

No. 028-12

22 MAY 2012

Recipients: S.P.D. P. Drago (Ed.)
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The Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva, presents its compliments to the Office of the High Commissioner for Human Rights and to the Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances, the Vice-Chair of the Working Group on Arbitrary Detention, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Mr. Sarkin, Ms. Sadar Ali, Mr. Emmerson, and Mr. Méndez.

The United States thanks the Special Rapporteurs and Working Groups for their October 21, 2011 correspondence regarding a joint study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism. The United States welcomes the opportunity to provide the Special Rapporteurs with the attached additional information about proactive measures taken to investigate specific allegations in compliance with international human rights norms and standards.

The Permanent Mission of the United States of America thanks the Special Rapporteurs for their dedicated work and avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights, the assurances of its highest consideration.

The Permanent Mission of the

United States of America, Geneva,

May 9, 2012.



Follow-Up to Joint Study on Global Practices in Relation to Secret
Detention in the Context of Countering Terrorism

U.S. Response to the Communication
of October 21, 2011

As reflected in our response to your initial solicitation for State input on the joint study, the United States has taken numerous steps to fulfill President Obama's commitments to review and, where necessary, reform U.S. detention, interrogation, and transfer policies, to uphold the rule of law in U.S. detention practices, and to ensure conformity of U.S. detention practices with our obligations under international law.

Although this communication does not convey the full range of U.S. legal views on the joint study or the characterizations made therein, we note the study's observation that in response to the terrorist attacks of September 11, 2001, the United States "embarked on a process of reducing and removing various human rights and other protection mechanisms." To the contrary, the United States has not taken the position that a time of war suspends the operation of a State's international human rights law obligations to matters within the scope of their application. Although more complex issues arise, with respect to the relevant body of law that determines whether a State's actions in the actual conduct of an armed conflict comport with international law, in this context, it is important to bear in mind that international human rights law and the law of armed conflict contain many similar protections and are in many respects

complementary and mutually reinforcing. Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is necessarily a fact-specific determination and cannot easily be generalized.

The United States regrets that it is not possible to comment specifically on allegations contained in the joint study. As the U.S. delegation noted at the presentation of the joint study to the members of the Human Rights Council, even governments whose actions are fully compliant with international law may find it impossible to challenge or comment on false allegations about their conduct with respect to purported secret detention without compromising their national security.

In response to the specific issues identified in the joint study for further communication, the United States is pleased to provide the following information.

Scope of Executive Order 13491:

Executive Order 13491 required the Central Intelligence Agency (CIA) to “close as expeditiously as possible any detention facilities that it currently operates” and ordered that it “shall not operate any such detention facility in the future.” As the joint study observes, the Executive Order accepts for this purpose, facilities used only to hold individuals on a short-term, transitory basis.

In Executive Order 13491, the President also directed a review of U.S. interrogation practices in order to: improve the effectiveness of human

intelligence-gathering; promote the safe, lawful, and humane treatment of individuals in United States custody, and of United States personnel who are detained in armed conflicts; and to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and domestic law. That review culminated in a report that proposed that the Obama Administration establish a specialized interrogation group to bring together officials from law enforcement, the U.S. Intelligence Community and the Department of Defense to conduct interrogations in a manner that will strengthen national security consistent with the rule of law. The report also made policy recommendations with respect to scenarios in which the United States moves or facilitates the movement of a person from one country to another or from U.S. custody to the custody of another country to ensure that U.S. practices in such transfers comply with U.S. law, policy and international obligations and do not result in the transfer of individuals to face torture. The President has reviewed and accepted the recommendations of the Task Force, and the United States Government is implementing the Task Force recommendations. The Executive Order also prohibits torture and other cruel, inhuman, and degrading treatment and directs the use of only those interrogation techniques set forth in the Army Field Manual and other authorized federal law enforcement techniques.

ICRC Notification:

The United States fully supports the ICRC's unique and important role in situations of armed conflict. The ICRC is notified of, and has timely access to; any individual detained by the United States Department of Defense in connection with the armed conflict with al-Qaida, the Taliban, and associated forces, consistent with DoD policy. We have a productive

dialogue with the ICRC regarding our detention operations. We value the ICRC's input and address any concerns its representatives may raise in a constructive, on-going dialogue at all levels of command and civilian leadership.

Detention in Afghanistan:

With respect to the joint study's concerns about the improved review procedures for individuals held at the Detention Facility in Parwan (DFIP) at Bagram airfield, Afghanistan, the following additional information is provided in follow-up to the United States' initial response. The basis for the detainee's detention is reviewed 60 days after transfer to the DFIP, six months later, and periodically thereafter. These robust procedures have improved the ability of the United States to assess whether the facts support the detention of each individual, and enhance a detainee's ability to challenge the basis of detention as well as the determination that continued internment is necessary to mitigate the threat posed by the detainee. For example, each detainee is appointed a personal representative, who is required to act in the best interests of the detainee and has access to all reasonably available information (including classified information) relevant to review board proceedings. Detainees can present evidence and witnesses if reasonably available, and the United States helps facilitate the collection of documentary evidence (such as letters from family and local villagers on behalf of detainees), as well as witness appearances in person, telephonically, or by video conferencing. The unclassified portions of review board proceedings are generally open, including to family, nongovernmental observers, and other interested parties. Determinations

that a detainee meets the criteria for continued detention are reviewed for legal sufficiency by a Judge Advocate.

The U.S. Court of Appeals for the District of Columbia Circuit has held in *Maqaleh v. Gates*, 605 F.3d 84, 98-99 (D.C. Circuit 2010), that federal habeas jurisdiction does not extend to individuals detained in Afghanistan, which remains an area of ongoing hostilities. The Court specifically rejected the petitioners' claim that the United States had manipulated their place of detention in order to evade judicial review, concluding that the claim "is not only unsupported by the evidence, it is not supported by reason."

In addition to the above information, we are pleased to inform you of the following specific measures the United States has adopted since our last communication:

- Confirmed, consistent with the instruction set forth in Executive Order 13491, that the CIA has closed any detention facilities in operation as of January 22, 2009, and no longer operates such detention facilities.
- Announced the transfer of 42 detainees from Guantanamo Bay, including 24 to third countries (22 due to humane treatment or other concerns in their home countries).
- Issued Executive Order 13567, which, consistent with applicable law, provides periodic review for certain individuals detained at Guantanamo Bay. This periodic review process is designed to ensure that such individuals continue to be detained only as long as necessary to protect against a significant threat to the security of

the United States. The periodic review process shall include a full review at least every three years, in addition to file reviews every six months. For each full review, the detainee is permitted to introduce relevant information, call certain witnesses, answer any questions posed by the Periodic Review Board, and present a written or oral statement. The detainee will be assisted by a government-provided personal representative to advocate on his behalf during the review process and, in addition, may be assisted by private counsel at no expense to the government. If a significant question is raised as to whether the detainee's continued detention is warranted during a file review, a full review will be convened promptly.

- Implemented enhanced procedural protections for military commissions, including: prohibiting the admission at trial of statements obtained by use of torture or cruel, inhuman, or degrading treatment, except against a person accused of torture or such treatment as evidence that the statement was made; providing a right to exculpatory evidence and a right to present evidence, compel witnesses, compel favorable testimony, and challenge the government's evidence; stipulating that an accused in a capital case be provided with counsel "learned in applicable law relating to capital cases;" providing the accused with greater latitude in selecting his or her own military defense counsel; enhancing the accused's right to discovery; and establishing an enhanced system for handling classified information.

- Expended considerable effort to support Afghan criminal trials for detainees captured and detained by coalition forces in Afghanistan. In June 2010, the U.S. and Afghan Governments partnered to establish the Justice Center in Parwan (JCIP), which enables the transition of U.S. military detainees into the Afghan criminal justice system through transparent trials conducted by the Government of Afghanistan under Afghan law. The JCIP has become the premier venue for the fair and legitimate prosecution of Afghan national security cases. USG officials provide mentoring, training, and assistance to Afghan judges, prosecutors, defense attorneys, and investigators at the JCIP. The courts at the JCIP—which include primary and appellate courts for adult and juvenile defendants—have processed 548 national security criminal cases over the past 18 months.
- Announced the transfer of the Detention Facility in Parwan (DFIP) to the Government of Afghanistan. On March 9, the USG and the Government of Afghanistan signed a Memorandum of Understanding on the transfer of all Afghan detainees at the DFIP to Afghanistan in six months, and arrangements to transfer full responsibility for the facility.
- Worked with coalition partners to establish monitoring procedures for detainees transferred from the International Security Assistance Force (ISAF) to Afghan custody.
- Partnered with the Afghan Government and other coalition partners to assist Afghanistan's effort to build a safe, secure, and humane Afghan corrections system that meets Afghan cultural

requirements and satisfies international standards, such as those contained in the UN Basic Principles on the Treatment of Prisoners. Since 2006, the State Department has invested over \$250 million to provide training, advisory support, capacity building, equipment, salary support, and infrastructure assistance to the Afghan Central Prison Directorate.

- Announced its support for Additional Protocol II to the 1949 Geneva Conventions (“AP II”) and urged the U.S. Senate to act on it as soon as practicable.
- Affirmed that the United States will choose out of a sense of legal obligation to treat the principles in Article 75 of Additional Protocol I to the 1949 Geneva Conventions (“AP I”), which sets forth fundamental guarantees for persons in the hands of opposing forces in international armed conflict, as applicable to any individual it detains in an international armed conflict.
- Conducted reviews that have confirmed that U.S. military detention operations, including at Guantanamo Bay and in Afghanistan, are consistent with Common Article 3 of the Geneva Conventions and AP II.
- Announced, following a two-year investigation, on June 30, 2011, that the Justice Department was opening a full criminal investigation into the deaths of two individuals in CIA custody overseas, and that it had concluded that further investigation into the other cases examined in the preliminary investigation was not

warranted. Please see...

<http://www.justice.gov/opa/pr/2011/June/11-ag-861.html>.

The United States welcomes open dialogue with the Special Procedures mandate holders, and we hope this information helps to underscore the United States' abiding commitment to the humane treatment of detained individuals. We continue to work closely with U.N. Member States to advance the protection and promotion of human rights and the rule of law at home and abroad, and we thank you for your actions in support of these shared goals.