

UNCLASSIFIED

of P... CST

RELEASED IN FULL

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

GEZ

1. Overview of the time-table for the USG delegation in Geneva – (delegation meeting, hearing schedule)
2. Mechanics of hearing – (USG's opening statements, script of USG presentation, note-takers, additional questions from the Committee, Committee's conclusions and recommendations)
3. Agency reps and their participation in USG's presentation
4. Strategy for addressing additional questions from the Committee
5. Additional work-products
 - a. Script of USG presentation – opening statements, summaries of answers to Committee's list of questions.
 - b. Briefing book – DOS to provide
 - c. Hard Questions – each agency to draft, submit to DOS
 - d. Press Guidance – DOS to draft, and circulate for interagency clearance
6. Travel/other administrative matters
 - a. Final delegation list, accreditation
 - b. Travel, hotel reservations

UNCLASSIFIED

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

for new press guidance file

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

-----Original Message-----

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

L Press Guidance
November 30, 2005

Alleged CIA "Secret Prisons" in Europe

Question:

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

Answer:

- We received today a letter to the Secretary from Jack Straw on behalf of the European Union in which he asks for information from the United States regarding press reports about the alleged detention or transportation of terrorist suspects in or through EU member states.
- We are of course aware of those press reports and the parliamentary and public concerns they have created.
- As the Secretary and I have said, the United States will respond to the EU's inquiry as soon as we are able. In the meantime, we will of course remain in regular communication with our European allies about a wide range of issues, including the war on terrorism.

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

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

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

Drafted: L/EUR: DTerrill

Cleared:

L: SWitten - ok

EUR/ERA: RFaucher - ok

S/WCI: ASagor - ok

Noon briefing, 11/30/05

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

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

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

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

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

Yes.

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

UNCLASSIFIED

UNCLASSIFIED

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

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

MR. MCCORMACK: No.

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

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

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

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

QUESTION: But you don't --

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

Yes.

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

Yes.

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

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

QUESTION: One more?

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

Yes, sir.

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

SECRET

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

Fourth session

Geneva, 31 January-11 February 2005

Dist.
RESTRICTED

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

ENGLISH
Original: FRENCH

GE20

Introduction

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

I. ORGANIZATION OF THE SESSIONS

A. Election of officers

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

B. Attendance

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

GE.05-10589 (E) 030204 030205

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

UNCLASSIFIED

E/CN.4/2005/WG.22/CRP.1
page 2

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

4. The following States non-members of the Commission on Human Rights were represented by observers at the Working Group's meetings: Algeria, Angola, Austria, Azerbaijan, Bangladesh, Belgium, Bolivia, Chile, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Ghana, Greece, Haïti, Iran (Islamic Republic of), Israel, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malta, Morocco, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Rwanda, Serbia and Montenegro, Slovenia, Sweden, Switzerland, Syrian Arab Republic, Tunisia, Turkey, Uruguay.
5. The Holy See was also represented by an observer.
6. The following non-governmental organizations in consultative status with the Economic and Social Council were represented by observers at the Working Group's meetings: Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Association against Torture, International Commission of Jurists, International Federation of Human Rights Leagues, International League for the Rights and Liberation of Peoples, International Service for Human Rights, Latin American Federation of Associations of Relatives of Disappeared Detainees, World Federation of Trade Unions.
7. The International Committee of the Red Cross (ICRC), the European Commission and the League of Arab States were represented by observers.
8. The following experts also participated in the sessions: Manfred Nowak, in pursuance of his mandate under resolution 2001/46; Louis Joinet, in his capacity as independent expert and Chairman of the Working Group on the Administration of Justice of the Sub-Commission on the Promotion and Protection of Human Rights which drew up the draft international convention on the protection of all persons from enforced disappearance in 1998; and Darko Götlicher (third session) and Santiago Corcuera Cabezut (fourth session), members of the Working Group on Enforced or Involuntary Disappearances.

C. Documentation

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

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

II. ORGANIZATION OF WORK

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

~~fourth session.~~

At the end of 4th session the Chair in summary noted that -

UNCLASSIFIED

SECRET
RELEASED IN FULL

GE23

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

GE28

Lee, Michelle G

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

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

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

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

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

1
UNCLASSIFIED

FP0669

GE30A

U.S. DELEGATION ORAL RESPONSES TO CAT

COMMITTEE QUESTIONS

[BELLINGER]

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

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

The Department of Justice's Office of Legal Counsel, which provides opinions on questions of law to the Executive Branch of the United States Government, produced the August 2002 and December 2004 memoranda.

The August 2002 memorandum provided legal advice on the meaning of the term "torture" under the extraterritorial criminal torture statute and

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

UNCLASSIFIED

RELEASED IN FULL
2

addressed issues concerning the separation of powers under the United States Constitution. This opinion was requested to provide operational guidance with respect to the implementation of the criminal statute at the level of detail needed to guide U.S. government officials

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

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

UNCLASSIFIED

3

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

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

4

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

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

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

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

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

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

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

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

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

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

7

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

8

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

STIMSON

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

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

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

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

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

I will now return the floor to John Bellinger.

BELLINGER

Question 9 asks about derogations. I would like to state

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 3.

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

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

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

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

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

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

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

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

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

21

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

The same is true of the military justice system, which is the focus of

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

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

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

22

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

[STIMSON]

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

23

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

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

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

24

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

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

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

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

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

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

[BELLINGER]

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

[MONHEIM]

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

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

27

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

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

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

28

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

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

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

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

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

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

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

BEFLINGER

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

31

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

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

STIMSON

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

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

32

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

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

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

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

As the Department of Defense has conducted an honest, open and impartial set of investigations since the events of Abu Ghraib into all aspects of detention operations, other investigations are not foreseen at this time, as they would not add value to the 12 investigations already conducted.

Should information come to light that would suggest additional investigation is warranted, the Department of Defense will, as it has before, investigate such allegations fully.

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

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

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

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

Question 38 requests an update on *habeas corpus* litigation in U.S. courts. Currently, there are approximately 195 *habeas corpus* cases on behalf of more than 350 detainees presently pending before 15 district court judges. Proceedings in almost all of these cases are stayed awaiting a decision of either the U.S. Supreme Court in the case of *Hamdan v. Rumsfeld* or the U.S. Court of Appeals on the appeals pending before it.

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

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

MONHEIM

Question 35 asks for further information on the Justice for All Act.

This Act provides for a range of rights of victims of federal crimes described in greater detail in our written response. The protections contained in the Act improve the ability of victims of abuse to monitor and assist in efforts to

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

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

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

37

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

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

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

I now return the floor to Mr. Bellinger.

BELLINGER

38

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

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

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

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

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

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

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

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

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

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

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

41

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

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

42

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

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

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

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

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

MONHEIM

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

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

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

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

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

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

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

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

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

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

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

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

47

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

Allegations of the misuse of shackles or other restraints in both federal and state prisons are investigated by the Department of Justice.

However, it should be noted that since the use of shackles on prisoners is not *per se* unconstitutional, there are circumstances in which the use of shackles is permissible.

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

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

48

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

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

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

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

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

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

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

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

I now return the floor to Mr. Bellinger.

BELLINGER

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

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

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

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

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

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

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

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

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

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

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

GE30B

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

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

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

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

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

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

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

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

UNCLASSIFIED

RELEASED IN FULL

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

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

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

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

UNCLASSIFIED

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

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

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

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

Thank you very much.

UNCLASSIFIED

RELEASED IN FULL

GE33

Lee, Michelle G

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

Wendy,

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



12 May 2006 -
Response of the ...



Hanny Gale
Office of Legal Affairs
U.S. Mission Geneva
E-mail: Galeth@state.gov
Tel: [41] (0)22-749-4460
Fax: [41] (0)22-749-4343

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

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

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

1

UNCLASSIFIED

FP0698

UNCLASSIFIED
RELEASED IN FULL

GE39

West, Lora

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

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

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

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

1
UNCLASSIFIED

FP0699

General Statement of the United States: Forced Disappearances Text

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

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

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

UNCLASSIFIED

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

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

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

#18367

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

GE41

West, Lora

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

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

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

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

UNCLASSIFIED

FP0704

UNCLASSIFIED

RELEASED IN FULL

GE43A

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

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

UNCLASSIFIED

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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

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

UNCLASSIFIED

UNCLASSIFIED

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

Cleared: Mission Geneva/L – Jeff Kovar
Mission Geneva/PSC – Jan Levin
L/HRR – Bob Harris (subs) – ok
L/PM – Vijay Padmanabhan – ok
L/LEI – Denise Manning - ok
IO – Mark Lagon - ok
IO/RHS – Tom Johnson - ok
DRL/MLA – Lynn Sicade - ok
S/WCI – Sam Witten (subs) - ok
DOJ/OLP – Larry Rothenberg – ok
DOD/OGC – Chuck Allen – ok
NSC/Legal – Him Das - ok

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

6E43B

General Statement of the United States: Forced Disappearances Text

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

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

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

UNCLASSIFIED

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

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

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

#18367

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

GE 44A

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

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

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

DEFINITION - Article 2

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

CRIMINALIZATION - Article 4

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

CRIME AGAINST HUMANITY - Article 5 –

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

UNCLASSIFIED

DEFENSE OF SUPERIOR ORDERS - Article 6(2)

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

STATUTE OF LIMITATIONS – Article 8

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

JURISDICTION - Article 9

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

- (a) When the offence is committed within its territory;
- (b) When the alleged offender is one of its nationals; and
- (c) When the disappeared person is one of its nationals and the State Party considers it appropriate."

CONSULTATION WITH CONSULAR AUTHORITIES – Article 10(3)

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

NON-REFOULEMENT - Article 16

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

UNCLASSIFIED

UNCLASSIFIED

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

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

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED

Doc 26771

Drafted: L/HRR – Gilda Brancato

Cleared: IO/RHS – Thomas Johnson

DRL/MLA – Lynn Sicade

Mission Geneva – Jeffrey Kovar

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

GE45A

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

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

UNCLASSIFIED

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

UNCLASSIFIED

UNCLASSIFIED

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

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

UNCLASSIFIED

UNCLASSIFIED

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

**Cleared: Mission Geneva/L – Jeff Kovar
Mission Geneva/PSC – Jan Levin
L/HRR – Bob Harris (subs) – ok
L/PM – Vijay Padmanabhan – ok
L/LEI – Denise Manning - ok
IO – Mark Lagon - ok
IO/RHS – Tom Johnson - ok
DRL/MLA – Lynn Sicade - ok
S/WCI – Sam Witten (subs) - ok
DOJ/OLP – Larry Rothenberg – ok
DOD/OGC – Chuck Allen – ok
NSC/Legal – Him Das - ok**

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

GE46D

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED

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

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

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

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

UNCLASSIFIED

UNCLASSIFIED
RELEASED IN FULL

6E51

West, Lora

From: Brancato, Gilda M
Sent: Friday, December 09, 2005 5:40 PM
To: 'hdas@nsc.eop.gov'; 'jweigman@nsc.eop.gov'; 'Burger, James, Mr, DoD OGC'; Harris, Robert K; Brooks, Waldo W; Legal-L-HRR; Jacobson, Linda; Lucas, William E; Johnson, Thomas A; Sicade, Lynn M (DRL); Camponovo, Christopher N (DRL); Noyes, Julieta V (DRL); Witten, Samuel M; Propp, Kenneth R; Kovar, Jeffrey D; Barton, Paula J; DePirro, Velia M; Levin, Jan
Subject: Emailing: Final of proposed UN disappearances treaty text



Final of proposed
disappearance...

Attached FYI is final text of the proposed UN forced disappearances convention, completed at the CHR in Geneva this Fall. A fuller e-mail explanation and supporting documents, including the strong objections of the United States delegation, and discussion of next steps to follow by separate email.
Happiest holidays, sincerely, Gilda

UNCLASSIFIED

RELEASED IN FULL

E/CN.4/2005/WG.22/WP.1/REV.4

23 September 2005

(Translated from French)

GESIA

**INTERNATIONAL CONVENTION
FOR THE PROTECTION OF ALL PERSONS
FROM ENFORCED DISAPPEARANCE**

Preamble

The States Parties to this Convention,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to the Universal Declaration of Human Rights,

Recalling the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and all other relevant international instruments in the fields of human rights, humanitarian law and international criminal law,

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

Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity,

Determined to prevent enforced disappearances and combat impunity for the crime of enforced disappearance,

Considering the right of any person not to be subjected to an enforced disappearance, the right of victims to justice and to reparation and,

Affirming the right to know the truth about circumstances of an enforced disappearance and the fate of the disappeared person, and the respect of the right to freedom to seek, receive and impart information to this end.

Have agreed as follows:

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

UNCLASSIFIED

FP0731

Article 1

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

Article 2

For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article 3

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

Article 4

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

Article 5

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

Article 6

1. Each State Party shall take the necessary measures to hold criminally responsible at least:
 - (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;

- (b) The superior who:
 - (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
 - (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
 - (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of the enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

Article 7

1. Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish:

(a) Mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;

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

Article 8

Without prejudice to article 5,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:
 - (a) Is of long duration and is proportionate to the extreme seriousness of this offence;
 - (b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.
2. Each State Party shall guarantee the right of victims of enforced disappearances to an effective remedy during the term of limitation.

Article 9

1. Each State Party shall take the necessary measures to establish its jurisdiction over the offence of enforced disappearance:
 - (a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - (b) When the alleged offender is one of its nationals;
 - (c) When the disappeared person is one of its nationals and the State Party considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.
3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.

Article 10

1. Upon being satisfied, after an examination of the information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an offence of enforced disappearance is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be continued only for such time as is necessary to ensure the person's presence at criminal, surrender or extradition proceedings.

2. A State Party which has taken the measures referred to in paragraph 1 shall immediately carry out a preliminary inquiry or investigations to establish the facts. It shall notify the States Parties referred to in article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention, and the findings of its preliminary inquiry or its investigations, indicating whether it intends to exercise its jurisdiction.

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

Article 11

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.

3. Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.

Article 12

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where appropriate, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their

defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 shall undertake an investigation, even if there has been no formal complaint.

3. Each State Party shall ensure that the authorities referred to in paragraph 1:

(a) Have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation;

(b) Have access, if necessary with the prior authorization of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present.

4. Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of the investigations. It shall ensure in particular that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of the investigations by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.

Article 13

1. For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused only on these grounds.

2. The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of this Convention.

3. States Parties undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance.

5. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between themselves.

6. Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, in particular, conditions relating to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.

7. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, membership of a particular social group or political opinions, or that compliance with the request would cause harm to that person for any one of these reasons.

Article 14

1. States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.

2. Such legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, in particular, the conditions in relation to the grounds upon which the requested State Party may refuse to grant mutual legal assistance or may make it subject to conditions.

Article 15

States Parties shall cooperate with each other and shall afford one another the greatest measure of assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.

Article 16

1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Article 17

1. No one shall be held in secret detention.
2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:
 - (a) Establish the conditions under which orders of deprivation of liberty may be given;
 - (b) Indicate those authorities authorized to order the deprivation of liberty;
 - (c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;
 - (d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;
 - (e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with the prior authorisation of a judicial authority ;
 - (f) Guarantee that any person deprived of liberty and, in the case of a suspected enforced disappearance, the person deprived of liberty not being able to exercise this right, that any person with a legitimate interest, such as relatives of the person deprived of liberty, their representative or their counsel, in all circumstances, shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the deprivation of liberty and order the release if that deprivation of liberty is not lawful.

UNCLASSIFIED

- 9 -

3. Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:

- (a) The identity of the person deprived of liberty;
- (b) The date, time and location where the person was deprived of liberty and the identity of the authority who deprived the person of liberty;
- (c) The authority having decided the deprivation of liberty and the reasons for the deprivation of liberty;
- (d) The authority controlling the deprivation of liberty;
- (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
- (f) Elements regarding the physical integrity of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains;
- (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

Article 18

1. Without prejudice to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representative or their counsel, access to at least the following information:

- (a) The authority having decided the deprivation of liberty;
- (b) The date, time and location where the person was deprived of liberty and admitted to the place of deprivation of liberty;
- (c) The authority controlling the deprivation of liberty;
- (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
- (e) The date, time and place of release;

UNCLASSIFIED

(f) Elements regarding the physical integrity of the person deprived of liberty;

(g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains.

2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

Article 19

1. Personal information, including medical and genetic data, which are collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.

2. The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.

Article 20

1. Only when a person is under the protection of the law and the deprivation of liberty is subject to judicial control, can the right to information referred to in Article 18 be restricted and only on an exceptional basis, where strictly necessary and provided for by law, and if the transmission of the information would undermine the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions to the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.

2. Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1 the right to a prompt and effective judicial remedy as a means of obtaining without delay information

referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.

Article 21

Each State Party shall take the necessary measures to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released. Each State Party shall also take the necessary measures to assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release, without prejudice to any obligations to which such persons may be subject under national law.

Article 22

Without prejudice to article 6, each State Party shall take the necessary measures to prevent and impose sanctions for the following conduct:

- (a) Delaying or obstructing the remedies referred to in article 17, paragraph 2 (f), and article 20, paragraph 2;
- (b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register and/or records knew or should have known to be inaccurate;
- (c) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.

Article 23

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to:

- (a) Prevent the involvement of such officials in enforced disappearances;
- (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances;
- (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized.

2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished.

3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or organs vested with reviewing or remedial powers.

Article 24

1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as a direct result of an enforced disappearance.

2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

5. The right to obtain reparation referred to in paragraph 4 covers material and psychological harm and, where appropriate, other means of reparation such as:

- (a) Restitution;
- (b) Rehabilitation;
- (c) Satisfaction, including restoration of dignity and reputation;
- (d) Guarantees of non-repetition.

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of the disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with contributing to the establishment of the circumstances of

enforced disappearances and the fate of disappeared persons, and with assistance to victims of enforced disappearance.

Article 25

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

(a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

(b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.

3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (a).

4. Given the need to protect the best interests of the children referred to in paragraph 1 (a) and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that stemmed from an enforced disappearance.

5. In all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 26

1. A Committee on Enforced Disappearances (hereafter referred to as the Committee) shall be established to carry out the functions provided for under this Convention. The Committee shall consist of 10 experts of high moral character and recognised competence in the field of human rights, who shall serve in their personal capacity and be independent and impartial. The

UNCLASSIFIED

- 14 -

members of the Committee shall be elected by the States Parties according to equitable geographical distribution. Consideration shall be given to the usefulness of the participation to the work of the Committee of persons having relevant legal experience and to balanced gender representation.

2. *The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals, at biennial meetings of States Parties convened by the Secretary General of the United Nations for this purpose. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of votes of the representatives of States Parties present and voting.*

3. *The initial election shall be held no later than six months after the date of entry into force of this Convention. At least four months before the date of each election, the Secretary General of the United Nations shall address a letter to the States Parties inviting them to submit the nominations within three months. The Secretary General shall prepare a list in alphabetical order of all persons thus nominated, indicating the State Party which nominated each candidate. He/She shall submit this list to all States Parties.*

4. *The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 2 of this article.*

5. *If a member of the Committee dies or resigns or for any other cause can no longer perform his/her committee duties, the State Party which nominated him/her shall, in accordance with the criteria set out in paragraph 1 of this article, appoint another candidate from among its nationals, to serve for the remainder of his/her term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary General of the United Nations of the proposed appointment.*

6. *The Committee shall establish its own rules of procedure.*

7. *The Secretary General of the United Nations shall provide the necessary means, staff and facilities for the effective performance of the functions of the Committee. The Secretary General of the United Nations shall convene the initial meeting of the Committee.*

UNCLASSIFIED

8. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

9. Each State Party shall co-operate with the Committee and assist its members in the fulfilment of their mandate, to the extent of the Committee's functions that the State Party has accepted.

Article 27

A Conference of States Parties will take place at the earliest four years and at the latest six years following the entry into force of this Convention to evaluate the functioning of the Committee and to decide, in accordance with the procedure described in article 44, paragraph 2, whether it is appropriate to transfer to another body – without excluding any possibility – the monitoring of this Convention, in accordance with the functions defined in articles 28 to 36.

Article 28

1. In the framework of the competencies granted by this Convention, the Committee shall co-operate with all relevant organs, offices and specialized agencies and funds of the United Nations, with the treaty bodies instituted by international instruments, with the special procedures of the United Nations, and with the regional intergovernmental organizations or bodies concerned, as well as with all relevant State institutions, agencies or offices working toward the protection of all persons against enforced disappearances.

2. As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations.

Article 29

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its obligations under this Convention, within two years after the entry into force of this Convention for the State Party concerned.

2. The Secretary-General of the United Nations shall make this report available to all States Parties.
3. Each report shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate. The comments, observations or recommendations shall be communicated to the State Party concerned, which may respond to them, on its own initiative or at the request of the Committee.
4. The Committee may also request further information from State Parties relevant to the implementation of this Convention.

Article 30

1. A request that a disappeared person should be sought and found on an urgent basis may be submitted to the Committee by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any other person having a legitimate interest.
2. If the Committee considers that the request for urgent action submitted in pursuance of paragraph 1:
 - (a) Is not manifestly unfounded;
 - (b) Does not constitute an abuse of the right of submission of such requests;
 - (c) Has already been duly presented to the competent bodies of the State Party concerned, such as investigative authorities, when this possibility exists;
 - (d) Is not incompatible with the provisions of this Convention; and
 - (e) The same matter is not being examined under another procedure of international investigation or settlement of the same nature;it shall request the State Party concerned to provide it with information on the situation of the person concerned, within a time limit set by the Committee.
3. In the light of the information provided by the State Party concerned in accordance with paragraph 2, the Committee may transmit recommendations to the State Party including a request that the State Party take all appropriate measures, including interim measures, to locate and protect the person in accordance with this Convention and inform the Committee within a specified period of time, of measures taken, taking into account the urgency of the situation. The Committee shall inform the person submitting the urgent action request of its recommendations and of the information provided to it by the State as it becomes available.

4. The Committee shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved. The person presenting the request shall be kept informed.

Article 31

1. A State Party may at the time of ratification or at any time afterwards declare that it recognises the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of the provisions of this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider a communication inadmissible when:

(a) The communication is anonymous;

(b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;

(c) The same matter is being examined under another procedure of international investigation or settlement; or when

(d) All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged.

3. If the Committee considers that the communication meets the requirements set out in paragraph 2, it shall transmit the communication to the State Party concerned, requesting it to provide observations and comments within a time limit set by the Committee

4. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation. Where the Committee exercises its discretion, this does not imply a determination on admissibility or on the merits of the communication.

5. The Committee shall hold closed meetings when examining communications under the present article. It shall inform the author of the communication of the responses provided by the State Party concerned. When the Committee decides to terminate the procedure it shall communicate its views to the State Party and to the author of the communication.

Article 32

1. If the Committee receives reliable information indicating grave violations by a State Party of this Convention, it may, after consultation with the State Party concerned, request one or more of its members to undertake a visit and report back to it without delay.
2. The Committee shall notify the State Party concerned in writing of its intention to organise a visit, indicating the composition of the delegation and the purpose of the visit. The State Party shall answer the Committee within a reasonable time.
3. Upon a substantiated request by the State Party, the Committee may decide to postpone or cancel its visit.
4. If the State Party agrees to the visit, the Committee and the State Party concerned shall work together to define the modalities of the visit and the State Party shall provide the Committee with all the facilities needed for the successful completion of the visit.
5. Following its visit, the Committee shall communicate to the State Party concerned its observations and recommendations.

Article 33

A State Party to this Convention may at any time declare that it recognises the *competence of the Committee to receive and consider communications* to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. The Committee shall not receive communications concerning a State Party which has not made such a declaration, nor communications from a State Party which has not made such a declaration.

Article 34

If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State Party, it may, after seeking from the State Party concerned all relevant information on the situation, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary General of the United Nations.

Article 35

1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.
2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.

Article 36

1. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.
2. Before an observation on a State Party is published in the annual report, the State Party concerned shall be informed in advance and shall be given reasonable time to answer. This State Party may request the publication of its comments or observations in the report.

Article 37

Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in :

- a) the law of a State Party;
- b) International law in force for that State.

Article 38

1. This Convention is open for signature by all Member States of the United Nations Organisation.
2. This Convention is subject to ratification by all Member States of the United Nations Organisation. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. This Convention is open to accession by all Member States of the United Nations Organisation. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 39

1. This Convention shall enter into force on the thirtieth day after the date of deposit of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, this Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 40

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications and accessions under article 38;
- (b) The date of entry into force of this Convention under article 39.

Article 41

The provisions of this Convention shall extend to all parts of federal States without any limitations or exceptions.

Article 42

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation or by the procedures expressly provided for in this Convention shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organisation of the arbitration, any one of those Parties may refer the dispute to the *International Court of Justice* by request in conformity with the Statute of the Court.
2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a declaration.
3. Any State Party having made a declaration in accordance with paragraph 2 of this article may at any time withdraw this declaration by notification to the Secretary-General of the United Nations.

Article 43

This Convention is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the additional protocols thereto of 8 June 1977, or to the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 44

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.
2. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
3. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have accepted it in accordance with their respective constitutional processes.
4. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted.

Article 45

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

Forced Disappearances Treaty Negotiations September 2005
Guidance for Closing Statement of the United States

- As the work of the Working Group draws to a close, we express appreciation to the Chair and his team, including the Secretariat, for your enormous dedication, skill, and industriousness during negotiations on a binding instrument to combat this heinous crime.
- We also commend the State delegations, the independent experts, the ICRC, and non-governmental organizations for their commitment, expertise, tireless work, and collegiality throughout, and give special thanks to the families of the disappeared for bearing witness to this terrible scourge.
- At the same time, as we have said before, in order to produce a document that reflects consensus, treaty negotiations should be deliberate, unhurried, and careful, allowing for full expression of views by all representatives.
- All negotiations should additionally be inclusive, allowing full attendance by all delegation members, and transparent, based on a clear draft treaty text which takes account of opposing views.
- Deliberate, participatory and transparent negotiating processes are far more likely to result in a carefully drafted and fully vetted document that represents consensus.
- We regret that the pace of negotiations, among other factors, has resulted in a document that does not reflect consensus of the Working Group.
- Key issues remain disputed, and the United States, for example, continues to have reservations regarding a number of articles or sub-articles including:
 - RIGHT TO THE TRUTH - Preamble paragraph 7 and Article 24(2)
 - DEFINITION - Article 2
 - CRIMINALIZATION - Article 4
 - CRIME AGAINST HUMANITY - Article 5
 - LACK OF DEFENSE OF SUPERIOR ORDERS - Article 6(2)
 - STATUTE OF LIMITATIONS - Article 8
 - "FOUND IN" JURISDICTION - Article 9(2)
 - NON-REFOULEMENT - Article 16(2) & (3)
 - ACCESS TO PLACES OF DETENTION - Article 17, including 17(2) (e) and
 - NEW TREATY MONITORY BODY - Article 26 .
- We now look to the work that lies ahead, as states consider proposals before UN bodies for adoption of the instrument for adoption by member states.

UNCLASSIFIED

RELEASED IN FULL

GE60

West, Lora

From: Gale, T Hanny
Sent: Wednesday, June 21, 2006 11:53 AM
To: Aswad, Evelyn M; Barton, Paula J; Bentes, Julianna W; Brancato, Gilda M; Gaffney, Francis M; Gheibi, Shahnaz; Harris, Robert K; Kovar, Jeffrey D
Subject: Draft Int'l Conv for the Protection of All Persons from ED.pdf
Attachments: Draft Int'l Conv for the Protection of All Persons from ED.pdf

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

UNCLASSIFIED



RELEASED IN FULL, UNCLASSIFIED

GE60A

INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

"dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights"

Geneva, 19 June 2006

S.E. M. Kevin E. MOLEY
Mission permanente des Etats-Unis d'Amérique
auprès de l'Office des Nations Unies à Genève
Route de Prégny 11
1292 Chambésy

cc: 'Leje' /
PSA

fax : 022 74948 80

Your Excellency,

The International Commission of Jurists, AFAD, FEDEFAM, HOM, Human Rights Watch, the International Federation of Human Rights and the International Service for Human Rights have the pleasure to invite you to a conference on the *draft International Convention for the Protection of All Persons from Enforced Disappearance* that will take place on Friday, 23 June from 13:00 to 15:00, Room VIII in Palais des Nations.

This event mostly seeks to promote the prompt adoption of this important legal tool. Amongst others, associations of victims* relatives and ambassadors of countries that have played a major role in this process will speak. For more details, please see the attached programme.

Please accept the assurances of my highest consideration.

Federico Andreu-Guzmán
Deputy Secretary-General
for legal affairs

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

81A, avenue de Châtelaine, P.O. Box 216, 1219 Châtelaine, Geneva, Switzerland
Tel: +41(0)22 979 1300 - Fax: +41(0) 23 979 1301 Website: <http://www.ij.org> - E-mail: info@ij.org

UNCLASSIFIED

UNCLASSIFIED
RELEASED IN FULL

GEB03

Asian Federation Against Involuntary Disappearances (AFAD)
Latin-American Federation of Association of Relatives of Disappeared
Detainees (FEDEFAM)
Humanist Committee on Human Rights (HOM)
Human Rights Watch
International Commission of Jurists (ICJ)
International Federation of Human Rights (FIDH)
International Service for Human Rights (ISHR)

Have the pleasure to invite you to a meeting on

**THE DRAFT INTERNATIONAL CONVENTION
FOR THE PROTECTION OF ALL PERSONS
AGAINST ENFORCED DISAPPEARANCES**

A Crucial Tool To Fight Against Enforced Disappearance

on Friday 23rd of June from 13:00 to 15:00
Room VIII, Palais des Nations

The draft Convention against Enforced Disappearance is presently before the Human Rights Council for consideration. This meeting will discuss the draft document and its implications for the fight against this egregious violation of human rights. The meeting also seeks to promote the adoption of the Convention by the Human Rights Council at its first session.

An open letter, signed by eminent persons and organisations from all around the world will be presented to the Chairperson of the Human Rights Council, H.E. Mr. Luis Alfonso de Alba, ambassador of Mexico,

Speakers include;

H.E. Mr. Jean-Maurice Ripert, Ambassador of France
H.E. Mr. Alberto J. Dumont, Ambassador of Argentina
H.E. Mr. Juan Antonio March, Ambassador of Spain
H.E. Mr. Juan Martabit, Ambassador of Chile
Mrs. Xóchitl Galvez, Commission for the development of indigenous peoples, Mexico
Mrs. Mary Aileen D. Bacalso, AFAD
Mrs. Marta Ocampo de Vazquez, FEDEFAM

Moderator: Federico Andreu-Guzmán, International Commission of Jurists

Sandwiches and refreshments will be provided
Simultaneous interpretation will be available in Spanish, French and English

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

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL **GEBI**

West, Lora

From: Gale, T Hanny
Sent: Monday, March 20, 2006 11:51 AM
To: Williams, Kendl ; Aswad, Evelyn M (Washington); Barton, Paula J; Bentes, Julianna W; Brancato, Gilda M; Gaffney, Francis M; Gheibi, Shahnaz; Harris, Robert K; Kovar, Jeffrey D; Prosser, Sarah E; Schou, Nina E
Subject: 17 March 2006 - Ltr from Human Rights Watch asking support - Enforced Disappearances.pdf



17 March 2006 - Ltr
from Human...

Kendl,

As mentioned on the phone, attached is a letter from the Human Rights Watch asking US support in favour of a resolution by which the 62nd session of the Commission adopt the Draft Int'l Convention for the Protection of All Persons from Enforced Disappearances.

Hanny

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

1

UNCLASSIFIED

FP0756

UNCLASSIFIED

RELEASED IN FULL

E62

West, Lora

From: Gale, T Hanny
Sent: Tuesday, October 04, 2005 4:42 PM
To: Brancato, Gilda M
Cc: Kovar, Jeffrey D; Barton, Paula J
Subject: Enforced Disappearances document - 2nd e-mail

Oops,
Please disregard previous e-mail. Attached are all three documents.



23 September 2005 23 September 2005 23 September 2005
- E.CN.4-200... - General St... - List of Pa...

T. Hanny Gale
Office of Legal Affairs
U.S. Mission Geneva
Tel: [41](0)22-749-4460
Fax: [41](0)22-749-4343
E-mail: GaleTH@state.gov

*"A friend is someone who knows the song in your heart
and can sing it back to you when you have forgotten the words..."*

"C'est bien agréable d'être important, mais c'est plus important d'être agréable"

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

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

UN¹CLASSIFIED

FP0757

UNCLASSIFIED

RELEASED IN FULL

GE62A

West, Lora

From: Gale, T Hanny
Sent: Friday, September 16, 2005 3:42 PM
To: Kovar, Jeffrey D; Brancato, Gilda M; Barton, Paula J
Subject: Gilda's Papers on Enforced Disappearances - 15 September 2005

Importance: High



Gilda Brancato -
forced disapp...



Gilda Brancato -
FRED LINE for...

T. Hanny Gale
Office of Legal Affairs
U.S. Mission Geneva
Tel: [41](0)22-749-4460
Fax: [41](0)22-749-4343
E-mail: GaleTH@state.gov

*"A friend is someone who knows the song in your heart
and can sing it back to you when you have forgotten the words..."*

"C'est bien agréable d'être important, mais c'est plus important d'être agréable"

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

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

UNCLASSIFIED

FP0758

UNCLASSIFIED
RELEASED IN FULL

GEB3

West, Lora

From: Harris, Robert K
Sent: Friday, August 18, 2006 2:38 PM
To: Hill, Steven R
Cc: Noyes, Julieta V (DRL); Sicade, Lynn M (DRL); Rohn, Douglas C; Johnson, Thomas A; Kovar, Jeffrey D
Subject: FW: Working Group on Enforced or Involuntary Disappearances

Steve,

When things settle down, can you keep an eye on this account?

Julieta and Doug,

Could you each designate an officer who can work with Steve on this? Thanks.

Bob

From: Mendez Kiel, Paula(Geneva)
Sent: Friday, August 18, 2006 6:59 AM
To: IO-RHS; DRL-MLA-DL; Legal-L-HRR
Subject: Working Group on Enforced or Involuntary Disappearances



08.18.06 WG on
Enforced Disapp...

NATIONS UNIES
HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME



UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

PROCEDURES SPECIALES ASSUMÉES PAR
LE CONSEIL DES DROITS DE L'HOMME

SPECIAL PROCEDURES ASSUMED BY THE
HUMAN RIGHTS COUNCIL

Chairman of the Working Group on Enforced or Involuntary Disappearances

Téléfax: (41-22)-9 17 9006
Télégrammes: UNATIONS, GENEVE
Telex: 41 29 62
Telephone: (41-22)- 917 9176
Internet: <http://www.ohchr.org/english/issues/disappear/index.htm>
E-mail: wgeid@ohchr.org



Address:
Palais des Nations
CH-1211 GENEVE 10

GE63A

REFERENCE: G/SO 217/USA

10 August 2006

Excellency,

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

"Excellency,

I have the honour to write to you on behalf of the Working Group on Enforced or Involuntary Disappearances, which held its seventy-ninth session from 24 to 28 July 2006, at the United Nations Office in Geneva.

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

I would like to take this opportunity to remind your Government that the Working Group will hold its eightieth session at the United Nations Office at Geneva from 20 November to 1 December 2006. As such, the Working Group would be grateful if any written information which your Government wishes to submit for the Working Group's consideration, could be received by 2 October 2006. Information may be submitted at any time of the year, and will be reviewed as soon as it can be processed.

./...

H.E. Mr. Warren W. Tichenor
Ambassador
Permanent Mission of the United States of America
to the United Nations Office at Geneva
Route de Pregny 11
1292 Chambesey

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

UNCLASSIFIED

UNCLASSIFIED

In conformity with its usual practice, the Working Group is prepared to receive representatives of interested Governments during the first three days of its next session, from 20 to 22 November 2006. Should your Government wish to be represented at the forthcoming session, please contact the Working Group's secretariat at the United Nations Office of the High Commissioner for Human Rights in Geneva (tel: 022 917 9176, fax: 022 917 9006) to schedule an appointment with the Working Group. The dates of subsequent sessions for the coming year may also be requested or found on the WGEID webpage: <http://www.ohchr.org/english/issues/disappear>.

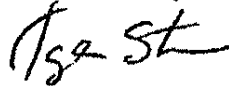
I remain,
Excellency,

Yours sincerely,

Santiago Corcuera
Chairman-Rapporteur
Working Group on Enforced
or Involuntary Disappearances"

I remain,
Excellency,

Yours sincerely,



Tanya Smith
Secretary
Working Group on Enforced
or Involuntary Disappearances

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

GEL6E

12/06/06

Draft

International Convention on the Protection of all Persons from Enforced Disappearances

The Human Rights Council

PP 1 : *Recalling* General Assembly resolution 47/133 of 18 December 1992, by which the Assembly adopted the Declaration on the Protection of all Persons against Enforced Disappearances as a body of principles for all States,

PP 2 : *Recalling* CHR resolution 2001/46 establishing an intersessional open ended working group to elaborate a draft legally binding instrument for the protection of all persons against enforced disappearances, and its resolution 2005/27,

PP 3 : *Taking note* of the report E/CN.4/2006/57 of the intersessional open ended working group to elaborate a draft legally binding instrument for the protection of all persons against enforced disappearances and the decision of the working group to conclude its work and to transmit the draft International Convention on the Protection of all Persons against Enforced Disappearances to the Commission on Human Rights for adoption,

PP 4 : *Welcoming* the proposal of France to host the signing ceremony of the International Convention on the Protection of all Persons against Enforced Disappearances in Paris (France),

OP 1 : *Adopts* the text of the International Convention on the Protection of all Persons against Enforced Disappearances as contained in the annex to the present resolution,

OP 2 : *Recommends* the International Convention on the Protection of all Persons against Enforced Disappearances to the General Assembly for final adoption at its 61st session,

OP 3 : *Recommends* that the International Convention on the Protection of all Persons against Enforced Disappearances, following its adoption by the General Assembly, be open for signature at a signing ceremony to be held in Paris (France).

UNCLASSIFIED

RELEASED IN FULL

GE72A

(Unofficial translation)

Russian Federation Statement on International Convention for the protection of all persons from enforced disappearances

Mr. Chairman,

It is difficult to overvalue the importance of this problem covered by the International Convention for the Protection of All Persons from Enforced Disappearances. It is even more obvious when we learn about similar crimes, including hostage taking or other terrorist acts, taking place literally every day. The latest sad case is the kidnapping and then cold-blooded murder of four workers of the Russian Federation Embassy in Iraq. We consider that kidnapping is a gross violation of human rights and is a direct violation of all forms of individual protection and cannot be justified under any circumstances. In this regard, the Russian Federation is convinced that the Human Rights Council should pay attention to the struggle against hostage taking with same degree of attention given to it by the former Commission on Human Rights. We consider that the Council, like the General Assembly and the Commission on Human Rights, should confirm that every person has an inalienable right to protection from terrorism.

Mr. Chairman,

The Russian Federation expresses gratitude to France for its efforts and contributions in the development of the International Convention for the Protection of All Persons from Enforced Disappearances. We are convinced that the adoption of this document will encourage the strengthening of an international regime for the protection of human rights and freedoms, the eradication of similar crimes, and also will contribute to the global effort in the struggle against terrorism.

We express special satisfaction with the inclusion of the Convention's articles contributing to the further progressive development of the concept of human rights. In particular, it is especially important to us that articles of the [Convention] include the possibility of assigning responsibility for the violation of this right – the right to protection from enforced disappearances – to the so-called “non-State actors.” As is known, a significant part of enforced or involuntary disappearances, including kidnappings, are committed by terrorists or terrorist groups, illegal armed formations, and others. In this connection, the Russian Federation welcomes the development of new rights-defending standards that take into account contemporary realities of today's world. It is hoped that adoption of this important document will encourage a change in position of those who, up to this point, maintain that human rights can only be broken exclusively by official states or their official representatives and reject the possibility of assigning appropriate responsibility to non-State actors.

Thank you, Mr. Chairman.

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

UNCLASSIFIED

West, Lora

From: Barton, Paula J
Sent: Friday, July 07, 2006 11:52 AM
To: Brancato, Gilda M
Cc: Kovar, Jeffrey D; Levin, Jan; Gale, T Hanny
Subject: FW: Enforced Disappearance final statement (Canada)

Gilda,

Below is the EOP delivered by Canada at the time of adoption. I'll send the UK statement separately.

Paula

Canada

Statement in Explanation of Position upon adoption of the International Convention for the Protection of All Persons against Enforced Disappearances by the UN Human Rights Council

Mr. President,

Canada has long been committed to combatting enforced disappearance. Canada helped to establish the Working Group on Enforced and Involuntary Disappearances, and supported the adoption of the UN Declaration on the Protection of All Persons from Enforced Disappearance.

Canada actively participated in the negotiation of the new Convention with the objectives of clearly prohibiting enforced disappearances, combatting impunity for such acts, and providing effective protection from this grave human rights violation, which continues to be perpetrated around the world. Canada is pleased to support the adoption of this Convention.

That we succeeded is in large part due to the dedication of the chair, the support of many States where this abhorrent practice was once widespread, and the resolve of many civil society activists, including victims.

While our preference would have been to allocate effective monitoring functions to the Human Rights Committee, as being best placed to provide a comprehensive remedy to victims, Canada joined consensus on the creation of a new body, and contributed to its strengthening. The Convention provides for a future review of the monitoring mechanism, to ensure consistency with efforts to strengthen the human rights treaty body system.

Canada requests that the following statements of understanding be placed on the official record of this meeting:

- The definition in article 2 and all references to crimes or offences in this Convention must be interpreted in light of the element of criminal intent required under domestic law for any criminal offence.
- Articles 5 and 6 must be interpreted consistent with international law, including the Rome Statute of the International Criminal Court.
- The provision in article 7 allowing for the consideration of mitigating circumstances in sentencing cannot be interpreted in any manner that would result in an effective amnesty which would allow impunity for violators, who must be punished with appropriate penalties taking into account the gravity of the offence.
- Article 8 on statutes of limitations must be interpreted as being subject to international law. This provision should never be allowed to operate so as to condone impunity for perpetrators. Further, no statutes of limitations are permitted under international law for any enforced disappearance which constitutes a crime against humanity.
- Article 12, paragraph 3 must be interpreted as permitting States to ensure access by investigating authorities to relevant documentation and other information which are not in the control of the State on the basis of prior authorization of a judicial authority, where necessary.

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

UNCLASSIFIED

- The provisions in article 24 relating to reparation must be interpreted in a manner consistent with international law, including the law of sovereign immunity.

Canada will consider whether to become a party to the new Convention following its adoption by the General Assembly. Canadian law already provides effective protection from the essential elements of enforced disappearance, including the criminalization of enforced disappearance at the level of a crime against humanity.

It is our hope that this new Convention will provide additional protection from enforced disappearance and contribute to ending impunity for this grave human rights violation.

Thank you Mr. President.

GE79

West, Lora

From: Brancato, Gilda M [BrancatoGM@state.gov]
Sent: Wednesday, June 21, 2006 6:32 PM
To: Kovar, Jeffrey D; Padmanabhan, Vijay M; Witten, Samuel M; Lagon, Mark P; Barks-Ruggles, Erica J (DRL)
Subject: FW: Enforced Disappearances informals

FYI.

From: Levin, Jan(Geneva)
Sent: Wednesday, June 21, 2006 12:30 PM
To: Legal-L-HRR
Cc: IO-RHS users; DRL-MLA-DL; DePirro, Velia M; Barton, Paula J; Levin, Jan
Subject: Enforced Disappearances informals

Please find attached below the new draft resolution from France on Enforced Disappearances. During this morning's informals, there were no strong objections to the Convention expressed. India noted it would have preferred an optional protocol to the ICCPR, but participated constructively in negotiations and still has concerns. No suggestion that they would call for a vote.

Those who announced as co-sponsors were: Chile, Argentina, Switzerland, Spain, Hungary, Ireland, and Estonia.

Those who support: Morocco, Austria, Russia, New Zealand (announced would support during GA when it can participate), Brazil, Canada, Azerbaijan, Mexico, Ukraine and Japan.

France noted it would table the resolution promptly so that it can be translated and distributed, and cosponsors would have time to prepare interpretive statements to be delivered at the time of adoption of the text.



06.12.06 Draft In'tl
 conventio...

UNCLASSIFIED
RELEASED IN FULL

6582

West, Lora

From: Brancato, Glida M
Sent: Thursday, June 15, 2006 6:53 PM
To: Witten, Samuel M; Lagon, Mark P; Johnson, Thomas A; Kovar, Jeffrey D; Levin, Jan; Harris, Robert K; Padmanabhan, Vijay M; Sicade, Lynn M (DRL); Bellinger, John B(Legal); Bettauer, Ronald J
Cc: Rohn, Douglas C; DePirro, Velia M; Barton, Paula J; Noyes, Julieta V (DRL); Legal-L-HRR; Hata, Marianne J; Propp, Kenneth R; Manning, Denise; Dorosin, Joshua L
Subject: RE: (SBU) Info memo to L/ Draft Disappearances Convention
Attachments: LEGAL-#26632-v1-Forced_Disappearances_Update_to_JBB.DOC; LEGAL-#18367-v1-Disappearances_treaty_USG_Final_Statement.DOC

Sensitive But Unclassified - John - attached for your information is an update on the proposed Forced Disappearances Convention. Also attached FYI is our Closing Statement delivered at the conclusion of negotiations on the treaty in 2005.

Please let us know if you have any comments or questions.

Marianne - could you ensure that this memorandum gets to John. Thank you!

UNCLASSIFIED
RELEASED IN FULL

CE87

West, Lora

From: Brancato, Gilda M
Sent: Monday, April 03, 2006 9:35 PM
To: Kovar, Jeffrey D; Barton, Paula J; DePirro, Velia M; Levin, Jan
Cc: Legal-L-HRR; Johnson, Thomas A; Hammond, Sylvia L; Noyes, Julieta V (DRL); Sicade, Lynn M (DRL); Deeks, Ashley S
Subject: LEGAL-#23727-v1-reply_to_NGOs_on_forced_disappearances_treaty.DOC



LEGAL-#23727-v1-r
eply_to_NGOs_...

Jeff/Paula/ Velia/Jan - as we discussed, attached is a reply for Mission Geneva, to which our Closing Statement on the proposed Disappearances Convention delivered in September 2005 should be attached.

Thank you, Gilda

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

1
UNCLASSIFIED

FP0768

UNCLASSIFIED

RELEASED IN FULL

BE98

West, Lora

From: Kovar, Jeffrey D
Sent: Monday, July 24, 2006 4:05 PM
To: DePirro, Velia M
Subject: RE: Disappearances Binder--Foreign Government Statements on Convention

Velia -- I asked Paula to work with Patrick to do this. - Jeff

From: Aswad, Evelyn M [<mailto:AswadEM@state.gov>]
Sent: Friday, July 21, 2006 6:53 PM
To: Aswad, Evelyn M; Johnson, Thomas A
Cc: Kovar, Jeffrey D; DePirro, Velia M; Levin, Jan; Smeller, Patrick; Barton, Paula J
Subject: RE: Disappearances Binder--Foreign Government Statements on Convention

Jeff & Velia -- please let us know if you are able to get translations or key points from the Geneva missions for China and Russia. Many thanks! Evelyn

From: Aswad, Evelyn M
Sent: Thursday, July 20, 2006 5:32 PM
To: Johnson, Thomas A
Cc: IO-RHS; Kovar, Jeffrey D; DePirro, Velia M; Levin, Jan; Smeller, Patrick; Barton, Paula J
Subject: RE: Disappearances Binder--Foreign Government Statements on Convention

OK -- Thanks for looking into this. Evelyn

From: Johnson, Thomas A(Main State Rm 5336)
Sent: Thursday, July 20, 2006 4:08 PM
To: Aswad, Evelyn M
Cc: IO-RHS; Kovar, Jeffrey D; DePirro, Velia M; Levin, Jan; Smeller, Patrick; Barton, Paula J
Subject: Disappearances Binder--Foreign Government Statements on Convention

Evelyn--

There are about 8 Spanish documents that Molly can translate, and 5 in French that Rebecca will translate. But we are being quoted \$120 for translation of the Chinese document, and probably about the same for the Russian document. Money is scarce. Let's just live with Geneva (Jeff or others) trying to get an English translation from their Chinese and Russian counterparts, or at least the key points in each statement that are of interest to us.

UNCLASSIFIED

RELEASED IN FULL

File: Enforced Det

Peay, T Michael

GE103

From: Brancato, Gilda M
Sent: Friday, January 09, 2004 4:24 PM
To: Peay, T Michael(Geneva)
Cc: Harris, Robert K; Gale, Teresa H(Geneva); Manning, Denise
Subject: INSTRUCTIONS TO THE UNITED STATES DELEGATION TO THE UNCHR WORKING GROUP SESESION ON FORCED DSIAPPEARANCES:

The attached draft, which I need to review and proofread, contains comments of DOJ/OIA, DOD/GC and L/PM. Will



2G_901!.DOC

incorporate comments of L/LEI in Geneva. See you Monday! Best, Gilda recei

Preamble

Les États parties [au présent instrument],

Considérant que la Charte des Nations Unies impose aux Etats l'obligation de promouvoir le respect universel et effectif des droits et des libertés fondamentales de l'Homme,

Se référant à la Déclaration universelle des droits de l'Homme,

Rappelant le Pacte sur les Droits économiques, sociaux et culturels, le Pacte sur les Droits civils et politiques et les autres instruments internationaux pertinents dans le domaine des Droits de l'homme, du Droit humanitaire et du Droit pénal international,

Rappelant la Déclaration sur la protection de toutes les personnes contre les disparitions forcées adoptée par l'Assemblée générale des Nations Unies dans sa résolution 47/133 du 18 décembre 1992,

Conscients de l'extrême gravité de la disparition forcée qui constitue un crime et, dans certaines circonstances définies par le droit international, un crime contre l'humanité,

Déterminés à prévenir les disparitions forcées et à lutter contre l'impunité du crime de disparition forcée,

Affirmant le droit de toute personne de ne pas être soumise à une disparition forcée et le droit des victimes de savoir la vérité sur les circonstances d'une disparition forcée et le sort de la personne disparue,

Sont convenus de ce qui suit:

UNCLASSIFIED

Article 1 bis

1. Nul ne sera soumis à une disparition forcée.
2. Aucune circonstance **exceptionnelle**, quelle qu'elle soit, qu'il s'agisse de l'état de guerre ou de menace de guerre, d'instabilité politique intérieure ou de tout autre état d'exception, ne peut être invoquée pour justifier la disparition forcée.

UNCLASSIFIED

Article 3

Tout État partie prend les mesures nécessaires **pour tenir pénalement responsables** : ~~pour poursuivre et punir ceux qui commettent ou concourent à commettre une disparition forcée.~~

- a) **ceux qui commettent, commanditent, tentent de commettre une disparition forcée, y participent ou en sont complices.**

~~1. Sont punis :~~

- a) ~~Les auteurs d'une disparition forcée et ceux qui s'en rendent complices ;~~
b) ~~La tentative de disparition forcée ;~~
e) ~~L'entente en vue de commettre une disparition forcée.~~

~~2. Sont également punis :~~

a) ~~Ceux qui ordonnent ou encouragent la commission ou la tentative d'une telle infraction, ceux qui en facilitent la commission ou la tentative en apportant leur aide, leur concours ou tout autre forme d'assistance, y compris en fournissant les moyens de cette commission ou de cette tentative ;~~

b) Le supérieur qui:

- i) **Savait que des subordonnés placés sous son autorité et son contrôle effectifs, commettaient ou allaient commettre une disparition forcée ou a délibérément négligé de tenir compte d'informations qui l'indiquaient clairement; et qui**
ii) **N'a pas pris toutes les mesures nécessaires et raisonnables qui étaient en son pouvoir pour empêcher ou faire cesser réprimer une disparition forcée, ou pour en réprimer l'exécution ou pour en référer aux autorités compétentes aux fins d'enquête et de poursuites.**

2. Aucun ordre ou instruction émanant d'une autorité publique, civile, militaire ou autre, ne peut être invoqué pour justifier une disparition forcée.

Article 4

1. Tout État partie rend **le crime de** disparition forcée passible de peines appropriées qui prennent en compte son extrême gravité.
2. Tout État partie peut prévoir:
 - a) Des circonstances atténuantes, notamment en faveur de ceux qui, impliqués dans la commission d'une disparition forcée, auront contribué efficacement à la récupération en vie de la personne disparue ou auront permis d'élucider des cas de disparitions forcées ou d'identifier les auteurs d'une disparition forcée;
 - b) **Sans préjudice d'autres procédures pénales**, des circonstances aggravantes, notamment en cas de décès de la victime ou envers ceux qui se sont rendus coupables d'une disparition forcée à l'encontre de femmes enceintes, de mineurs ou d'autres personnes particulièrement vulnérables.

Article 9

1. Tout État partie prend les mesures nécessaires pour établir sa compétence aux fins de connaître d'un **crime de disparition forcée**:

- a) Quand l'infraction a été commise sur tout territoire sous sa juridiction ou à bord ~~d'un navire battant son pavillon ou d'un~~ **aéronefs ou de navires immatriculés conformément à sa législation au moment des faits dans cet État** ;
- b) Quand l'auteur présumé de l'infraction est l'un de ses ressortissants, ~~ou une personne apatride résidant habituellement sur son territoire~~ ;
- c) Quand la personne disparue est l'un de ses ressortissants et ~~que cet État partie le juge approprié~~ .

2. Tout État partie prend également les mesures nécessaires pour établir sa compétence aux fins de connaître d'un **crime de disparition forcée** quand l'auteur présumé de l'infraction se trouve sur tout territoire relevant de sa juridiction, sauf s'il l'extrade ou le remet à un autre État **conformément à ses obligations internationales**, ou s'il le remet à une juridiction pénale internationale dont il a reconnu la compétence.

3. [*Le présent instrument*] n'écarte aucune compétence pénale **supplémentaire** exercée conformément aux lois nationales.

Article 23

1. Tout État partie prend les mesures nécessaires pour prévenir et réprimer pénalement:

a) ~~L'enlèvement ou~~ l'appropriation d'enfants soumis à une disparition forcée ~~victimes de disparitions forcées, ou dont le père, la mère sont victimes d'une disparition forcée~~ ou le représentant légal sont soumis à une disparition forcée, ou d'enfants nés pendant la captivité de leur mère ~~victime d'une disparition forcée~~ soumise à une disparition forcée ;

b) La falsification ou la **dissimulation** ~~destruction de documents~~ attestant de la véritable identité des enfants visés à l'alinéa (a).

2. Tout État partie prend les mesures nécessaires pour rechercher et identifier les enfants visés au paragraphe 1 a) ~~et b)~~ et les rendre à leur famille d'origine.

Article 25

1. ~~Lorsqu'un enfant enlevé ou approprié dans les conditions de l'article 23 a) est retrouvé sur le territoire d'un Etat partie, la question de son éventuel retour vers sa famille d'origine est réglée soit par la loi nationale de cet Etat partie, soit par l'accord bilatéral ou multilatéral qui le lie avec tout autre Etat dans lequel réside la famille d'origine.~~
2. **Compte tenu de la nécessité de préserver l'intérêt supérieur des enfants visés à l'article 23, § 1 a) et leur droit à préserver leur identité, y compris leur nationalité et leurs liens familiaux reconnus par la loi, il doit être possible, dans les Etats parties qui reconnaissent le système d'adoption, de réviser la procédure d'adoption de ces enfants, et en particulier d'annuler toute adoption qui trouve son origine dans une disparition forcée. Une telle adoption peut néanmoins continuer à produire ses effets si les plus proches parents de l'enfant donnent leur consentement au moment de la révision.**
3. En toute circonstance, l'intérêt supérieur de l'enfant est une considération primordiale, et l'enfant qui est capable de discernement a le droit d'exprimer librement son opinion, laquelle est dûment prise en compte eu égard à son âge et à son degré de maturité.

*Mission Permanente de la France
auprès des Nations Unies
et des Organisations Internationales
à Genève*

L'Ambassadeur

Genève, le 21 décembre 2004

GE110

CC/cd
N°

1588

Chers collègues,

Grâce à votre participation, notre réunion du 9 décembre a permis de faire des progrès dans la discussion du projet d'instrument pour la protection de toutes les personnes contre les disparitions forcées.

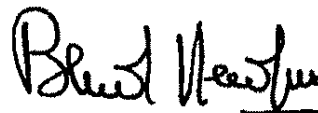
Je vous propose que nous nous réunissions à nouveau, toujours de façon informelle, à la mission française

- le 19 janvier à partir de 15h, pour traiter les articles 10, 11, 12, 13, 14, 15, 15bis, 19 et 20 ;

- le 24 janvier toute la journée, pour traiter les articles 16, 16bis, 17, 18 et 22 à partir de 9h, et les parties 2 et 3 à partir de 14h. Une collation sera servie pour le déjeuner.

Avec mes remerciements pour notre fructueuse coopération, je vous présente mes meilleurs vœux pour l'année 2005.

Bien amicalement



Bernard KESSEDJIAN

NB : Merci de bien vouloir informer Mme d'Angelo (022 758 91 42) de votre participation.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

36, route de Pregny - 1298 Genève - Chambésy

UNCLASSIFIED

UNCLASSIFIED

Recipient

Read

Aswad, Evelyn M (L-HRR)

Read: 12/28/2004 4:14 PM

Cassel, Lynn L

Read: 12/28/2004 4:17 PM

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

TRADUCTION

GE12A

cc. DCM
LA

Geneva, 30 November 2004

Subject : Enforced disappearances

Dear Colleagues,

As was envisaged during the last session of our working group on the negotiation of an instrument on enforced disappearances and with a view to making progress before the next session (31 January-11 February 2005), I would like to suggest that we meet on 9 December to work on the text of the draft instrument. During this day, all interested delegations are invited to contribute to the elaboration of formulas to solve certain issues or to facilitate progress. These discussions will of course be informal and friendly.

Work will take place from 9 a.m. to 18 p.m. on 9 December at the French Mission. A light lunch will be served.

I am grateful in advance for your participation in this working meeting and I look forward to seeing you again on this occasion.

PS : Please let Mme d'Angelo (022 758 91 42) know if you plan to attend.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

UNCLASSIFIED

FP0780

UNCLASSIFIED

RELEASED IN FULL

*Mission Permanente de la France
auprès des Nations Unies
et des Organisations Internationales
à Genève*

GE112B

L'Ambassadeur

Genève, le 30 novembre 2004

Objet : Disparitions forcées
N° 1486

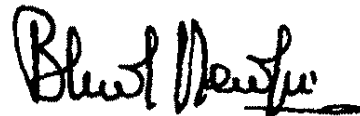
Chers collègues,

Ainsi qu'il avait été envisagé au cours de la dernière session de notre groupe de négociation d'un instrument sur les disparitions forcées et afin de faire avancer notre travail en vue de la prochaine session (31 janvier-11 février 2005), je vous propose de nous réunir le 9 décembre, pour une journée de travail sur le texte du projet d'instrument. Au cours de cette journée, l'ensemble des délégations intéressées sont invitées à contribuer à l'élaboration de propositions pour tenter de régler certaines difficultés ou en faire progresser la solution. Ces discussions se dérouleront bien sûr de façon informelle et amicale.

Cette réunion aura lieu le 9 décembre de 9h à 18h, à la mission de France. Une collation sera servie à l'heure du déjeuner.

Je vous remercie par avance de votre participation à cette réunion de travail et je me réjouis de vous revoir à cette occasion.

Bien amicalement



Bernard KESSEDJIAN

NB : Merci d'informer Mme d'Angelo (022 758 91 42) de votre participation.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

UNCLASSIFIED
36, route de Pregny - 1292 Genève - Chambésy

FP0781

John E. Dwyer

Peay, T Michael

From: Brancato, Gilda M
Sent: Tuesday, July 06, 2004 7:17 PM
To: Peay, T Michael
Cc: Solomon, Steven A
Subject: FW: Secret detentions

BE129

another article on the disappeared. Mike, have our september one week formal negotiations on the disappearances treaty been scheduled yet? many thanks, gilda

-----Original Message-----

From: Mallonek, Tom V
Sent: Monday, June 28, 2004 10:14 AM
To: Alder, Lois L; Blanck Jr, John I; Cook, Daphne W; Dalton, Robert E; Dennis, Michael J; Dolan, JoAnn; Haines, Avril D; Legal-L-HRR-dl
Subject: Secret detentions

UNCLASSIFIED per E.O. 12958

Washington Times, June 28, 2004 - pg. 17

Torturing Suspected Terrorists?

By Nat Hentoff

Much of the media eventually may lose interest in the contention of administration lawyers - in leaked Pentagon and Justice Department reports - that the president, as commander in chief in a war on terrorism, has the authority to justify selective use of torture on prisoners allegedly linked to terrorism. But in a letter to the New York Times, Dr. Allen Kelley, Director of the Bellevue-NYU Program for Survivors of Torture, sounds a warning:

"The notion that torture is justified or effective in eliciting information is misguided and dangerous. Individuals so brutalized will say whatever they think their interrogators want to hear."

Meanwhile, even weeks later, the media has almost entirely ignored the May 16 ABC Television "Nightline" program titled "The Disappeared." It focused not on whether, and when, a congressional statute and international treaties we've signed can be bypassed, but rather, on an operation apparently even more disconnected from our laws.

"Nightline" focused on super-secret CIA interrogation centers overseas. "The inmates are believed to make up a who's who of the top al Qaeda leadership," said reporter Chris Bury. "But even their names are classified. Some of them may never be released. For all practical purposes, they have just disappeared."

Obviously, it's essential to get information from leading terrorists. But, Mr. Bury continued, these prisons "operate entirely outside the U.S. judicial system, according to a set of rules approved by the Justice Department. But like everything else about the CIA's prisons, those rules are also top secret."

As the May 24 edition of Newsweek reported, after the president was assured by his legal advisers that the Geneva Conventions do not apply to the questioning of such terrorist prisoners, his directive "authorized the CIA to set up a series of secret detention facilities outside the United States, and to question those held in them with unprecedented harshness."

"Nightline" broadcast a news clip where the president declared: "You need to have a president who understands

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

1
UNCLASSIFIED

UNCLASSIFIED

you can't win this war with legal papers. We've got to use every asset at our disposal."

Though most of the media has ignored this story, there has been some earlier coverage on the secret CIA interrogation centers, such as in the Dec. 26, 2002, story by The Washington Post on prisoners in a CIA facility at Bagram Air Force base in Afghanistan. They were systematically subjected to abuses veering on torture. But that story died soon after.

Mr. Bury, speaking of the series of secret CIA prisons beyond the reach of the American rule of law, asked: "Since when are people in American custody allowed simply to disappear into a black hole?"

Appearing on the program was retired FBI agent Jack Cloonan, on the job for 27 years and the senior agent on the FBI's "bin Laden Squad" in New York. Knowing from experience how vital it is to get information from these high-echelon terrorists, Mr. Cloonan also wonders:

"What are we going to do with these people (in the CIA secret prisons) when we're finished exploiting them? Are they gonna disappear? Are they stateless? I mean, what are we gonna explain to people when they start asking questions about where they are? Are they dead? Are they alive? What oversight does Congress have?"

On the same program, Rep. Jane Harman of California, ranking Democrat on the House Intelligence Committee, said that she wants "to save American lives, but I want to do it within the constraints of U.S. and international law ... I think the oversight process in Congress right now is less than it needs to be.

"The people we're fighting don't abide by the rules. But if we don't follow the rule of law, what are we fighting for?"

"Nightline" reporter John McWethy, the principal reporter on the story, said that "a CIA official claims the prisoners are not being tortured. As for the details of where they are being held, exactly how they are being treated and what the U.S. plans to do with them, that is all a secret. When asked why, an official from the CIA explained, that's a secret, too." Now that George Tenet has resigned as head of the CIA, will he disclose some of those secrets in the interest of justice? After all, international treaties we have signed forbid such bottomless secrecy about such prisoners.

What also concerns me, as a journalist, is why the great majority of the print, broadcast and other media did not quickly follow up on the "Nightline" report. Later, I asked Mr. Bury if he had seen any meaningful coverage of that program. He had not. Neither did I. But recently, other reports were emerging about the secret prisons - especially Human Rights First's documented "Ending Secret Detentions."

We did previously find out from the May 16 New York Times that one of most important al Qaeda prisoners, Khalid Shaikh Mohammed, was somewhere "strapped down forcibly, pushed under water and made to believe he might drown."

I can't say I felt terribly sorry for him; but are we ever going to know what else is being done to him, and to others of the CIA's super-secret prisoners? Should we care whether they entirely disappear? Even these mass murderers?

What do you think?

Tom Malioneck

Analyst for Boundaries - Boundary Waters - Conservation - Environment - Fisheries - Human Rights - Maritime Matters

Office of the Assistant Legal Adviser for Treaty Affairs (L/T)

5420 HST

phone 202-647-1336 (direct)

fax 202-736-7541

UNCLASSIFIED

United States Proposals on "Access to Information" (January 16, 2004)**Article 7**

Delete the following sentence: "In particular, the right to obtain accurate and full information on the fate of disappeared persons is guaranteed in all circumstances." [*Unnecessary in light of what follows.*]

Article 12 [as shortened]

1. (same)
2. (same)
3. (same)

New Consolidated Chapter on – "Access to Information"**Article 12 bis** [New]

1. Each State Party, subject to Article 12 ter(4), shall provide to family members, and to other persons with a legitimate interest, information concerning the whereabouts and fate of a disappeared person, including information resulting from an investigation into the disappearance.
2. *At a minimum, such information shall include:*
 - (a) *The authority to whom the person has been referred;*
 - (b) *The whereabouts of the person deprived of liberty, including in case of transfer;*
 - (c) *The identity of the person responsible for the deprivation of liberty and of the person in whose hands the person deprived of liberty has been placed.*
[Former Art. 16(2)]
3. Each State Party shall prepare and maintain one or several official registers of persons deprived of liberty. [Former Art. 16(3); however, the 2nd sentence would become unnecessary in view of Art. 12 bis.]

UNCLASSIFIED

Article 12 ter [New]

1. In implementing their obligations under this [instrument], States Parties shall respect the fundamental need of family members, and other persons with a legitimate interest, to obtain information promptly and regularly regarding the whereabouts and the fate of a disappeared person.
2. States Parties shall adopt, if they have not yet done so, the necessary domestic legal measures to ensure appropriate access to such information.
3. States Parties shall be guided by the principle that furnishing such information shall in no circumstances be unreasonably denied.
4. Such access shall be subject only to privacy, law enforcement, national security, or other similar considerations duly justified under law.

Article 17

[The necessity of this article would need to be reevaluated, in light of provisions in the new "Access to Information" Chapter].

Article 19 [as revised]

Each State Party shall take the necessary measures to prevent or punish the following conduct:

- (a) Any unlawful delay or obstruction in providing the access to information envisioned by Article 12 bis and Article 12 ter. [*delete reference to Art. 17*]
- (b) same
- (c) same

UNCLASSIFIED

Peay, T Michael

To: Moley, Kevin; Cassel, Lynn L
Cc: DeLaurentis, Jeffrey
Subject: Enforced Disappearances Negotiations: Draft Reporting Cable



Reporting Cable
Forced Disappe...

January 27, 2004

Ambassador and DCM:

Per your requests, attached for your information and comment is the current draft text of the reporting cable that has been penned by Gilda Brancato from L/HRR and edited by me to reflect the past two weeks of negotiations on this instrument.

She has not yet drafted a comment, but I can furnish that to you when drafted for your information and comment.

I welcome any reactions you may have.

Mike Peay

UNCLASSIFIED

RELEASED IN FULL

Peay, T Michael

GE 158

From: Brancato, Gilda M
Sent: Tuesday, December 31, 2002 9:57 PM
To: Surena, Andre M; Manning, Denise; Johnson, Thomas A; Sicade, Lynn M; Camponovo, Christopher N (DRL); Stewart, David P; Dorosin, Joshua L; 'Eliana_davidson@nts.policy.osd.pentagon.smil.mil'
Cc: Witten, Samuel M; Jacobson, Linda; Buchwald, Todd F; Dolan, JoAnn; Hollis, Duncan; Danies, Joel D(Geneva); Peay, T Michael(Geneva); Solomon, Steven A(Geneva); Legal-L-HRR-dl
Subject: ARTICLE BY ARTICLE INSTRUCTIONS TO THE UNITED STATES DELEGATION TO THE UNCHR WORKING GROUP SESESSION ON FORCED DSIAPPEARANCES:

Attached for your review is a discussion of the principal sections of the 1998 UNCHR sub-commission draft on forced disappearances. This article by article analysis is intended to supplement the general instructions paper sent to you for clearance on December 23. I would very much appreciate any comments you may have and clearance if possible. However, I realize that time is short and thus you may not have time to do a review by Friday noon (last day in the office before leaving for Geneva). Many thanks, and wishing you a wonderful new year, filled with good health and good events.



285C011.doc

Gilda cc by fax - doj/oa - tom burrows

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

UNCLASSIFIED

UNCLASSIFIED



UNITED NATIONS HIGH COMMISSIONER
FOR HUMAN RIGHTS



GE159

RELEASED IN FULL

**Draft international convention on the protection of all persons
from enforced disappearance**

Sub-Commission resolution 1998/25

The Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Recalling General Assembly resolution 47/133 of 18 December 1992 by which the Assembly proclaimed the Declaration on the Protection of All Persons from Enforced Disappearance as a body of principles for all States and urged that all efforts be made so that the Declaration became generally known and implemented,

Recalling also General Assembly resolution 41/120 of 4 December 1986 in which the Assembly recognized the value of continuing efforts to identify specific areas where further international action was required to develop the existing legal framework in the field of human rights,

Recalling further Commission on Human Rights resolution 1997/26 in which the Commission, deeply concerned, in particular, by the intensification of enforced or involuntary disappearances in various regions of the world and by the growing number of reports concerning harassment, ill-treatment and intimidation of witnesses, of disappearances or relatives of persons who have disappeared, took note of the report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1997/34), which at paragraph 31, welcomed the efforts of the Sub-Commission's sessional working group on the administration of justice to prepare a draft international convention on the prevention and punishment of enforced disappearances,

Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of enforced disappearance is of the nature of a crime against humanity,

Recalling that at the forty-seventh session of the Sub-Commission the sessional working group on the administration of justice, had asked its Chairman-Rapporteur, Mr. Louis Joinet, to submit a preliminary draft "international convention on the prevention and punishment of enforced disappearances" which formed the basis for discussion at the working group at its 1996 and 1997 sessions,

Expressing its appreciation, to the Chairman-Rapporteur for having submitted, in time for the Sub-Commission's consideration at its fiftieth session, a text entitled "Draft international convention on the protection of all persons from enforced disappearance" (E/CN.4/Sub.2/1998/19, annex) which was revised by the working group at the current session,

1. Decides to transmit the draft international convention on the protection of all persons from enforced disappearance to the Commission on Human Rights for its consideration, together with the comments of the Sub-Commission thereon as well as those of the sessional working group on the administration of justice (E/CN.4/Sub.2/1998/19, paras. 9-64);

<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/5209b6d89a0e590f802566730034c3a> 1/3/03

1998 Draft Ann.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

UNCLASSIFIED

UNCLASSIFIED

2. Requests the Commission to invite Governments, intergovernmental organizations and non-governmental organizations to provide comments on the draft convention.

35th meeting

26 August 1998

[Adopted without a vote. See chap. XI.]

[HOME](#) | [SITE MAP](#) | [SEARCH](#) | [INDEX](#) | [DOCUMENTS](#) | [TREATIES](#) | [MEETINGS](#) | [PRESS](#) | [STATEMENTS](#)

© Copyright 1996-2000
Office of the United Nations High Commissioner for Human Rights
Geneva, Switzerland

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/5209b6d89a0e590f802566730034c3...> 1/3/03

UNCLASSIFIED

UNCLASSIFIED

RELEASED IN FULL

GELBA

Peay, T Michael

From: Brancato, Gilda M
Sent: Thursday, December 18, 2003 1:16 AM
To: Manning, Denise; Brooks, Waldo W; Peay, T Michael (Geneva); Harris, Robert K; Johnson, Thomas A; Camponovo, Christopher N (DRL); Carlson, Mary Helen; 'James_Burger@nts.policy.osd.pentagon.smil.mil'
Cc: Teel, Wynne M; Dalton, Robert E; Jacobson, Linda; Buchwald, Todd F; Dolan, JoAnn; Cummings, Edward R (Main State); Danies, Joel D (Geneva); Solomon, Steven A (Geneva); DeLaurentis, Jeffrey (Geneva); Legal-L-HRR-d; Perry, June C; Sicade, Lynn M; Witten, Samuel M
Subject: Draft Instructions for Second Formal Round of Forced Disappearances Treaty Negotiations

Attached for the clearance of those on the TO line are proposed instructions for the US delegation during forced



26_8011.DOC

disappearance treaty negotiations beginning January 12. I had earlier circulated the Chair's 2003 convention text on the unclassified system. Please let me know if you need another copy. These 27 pages of detailed comments may look daunting, if not excruciating, so to the extent you cleared earlier instructions one year ago on a different treaty text and wish to put down for a draft clearance on this round, please let me know. If you have not yet cleared an iteration of these comments, I would appreciate your doing so, please. This treaty negotiation raises important issues, and DOD and DOJ review in particular is important. Thank you. L/PIL - you only need to review comments on Article 23-25 on abduction of children of the disappeared. Thank you all, Gilda

December 2003 Guidance

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 23 JUN 2009 200706444

1
UNCLASSIFIED

FP0790

Document de travail
01/12/03

Partie I

[Chapitre 1. — Définition]

Article premier

Aux fins *[du présent instrument]*, on entend par disparition forcée la privation de liberté d'une personne, sous quelque forme que ce soit, commise par des agents de l'État ou par une organisation politique, ou par des personnes ou des groupes de personnes qui agissent avec l'autorisation, l'appui ou l'acquiescement de l'État ou de l'organisation politique, suivie du déni de la reconnaissance de la privation de liberté ou de la dissimulation du sort réservé à la personne disparue ou du lieu où elle se trouve, la soustrayant ainsi à la protection de la loi.

[Chapitre 2. — Incriminations et sanctions].

Article 2

1. Tout Etat partie prend les mesures nécessaires pour que la disparition forcée, telle qu'elle est définie à l'article 1^{er}, constitue une infraction au regard de son droit pénal.
2. Le présent article est sans préjudice de tout autre instrument international ou de toute loi nationale qui contient ou peut contenir des dispositions de portée plus large.

Article 3

Tout Etat partie prend les mesures nécessaires pour punir :

- a) les auteurs d'une disparition forcée et ceux qui s'en rendent complices, soit en ordonnant, sollicitant ou encourageant la commission ou la tentative d'une telle infraction, soit en facilitant la commission ou la tentative d'une telle infraction en apportant leur aide, leur concours ou toute autre forme d'assistance, y compris en fournissant les moyens de cette commission ou de cette tentative,
- b) la tentative de disparition forcée,
- c) l'intention en vue de commettre une disparition forcée,

d) le supérieur hiérarchique qui :

(i) savait ou, en raison des circonstances et des informations dont il disposait, aurait dû savoir qu'un subordonné placé sous son autorité ou son contrôle effectifs était en train de commettre ou sur le point de commettre une disparition forcée, et qui :

(ii) n'a pas pris toutes les mesures nécessaires et raisonnables qui étaient en son pouvoir pour empêcher ou faire cesser la disparition forcée, ou pour en réprimer l'exécution ou en référer aux autorités compétentes aux fins d'enquête et de poursuites.

Article 4

1. Tout Etat partie rend la disparition forcée passible de peines appropriées qui prennent en considération sa gravité.

2. Tout Etat partie peut prévoir :

a) des circonstances atténuantes en faveur de ceux qui, impliqués dans la commission d'une disparition forcée, auront contribué efficacement à la récupération en vie de la personne disparue ou auront permis d'élucider des cas de disparitions forcées ou d'identifier les auteurs d'une disparition forcée ;

b) des circonstances aggravantes envers ceux qui se sont rendus coupables d'une disparition forcée à l'encontre d'une personne particulièrement vulnérable.

[Chapitre 3. — Protection contre l'impunité.]

Article 5

1. Tout Etat partie prend les mesures nécessaires pour qu'à l'égard de la disparition forcée, le délai de prescription de l'action pénale :

a) soit égal au délai le plus long prévu dans sa législation ;

b) commence à courir à compter du jour où le sort de la personne disparue est connu avec certitude.

2. Lorsque les recours prévus à l'article 2 § 3 a) du Pacte international relatif aux droits civils et politiques ne sont pas efficaces, la prescription de la disparition forcée est suspendue aussi longtemps que l'efficacité de ces recours n'aura pas été rétablie.

Article 6

L'ordre d'un supérieur ou d'une autorité publique ne peut être invoqué pour justifier une disparition forcée.

Article 7

Tout Etat partie s'assure que les mesures de grâce, d'amnistie et les autres mesures analogues dont peuvent bénéficier les auteurs ou les personnes soupçonnées d'avoir commis une disparition forcée, n'aient pas pour effet d'empêcher l'exercice d'un recours effectif pour l'obtention d'une réparation. Est notamment garanti, en toute circonstance, le droit d'obtenir des informations exactes et complètes sur le sort des personnes disparues.

Article 8

Tout Etat partie considère la disparition forcée comme un crime grave de droit commun, au sens de l'article 1 F b) de la Convention relative au statut des réfugiés du 28 juillet 1951.

[Chapitre 4. — Poursuites au plan national.]

Article 9

1. Tout Etat partie prend les mesures nécessaires pour établir sa compétence aux fins de connaître d'une disparition forcée, dans les cas suivants :

- a) Quand l'infraction a été commise sur tout territoire relevant de sa juridiction ou à bord d'un navire battant son pavillon ou d'un aéronef immatriculé conformément à sa législation au moment des faits ;
- b) Quand l'auteur présumé de l'infraction est l'un de ses ressortissants ;
- c) Quand la personne disparue est l'un de ses ressortissants ;
- d) Quand l'auteur présumé de l'infraction se trouve sur tout territoire relevant de sa juridiction, sauf s'il l'extrade ou s'il le défère devant une juridiction pénale internationale.

2. *[Le présent instrument]* n'écarte aucune compétence pénale exercée conformément aux lois nationales.

Article 10

1. S'il estime que les circonstances le justifient, après avoir examiné les renseignements dont il dispose, tout État partie sur le territoire duquel se trouve une personne soupçonnée d'avoir commis une disparition forcée assure la détention de cette personne ou prend toutes autres mesures juridiques nécessaires pour assurer sa présence. Cette détention et ces mesures doivent être conformes à la législation dudit État partie ; elles ne peuvent être maintenues que pendant le délai nécessaire à l'engagement de poursuites pénales ou d'une procédure d'extradition.

2. L'État partie qui a pris les mesures visées au paragraphe 1 procède immédiatement à une enquête en vue d'établir les faits. Il informe les États parties qui pourraient être compétents conformément à l'article 9 § 1 a), b) et c) des mesures qu'il a prises en application du paragraphe 1 et des conclusions de son enquête, en leur indiquant s'il entend exercer sa compétence.

3. Toute personne détenue en application du paragraphe 1 peut communiquer immédiatement avec le plus proche représentant qualifié de l'État dont elle a la nationalité ou, s'il s'agit d'une personne apatride, avec le représentant de l'État où elle réside habituellement.

Article 11

1. L'État partie sur le territoire sous la juridiction duquel l'auteur présumé d'une disparition forcée est découvert, s'il n'extrade pas ce dernier ou ne le défère pas devant une juridiction pénale internationale, soumet l'affaire à ses autorités compétentes pour l'exercice de l'action pénale.

2. Ces autorités prennent leur décision dans les mêmes conditions que pour toute infraction de droit commun de caractère grave en vertu du droit de cet État partie. Dans les cas visés à l'article 9 § 1 d), les règles de preuve qui s'appliquent aux poursuites et à la condamnation ne sont en aucune façon moins rigoureuses que celles qui s'appliquent dans les cas visés à l'article 9 § 1 a), b) et c).

3. Toute personne soupçonnée d'avoir commis une disparition forcée est jugée par une juridiction de droit commun qui offre des garanties de compétence, d'indépendance et d'impartialité et qui respecte les garanties du procès équitable.

Article 12

1. Tout État partie assure à quiconque alléguant qu'une personne a été victime d'une disparition forcée le droit de dénoncer les faits devant une autorité compétente, laquelle procède immédiatement et impartialement à une enquête approfondie. Des mesures seront prises pour assurer la protection du plaignant et des témoins contre tout mauvais traitement ou toute intimidation en raison de la plainte déposée ou de toute déposition faite.

2. Lorsqu'il existe des raisons sérieuses de croire qu'une personne a été victime d'une disparition forcée, tout État partie soumet l'affaire à l'autorité visée au paragraphe 1, afin qu'elle ouvre une enquête, même si aucune plainte n'a été officiellement déposée.
3. Tout État partie veille à ce que l'autorité visée au paragraphe 1 :
 - a) dispose des pouvoirs et des ressources nécessaires pour mener l'enquête à bien ;
 - b) ait communication des documents nécessaires à son enquête ;
 - c) ait accès à tout lieu où la présence d'une personne disparue est soupçonnée.
4. Tout État partie garantit aux personnes qui ont un intérêt légitime le droit d'être informées, à leur demande, des progrès et des résultats de l'enquête ouverte en application des paragraphes 1 ou 2.
5. Sont considérés comme ayant un intérêt légitime, aux fins *[du présent instrument]* :
 - a) la personne privée de liberté ;
 - b) le conjoint et les membres de la famille de la personne privée de liberté, son avocat ou son représentant légal ;
 - c) toute personne mandatée par les personnes visées aux points a) et b).
6. Tout État partie prend les mesures nécessaires pour prévenir et sanctionner les actes de nature à entraver le déroulement des enquêtes. Il s'assure notamment que les personnes soupçonnées d'avoir commis une disparition forcée ne soient pas en mesure d'influer sur le cours des enquêtes, par des pressions et des actes d'intimidation ou de représailles exercés sur ceux qui participent à l'enquête, sur les témoins et sur les proches de la personne disparue.

[Chapitre 5. — Coopération internationale]

Article 13

1. Aux effets de l'extradition, la disparition forcée n'est pas considérée comme une infraction politique ou comme une infraction de droit commun commises pour des raisons politiques.
2. La disparition forcée est de plein droit comprise au nombre des infractions donnant lieu à extradition dans tout traité d'extradition conclu entre des États parties.
3. Tout État partie s'engage à inclure la disparition forcée au nombre des infractions qui justifient l'extradition dans tout traité d'extradition auquel il souscrit.

UNCLASSIFIED

4. Tout Etat partie qui assujettit l'extradition à l'existence d'un traité peut, s'il reçoit une demande d'extradition d'un autre Etat partie auquel il n'est pas lié par un traité, considérer [*le présent instrument*] comme la base juridique nécessaire pour l'extradition en ce qui concerne la disparition forcée.
5. Tout Etat partie qui n'assujettit pas l'extradition à l'existence d'un traité reconnaît la disparition forcée comme susceptible d'extradition.
6. L'extradition est subordonnée aux conditions prévues par le droit de l'Etat partie requis ou par les traités d'extradition applicables, y compris, notamment, aux conditions concernant la peine minimale requise pour extradier et aux motifs pour lesquels l'Etat partie requis peut refuser l'extradition.
7. Aucune disposition [*du présent instrument*] ne doit être interprétée comme faisant obligation à l'Etat partie requis d'extrader s'il a de sérieuses raisons de penser que la demande a été présentée aux fins de poursuivre ou de punir une personne en raison de son sexe, de sa race, de sa religion, de sa nationalité, de son origine ethnique ou de ses opinions politiques, ou que donner suite à cette demande causerait un préjudice à cette personne pour l'une quelconque de ces raisons.

Article 14

1. Les Etats parties s'accordent l'entraide judiciaire la plus large possible dans toute enquête ou procédure pénale relative à une disparition forcée, y compris en ce qui concerne la communication de tous les éléments de preuve dont ils disposent et qui sont nécessaires aux fins de la procédure.
2. L'entraide judiciaire est subordonnée aux conditions prévues par le droit interne de l'Etat partie requis ou par les traités d'entraide judiciaire applicables, y compris, notamment, aux conditions concernant les motifs pour lesquels l'Etat partie requis peut refuser d'accorder l'entraide judiciaire.
3. L'entraide judiciaire peut notamment être refusée si l'Etat partie requis estime que l'exécution de la demande est susceptible de porter atteinte à sa souveraineté, à sa sécurité, à son ordre public ou à d'autres intérêts essentiels.

Article 15

1. Les Etats parties coopèrent entre eux et s'accordent l'entraide la plus large possible dans la recherche, la localisation et la libération des personnes disparues.
2. Les Etats parties s'accordent mutuellement aide et assistance en vue de porter secours aux victimes des disparitions forcées et, en cas de décès des personnes disparues, en vue de la restitution de leurs restes.

UNCLASSIFIED

UNCLASSIFIED

[Chapitre 6. — Prévention.]

Article 16

1. Tout Etat partie :
 - a) désigne les agents de l'Etat habilités à ordonner des privations de liberté ;
 - b) détermine les conditions dans lesquelles de tels ordres peuvent être donnés ;
 - c) garantit que toute personne privée de liberté sera placée uniquement dans un lieu officiellement reconnu et contrôlé ;
 - d) garantit à toute personne privée de liberté, en toute circonstance :
 - (i) le droit d'introduire un recours devant un tribunal afin que celui-ci statue sans délai sur la légalité de sa privation de liberté et ordonne sa libération si cette privation de liberté est illégale et,
 - (ii) si la personne privée de liberté est soupçonnée d'avoir commis une infraction pénale, le droit d'être traduit dans le plus court délai devant un juge ou une autre autorité habilitée par la loi à exercer des fonctions judiciaires.
2. Tout Etat partie prend les mesures nécessaires pour que les personnes ayant un intérêt légitime, au sens de l'article 12 § 5, reçoivent communication, lorsqu'ils en font la demande, d'informations sur la situation d'une personne privée de liberté. Ces informations concernent au moins :
 - a) l'autorité à laquelle la personne a été déférée ;
 - b) le lieu où se trouve la personne privée de liberté, y compris lorsqu'elle fait l'objet d'un transfert ;
 - c) l'identité de la personne qui a ordonné la privation de liberté et de celle qui en assure le contrôle.
3. Tout État partie établit et tient à jour un ou plusieurs registres officiels des personnes privées de liberté. Les informations concernant la personne privée de liberté figurant sur ces registres sont tenues à la disposition des personnes et autorités mentionnées aux paragraphes 1 et 2, pour consultation.

Article 17

Sans préjudice de l'examen de la légalité de la privation de liberté d'une personne, les États parties garantissent à toute personne ayant un intérêt légitime, au sens de l'article 12 § 5, le droit à un recours effectif pour obtenir les informations visées à l'article 16 § 2. Ce droit à un recours ne peut être suspendu ou limité en aucune circonstance.

UNCLASSIFIED

UNCLASSIFIED

Article 18

Tout État partie prend les mesures nécessaires pour que la remise en liberté d'une personne se déroule selon des modalités qui permettent de vérifier avec certitude que la personne a été effectivement libérée et qu'elle l'a été de telle manière que son intégrité physique et sa faculté d'exercer pleinement ses droits ont été assurées.

Article 19

Tout Etat partie prend les mesures nécessaires pour prévenir et sanctionner les agissements suivants :

- a) l'entrave ou l'obstruction au recours visé à l'article 17 ;
- b) le manquement à l'obligation d'enregistrement de toute privation de liberté, ainsi que l'enregistrement de toute information dont l'agent responsable du registre officiel connaît ou devrait connaître l'inexactitude ;
- c) le refus illégitime opposé par un agent de l'Etat de fournir des informations sur une privation de liberté, ou la fourniture d'informations inexactes.

Article 20

1. Tout Etat partie veille à ce que la formation des agents chargés de l'application de la loi puisse inclure l'apprentissage nécessaire concernant les dispositions *[du présent instrument]*, en vue de :

- a) prévenir l'implication de ces agents dans des disparitions forcées ;
- b) souligner l'importance de la prévention et des enquêtes en matière de disparition forcée ;
- c) veiller à ce que l'urgence de la résolution des cas de disparition forcée soit reconnue.

2. Tout Etat partie veille à ce que soient interdits les ordres ou instructions prescrivant, autorisant ou encourageant une disparition forcée.

3. Tout Etat partie prend les mesures nécessaires pour que les agents chargés de l'application de la loi qui ont des raisons de penser qu'une disparition forcée s'est produite ou est sur le point de se produire signalent le cas à leurs supérieurs et, au besoin, aux autorités ou instances de contrôle ou de recours compétentes.

Article 21

1. Aucun État partie n'expulse, ne refoule ni n'extrade une personne vers un autre État s'il y a des motifs de croire qu'une disparition forcée risque d'être commise à son encontre dans cet Etat.

2. Pour déterminer s'il existe de tels motifs, les autorités compétentes tiendront compte de toutes les considérations pertinentes, y compris, le cas échéant, de l'existence, dans l'Etat intéressé, d'un ensemble de violations systématiques, graves, flagrantes ou massives des droits de l'homme ou du droit humanitaire.

[Chapitre 7. — Victimes.]

Article 22

1. Aux fins *[du présent instrument]*, on entend par victime toute personne physique qui a subi un préjudice en raison de la commission de l'infraction définie à l'article 1^{er}.

2. Tout Etat partie garantit, dans son système juridique, à la victime d'une disparition forcée le droit d'obtenir une réparation des dommages matériels ou moraux qui lui ont été causés.

3. Le droit à réparation visé au paragraphe 2 comprend notamment :

- a) l'indemnisation,
- b) la restitution,
- c) la réadaptation,
- d) le rétablissement de la dignité et de la réputation.

[Chapitre 8. — Enfants de personnes disparues.]

Article 23

Tout Etat partie prend les mesures nécessaires pour prévenir et réprimer pénalement :

- a) l'enlèvement ou l'appropriation d'enfants dont l'un ou l'autre des parents sont victimes des crime de disparition forcée ;
- b) la falsification ou la destruction de documents attestant la véritable identité des enfants visés au a).

Article 24

Les États parties se prêtent mutuellement assistance dans la recherche, l'identification et la détermination du lieu où se trouvent les enfants enlevés ou appropriés dans les conditions de l'article 23 a).

Article 25

1. Lorsqu'un enfant enlevé ou approprié dans les conditions de l'article 23 a) est retrouvé sur le territoire d'un Etat partie, la question de son éventuel retour vers sa famille d'origine est réglée, soit par la loi nationale de cet Etat partie, soit par l'accord bilatéral ou multilatéral qui le lie avec tout autre Etat dans lequel réside la famille d'origine.
2. En toute circonstance, l'intérêt supérieur de l'enfant est une considération primordiale et l'enfant qui est capable de discernement a le droit d'exprimer librement son opinion, laquelle est dûment prise en compte eu égard à son âge et à son degré de maturité.

Partie II

Article II-A

1. Tout Etat partie présente [à l'organe de suivi], par l'entremise du Secrétaire général de l'Organisation des Nations Unies, un rapport sur les mesures prises pour donner effet à ses obligations en vertu [du présent instrument], dans un délai d'un an à compter de l'entrée en vigueur [du présent instrument] à son égard.
2. A la suite de la présentation du rapport visé au paragraphe 1, tout Etat partie fournit un rapport complémentaire sur demande [de l'organe de suivi].
3. Le Secrétaire général de l'Organisation des Nations Unies transmet les rapports à tous les États parties.
4. Chaque rapport est étudié par [l'organe de suivi], qui peut faire les commentaires, les observations, les recommandations et les mises en garde qu'il estime appropriés. L'État partie intéressé reçoit communication des commentaires, observations, recommandations et mises en garde, auxquels il peut répondre, de sa propre initiative ou à la demande [de l'organe de suivi].

Article II-B

1. [L'organe de suivi] peut être saisi par un État partie, ou par toute personne qui a un intérêt légitime, au sens de l'article 12 § 5, d'une demande visant à chercher et retrouver une personne disparue au sens de l'article 1^{er}.
2. S'il estime que la demande présentée en vertu du paragraphe 1 n'est pas manifestement dépourvue de fondement, qu'elle ne constitue pas un abus de droit et qu'elle n'est pas incompatible avec les dispositions [du présent instrument], [l'organe de suivi] demande à tout Etat partie de lui fournir, dans un délai qu'il fixe, des renseignements sur la situation de cette personne.

3. Au vu de la réponse fournie par l'Etat partie intéressé conformément au paragraphe 2, [l'organe de suivi] présente à ce dernier une recommandation ou une mise en garde. Il peut aussi lui enjoindre de prendre des mesures adéquates et de lui en faire rapport, dans un délai qu'il fixe.

4. [L'organe de suivi] établit les conclusions de son enquête et les communique à l'auteur de la demande visée au paragraphe 1 et à tout Etat partie auquel des renseignements ont été demandés.

5. La procédure visée par le présent article est confidentielle. Toutefois, s'il estime qu'aucune mesure adéquate n'a été prise à la suite d'une demande présentée conformément au paragraphe 3, [l'organe de suivi] peut, après avoir mis en demeure les Etats parties concernés, rendre publiques ses conclusions, ainsi que les réponses et renseignements qui lui ont été fournis.

Article II-C

1. S'il estime qu'un déplacement sur le territoire d'un Etat partie sous la juridiction duquel se trouverait la personne disparue est indispensable pour répondre à la demande dont il est saisi conformément à l'article II-B, [l'organe de suivi] peut demander à un ou plusieurs de ses membres de réaliser une mission d'enquête et de l'informer sans retard. Le ou les membres [de l'organe de suivi] qui effectuent la mission peuvent se faire accompagner, si nécessaire, par des interprètes, des secrétaires et des experts. Aucun membre de la délégation, à l'exception des interprètes, ne peut être ressortissant de l'Etat partie dans lequel la visite est effectuée.

2. [L'organe de suivi] notifie par écrit à l'Etat partie concerné son intention d'organiser une mission d'enquête et indique la composition de la délégation. L'Etat partie fait connaître sans retard à [l'organe de suivi] son accord ou son opposition à la mission d'enquête sur un territoire sur lequel il exerce sa juridiction.

3. Si l'Etat partie a donné son accord à la mission d'enquête, il fournit [à l'organe de suivi] toutes facilités nécessaires à l'accomplissement de cette mission. [L'organe de suivi] peut notamment :

- a) effectuer les visites qu'il jugera nécessaires pour chercher et retrouver la personne dont la disparition forcée est alléguée ;
- b) entrer en contact librement avec toute personne dont il pense qu'elle peut lui fournir des informations utiles sur le sort de la personne dont la disparition forcée est alléguée ;
- c) se faire présenter la personne dont la disparition forcée est alléguée et s'entretenir avec elle sans témoin.

4. [L'organe de suivi] fait part des constatations faites pendant sa mission d'enquête :

- a) à l'auteur de la demande visée à l'article II-B paragraphe 1 ;