothes. Muhammad al-Assad speaks a little English, and thinks both were from the US.

Muhammad al-Assad had three or four interrogation sessions with them, and said the interrogator herself never threatened him, although the translator told him, when he could not respond to a question: "you have to understand that your children will be orphans." The translator was fluent in Arabic, although it was clearly not his native tongue. Muhammad al-Assad said he once complimented him on his Arabic, and the translator retorted with a familiar Arabic saying: "the one who learns the other's language avoids their tricks".

They quizzed him about al-Haramain and its employees, mostly concentrating on two men, the current and former directors. They wanted to know all about the men's movements, their friends and contacts, and relationship to Muhammad al-Assad. They also asked many questions about al-Haramain's activities. He says he told them everything he knew, which wasn't much, and they said they would be sending him to another country. He took this to mean they would send him back to Tanzania.

After about two weeks, however, he was given a Western-style shirt and trousers in a heavier fabric, and taken back to the airfield. This plane, he felt, was large, and he was made to lie on the floor or a bench. He remained hooded and cuffed, and had something wrapped around his ears. He thinks the plane flew for a long time, perhaps eight hours, then touched down for about an hour, then flew again for about three hours.

When he was taken off the plane, he felt that the weather was much colder. His new cell was a bit larger, although completely windowless and empty, except for matting on the floor. He did not have any blanket and was very cold. There was a toilet outside his cell and he was taken there three times a day.

After about nine days alone in his cell, the interrogation started. This time the interrogator and translator were both white men, perhaps in their 40s, but the questions remained exactly the same. He talked to no one else; the guards, who were also English-speaking, came to bring him food and take him to the toilet, but never spoke to him or answered any of his questions.

He stayed there for about two weeks, and was then taken by car to a place about 20 minutes away. There he was put in a cell that was smaller and older, but otherwise very similar, and he stayed there about three months. He was brought irregularly to the same interrogator who had questioned him at the previous place, otherwise he did not leave the room.

"Black site" detention

The last of Muhammad al-Assad's secret transfers took place in what he estimates to be late April 2004. The flight lasted some five or six hours; when the plane landed, he was transferred to a helicopter, where he was thrown roughly to the floor. He says he felt the presence of others on the floor with him. It is indeed possible that the others included Salah 'Ali and Muhammad Bashmilah, who were also transferred to their final secret destination at about this time, and who also describe a flight landing followed by transfer in a helicopter. Salah 'Ali now jokes about it, and calls it the last leg of his world tour. Muhammad Bashmilah says this flight took place between 22 and 24 April.

Descriptions of the new facility and its detention regime were given to Amnesty International separately by the three men; Muhammad al-Assad has never met or spoken to Salah 'Ali and Muhammad Bashmilah. Their accounts are cohesive and consistent; whether or not they arrived on the same day, they were clearly held in the same place.

It was no makeshift military camp but a purpose-built facility, or at least one that had been extensively refurbished in an effort to make it as anonymous as possible. There were no pictures or ornaments on the walls, no floor coverings, no windows, no natural light. The only clue to its construction, according to Salah 'Ali, was that it was not Arab-built, as the toilets faced the direction of Mecca. The description of the facility tallies with a Washington Post report of the covert prison system run by the CIA, in which secret detention facilities in some eight countries are referred to as "black sites".[20]

Once again, the men were held in complete isolation, and never spoke a word to anyone except their interrogators. In a bizarre twist, the silent guards were covered in black from head to toe – Muhammad Bashmilah described them as "ninjas" – and communicated only by hand gestures. It is a description that would seem like pure

[20] Dana Priest, 'CIA holds terror suspects in secret prisons', Washington Post, 2 November 2005

fantasy if it had not been corroborated by other detainees who have spent time in secret US detention.[21]

Inside their cells, there was a constant low-level hum of white noise from the loudspeakers, which sometimes played western music and, towards the end of their stay, occasional verses from the Qur'an. With artificial light kept on 24 hours a day, morning, noon and night were marked only by the kinds of meals served, or because it was time to pray.

There was nothing haphazard or makeshift about the detention regime, it was carefully designed to induce maximum disorientation, dependence and stress in the detainees. The men were subjected to extreme sensory deprivation; for over a year they did not know what country they were in, whether it was night or day, whether it was raining or sunny. They spoke to no one but their interrogators, through translators, and no one spoke to them. For the first six to eight months, they spent nearly every waking hour staring at the four blank walls of their cells, leaving only to go to interrogation, and once a week, to the showers.

The men were all given a Qur'an, a watch, a prayer mat and prayer schedules, and told the direction of Mecca. Muhammad Bashmilah and Salah 'Ali both said that the watch and schedule were manipulated by a few minutes each month to make sure the times didn't correspond exactly to their actual location.

By the last four to six months of their stay, even the interrogators had run out of questions, and formal interrogation sessions stopped almost completely. There were times when they spoke to no one at all for weeks on end. Muhammad al-Assad says that one of the interrogators visited him in his cell a few times, to ask if he needed anything. He always asked why he was there, and the interrogator always replied: "God brought you here and only God can bring you out".

None of the men ever saw each other, or any other detainee, although Muhammad al-Assad remembers that once the electricity went off, and he heard different voices shouting in Arabic. In any case, the system they describe could not have been maintained solely for the purpose of interrogating three low-level detainees. In their daily routines, the men began to pick up some indications of the capacity of the facility. All three have told Amnesty International that during the final months of their

[21] Khaled el-Masri, a German citizen, said that was detained in Macedonia in December 2003, before being transferred to a secret US-run prison in Afghanistan. He described guards wearing black masks and black gloves, and told the Guardian that there were other prisoners there from Pakistan, Tanzania, Yemen and Saudi Arabia. El-Masri said that he was held for five months and interrogated by Americans through an interpreter. Isotope analysis of his hair carried out in Germany in 2004 confirmed that he had been in Afghanistan.

stay, they were given a multi-page list of books, from which they could choose several to keep in their cells. Muhammad al-Assad thinks the list contained some 600 titles, in different languages, including the three he recognizes (Arabic, English and Swahili). It's a generous reading list by any standards. Although videos were not on the list, Salah 'Ali was told that there were some available, so he asked for a film on the life of the prophet, called "The Message". He was taken to a small room to see it a few days later, again suggesting that the facility had the capacity to maintain a significant stock of books and videos.

The men were taken to shower every Friday. Muhammad Bashmilah says they were given two cotton ear swabs each week, and each week he counted the number of swabs left in the bin, eventually concluding that there could be up to 20 others using his shower room. He also said that loud music was played during the 15 minutes or so each detainee spent in the shower room, and that counting the musical interludes also led him to conclude that about 20 people were held in his section. He has no idea, however, whether the facility may have contained more than one section.

During the last four months of his captivity, Muhammad al-Assad says, he was finally allowed to take some exercise. He was given a ball and taken to a small hall to play football on his own for half an hour three times a week. At about the same time, he met the new Prison Director. "He said he had come from the US, for the sake of the prisoners to see who is innocent and who is guilty," Muhammad al-Assad said. "He was quite harsh at our first meeting, but the next time he was kinder, I think he read my file. He said that I was at the top of the list to be released."

Salah 'Ali describes a similar regime, although he was convinced that the prison was underground. He was interrogated only for the first six weeks, and throughout this time, he said, he remained in shackles, day and night. Sometimes, he told Amnesty International, even when he was taking his weekly shower, the guards would cuff one of his arms up over his head, and force him to wash using one hand. He says he went on hunger strike for 29 days to force the authorities "to recognize I was there and to get some improvements". He was eventually taken to another cell, where a tube was put up his nose and he was force fed. Afterwards, he says, he was given a blanket and his leg irons were removed.

Torture, ill-treatment and "disappearance": violations of international law

None of the men has alleged that they were beaten at this facility, but that does not make the regime they endured benign or humane. Torture and ill-treatment take many forms. Prolonged isolation has been shown to cause depression, paranoia, aggression, hallucinations and suicide. The psychological trauma can last a lifetime.[22] Where the detainee has been "disappeared", the effects of enforced solitude are compounded by a pervasive sense of uncertainty and anxiety about the future, which can be similarly destructive.[23]

Incommunicado detention has been condemned by human rights bodies, and by the United Nations Special Rapporteur on Torture, as a human rights violation that also facilitates other violations such as torture or ill-treatment. Related practices, such as hooding, cuffing and shackling, isolation and "white noise" impair the sight, the hearing and the sense of smell of the individual who is subjected to it, lead to disorientation and an increased sense of vulnerability, and cause mental and physical suffering.

Secret detention is prohibited under international human rights standards. Principle 6 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states that "governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyers or other persons of confidence."[24]

The Human Rights Committee, in an authoritative statement on the prohibition on torture and cruel, inhuman and degrading treatment, has stated that "to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and

[22] In 2004, a group of psychologists and psychiatrists examined eight people being detained under anti-terrorist legislation in the UK. They found "that serious damage to the health of all the detainees they have examined has occurred and is inevitable under a regime which consists of indefinite detention." All of the detainees "now suffer from significant levels of depression and anxiety. The symptoms are of clinical severity and have shown a deterioration over time." Most of the detainees had suicidal thoughts, some had attempted to hang themselves, and several developed significant psychotic symptoms. The study also concluded that: "Deterioration in mood state is clearly linked to a sense of helplessness and hopelessness which is an integral aspect of indefinite detention." See Professor Ian Robbins, Dr James MacKeith, Professor Michael Kopelman, Dr Clive Meux, Dr Sumi Ratnam, Dr Richard Taylor, Dr Sophie Davison and Dr David Somekh, *The Psychiatric Problems of Detainees under the 2001 Antiterrorism Crime and Security Act*, 13 October 2004, http://www.statewatch.org/news/2004/nov/belmarsh-mh.pdf, accessed 5 January 2005. The report was endorsed by the Royal College of Psychiatrists.

[23] Combating torture: a manual for action, Amnesty International, 2003. See also Human Rights First, Behind the Wire: An Update to *Ending Secret Detentions* , March 2005, p 30. http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf

[24] Recommended by the UN Economic and Social Council resolution 1989/65 of 24 May 1989.

places of detention… to be kept in registers readily available and accessible to those concerned, including relatives and friends".[25]

The UN Special Rapporteur on torture has also said that "the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention."[26]

"Disappearances" are crimes under international law, involving multiple human rights violations. In certain circumstances they are crimes against humanity, and can be prosecuted in international criminal proceedings. The defining characteristic of a "disappearance" is that it puts the victim beyond the protection of the law, while at the same time concealing the violations from outside scrutiny, making them harder to expose and condemn, and allowing governments to avoid accountability. The United Nations General Assembly has said that enforced disappearance "constitutes an offence to human dignity, a grave and flagrant violation of human rights and fundamental freedoms ..."[27] The ICRC has said of "disappearances", that "no one has the right to keep that person's fate or whereabouts secret or to deny that he or she is being detained. This practice runs counter to the basic tenets of international humanitarian law and human rights law."[28]

The UN, "Declaration on the Protection of All Persons from Enforced Disappearances" of 1992 states that "any act of enforced disappearance is an offence to human dignity", which "*places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life*".

[25] Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 30 (1994), para. 11. Accurate and detailed registers of detainees are required under international law and standards, including the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), Articles 122 to 125 and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Articles 136 to 141.

[26] UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.

[27] UN General Assembly, "Question of Enforced or Involuntary Disappearances", New York: United Nations, 1994

[28] 'Enforced disappearance must stop', ICRC Press Release 03/60, 30 August 2003

The Rome Statute of the International Criminal Court defines the crime against humanity of "enforced disappearance of persons" as *"the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."* [29]

The UN Committee Against Torture has determined that the uncertainty regarding the circumstances surrounding their loved ones' fate "causes the families of disappeared persons serious and continuous suffering".[30]

This is certainly the case for the families of these three men. They have finally discovered that the men are alive, but are still suffering the emotional and economic impact of their "disappearance" and continued detention. When Muhammad al-Assad was transferred to Yemen, his wife Zahra Salloum and their five children came from their home in Dar es Salaam to the remote and dusty town of al-Ghaydah. He had never seen his youngest daughter, born after his arrest; the family named her Sabra, meaning "patient one". They all live in the house of Muhammad al-Assad's father, with his three wives and 10 of their children. Zahra Salloum speaks no Arabic, and none of the women in the family speak Swahili. She prepares meals for Muhammad al-Assad every day, but is only able to visit him in the prison once or twice a week.

The Indonesian wives of Salah 'Ali and Muhammad Bashmilah are even less fortunate. Salah 'Ali's wife, Aisha, had a baby girl after he was detained, and he has yet to even see her, although he has now been permitted a couple of telephone conversations with his wife. The family does not have enough money to travel to Yemen, and without him, they have no means of support in Indonesia. They are destitute, he says, "sometimes they cannot afford milk for the little girl".

Zahra, Muhammad Bashmilah's wife in Indonesia, has also been unable to travel to Yemen, and he has not seen her for more than two years. His father died in September 2004, without ever finding out what had happened to his son, and his mother remains extremely ill. She did not go ahead with her heart operation because of his arrest and "disappearance" in Jordan, and now also suffers what appears to be a thyroid ailment.

[29] The Rome Statute of the International Criminal Court, Art. 7(2)(i). Article 7(1) provides that a crime against humanity under the Statute, means an act listed in that Article (including "enforced disappearances of persons") "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

[30] Concluding observations of the Committee against Torture: Guatemala, UN Doc. A/56/44, 6 December 2000, para. 73(e).

Despite her frailty, she insists on making the trek to the Central Prison in Aden, nearly every day, in the intense midday heat, to see her son. He has asked her to stop, but she refuses. "She suffers a lot to see me", he admits, and says he is consumed with worries over her health.

Arbitrary detention in Yemen under US direction

The three men were sent to Yemen on 5 May 2005. Rajih Hunaish, the Undersecretary of the Central Organ for Political Security, told Amnesty International that the Yemeni government was notified of the return only 24 hours before the plane landed at Sana'a. It is not clear whether the Yemeni government knows the origin of the flight, when asked for a flight plan Rajih Hunaish said it would indeed be normal for a flight plan to be filed, but that they had no information about this specific flight, and his office would have to check into it further. Amnesty International has not yet received any response.

The men were held in the political security prison at Sana'a for about two weeks before Muhammad al-Assad was transferred to al-Ghaydah; he has still never met Salah 'Ali and Muhammad Bashmilah, who were sent to Aden. A number of Yemeni officials, including the Chairman of the Central Organ for Political Security, Ghalib al-Qamish, have told Amnesty International that US officials had given them explicit instructions on the continued detention of the three men, and that they are "awaiting files" from the US, so that they can try them. When asked if the men would be released if the US requested it, Rajih Hunaish said, without hesitation, "yes". He told Amnesty International that notification of the transfer in May, and further instructions on the detention of the three men, came from the US Embassy in Sana'a.

Amnesty International met US Embassy officials in Sana'a, and submitted additional questions to the Embassy in writing. In his reply, the Chief, Political/Economic and Commercial Section noted: "The U.S. Government relinquishes all custody and control over detainees transferred from Guantanamo Bay to the exclusive control of another government. There are no conditions attached." However, when asked if this meant that the US was confirming that the men had been released from Guantánamo, the official replied: "As a matter of policy, I am not permitted to talk about the details of any particular case; I can only share information on general policies."[31]

Amnesty International does not accept the assertion that the men were held in Guantánamo, a claim which continues to be repeated in the Yemeni press and by

[31] email correspondence dated 16 October 2005 and 18 October 2005

some Yemeni authorities, and which the US Embassy now appears to be promoting. However, the men could not have come from Guantánamo, the USA did not transfer any Guantánamo detainees to Yemen in May 2005, in fact, there were no detainee transfers at all on record between 28 April and 20 July. There was no ICRC notification of their detention, and they were never given access to ICRC officials. Although the ICRC is mandated to follow up on all cases of detainees transferred from Guantánamo to third countries, they have not contacted these three men since their arrival in Yemen. [32] The men's own description of the facilities, climate, detention regime, and length of their return flight, all indicate they were never in Guantánamo

Amnesty International first spoke to Muhammad Bashmilah and Salah 'Ali on 20 June 2005. In a report issued six weeks later, Amnesty International revealed that Yemeni officials had confirmed that their continued detention in Yemen, and that of a third man, Walid al Qadasi, who was returned from Guantánamo in April 2004, was without legal basis, and at the request of the US authorities.[33] In late July, Muhammad Bashmilah says, they were suddenly moved from the Central Prison in Aden to the Political Security Prison in Sana'a. He was told they were going there to be released, so he gave his few belongings to other prisoners, only to find that they had only been taken to Sana'a for questioning. (Walid al Qadasi, the third case in Amnesty International's August report, was also brought to Sana'a, although Muhammad al-Assad, who had not at that time been interviewed by Amnesty International, was not.) Muhammad Bashmilah and Salah 'Ali were interrogated in Sana'a about the circumstances of their arrest and the reasons for their transfer back to Yemen, then returned to Aden, where Muhammad Bashmilah was put into solitary confinement for five days. Since then, he and Salah 'Ali have been held separately. He believes the sudden trip to Sana'a was aimed at intimidating them, "and if we go on talking to you now", he added dryly, "we might be here for life".

In September 2005, Minister of the Interior Rashad Mohammed al-Alimi announced that the men had been accused of belonging to an international terror group and that their trial would begin "once the United States had sent through their files". Officials of the Political Security have also repeatedly told Amnesty International that they are awaiting files from the US before bringing any charges against the men.

[32] See 'US detention related to the events of 11 September 2001 and its aftermath - the role of the ICRC', Operational Update April 2005. http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList454/541ACF6DC88315C4C125700B004FF643 (accessed 13 October 2005)

[33] USA/Jordan/Yemen: Torture and secret detention: Testimony of the "disappeared" in the "war on terror", AI Index: AMR 51/108/2005

Muhammad Bashmilah says he finds this all confusing. "If we were guilty," he said simply, "the Americans would never have released us." He says that US officials had given him the choice of being handed over to Yemen or to another country, and he had insisted on Yemen because he was sure that he would be helped and welcomed at home. "More than four months have passed," he said, "and we are still detained, but we hear that others who have been returned to European countries have been released and that things have been done to facilitate their return, and this is the opposite to what we have here."

There have been no investigations into any accusations against the men, no charges have been made, none of the men have seen a lawyer or been brought before a judge. Anxiety and uncertainty over their futures, and the fear that their fate may remain unresolved, continue to torment the men and their families. All of them would welcome the prospect of trial. "If I am guilty of anything, try me and I will spend the rest of my life in jail," said Muhammad al-Assad, "only give me a trial".

"If there really are any charges," said Muhammad Bashmilah, "we are ready to defend ourselves… The Interior Minister says he is waiting for an American decision on our cases. But we are Yemenis in Yemen, why is he waiting for the Americans to decide?"

RECOMMENDATIONS

"Disappearance" and secret detentions

The US authorities should:

- Disclose the location and status of the detention centres where Muhammad Abdullah Salah al-Assad, Muhammad Faraj Ahmed Bashmilah and Salah Nasser Salim 'Ali were held; disclose the identities and whereabouts of all others held at these places and their legal status, and invite the ICRC to have full and regular access to those detained;

- End immediately the practices of incommunicado and secret detention wherever it is occurring, and under whatever agency;

- Hold detainees only in officially recognized places of detention with access to family, lawyers and courts;

Ensure that any person alleged to have perpetrated an act of "disappearance" should, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities for prosecution and trial, in accordance with Article 14 of the UN Declaration on the Protection of all Persons from Enforced Disappearance;

Torture

The US and Jordanian authorities should:

- Immediately end all acts of torture and other cruel, inhuman or degrading treatment of punishment, and make it clear to all officials involved in the treatment or interrogation of detainees and prisoners that such acts are prohibited absolutely and will not be tolerated;

- Investigate all allegations of torture and other ill-treatment of Muhammad Abdullah Salah al-Assad, Muhammad Faraj Ahmed Bashmilah and Salah Nasser Salim 'Ali and ensure that anyone found responsible is brought to justice;

Prohibit the return or transfer of persons to places where they are at risk of torture or other ill-treatment;

Provide full reparation including restitution, compensation and rehabilitation, and satisfaction.

The Yemeni authorities should:

Ensure that no statement coerced as a result of torture or other ill-treatment, including long-term indefinite detention without trial, or any other information or evidence obtained directly or indirectly as the result of torture or ill-treatment, is admitted as evidence against any defendant, except the perpetrator of the human rights violation in question;

Ensure that the men have access to, and the means to obtain, full reparation including restitution, compensation and rehabilitation, and satisfaction.

Charge or trial
The US authorities should:

Clarify the current legal status of former secret detainees Muhammad Abdullah Salah al-Assad, Muhammad Faraj Ahmed Bashmilah and Salah Nasser Salim 'Ali. If US policy is to relinquish all custody and control over detainees transferred to the control of another government, it should state clearly that this is the case with regard to these three men, and emphasise that there are no US conditions attached to their release;

State clearly that there are no conditions attached to the release of Walid Muhammad Shahir Muhammad al-Qadasi, who was released from Guantánamo in April 2004, and who remains in detention in Yemen without charge or trial;

Withdraw all requests or demands to the Yemeni government for the continued detention of persons, unless it is with a view to prompt prosecution for internationally recognizable criminal offences and in accordance with international standards for fair trial;

Release all detainees in US custody at undisclosed locations unless they are to be charged with internationally recognizable criminal offences and brought to trial promptly and fairly, in full accordance with relevant international standards, and without recourse to the death penalty.

The Yemeni authorities should:

- Release Muhammad Abdullah Salah al-Assad, Muhammad Faraj Ahmed Bashmilah, Salah Nasser Salim 'Ali and Walid Muhammad Shahir Muhammad al-Qadasi immediately from detention unless they are to be promptly charged with internationally recognizable criminal offences and brought to trial in a reasonable time in full accordance with international standards;
- Ensure that all detainees are given prompt access to lawyers and to the judiciary to challenge the legality of their detention.

Security cooperation

The US, Jordanian, Yemeni, Tanzanian and Indonesian authorities should:

- Ensure that human rights laws and standards are strictly adhered to in the cooperation between their security forces, and any other country particularly in the arrest and questioning of detainees, and detention;

- In particular, ensure that torture and other ill-treatment, arbitrary arrest, secret and incommunicado detentions and "disappearances" play no part in such cooperation.

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT R

UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
GENERAL

CCPR/C/USA/CO/3
15 September 2006

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Eighty-seventh session
10-28 July 2006

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Concluding observations of the Human Rights Committee

UNITED STATES OF AMERICA

1. The Committee considered the second and third periodic reports of the United States of America (CCPR/C/USA/3) at its 2379th, 2380th and 2381st meetings (CCPR/C/SR.2379-2381), held on 17 and 18 July 2006, and adopted the following concluding observations at its 2395th meeting (CCPR/C/SR.2395), held on 27 July 2006.

A. Introduction

2. The Committee notes the submission of the State party's second and third periodic combined report, which was seven years overdue, as well as the written answers provided in advance. It appreciates the attendance of a delegation composed of experts belonging to various agencies responsible for the implementation of the Covenant, and welcomes their efforts to answer to the Committee's written and oral questions.

3. The Committee regrets that the State party has not integrated into its report information on the implementation of the Covenant with respect to individuals under its jurisdiction and outside its territory. The Committee notes however that the State party has provided additional material "out of courtesy". The Committee further regrets that the State party, invoking grounds of non-applicability of the Covenant or intelligence operations, refused to address certain serious allegations of violations of the rights protected under the Covenant.

4. The Committee regrets that only limited information was provided on the implementation of the Covenant at the State level.

B. Positive aspects

5. The Committee welcomes the Supreme Court's decision in *Hamdan v. Rumsfeld* (2006) establishing the applicability of common article 3 of the Geneva Conventions of 12 August 1949, which reflects fundamental rights guaranteed by the Covenant in any armed conflict.

6. The Committee welcomes the Supreme Court's decision in *Roper v. Simmons* (2005), which held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. In this regard, the Committee reiterates the recommendation made in its previous concluding observations, encouraging the State party to withdraw its reservation to article 6 (5) of the Covenant.

7. The Committee welcomes the Supreme Court's decision in *Atkins v. Virginia* (2002), which held that executions of mentally retarded criminals are cruel and unusual punishments, and encourages the State party to ensure that persons suffering from severe forms of mental illness not amounting to mental retardation are equally protected.

8. The Committee welcomes the promulgation of the National Detention Standards in 2000, establishing minimum standards for detention facilities holding Department of Homeland Security detainees, and encourages the State party to adopt all measures necessary for their effective enforcement.

9. The Committee welcomes the Supreme Court's decision in *Lawrence et al. v. Texas* (2003), which declared unconstitutional legislation criminalizing homosexual relations between consenting adults.

C. Principal subjects of concern and recommendations

10. The Committee notes with concern the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of (a) its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice; (b) its failure to take fully into consideration its obligation under the Covenant not only to respect, but also to ensure the rights prescribed by the Covenant; and (c) its restrictive approach to some substantive provisions of the Covenant, which is not in conformity with the interpretation made by the Committee before and after the State party's ratification of the Covenant. (articles 2 and 40)

> **The State party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory,**

as well as its applicability in time of war; (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the Covenant; and (c) consider in good faith the interpretation of the Covenant provided by the Committee pursuant to its mandate.

11. The Committee expresses its concern about the potentially overbroad reach of the definitions of terrorism under domestic law, in particular under 8 U.S.C. § 1182 (a) (3) (B) and Executive Order 13224 which seem to extend to conduct, e.g. in the context of political dissent, which, although unlawful, should not be understood as constituting terrorism (articles 17, 19 and 21).

The State party should ensure that its counter-terrorism measures are in full conformity with the Covenant and in particular that the legislation adopted in this context is limited to crimes that would justify being assimilated to terrorism, and the grave consequences associated with it.

12. The Committee is concerned by credible and uncontested information that the State party has seen fit to engage in the practice of detaining people secretly and in secret places for months and years on end, without keeping the International Committee of the Red Cross informed. In such cases, the rights of the families of the detainees are also being violated. The Committee is also concerned that, even when such persons may have their detention acknowledged, they have been held incommunicado for months or years, a practice that violates the rights protected by articles 7 and 9. In general, the Committee is concerned by the fact that people are detained in places where they cannot benefit from the protection of domestic or international law or where that protection is substantially curtailed, a practice that cannot be justified by the stated need to remove them from the battlefield. (articles 7 and 9)

The State party should immediately cease its practice of secret detention and close all secret detention facilities. It should also grant the International Committee of the Red Cross prompt access to any person detained in connection with an armed conflict. The State party should also ensure that detainees, regardless of their place of detention, always benefit from the full protection of the law.

13. The Committee is concerned with the fact that the State party has authorized for some time the use of enhanced interrogation techniques, such as prolonged stress positions and isolation, sensory deprivation, hooding, exposure to cold or heat, sleep and dietary adjustments, 20-hour interrogations, removal of clothing and deprivation of all comfort and religious items, forced grooming, and exploitation of detainees' individual phobias. Although the Committee welcomes the assurance that, according to the Detainee Treatment Act of 2005, such interrogation techniques are prohibited by the present Army Field Manual on Intelligence Interrogation, the Committee remains concerned that (a) the State party refuses to acknowledge that such techniques, several of which were allegedly applied, either individually or in combination, over a protracted period of time, violate the prohibition contained by article 7 of the Covenant; (b) no sentence has been pronounced against an officer, employee, member of the Armed Forces, or other agent of the United States Government for using harsh interrogation techniques that had been approved; (c) these interrogation techniques may still be authorized or used by other agencies, including intelligence agencies and "private contractors"; and (d) the

State party has provided no information to the fact that oversight systems of such agencies have been established to ensure compliance with article 7.

The State party should ensure that any revision of the Army Field Manual only provides for interrogation techniques in conformity with the international understanding of the scope of the prohibition contained in article 7 of the Covenant; the State party should also ensure that the current interrogation techniques or any revised techniques are binding on all agencies of the United States Government and any others acting on its behalf; the State party should ensure that there are effective means to follow suit against abuses committed by agencies operating outside the military structure and that appropriate sanctions be imposed on its personnel who used or approved the use of the now prohibited techniques; the State party should ensure that the right to reparation of the victims of such practices is respected; and it should inform the Committee of any revisions of the interrogation techniques approved by the Army Field Manual.

14. The Committee notes with concern shortcomings concerning the independence, impartiality and effectiveness of investigations into allegations of torture and cruel, inhuman or degrading treatment or punishment inflicted by United States military and non-military personnel or contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq, and other overseas locations, and to alleged cases of suspicious death in custody in any of these locations. The Committee regrets that the State party did not provide sufficient information regarding the prosecutions launched, sentences passed (which appear excessively light for offences of such gravity) and reparation granted to the victims. (articles 6 and 7)

The State party should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders) as well as contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations. The State party should ensure that those responsible are prosecuted and punished in accordance with the gravity of the crime. The State party should adopt all necessary measures to prevent the recurrence of such behaviors, in particular by providing adequate training and clear guidance to its personnel (including commanders) and contract employees, about their respective obligations and responsibilities, in line with articles 7 and 10 of the Covenant. During the course of any legal proceedings, the State party should also refrain from relying on evidence obtained by treatment incompatible with article 7. The Committee wishes to be informed about the measures taken by the State party to ensure the respect of the right to reparation for the victims.

15. The Committee notes with concern that section 1005 (e) of the Detainee Treatment Act bars detainees in Guantanamo Bay from seeking review in case of allegations of ill-treatment or poor conditions of detention. (articles 7 and 10)

The State party should amend section 1005 of the Detainee Treatment Act so as to allow detainees in Guantanamo Bay to seek review of their treatment or conditions of detention before a court.

16. The Committee notes with concern the State party's restrictive interpretation of article 7 of the Covenant according to which it understands (a) that the obligation not to subject anyone to treatment does not include an obligation not to expose anyone to such treatment by means of transfer, rendition, extradition, expulsion or refoulement; (b) that, in any case, it is not under any other obligation not to deport an individual who may undergo cruel, inhumane or degrading treatment or punishment other than torture, as the State party understands the term; and (c) that it is not under any international obligation to respect a non-refoulement rule in relation to persons it detains outside its territory. The Committee also notes with concern the "more likely than not" standard the State party uses in non-refoulement procedures. The Committee is concerned that in practice the State party appears to have adopted a policy to remove, or to assist in removing, either from the United States or other States' territories, suspected terrorists to third countries. for the purpose of detention and interrogation, without the appropriate safeguards to protect them from treatment prohibited by the Covenant. The Committee is also concerned by numerous, well-publicized and documented allegations that persons sent to third countries in this way were indeed detained and interrogated under conditions grossly violating the prohibition contained in article 7, allegations that the State party did not contest. It is deeply concerned with the invocation of State-secrets privilege in cases where the victims of these practices have brought claim before the State party's courts (e.g. the cases of *Maher Arar v. Ashcroft* (2006) and *Khaled Al-Masri v. Tenet* (2006)). (article 7)

The State party should review its position, in accordance with the Committee's general comments No 20 (1992) on Article 7 and No 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant. The State party should take all necessary measures to ensure that detainees, including in facilities outside its own territory, are not removed to another country by way of, *inter alia*, transfer, rendition, extradition, expulsion or refoulement, if there are substantial reasons to believe that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. The State party should conduct thorough and independent investigations into allegations that persons have been removed to third countries where they have been victims of torture or cruel, inhuman or degrading treatment or punishment; modify its legislation and policies to ensure that no such situation will recur; and provide appropriate reparation to the victims. The State party should exercise the utmost care in the use of diplomatic assurances and adopt clear and transparent procedures, with adequate judicial mechanisms for review, prior to removing any detainees to third countries. It should also establish effective mechanisms to monitor scrupulously and vigorously the removal of detainees to third countries. The State party should be aware that in countries where torture or cruel, inhuman or degrading treatment are common practice, it is likely to be used regardless of assurances to the contrary, however stringent any agreed follow-up procedures may be.

17. The Committee is concerned that the Patriot Act and the 2005 REAL ID Act of 2005 may bar from asylum and withholding of removal any person who has provided "material support" to a "terrorist organization", whether voluntarily or under duress. It regrets having received no response on this matter from the State party. (article 7)

The State party should ensure that the "material support to terrorist organisations" bar is not applied to those who acted under duress.

18. The Committee is concerned that, following the Supreme Court ruling in *Rasul v. Bush* (2004), proceedings before Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs), mandated respectively to determine and review the status of detainees, may not offer adequate safeguards of due process, in particular due to : (a) their lack of independence from the executive branch and the army, (b) restrictions on the rights of detainees to have access to all proceedings and evidence, (c) the inevitable difficulty CSRTs and ARBs face in summoning witnesses, and (d) the possibility given to CSRTs and ARBs, under Section 1005 of the 2005 Detainee Treatment Act, to weigh evidence obtained by coercion for its probative value. The Committee is further concerned that detention in other locations, such as Afghanistan and Iraq, is reviewed by mechanisms providing even fewer guarantees. (article 9)

The State party should ensure, in accordance with article 9 (4) of the Covenant, that persons detained in Guantanamo Bay are entitled to proceedings before a court to decide, without delay, on the lawfulness of their detention or order their release. Due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard.

19. The Committee, having taken into consideration information provided by the State party, is concerned by reports that, following the September 11 attacks, many non-U.S. citizens, suspected to have committed terrorism-related offences have been detained for long periods pursuant to immigration laws with fewer guarantees than in the context of criminal procedures, or on the basis of the Material Witness Statute only. The Committee is also concerned with the compatibility of the Statute with the Covenant since it may be applied for up-coming trials but also to investigations or proposed investigations. (article 9)

The State party should review its practice with a view to ensuring that the Material Witness Statute and immigration laws are not used so as to detain persons suspected of terrorism or any other criminal offences with fewer guarantees than in criminal proceedings. The State party should also ensure that those improperly so detained receive appropriate reparation.

20. The Committee notes that the decision of the Supreme Court in *Hamdan v. Rumsfeld*, according to which Guantanamo Bay detainees accused of terrorism offences are to be judged by a regularly constituted court affording all the judicial guarantees required by common article 3 of the Geneva Conventions of 12 August 1949, remains to be implemented. (article 14)

The State party should provide the Committee with information on its implementation of the decision.

21. The Committee, while noting some positive amendments introduced in 2006, notes that section 213 of the Patriot Act, expanding the possibility of delayed notification of home and office searches; section 215 regarding access to individuals' personal records and belongings; and section 505, relating to the issuance of national security letters, still raise issues of concern in relation to article 17 of the Covenant. In particular, the Committee is concerned about the

restricted possibilities for the concerned persons to be informed about such measures and to effectively challenge them. Furthermore, the Committee is concerned that the State Party, including through the National Security Agency (NSA), has monitored and still monitors phone, email, and fax communications of individuals both within and outside the U.S., without any judicial or other independent oversight. (articles 2(3) and 17)

The State party should review sections 213, 215 and 505 of the Patriot Act to ensure full compatibility with article 17 of the Covenant. The State party should ensure that any infringement on individual's rights to privacy is strictly necessary and duly authorized by law, and that the rights of individuals to follow suit in this regard are respected.

22. The Committee is concerned with reports that some 50 % of homeless people are African American although they constitute only 12 % of the United States population. (articles 2 and 26)

The State party should take measures, including adequate and adequately implemented policies, to bring an end to such de facto and historically generated racial discrimination.

23. The Committee notes with concern reports of de facto racial segregation in public schools, reportedly caused by discrepancies between the racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which schools districts are created, funded and regulated. The Committee is concerned that the State party, despite measures adopted, has not succeeded in eliminating racial discrimination such as regarding the wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students. It also notes with concern the State party's position that federal government authorities cannot take legal action if there is no indication of discriminatory intent by state or local authorities. (articles 2 and 26)

The Committee reminds the State party of its obligation under articles 2 and 26 of the Covenant to respect and ensure that all individuals are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis. The State party should conduct in-depth investigations into the de facto segregation described above and take remedial steps, in consultation with the affected communities.

24. The Committee, while welcoming the mandate given to the Attorney General to review the use by federal enforcement authorities of race as a factor in conducting stops, searches, and other enforcement procedures, and the prohibition of racial profiling made in guidance to federal law enforcement officials, remains concerned about information that such practices still persist in the State party, in particular at the state level. It also notes with concern information about racial disparities and discrimination in prosecuting and sentencing processes in the criminal justice system. (articles 2 and 26)

The State party should continue and intensify its efforts to put an end to racial profiling used by federal as well as state law enforcement officials. The Committee wishes to receive more detailed information about the extent to which such practices

still persist, as well as statistical data on complaints, prosecutions and sentences in such matters.

25. The Committee notes with concern allegations of widespread incidence of violent crime perpetrated against persons of minority sexual orientation, including by law enforcement officials. It notes with concern the failure to address such crime in the legislation on hate crime adopted at the federal level and in many states. It notes with concern the failure to outlaw employment discrimination on the basis of sexual orientation in many states. (articles 2 and 26)

The State party should acknowledge its legal obligation under articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation. The State party should ensure that its hate crime legislation, both at the federal and state levels, address sexual orientation-related violence and that federal and state employment legislation outlaw discrimination on the basis of sexual orientation.

26. The Committee, while taking note of the various rules and regulations prohibiting discrimination in the provision of disaster relief and emergency assistance, remains concerned about information that the poor, and in particular African-Americans, were disadvantaged by the rescue and evacuation plans implemented when Hurricane Katrina hit the United States, and continue to be disadvantaged under the reconstruction plans. (articles 6 and 26)

The State party should review its practices and policies to ensure the full implementation of its obligation to protect life and of the prohibition of discrimination, whether direct or indirect, as well as of the United Nations Guiding Principles on Internal Displacement, in matters related to disaster prevention and preparedness, emergency assistance and relief measures. In the aftermath of Hurricane Katrina, the State party should increase its efforts to ensure that the rights of the poor, and in particular African-Americans, are fully taken into consideration in the reconstruction plans with regard to access to housing, education and healthcare. The Committee wishes to be informed about the results of the inquiries into the alleged failure to evacuate prisoners at the Parish prison, as well as the allegations that New Orleans residents were not permitted by law enforcement officials to cross the Greater New Orleans Bridge to Gretna, Louisiana.

27. The Committee regrets that it has not received sufficient information on the measures the State party considers adopting in relation to the reportedly nine million undocumented migrants now in the United States. While noting the information provided by the delegation that National Guard troops will not engage in direct law enforcement duties in the apprehension or detention of aliens, the Committee remains concerned about the increased level of militarization on the southwest border with Mexico. (articles 12 and 26)

The State party should provide the Committee with more detailed information on these issues, in particular on the concrete measures adopted to ensure that only agents who have received adequate training on immigration issues enforce

immigration laws, which should be compatible with the rights guaranteed by the Covenant.

28. The Committee regrets that many federal laws which address sex-discrimination are limited in scope and restricted in implementation. The Committee is especially concerned about the reported persistence of employment discrimination against women. (articles 3 and 26)

The State party should take all steps necessary, including at state level, to ensure the equality of women before the law and equal protection of the law, as well as effective protection against discrimination on the ground of sex, in particular in the area of employment.

29. The Committee regrets that the State party does not indicate that it has taken any steps to review federal and state legislation with a view to assessing whether offences carrying the death penalty are restricted to the most serious crimes, and that, despite the Committee's previous concluding observations, the State party has extended the number of offences for which the death penalty is applicable. While taking note of some efforts towards the improvement of the quality of legal representation provided to indigent defendants facing capital punishment, the Committee remains concerned by studies according to which the death penalty may be imposed disproportionately on ethnic minorities as well as on low-income groups, a problem which does not seem to be fully acknowledged by the State party. (articles 6 and 14)

The State party should review federal and state legislation with a view to restricting the number of offences carrying the death penalty. The State party should also assess the extent to which death penalty is disproportionately imposed on ethnic minorities and on low-income population groups, as well as the reasons for this, and adopt all appropriate measures to address the problem. In the meantime, the State party should place a moratorium on capital sentences, bearing in mind the desirability of abolishing death penalty.

30. The Committee reiterates its concern about reports of police brutality and excessive use of force by law enforcement officials. The Committee is concerned in particular by the use of so-called less lethal restraint devices, such as electro-muscular disruption devices (EMDs), in situations where lethal or other serious force would not otherwise have been used. It is concerned about information according to which police have used tasers against unruly schoolchildren; mentally disabled or intoxicated individuals involved in disturbed but non-life-threatening behaviour; elderly people; pregnant women; unarmed suspects fleeing minor crime scenes and people who argue with officers or simply fail to comply with police commands, without in most cases the responsible officers being found to have violated their departments' policies. (articles 6 and 7)

The State party should increase significantly its efforts towards the elimination of police brutality and excessive use of force by law enforcement officials. The State party should ensure that EMDs and other restraint devices are only used in situations where greater or lethal force would otherwise have been justified, and in particular that they are never used against vulnerable persons. The State party

should bring its policies into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

31. The Committee notes that (a) waivers of consent in research regulated by the U.S Department of Health and Human Services and the Food and Drug Administration may be given in case of individual and national emergencies; (b) some research may be conducted on persons vulnerable to coercion or undue influence such as children, prisoners, pregnant women, mentally disabled persons, or economically disadvantaged persons; (c) non-therapeutic research may be conducted on mentally ill persons or persons with impaired decision-making capacity, including minors; and (d) although no waivers have been given so far, domestic law authorizes the President to waive the prior informed-consent requirement for the administration of an investigational new drug to a member of the U.S. Armed Forces, if the President determines that obtaining consent is not feasible, is contrary to the best interests of the military members, or is not in the interests of U.S. national security. (article 7)

The State party should ensure that it meets its obligation under article 7 of the Covenant not to subject anyone without his/her free consent to medical or scientific experimentation. The Committee recalls in this regard the non-derogable character of this obligation under article 4 of the Covenant. When there is doubt as to the ability of a person or a category of persons to give such consent, e.g. prisoners, the only experimental treatment compatible with article 7 would be treatment chosen as the most appropriate to meet the medical needs of the individual.

32. The Committee reiterates its concern that conditions in some maximum security prisons are incompatible with the obligation contained in article 10 (1) of the Covenant to treat detainees with humanity and respect for the inherent dignity of the human person. It is particularly concerned by the practice in some such institutions to hold detainees in prolonged cellular confinement, and to allow them out-of-cell recreation for only five hours per week, in general conditions of strict regimentation in a depersonalized environment. It is also concerned that such treatment cannot be reconciled with the requirement in article 10 (3) that the penitentiary system shall comprise treatment the essential aim of which shall be the reformation and social rehabilitation of prisoners. It also expresses concern about the reported high numbers of severely mentally ill persons in these prisons, as well as in regular in U.S. jails.

The State party should scrutinize conditions of detention in prisons, in particular in maximum security prisons, with a view to guaranteeing that persons deprived of their liberty be treated in accordance with the requirements of article 10 of the Covenant and the United Nations Standard Minimum Rules for the Treatment of Prisoners.

33. The Committee, while welcoming the adoption of the Prison Rape Elimination Act of 2003, regrets that the State party has not implemented its previous recommendation that legislation allowing male officers access to women's quarters should be amended to provide at least that they will always be accompanied by women officers. The Committee also expresses concern about the shackling of detained women during childbirth. (articles 7 and 10)

The Committee reiterates its recommendation that male officers should not be granted access to women's quarters, or at least be accompanied by women officers. The Committee also recommends the State party to prohibit the shackling of detained women during childbirth.

34. The Committee notes with concern reports that forty-two states and the Federal government have laws allowing persons under the age of eighteen at the time the offence was committed, to receive life sentences, without parole, and that about 2,225 youth offenders are currently serving life sentences in United States prisons. The Committee, while noting the State party's reservation to treat juveniles as adults in exceptional circumstances notwithstanding articles 10 (2) (b) and (3) and 14 (4) of the Covenant, remains concerned by information that treatment of children as adults is not only applied in exceptional circumstances. The Committee is of the view that sentencing children to life sentence without parole is of itself not in compliance with article 24 (1) of the Covenant. (articles 7 and 24)

The State party should ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.

35. The Committee is concerned that about five million citizens cannot vote due to a felony conviction, and that this practice has significant racial implications. The Committee also notes with concern that the recommendation made in 2001 by the National Commission on Federal Election Reform that all states restore voting rights to citizens who have fully served their sentences has not been endorsed by all states. The Committee is of the view that general deprivation of the right vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of articles 25 of 26 of the Covenant, nor serves the rehabilitation goals of article 10 (3).

The State party should adopt appropriate measures to ensure that states restore voting rights to citizens who have fully served their sentences and those who have been released on parole. The Committee also recommends that the State party review regulations relating to deprivation of votes for felony conviction to ensure that they always meet the reasonableness test of article 25. The State party should also assess the extent to which such regulations disproportionately impact on the rights of minority groups and provide the Committee with detailed information in this regard.

36. The Committee, having taken note of the responses provided by the delegation, remains concerned that residents of the District of Columbia do not enjoy full representation in Congress, a restriction which does not seem to be compatible with article 25 of the Covenant. (articles 2, 25 and 26)

The State party should ensure the right of residents of the District of Columbia to take part in the conduct of public affairs, directly or through freely chosen representatives, in particular with regard to the House of Representatives.

37. The Committee notes with concern that no action has been taken by the State party to address its previous recommendation relating to the extinguishment of aboriginal and indigenous rights. The Committee, while noting that the guarantees provided by the Fifth Amendment apply to the taking of land in situations where treaties concluded between the Federal Government and Indian tribes apply, is concerned that in other situations, in particular where land was assigned by creating a reservation or is held by reason of long possession and use, tribal property rights can be extinguished on the basis of the plenary authority of Congress for conducting Indian affairs without due process and fair compensation. The Committee is also concerned that the concept of permanent trusteeship over the Indian and Alaska native tribes and their land as well as the actual exercise of this trusteeship in managing the so called Individual Indian Money (IIM) accounts may infringe upon the full enjoyment of their rights under the Covenant. Finally, the Committee regrets that it has not received sufficient information on the consequences on the situation of Indigenous Native Hawaiians of Public Law 103-150 apologizing to the Native Hawaiians Peoples for the illegal overthrow of the Kingdom of Hawaii, which resulted in the suppression of the inherent sovereignty of the Hawaiian people. (articles 1, 26 and 27 in conjunction with Article 2, paragraph 3 of the Covenant).

The State party should review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous population. The State party should take further steps to secure the rights of all indigenous peoples, under articles 1 and 27 of the Covenant, so as to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture.

38. The Committee sets 1st August 2010 as the date for the submission of the fourth periodic report of the United States of America. It requests that the State party's second and third periodic reports and the present concluding observations be published and widely disseminated in the State party, to the general public as well as to the judicial, legislative and administrative authorities, and that the fourth periodic report be circulated for the attention of the non-governmental organizations operating in the country.

39. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should submit within one year information on the follow-up given to the Committee's recommendations in paragraphs 12, 13, 14, 16, 20 and 26 above. The Committee requests the State party to include in its next periodic report information on its remaining recommendations and on the implementation of the Covenant as a whole, as well as about the practical implementation of the Covenant, the difficulties encountered in this regard, and the implementation of the Covenant at state level. The State party is also encouraged to provide more detailed information on the adoption of effective mechanisms to ensure that new and existing legislation, at federal and at state level, is in compliance with the Covenant, and about mechanisms adopted to ensure proper follow-up of the Committee's concluding observations.

FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT S

The Washington Post

U.S. Decries Abuse but Defends Interrogations

'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities

By Dana Priest and Barton Gellman
Washington Post Staff Writers
Thursday, December 26, 2002

Advertisement

Deep inside the forbidden zone at the U.S.-occupied Bagram air base in Afghanistan, around the corner from the detention center and beyond the segregated clandestine military units, sits a cluster of metal shipping containers protected by a triple layer of concertina wire. The containers hold the most valuable prizes in the war on terrorism -- captured al Qaeda operatives and Taliban commanders.

Those who refuse to cooperate inside this secret CIA interrogation center are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods. At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights -- subject to what are known as "stress and duress" techniques.

Those who cooperate are rewarded with creature comforts, interrogators whose methods include feigned friendship, respect, cultural sensitivity and, in some cases, money. Some who do not cooperate are turned over -- "rendered," in official parlance -- to foreign intelligence services whose practice of torture has been documented by the U.S. government and human rights organizations.

In the multifaceted global war on terrorism waged by the Bush administration, one of the most opaque -- yet vital -- fronts is the detention and interrogation of terrorism suspects. U.S. officials have said little publicly about the captives' names, numbers or whereabouts, and virtually nothing about interrogation methods. But interviews with several former intelligence officials and 10 current U.S. national security officials -- including several people who witnessed the handling of prisoners -- provide insight into how the U.S. government is prosecuting this part of the war.

The picture that emerges is of a brass-knuckled quest for information, often in concert with allies of dubious human rights reputation, in which the traditional lines between right and wrong, legal and inhumane, are evolving and blurred.

While the U.S. government publicly denounces the use of torture, each of the current national security officials interviewed for this article defended the use of violence against captives as just and necessary. They expressed confidence that the American public would back their view. The CIA, which has primary responsibility for interrogations, declined to comment.

"If you don't violate someone's human rights some of the time, you probably aren't doing your job," said one official who has supervised the capture and transfer of accused terrorists. "I don't think we want to be promoting a view of zero tolerance on this. That was the whole problem for a long time with the CIA.."

The off-limits patch of ground at Bagram is one of a number of secret detention centers overseas where U.S. due process does not apply, according to several U.S. and European national security officials, where the CIA undertakes or manages the interrogation of suspected terrorists. Another is Diego Garcia, a somewhat horseshoe-shaped island in the Indian Ocean that the United States leases from Britain.

U.S. officials oversee most of the interrogations, especially those of the most senior captives. In some cases, highly trained CIA officers question captives through interpreters. In others, the intelligence agency undertakes a "false flag" operation using fake decor and disguises meant to deceive a captive into thinking he is imprisoned in a country with a reputation for brutality, when, in reality, he is still in CIA hands. Sometimes, female officers conduct interrogations, a psychologically jarring experience for men reared in a conservative Muslim culture where women are never in control.

In other cases, usually involving lower-level captives, the CIA hands them to foreign intelligence services -- notably those of Jordan, Egypt and Morocco -- with a list of questions the agency wants answered. These "extraordinary renditions" are done without resort to legal process and usually involve countries with security services known for using brutal means.

According to U.S. officials, nearly 3,000 suspected al Qaeda members and their supporters have been detained worldwide since Sept. 11, 2001. About 625 are at the U.S. military's confinement facility at Guantanamo Bay, Cuba. Some officials estimated that fewer than 100 captives have been rendered to third countries. Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners, the officials said.

At a Sept. 26 joint hearing of the House and Senate intelligence committees, Cofer Black, then head of the CIA Counterterrorist Center, spoke cryptically about the agency's new forms of "operational flexibility" in dealing with suspected terrorists. "This is a very highly classified area, but I have to say that all you need to know: There was a before 9/11, and there was an after 9/11," Black said. "After 9/11 the gloves come off."

According to one official who has been directly involved in rendering captives into foreign hands, the understanding is, "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them." Some countries are known to use mind-altering drugs such as sodium pentathol, said other officials involved in the process.

Abu Zubaida, who is believed to be the most important al Qaeda member in detention, was shot in the groin during his apprehension in Pakistan in March. National security officials suggested that Zubaida's painkillers were used selectively in the beginning of his captivity. He is now said to be cooperating, and his information has led to the apprehension of other al Qaeda members.

U.S. National Security Council spokesman Sean McCormack declined to comment earlier this week on CIA or intelligence-related matters. But, he said: "The United States is treating enemy combatants in U.S. government control, wherever held, humanely and in a manner consistent with the principles of the Third Geneva Convention of 1949."

The convention outlined the standards for treatment of prisoners of war. Suspected terrorists in CIA hands have not been accorded POW status.

Other U.S. government officials, speaking on condition of anonymity, acknowledged that interrogators deprive some captives of sleep, a practice with ambiguous status in international law.

The U.N. High Commissioner for Human Rights, the authoritative interpreter of the international Convention Against Torture, has ruled that lengthy interrogation may incidentally and legitimately cost a prisoner sleep. But when employed for the purpose of breaking a prisoner's will, sleep deprivation "may in some cases

constitute torture."

The State Department's annual human rights report routinely denounces sleep deprivation as an interrogation method. In its 2001 report on Turkey, Israel and Jordan, all U.S. allies, the department listed sleep deprivation among often-used alleged torture techniques.

U.S. officials who defend the renditions say the prisoners are sent to these third countries not because of their coercive questioning techniques, but because of their cultural affinity with the captives. Besides being illegal, they said, torture produces unreliable information from people who are desperate to stop the pain. They look to foreign allies more because their intelligence services can develop a culture of intimacy that Americans cannot. They may use interrogators who speak the captive's Arabic dialect and often use the prospects of shame and the reputation of the captive's family to goad the captive into talking.

In a speech on Dec. 11, CIA director George J. Tenet said that interrogations overseas have yielded significant returns recently. He calculated that worldwide efforts to capture or kill terrorists had eliminated about one-third of the al Qaeda leadership. "Almost half of our successes against senior al Qaeda members has come in recent months," he said.

Many of these successes have come as a result of information gained during interrogations. The capture of al Qaeda leaders Ramzi Binalshibh in Pakistan, Omar al-Faruq in Indonesia, Abd al-Rahim al-Nashiri in Kuwait and Muhammad al Darbi in Yemen were all partly the result of information gained during interrogations, according to U.S. intelligence and national security officials. All four remain under CIA control.

Time, rather than technique, has produced the most helpful information, several national security and intelligence officials said. Using its global computer database, the CIA is able to quickly check leads from captives in one country with information divulged by captives in another.

"We know so much more about them now than we did a year ago -- the personalities, how the networks are established, what they think are important targets, how they think we will react," said retired Army general Wayne Downing, the Bush administration's deputy national security adviser for combating terrorism until he resigned in June.

"The interrogations of Abu Zubaida drove me nuts at times," Downing said. "He and some of the others are very clever guys. At times I felt we were in a classic counter-interrogation class: They were telling us what they think we already knew. Then, what they thought we wanted to know. As they did that, they fabricated and weaved in threads that went nowhere. But, even with these ploys, we still get valuable information and they are off the street, unable to plot and coordinate future attacks."

In contrast to the detention center at Guantanamo Bay, where military lawyers, news reporters and the Red Cross received occasional access to monitor prisoner conditions and treatment, the CIA's overseas interrogation facilities are off-limits to outsiders, and often even to other government agencies. In addition to Bagram and Diego Garcia, the CIA has other secret detention centers overseas, and often uses the facilities of foreign intelligence services.

Free from the scrutiny of military lawyers steeped in the international laws of war, the CIA and its intelligence service allies have the leeway to exert physically and psychologically aggressive techniques, said national security officials and U.S. and European intelligence officers.

Although no direct evidence of mistreatment of prisoners in U.S. custody has come to light, the prisoners are denied access to lawyers or organizations, such as the Red Cross, that could independently assess their treatment. Even their names are secret.

This month, the U.S. military announced that it had begun a criminal investigation into the handling of two

prisoners who died in U.S. custody at the Bagram base. A base spokesman said autopsies found one of the detainees died of a pulmonary embolism, the other of a heart attack.

Al Qaeda suspects are seldom taken without force, and some suspects have been wounded during their capture. After apprehending suspects, U.S. take-down teams -- a mix of military special forces, FBI agents, CIA case officers and local allies -- aim to disorient and intimidate them on the way to detention facilities.

According to Americans with direct knowledge and others who have witnessed the treatment, captives are often "softened up" by MPs and U.S. Army Special Forces troops who beat them up and confine them in tiny rooms. The alleged terrorists are commonly blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep. The tone of intimidation and fear is the beginning, they said, of a process of piercing a prisoner's resistance.

The take-down teams often "package" prisoners for transport, fitting them with hoods and gags, and binding them to stretchers with duct tape.

Bush administration appointees and career national security officials acknowledged that, as one of them put it, "our guys may kick them around a little bit in the adrenaline of the immediate aftermath." Another said U.S. personnel are scrupulous in providing medical care to captives, adding in a deadpan voice, that "pain control [in wounded patients] is a very subjective thing."

The CIA's participation in the interrogation of rendered terrorist suspects varies from country to country.

"In some cases [involving interrogations in Saudi Arabia], we're able to observe through one-way mirrors the live investigations," said a senior U.S. official involved in Middle East security issues. "In others, we usually get summaries. We will feed questions to their investigators. They're still very much in control."

The official added: "We're not aware of any torture or even physical abuse."

Tenet acknowledged the Saudis' role in his Dec. 11 speech. "The Saudis are proving increasingly important support to our counterterrorism efforts -- from making arrests to sharing debriefing results," he said.

But Saudi Arabia is also said to withhold information that might lead the U.S. government to conclusions or policies that the Saudi royal family fears. U.S. teams, for that reason, have sometimes sent Saudi nationals to Egypt instead.

Jordan is a favored country for renditions, several U.S. officials said. The Jordanians are considered "highly professional" interrogators, which some officials said meant that they do not use torture. But the State Department's 2001 human rights report criticized Jordan and its General Intelligence Directorate for arbitrary and unlawful detentions and abuse.

"The most frequently alleged methods of torture include sleep deprivation, beatings on the soles of the feet, prolonged suspension with ropes in contorted positions and extended solitary confinement," the 2001 report noted. Jordan also is known to use prisoners' family members to induce suspects to talk.

Another significant destination for rendered suspects is Morocco, whose general intelligence service has sharply stepped up cooperation with the United States. Morocco has a documented history of torture, as well as longstanding ties to the CIA..

The State Department's human rights report says Moroccan law "prohibits torture, and the government claims that the use of torture has been discontinued; however, some members of the security forces still tortured or otherwise abused detainees."

In at least one case, U.S. operatives led the capture and transfer of an al Qaeda suspect to Syria, which for years has been near the top of U.S. lists of human rights violators and sponsors of terrorism. The German government strongly protested the move. The suspect, Mohammed Haydar Zammar, holds joint German and Syrian citizenship. It could not be learned how much of Zammar's interrogation record Syria has provided the CIA.

The Bush administration maintains a legal distance from any mistreatment that occurs overseas, officials said, by denying that torture is the intended result of its rendition policy. American teams, officials said, do no more than assist in the transfer of suspects who are wanted on criminal charges by friendly countries. But five officials acknowledged, as one of them put it, "that sometimes a friendly country can be invited to 'want' someone we grab." Then, other officials said, the foreign government will charge him with a crime of some sort.

One official who has had direct involvement in renditions said he knew they were likely to be tortured. "I . . . do it with my eyes open," he said.

According to present and former officials with firsthand knowledge, the CIA's authoritative Directorate of Operations instructions, drafted in cooperation with the general counsel, tells case officers in the field that they may not engage in, provide advice about or encourage the use of torture by cooperating intelligence services from other countries.

"Based largely on the Central American human rights experience," said Fred Hitz, former CIA inspector general, "we don't do torture, and we can't countenance torture in terms of we can't know of it." But if a country offers information gleaned from interrogations, "we can use the fruits of it."

Bush administration officials said the CIA, in practice, is using a narrow definition of what counts as "knowing" that a suspect has been tortured. "If we're not there in the room, who is to say?" said one official conversant with recent reports of renditions.

The Clinton administration pioneered the use of extraordinary rendition after the bombings of U.S. embassies in Kenya and Tanzania in 1998. But it also pressed allied intelligence services to respect lawful boundaries in interrogations.

After years of fruitless talks in Egypt, President Bill Clinton cut off funding and cooperation with the directorate of Egypt's general intelligence service, whose torture of suspects has been a perennial theme in State Department human rights reports.

"You can be sure," one Bush administration official said, "that we are not spending a lot of time on that now."

Staff writers Bob Woodward, Susan Schmidt and Douglas Farah, and correspondent Peter Finn in Berlin, contributed to this report.

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FACTUAL SUMMARY OF PUBLICLY AVAILABLE INFORMATION ON THE U.S. GOVERNMENT'S EXTRAORDINARY RENDITION, SECRET DETENTION, AND INTERROGATION PROGRAM AND DJIBOUTI'S ROLE IN THE PROGRAM

DOCUMENT T

guardian.co.uk

US sends suspects to face torture

Duncan Campbell in Los Angeles
The Guardian, Tuesday 12 March 2002 01.42 GMT

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The US has been secretly sending prisoners suspected of al-Qaida connections to countries where torture during interrogation is legal, according to US diplomatic and intelligence sources. Prisoners moved to such countries as Egypt and Jordan can be subjected to torture and threats to their families to extract information sought by the US in the wake of the September 11 attacks.

The normal extradition procedures have been bypassed in the transportation of dozens of prisoners suspected of terrorist connections, according to a report in the Washington Post. The suspects have been taken to countries where the CIA has close ties with the local intelligence services and where torture is permitted.

According to the report, US intelligence agents have been involved in a number of interrogations. A CIA spokesman yesterday said the agency had no comment on the allegations. A state department spokesman said the US had been "working very closely with other countries - It's a global fight against terrorism".

"After September 11, these sorts of movements have been occurring all the time," a US diplomat told the Washington Post. "It allows us to get information from terrorists in a way we can't do on US soil."

The seizing of suspects and taking them to a third country without due process of law is known as "rendition". The reason for sending a suspect to a third country rather than to the US, according to the diplomats, is an attempt to avoid highly publicised cases that could lead to a further backlash from Islamist extremists.

One of the prisoners transported in this way, Muhammad Saad Iqbal Madni, is allegedly linked to Richard Reid, the Briton accused of the attempted "shoe bomb" attack on an American Airlines flight from Paris to Miami in December. He was taken from Indonesia to Egypt on a US-registered Gulfstream jet without a court hearing after his name appeared on al-Qaida documents. He remains in custody in Egypt and has been subjected to interrogation by intelligence agents.

An Indonesian government official said disclosing the Americans' role would have exposed President Megawati Sukarnoputri to criticism from Muslim political parties. "We can't be seen to be cooperating too closely with the United States," the official said.

A Yemeni microbiology student has also been taken in this way, being flown from Pakistan to Jordan on a US-registered jet. US forces also seized five Algerians and a Yemeni in Bosnia on January 19 and flew them to Guantanamo Bay after the men were released by the Bosnian supreme court for lack of evidence, and despite an injunction from the Bosnian human rights chamber that four of them be allowed to remain in the country pending further proceedings.

The US has been criticised by some of its European allies over the detention of prisoners at Camp X-Ray in Guantanamo Bay, Cuba. After the Pentagon released pictures of blindfolded prisoners kneeling on the ground, the defence secretary, Donald Rumsfeld, was forced to defend the conditions in which they were being held.

Unsuccessful attempts have been made by civil rights lawyers based in Los Angeles to have the Camp X-Ray prisoners either charged in US courts or treated as prisoners of war. The US administration has resisted such moves, arguing that those detained, both Taliban fighters and members of al-Qaida, were not entitled to be regarded as prisoners of war because they were terrorists rather than soldiers and were not part of a recognised, uniformed army.

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