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TO: MEMBERS OF THE COMMITTEE AGAINST TORTURE
FROM: HUMAN RIGHTS FIRST
DATE: APRIL 7, 2006

**RE: ISSUES TO BE CONSIDERED DURING THE EXAMINATION OF
THE SECOND PERIODIC REPORT OF THE UNITED STATES OF
AMERICA (CAT/C/48/Add.3/Rev.1)**

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Headquarters

333 Seventh Avenue
13th Floor
New York, NY 10001
Tel: (212) 845-5200
Fax: (212) 845-5299

Washington D.C. Office

100 Maryland Avenue, N.E.
Suite 500
Washington, DC 20002
Tel: (202) 547-5692
Fax: (202) 543-5999

www.humanrightsfirst.org

EXECUTIVE SUMMARY - ENGLISH

The United States has asserted that its obligation under Article 16 of the Convention to prevent, and therefore, to refrain from, acts of cruel, inhuman or degrading treatment or punishment “in any territory under its jurisdiction” does not apply to such acts beyond the territory of the United States. This assertion is based on a recent erroneous interpretation by the United States to its reservation to the Convention, and should be rejected.

The practice of “extraordinary rendition,” by which the United States participates in the extra-judicial transfer of persons to States where there are substantial grounds for believing that the person would be in danger of being subjected to torture, violates Article 3 of the Convention.

Recent legislative initiatives appear to deprive certain victims of torture of any means of redress, in violation of Article 14 of the Convention.

EXECUTIVE SUMMARY – FRENCH

Les États-Unis ont affirmés que ses obligations sous l’Article 16 de la Convention Contre la Torture et Autres Peines ou Traitements Cruels, Inhumains ou Dégradants d’empêcher les peines et traitements cruels ne s’applique pas en dehors du territoire des États-Unis. Cette assertion est fondée sur une interprétation erronée prise par les États-Unis à sa réserve à la Convention. Cette interprétation doit être rejetée.

La participation par les États-Unis dans la “restitution extraordinaire” – une remise d’une personne d’un pays dans un autre où il y a des motifs sérieux de croire qu’elle risque d’être soumise à la torture – viole l’Article 3 de la Convention.

Les initiatives législatives qui ont été approuvées par le Congrès des États-Unis semble déposséder certaines des victimes d’un acte de torture de ses droit d’obtenir réparations. Dans ce cas, les États-Unis violeraient l’Article 14 de la Convention.

EXECUTIVE SUMMARY – SPANISH

Los Estados Unidos han afirmado que sus obligaciones de acuerdo con el Artículo 16 de la Convención para prevenir, y por lo tanto, abstenerse de actos de trato cruel, inhumano o degradante “en cualquier territorio bajo su jurisdicción,” no se aplica a los actos que tienen lugar afuera del territorio de los Estados Unidos. Esta afirmación se basa en una interpretación errónea de los Estados Unidos de su reserva a la Convención que debe ser rechazada.

La práctica de “rendición extraordinaria,” por la cual los Estados Unidos participa en la transferencia extrajudicial de personas a Estados en los cuales haya razones fundadas para creer que estaría en peligro de ser sometida a tortura, viola el Artículo 3 de la Convención.

Recientes iniciativas legislativas parecen privar a ciertas víctimas de la tortura de cualquier recurso de remedio legal, lo cual viola el Artículo 14 de la Convención.

I. EXTRATERRITORIAL APPLICATION OF THE PROHIBITION AGAINST CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT – ARTICLE 16 (Issue 44)

1. Treaty obligations prohibit the United States from subjecting citizens and non-citizens alike to either torture or to cruel, inhuman or degrading treatment or punishment, whether within or outside the territory of the United States, whether during armed conflict or peacetime. This prohibition is not subject to derogation.¹ In fact, the United States itself had declared that “otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment [cannot] be employed on grounds of exigent circumstances.”²

2. Nevertheless, recently, the United States has taken the position that, by virtue of its reservation to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), it has no obligation to refrain from cruel, inhuman and degrading treatment beyond the territory of the United States.³ This position is incorrect as a matter of law. Its wrongfulness is apparent from examination of the text of the CAT, the text and circumstances surrounding the United States’ reservation to the CAT, and the context and complementary operation of other treaty and customary provisions of international law that prohibit the use of such treatment by the United States either within or without its territory.

3. When ratifying the CAT in 1994, the United States attached the following reservation:
That the United States considers itself bound by the obligation under article 16 to prevent “cruel, inhuman or degrading treatment or punishment,” only insofar as the term “cruel,

¹ See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art 2(2), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT] (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”); International Covenant on Civil and Political Rights (ICCPR) art. 4, Dec. 16, 1966, U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (derogation from right to be free of torture or cruel, inhuman, or degrading treatment not permitted even in time of public emergency); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 6, G.A. Res 43/173, 43 U.N. GAOR Supp. (no. 49) at 297, U.N. Doc A/43/49 (1988) (“No circumstance whatever may be invoked as justification for torture or other cruel, inhuman or degrading treatment or punishment.”).

² Committee Against Torture, *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention: United States of America* (Oct. 15, 1999), U.N. Doc. CAT/C/28/Add.5 (2000), ¶6.

³ In the context of the hearings on his nomination before the Senate Judiciary Committee, the now-Attorney General Alberto Gonzalez, responding in writing to Senator Feinstein, stated that “... the Department of Justice has concluded that under Article 16 there is no legal prohibition under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas.” Senator Feinstein, “Senator Feinstein Seeks Clear Policy on Torture Overseas,” news release, December 9, 2005, available at <http://feinstein.senate.gov/05releases/r-ag-torture.pdf> (accessed April 6, 2006).

inhuman or degrading treatment or punishment” means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.⁴

4. During his January 2005 confirmation hearings for the position of Attorney General, Alberto Gonzales stated that CAT did not prohibit the United States from employing cruel, inhuman, and degrading treatment or punishment beyond its territory. He claimed that this position was based on the terms of the treaty itself, as well as on the meaning of the U.S. reservation to the treaty.⁵

5. As concerns the terms of the treaty itself, both torture and cruel, inhuman and degrading treatment or punishment are prohibited “in any territory under [a State Party’s] jurisdiction.”⁶

6. Abraham Sofaer, the respected legal scholar and former legal advisor to the State Department, provided the following explanation in his January 21, 2005 letter to the Senate Judiciary Committee concerning the meaning of the U.S. reservation:

(T)he purpose of the reservation [to CAT] was to prevent any tribunal or state from claiming that the U. S. would have to follow a different and broader meaning of the language of Article 16 than the meaning of those same words in the Eighth Amendment. *The words of the reservation support this understanding, in that they related to the meaning of the terms involved, not to their geographic application* (emphasis added).⁷

7. In a recent *Wall Street Journal* Op-ed piece, Mr. Sofaer reiterated that the U.S. reservation was not intended to create a limitation of geographic application and added:

Restricting enforcement of Art. 16 to U.S. territory would fundamentally undermine the treaty’s purpose of preventing “cruel, inhuman or degrading” treatment by any State in any place it has “jurisdiction.”⁸

8. Regardless of the meaning of the U.S. reservation to the CAT, other U.S. treaties applicable in times of peace and in times of war prohibit the use of cruel, inhuman or degrading treatment or punishment on detainees held outside the United States.

9. In peacetime, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) complements the relevant provisions of the CAT:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.⁹

⁴ See U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17486-01 (1990), *also available at* http://www.unhchr.ch/html/menu3/b/treaty12_asp.htm (accessed April 5, 2006).

⁵ See Human Rights First, “Human Rights First’s Analysis of Gonzales’ Testimony before the Senate Judiciary Committee and His Written Answers to Supplemental Questions,” Jan. 24, 2005, *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/statements/hrf_opp_gonz_full_012405.asp (accessed April 5, 2006).

⁶ CAT, *supra* note 1, art. 2 (torture), art. 16 (cruel, inhuman and degrading treatment).

⁷ Letter from Abraham Sofaer to Senator Patrick Leahy (Jan. 21, 2005), reprinted in 151 Cong. Rec. S12383 (Nov. 4, 2005).

⁸ Abraham D. Sofaer, “No Exceptions,” *Wall Street Journal*, November 26, 2005, p. A11.

10. Article 7 is one of several ICCPR provisions from which no derogation is permitted.¹⁰

11. Nevertheless, the United States has indicated its position that the ICCPR has no extraterritorial application. The United States asserts that Article 2(1) of the ICCPR, which obliges each State to respect and to ensure to all individuals “within its territory and subject to its jurisdiction” the rights recognized in the Covenant, was intended, according to the travaux préparatoires of the Covenant, to have no application to the conduct of a State beyond its territory.¹¹ Both the International Court of Justice (ICJ)¹² and the Human Rights Committee¹³ disagree. The ICJ notes, in particular, the ambiguity of the subject language, namely the possibility of reading the word “and” as either conjunctive or disjunctive.¹⁴ Ambiguity raises the need for interpretation, which, in accordance with customary provisions of the Vienna Convention on the Law of Treaties, is to be done in light of a treaty’s “object and purpose.”¹⁵ The Preamble to the ICCPR speaks of the inherent dignity and equal and inalienable rights of “all members of the human family” and conditions under which “everyone may enjoy” their rights.¹⁶ It can hardly be claimed that it is within the object and purpose of the ICCPR for a State Party to be permitted to discriminate in its responsibility for its own conduct, between consequences to persons at home versus those abroad. In its recent submission to the Human Rights Committee, the United States cites the ICCPR travaux préparatoires in support of its position that the treaty was intended to have no extraterritorial application. The travaux indicate that in describing the scope of application of the ICCPR, the United States was motivated to add the words “within its territory” to the words “subject to its jurisdiction” for a limited purpose. That purpose was to prevent a state from assuming responsibility for violations committed against persons over whom the state has nominal jurisdiction, such as its own citizens or persons in territory under its occupation, but where the violations are actually committed by another state.¹⁷ There was no indication of intent to shield a state from responsibility for the conduct of its own agents. This interpretation of the treaty language is the only one that is consistent with the “object and purpose” of the treaty.

⁹ ICCPR, *supra* note 1, art. 7.

¹⁰ ICCPR, *supra* note 1 (“No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision [allowing derogation in time of public emergency]”).

¹¹ Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, Oct. 21, 2005, Annex I, *available at* <http://www1.umn.edu/humanrts/us-report-HRC.html> (accessed April 5, 2006).

¹² International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, General List, No.131 §§ 108-111.

¹³ Human Rights Committee General Comment 31 on Article 2 of the ICCPR, adopted on Mar. 29, 2004, CCPR/C/21/Rev.1/Add.13; *Sergio Euben Lopez Burgos v Uruguay*, Communication No.R 12/52 (6 June 1979), UN Doc. Supp. No. 40 (A/36/40) § 12.1; *see also* *Guillermo Waksman v Uruguay*, 28 March 1980, Comm. 31/1978, U.N. Doc. CCPR/C/OP/1 (1984) 9; *Samuel Lichtensztein v Uruguay*, 31 March 1983, Comm. 77/1980, U.N. Doc. Supp 40 (A/38/40) (1983).

¹⁴ International Court of Justice, *Legal Consequences of the Construction of a Wall*, *supra* note 12, § 108.

¹⁵ Vienna Convention on the Law of Treaties art. 31, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980).

¹⁶ ICCPR, *supra* note 1, preamble.

¹⁷ Christian Tomuschat, *Human Rights between Idealism and Realism* (Oxford: Oxford University Press, 2003) pp. 109-110; *see also* Orna Ben-Naftali and Shany Yuval, “Living in Denial: The Application of Human Rights in the Occupied Territories,” *Israeli Law Review*, vol. 37, no. 1 (2003-2004), p. 34.

12. In times and situations of war, the provisions of the ICCPR and the CAT are complemented by applicable provisions of the law of armed conflict, or International Humanitarian Law.

13. Article 13 of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) provides that “(p)risoners of war must at all times be humanely treated.”¹⁸ Article 27 of the Convention Relative to the Protection of Civilian Persons in Times of War (Geneva IV) provides that “(p)rotected persons . . . shall at all times be humanely treated....”¹⁹

14. Article 3, common to all Four Geneva Conventions (Common Article 3) requires that “(p)ersons taking no active part in the hostilities . . . shall be treated humanely.”²⁰ Contrary to recent assertions of the United States, the application of Common Article 3 to all armed conflict is generally accepted as a tenet of customary international humanitarian law.²¹

15. Also generally accepted as tenets of customary international humanitarian law are the humane treatment requirements of Additional Protocols I and II of the Geneva Conventions.²²

16. The provisions of the Geneva Conventions and Additional Protocols cited above constitute an all-inclusive scheme of protection, prohibiting the cruel, inhuman or degrading treatment of any armed conflict detainee.

¹⁸ Geneva Convention [III] Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Third Geneva Convention], *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68> (accessed April 4, 2006).

¹⁹ Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention], *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5> (accessed April 4, 2006).

²⁰ Third Geneva Convention, *supra* note 18, art.3; Fourth Geneva Convention, *supra* note 19, art. 3.

²¹ See *Prosecutor v. Tadić*, Decision on the Defense Motion on Jurisdiction, IT-94-1-T (Aug. 10, 1995), ¶65; *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-AR72, (Oct. 2, 1995), ¶¶91, 134 (common Article 3 is incorporated into Article 3 the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) (Violation of the Laws and Customs of War) because common Article 3 imposes obligations that are “part of customary international law.”); see also *Nicaragua v. U.S.*, 1986 I.C.J. 4 (Merits Judgment of June 27, 1986) (the Court, applying international customary law, determined that the rules contained in common Article 3 constitute a “minimum yardstick” that is applicable in both international and non-international conflicts); Jean S. Pictet, ed., *Commentary on the Geneva Conventions of 12 August 1949: [No.] IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958), p. 36 (“[Common Article 3] merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the municipal law of the States in question, long before the convention was signed. . .no Government can object to observing, in dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.”); Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Oxford University Press, 1991) (“...the norms stated in [common] Article 3(1)(a)-(c) are of such an elementary, ethical character, and echo so many provisions in other humanitarian and human rights treaties, that they must be regarded as embodying minimum standards of customary law also applicable to non-international armed conflicts.”).

²² Jean-Marie Henckaerts, “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict,” *International Review of the Red Cross*, vol. 87 n. 857 (Mar. 2005), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/\\$File/irrc_857_Henckaerts.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/$File/irrc_857_Henckaerts.pdf) (accessed April 5, 2006).

17. The absence of territorial limitation to the obligation of humane treatment in the ICCPR and in the law of armed conflict, as well as the absence of a right to derogate from that obligation even in the most extreme of situations – war – makes untenable any claim that the CAT’s requirement of humane treatment can be, or was intended by the United States to be, geographically limited.

18. On February 7, 2002, President George W. Bush, noted that the values of the United States “call for us to treat detainees humanely, *including those who are not legally entitled to such treatment.*” (emphasis added).²³ As a matter of international law, *every* individual, regardless of status, circumstances, and geographical location, is entitled to be free from torture and cruel, inhuman and degrading treatment. In the time of armed conflict, international humanitarian law guarantees every individual humane treatment. Furthermore, both in the time of peace and in the times of conflict, the prohibition against torture under international law, including under CAT, is absolute, nonderogable, and has no geographic boundaries. In addition, as stated above, the United States’ obligation to refrain from engaging in cruel, inhuman and degrading treatment applies both within and outside the physical territory of the United States. The Detainee Treatment Act (2006), passed recently by the U.S. Congress, reaffirms congressional belief and understanding that CAT’s prohibition against cruel, inhuman and degrading treatment applies extraterritorially.²⁴ We urge the CAT Committee to question the United States on how its claim that there exists a group of people who are *legally* not entitled to humane treatment can be justified in light of applicable international human rights and humanitarian law obligations of the United States.

II. EXTRAORDINARY RENDITION – ARTICLE 3 (Issues 16-19)

1. Since September 11, 2001, numerous reports by media and human rights organizations have documented United States involvement in incidents of extraordinary rendition – that is, an extrajudicial transfer of an individual to a country in which such individual is likely to be subjected to torture.²⁵ The

²³ Memorandum from President G.W. Bush to the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, the Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and the Chairman of the Joint Chiefs of Staff, regarding *Humane Treatment of Taliban and al Qaeda Detainees*, Feb. 7, 2002 (on file with Human Rights First).

²⁴ Detainee Treatment Act of 2005, Pub. L. No. 109-148, enacted as title X of the Defense Appropriation Act, Sec. 1003, H.R. 2863, 109th Cong., 1st Sess. (Dec. 30, 2005) [hereinafter Detainee Treatment Act] (as included in the Department of Defense Appropriations Act, 2006 and agreed to by the U.S. House and Senate and signed by President Bush on December 30, 2005; “(a) In General- No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment. (b) Construction- Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.”).

²⁵ See Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (New York: ABCNY/CHRGJ, 2004) [hereinafter Torture by Proxy]; Center for Human Rights and Global Justice, New York University, *Beyond Guantanamo: One Year Since Rasul* (New York: CHRGJ, 2005); Human Rights Watch, “Sweden: Torture Inquiry Must be Under U.N. Auspices; Independent Panel Must Probe Abuses by Sweden, Egypt and U.S. Operatives,” news release, May 2004, available at http://www.hrw.org/english/docs/2004/05/27/sweden8621_txt.htm (accessed April 4, 2006); Craig Whitlock, “A Secret Deportation of Terror Suspects; 2 Men Reportedly Tortured in Egypt,” *Washington Post*, July 25, 2004, p. A1; “U.S.

number of individuals subjected to extraordinary rendition is unknown. Some experts have estimated that, since 2001, 150 people have been transferred by or with the assistance of the United States to foreign states.²⁶ However, Egypt alone has acknowledged receiving 60 or 70 detainees via this practice, which suggests that the total number of transferred individuals likely exceeds 150.²⁷ Indeed, according to Jane Mayer, a journalist for *The New Yorker*, “one source knowledgeable about the rendition program suggested that the number of *renditions* since September 11, 2001 may have reached as high as several thousand.”²⁸ Victims of extraordinary rendition face torture and mistreatment and are unable to challenge their detention.²⁹

2. Treaty obligations prohibit the United States from engaging or assisting in extraordinary renditions. Specifically, Article 3 of CAT prohibits the United States from expelling, returning, extraditing or otherwise transferring a person to another state where there are substantial grounds for believing that she or he would be in danger of being subjected to torture. The ICCPR, as interpreted by the Human Rights Committee, prohibits the *refoulement* of individuals to states where they may be “at risk of” either torture or cruel, inhuman or degrading treatment (or both). In addition, the Convention Relating to the Status of Refugees (Refugee Convention) may also afford protection against torture and *refoulement* to individuals with a “well-founded fear of persecution” on specific enumerated grounds.³⁰

3. The Geneva III and Geneva IV prohibit both torture and the inhuman treatment of prisoners of war and civilians classified as “protected persons” in the context of international armed conflict. The transfer of a prisoner of war (PoW) to a state where the PoW is likely to be tortured or inhumanely treated is a violation of Geneva III.³¹ The unlawful transfer of a civilian classified as a “protected

Bypasses Law in Fight against Terrorism,” *International Herald Tribune*, Mar. 12, 2002; Rajiv Chandrasekaran and Peter Finn, “U.S. Behind Secret Transfer of Terror Suspects,” *Washington Post*, Mar. 11, 2002, p. A1.

²⁶ Jane Mayer, “Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program,” *The New Yorker*, February 14, 2005, available at www.newyorker.com/printables/fact/050214fa_fact6 (accessed April 4, 2006) (citing Scott Horton, Chair the Committee on International Law of the Association of the Bar of the City of New York); see also “CIA Outsourcing Torture,” *Agence France Presse*, Feb. 7, 2005 (“Scott Horton - an expert on international law who has examined CIA renditions - estimates that 150 people have been picked up in the CIA net since 2001”).

²⁷ See Shaun Waterman, “Terror Detainees Sent to Egypt; Official, U.S. deny torture is condoned,” *Washington Times*, May 16, 2005, p. 4. See also “Egypt Confirms ‘Rendition’ of Terror Suspects,” *ISN Security Watch*, May 17, 2005, available at <http://www.isn.ethz.ch/news/sw/details.cfm?id=11297> (accessed April 4, 2006). During an interview with NBS news in Washington, Egypt’s prime minister denied that torture was a widespread practice in Egypt, stating:

We are a country that has been subject to terrorism. Our police force sometimes has to take necessary actions to make sure that we have peace and stability inside Egypt, as well. So I don’t blame them very much in many cases. But we do tell them not to abuse their forces as much as humanly possible.

²⁸ Jane Mayer, speaking at the panel discussion, Transferring Terrorist Suspects to Other Countries: Legal and Policy Implications of Extraordinary Rendition, Constitution Project, Wash. D.C. (April 20, 2005). However, because the term “rendition” is used by the media indiscriminately to describe a variety of extra-judicial transfers, including transfers to Guantánamo Bay, it is not known how many of these transfers were “extraordinary renditions.”

²⁹ For accounts of experiences in detention post-extraordinary rendition, see “Maher Arar: Chronology of Events: September 26, 2002 to October 5, 2003,” at 3, available at <http://www.maherarar.ca/cms/images/uploads/mahersstory.pdf> (accessed April 4, 2006); American Civil Liberties Union, “Extraordinary Rendition – Khaled El-Masri – Statement (12/6/2005),” available at <http://www.aclu.org/safefree/extraordinaryrendition/22201res20051206.html> (accessed April 4, 2006).

³⁰ Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152 (entered into force April 22, 1954), available at <http://www.ohchr.org/english/law/refugees.htm> (accessed April 4, 2006).

³¹ Third Geneva Convention, *supra* note 18, art. 12.

person” to such a state is a “grave breach” under Geneva IV, and is a criminal act.³² In the context of non-international armed conflict, Article 3, which is common to all four Geneva Conventions, requires humane treatment of individuals and prohibits “at any time and in any place whatsoever,” *inter alia*, “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” as well as “outrages upon personal dignity, in particular, humiliating and degrading treatment.” In addition, Article 75 of the Additional Protocol I prohibits, *inter alia*, “torture of all kinds, whether physical or mental” as well as “outrages on personal dignity, in particular, humiliating and degrading treatment, ...and any form of indecent assault.”³³ The United States has historically taken the position that Article 75 of the Additional Protocol I codifies customary international law that binds the United States.³⁴

4. The United States ratified CAT in October 1994, with certain reservations, understandings, and declarations. With respect to the prohibition of *refoulement* by CAT Article 3, the United States declared its understanding that this requirement refers to instances in which it would be “more likely than not” that the alien would be tortured.³⁵

5. In 1998, the United States enacted the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA),³⁶ which contained a policy statement that the “United States [shall] not ... expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, *regardless of whether the person is physically present in the United States.*”³⁷ FARRA required relevant agencies to promulgate regulations effectuating FARRA provisions. However, only the Department of Homeland Security

³² Fourth Geneva Convention, *supra* note 19, arts. 147, 148.

³³ Protocol Additional to the Geneva Conventions of 12 Aug 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], Annex I, *reprinted in* 1125 U.N.T.S. 3; 16 I.L.M. 1391, *available at* <http://www.unhchr.ch/html/menu3/b/93.htm> (accessed April 4, 2006).

³⁴ A former deputy legal adviser to the Department of State, Michael Matheson, stated that Article 75 of the Additional Protocol I exemplified “the principle that we [the United States] believe should be observed and in due course recognized as customary law, even if they have not already achieved that status in their relationship to the Provisions of the Protocol.” Michael Matheson, “The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions,” 2 Am. U. J. Int’l L. & Pol’y 419, 422 (1987). Most recently, William H. Taft, IV, a former legal adviser to the United States Department of State under the G.W. Bush Administration, had asserted that,

It is a general principle of civilized societies that inhumane treatment is cruel and unacceptable under any circumstance. Such treatment degrades the perpetrator even as it inflicts unjustifiable harm on the victim. The customary law of armed conflict innovated a structure to deal with the situation of persons - like terrorists - who fall into ‘enemy’ hands without meeting the basic criteria of Article 4 of the GPW. Article 64 of the Fourth Geneva Convention and articles which follow it reflect this system and the desire of states to ensure a protective ‘safety-net’ for persons, including enemy combatants without POW status, in occupied territory. More broadly, this customary law notion of fundamental guarantees found more expansive expression in Article 75 of Additional Protocol I to the Geneva Conventions. While the *United States* has major objections to parts of Additional Protocol I, it *does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.*

William H. Taft, IV, “Symposium: Current Pressure on International Humanitarian Law: The Law of Armed Conflict After 9/11: Some Salient Features,” 28 Yale J. Int’l L. 319, 321-22 (emphasis added).

³⁵ Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification (1990), II(2). This is the standard commonly used by the United States in determining whether to withhold removal for fear of persecution. *See INS v. Stevic*, 467 U.S. 407, 429-30 (1984).

³⁶ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII [hereinafter FARRA], §§ 2242, 2242(b).

³⁷ FARRA, *supra* note 36 §1242(a) (emphasis added).

(formerly the Immigration and Naturalization Service) promulgated such regulations (FARRA Regulations). There is no evidence that either the Department of Defense (DOD) or the Central Intelligence Agency (CIA), both of which have been implicated in extraordinary renditions, ever enacted such regulations.³⁸ Thus, no mechanism currently exists to ensure that those agencies act in compliance with Article 3 of CAT. Moreover, even with respect to the actions by the Department of Homeland Security, the legal framework provided by the FARRA Regulations is inadequate to ensure full compliance with CAT.

6. Broadly speaking, FARRA Regulations address three categories of people: (i) individuals subject to “summary exclusion” (also known as “expedited removal”), (ii) individuals subject to removal orders, and (iii) individuals subject to extradition orders.³⁹ Importantly, FARRA Regulations do not address individuals whose transfers originate outside of the United States – in other words, individuals who are picked up by the United States in one foreign country and transferred to another foreign country.⁴⁰ Thus, FARRA’s policy directive to apply the principle of *non-refoulement* regardless of whether the person is physically present in the United States has not been implemented and, as a result, there is no mechanism to ensure that the United States is not violating Article 3 of CAT when it operates beyond its territorial borders.

7. Moreover, CAT has not been adequately implemented when it comes to individuals who are subject to “summary exclusion” (also known as “expedited removal”). FARRA Regulations provide that for individuals who are subject to “summary exclusions” because “the Attorney General knows, or has reasonable ground to believe” that such individuals are a threat to national security, the “Service shall not execute a removal order under this section under circumstances that violate section 241(b)(3) of the Act [i.e., restrictions on removal to a country where the individual’s life or freedom would be threatened] or Article 3 of the Convention Against Torture.”⁴¹ However, FARRA Regulations provide no guidance regarding when, how and by whom the determination of a CAT claim would take place. In fact, the same provision explicitly states that there will be no consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer.⁴² Thus, the scope of CAT protection in the case of individuals arriving to the United States and *suspected* of being a threat to national security is unclear. Furthermore, to the extent that some protocol for determination of CAT claims exists, lack of any review makes it impossible to determine whether such a protocol safeguards protections afforded by CAT.

8. The deficiencies of the “summary exclusion” regime were demonstrated in the case of Maher Arar. Mr. Arar was found inadmissible because U.S. officials believed him to be a member of Al Qaeda

³⁸ See generally Tribunale Di Milano, Sezione Giudice per le indagini preliminari, Warrant for arrest of U.S. citizens in connection with the kidnapping of Nasr Osama Mustafa Hassan alias Abu Omar, n. 10838/05 R.G.N.R., n. 1966/05 R.G.GIP, issued by the Judge presiding over preliminary investigations, Dr. Chiara Nobili, June 22, 2005 (on file with Human Rights First). The warrant details, *inter alia*, allegations of transfer of Abu Omar to the U.S. army base at Aviano, Italy and a transfer of Abu Omar to Egypt on a U.S. military plane.

³⁹ A detailed discussion of the FARRA regulations for these categories can be found *Torture by Proxy*, *supra* note 25.

⁴⁰ Abu Omar would fall into this category of people.

⁴¹ 8 C.F.R. § 235.8(b)(4).

⁴² 8 C.F.R. §235.8(b)(4).

and he was ordered to be “summarily removed.”⁴³ Instead of “removing” him to Canada, a country of Mr. Arar’s nationality and his place of permanent residence, the U.S. government decided to transfer Mr. Arar to Syria.⁴⁴ Mr. Arar was reportedly denied the opportunity to challenge his removal on the grounds of fear of torture.⁴⁵ Upon transfer to Syria, Mr. Arar was detained for 10 months under abysmal conditions and subjected to torture and humiliation.⁴⁶ He was subsequently released following the intervention by the Canadian government. No charges were ever brought against Mr. Arar. Canada has initiated a public inquiry into Mr. Arar’s case; however, despite requests from Canadian authorities, the U.S. government has refused to cooperate with the inquiry.⁴⁷

9. In cases of extradition, U.S. law provides that once an authorized magistrate, after conducting an extradition hearing, finds a person to be “extraditable,” the Secretary of State is vested with the responsibility for the final decision about whether a person will be formally extradited to a foreign State.⁴⁸ The Secretary of State is required to consider whether transferring an individual to a foreign state would violate Article 3 of CAT. However, the U.S. government has taken a position that the decision of the Secretary of State is not subject to judicial review.⁴⁹ The Committee Against Torture has previously held that “the right to an effective remedy contained in article 3 requires...an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise” and that “an inability to contest an expulsion decision before an independent authority” is relevant to a finding of a violation of CAT Article 3.⁵⁰

10. Failure by the United States to adequately implement Article 3 of CAT has created a legal gap, which allows extraordinary renditions to take place with impunity. Noteworthy, despite increasing evidence of the practice and numerous investigations initiated by the Council of Europe and by at least

⁴³ U.S. Department of State, “U.S. Views Concerning Syrian Release of Mr. Maher Arar,” press release, Oct. 6, 2003, available at <http://www.state.gov/r/pa/prs/ps/2003/24965.htm> (accessed April 4, 2006) (“Mr. Maher Arar was detained in New York on September 26, 2002 by United States immigration and law enforcement authorities after his name appeared on an immigration watch list. He was subsequently refused entry into the United States under Section 235C [sic] of the United States Immigration and Nationality Act based on information in the possession of United States law enforcement officials.”).

⁴⁴ Maher Arar is a dual citizen of Syria and Canada.

⁴⁵ *Arar v. Ashcroft et al.*, complaint and demand for jury trial, Jan 22, 2004, available at http://www.maherarar.ca/cms/images/uploads/Arar_Complaint_FINAL.pdf (accessed April 4, 2006), ¶47.

⁴⁶ See generally *Arar v. Ashcroft et al.*, complaint and demand for jury trial, *supra* note 45.

⁴⁷ “U.S. won’t co-operate with Arar inquiry,” *CBS News*, Sept. 21, 2004, available at <http://www.cbc.ca/story/canada/national/2004/09/21/arar040921.html> (accessed April 4, 2006).

⁴⁸ 18 U.S.C. §§ 3184, 3186.

⁴⁹ At least one court has suggested that individuals subject to extradition and who fear torture may present a habeas claim under the general habeas statute, 22 U.S.C. §2241. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000). Subsequently, the Ninth Circuit held that its statement in *Cornejo* was advisory and nonbinding. *Cornejo-Barreto v. Seifert*, 379 F.3d 1075 (9th Cir. 2004). However, most recently, upon a rehearing *en banc*, the Court vacated the opinion published in 379 F.3d 1075 (9th Cir. 2004) as moot, leaving the earlier decision (218 F.3d 1004 (9th Cir. 2000)) undisturbed. *Cornejo-Barreto v. Seifert*, 389 F.3d 1307 (9th Cir. 2004).

⁵⁰ *Agiza v. Sweden*, Committee Against Torture, Communication No. 233/2003 *, U.N. Doc. CAT/C/34/D/233/2003, 24 May 2005, ¶13.7, available at <http://sim.law.uu.nl/SIM/CaseLaw/fulltextcat.nsf/160f6e7f0fb318e8c1256d410033e0a1/b38dcf2b03d521cc1257021003d2212?OpenDocument> (accessed April 5, 2006); *Arkauz Arana v. France*, Committee Against Torture, Communication No. 194/2001, U.N. Doc. CAT/C/34/D/194/2001 (2005), ¶¶ 11.5, 12, available at <http://www1.umn.edu/humanrts/cat/decisions/194-2001.html> (accessed April 5, 2006).

ten European countries, the United States has refused to investigate allegations concerning the participation of its agents in the practice. In fact, the United States government has resisted all outside efforts aimed at revealing the role of U.S. agents in extraordinary renditions. As an example, on January 22, 2006, Italian Minister of Justice forwarded to the United States a request for information submitted by the chief prosecutor in Milan, Armando Spataro, investigating the role of 20 CIA agents in the abduction of Nasr Osama Mostafa Hassan (aka Abu Omar). To date, no response from the U.S. government has been received. Most recently, in a civil suit against the former CIA Director George Tenet, filed in U.S. court by a victim of extraordinary rendition Khaled El-Masri,⁵¹ the United States government has intervened and moved to dismiss the suit on the grounds that any litigation of Mr. El-Masri's claims will expose "secrets of state." Despite the numerous public statements by high-level officials describing the rendition program and the worldwide press coverage of Mr. El-Masri's case, the United States asserts that it can neither confirm nor deny Mr. El-Masri's allegations without harming national security.

11. Failure by the United States to create an adequate legal mechanism implementing fully CAT Article 3, coupled with the government's refusal to investigate alleged involvement of U.S. officials in extraordinary renditions as well as to cooperate with such inquiries conducted by other countries, raises serious questions about the commitment of the United States to CAT's prohibition against torture and cruel, inhuman and degrading treatment.

12. Additional concerns about the compliance of the United States with CAT Article 3 are being raised with regards to the "Comprehensive Immigration Reform Act of 2006," currently under consideration in the U.S. Senate. This bill, if passed by Congress and signed by President Bush into law, would, *inter alia*, effectively eliminate the ability of the Appellate Courts to stay removal of individuals while they are appealing denials of their claims, including claims based on CAT.⁵² This means that an individual who is appealing the denial of a claim for protection based on a fear of torture could be removed to the country in which she faces danger of being tortured *even if* the appeal is subsequently resolved in her favor. We urge the Committee to question the United States on how such a law would be in compliance with CAT Article 3.

III. THE RIGHT TO REDRESS FOR ACTS OF TORTURE – ARTICLE 14 (Issues 34-36 and 39-40)

⁵¹ Mr. El-Masri was a forcibly abducted while on holiday in Macedonia and detained incommunicado. He was subsequently handed over to United States agents, then beaten, drugged, and transported to a secret prison in Afghanistan, where he was subjected to inhumane conditions and coercive interrogation and was detained without charge or public disclosure for several months. Five months after his abduction, Mr. El-Masri was deposited at night, without explanation, on a hill in Albania. *Khaled El-Masri v. Tenet et al.*, complaint filed in the United States District Court for the Eastern District of Virginia, Dec. 6, 2005, available at http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf (accessed April 4, 2006).

⁵² Comprehensive Immigration Reform Act of 2006, S.2454, 109th Cong., 2d Sess., Sec. 227(c).

1. Article 14 of CAT requires each state party to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.” Most recently, however, U.S. Congress passed, and President Bush signed into law, the Detainee Treatment Act, which purports to limit the jurisdiction of U.S. courts over claims advanced by individuals detained by the United States in Guantánamo Bay, Cuba. The relevant provisions of the Act state as follows:

[N]o court, justice, or judge shall have jurisdiction to hear or consider--

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who--

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.⁵³

We urge the Committee to question the United States on whether, with respect to detainees at Guantanamo Bay, this provision removes jurisdiction of United States courts to hear claims for redress for torture, and if so, what other mechanisms in the United States’ legal system provide an enforceable right to fair and adequate compensation, as required by Article 14 of CAT.

⁵³ Detainee Treatment Act of 2005, *supra* note 24, § 1005(e)(1). Other provisions of the Act, not relevant here, permit Guantanamo detainees to challenge the proceedings of Combatant Status Review Tribunals, which determine whether or not the detainee is an “enemy combatant,” and to challenge certain proceedings of Military Commissions, by which detainees are charged with crimes.