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Counter-terrorism measures and the prohibition on torture and ill-treatment

A briefing paper on developments in Europe, Central Asia and North America

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International Helsinki Federation for Human Rights

The **International Helsinki Federation for Human Rights (IHF)** is an international, nongovernmental organization constituted by national Helsinki committees and Cooperating Organizations in the participating States of the Organization for Security and Cooperation in Europe (OSCE). The IHF seeks to promote compliance with the human rights provisions of the Helsinki Final Act and its Follow-up Documents, with international legal obligations undertaken in the Council of Europe and the United Nations, and with human rights norms promoted by the European Union. The IHF mandate is to protect and strengthen civil society groups that monitor and report on human rights issues from a non-partisan perspective, and to bring them together on a common international platform. The IHF represents its affiliates on the international political level and in the media, supports and assists their human rights monitoring and advocacy activities, and disseminates documentation based on their research.

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INTRODUCTION

The absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment is one of the most fundamental human rights principles and a core element of the international human rights protection system. In the decades after World War II, an ever stronger global consensus about the inviolability of this principle emerged, with even the most abusive states pledging commitment to eradicating torture and denying and concealing the occurrence of any such practices. However, in the post-September 11 period, this consensus has begun to erode and the prohibition on torture and ill-treatment has been openly challenged in ways previously unseen. With reference to national security interests, governments have questioned the absolute nature of the ban on torture, sought to redefine the limits of what constitutes proscribed treatment and justified the use of abusive practices prohibited by international law.

In a remarkable trend, both established democracies and less democratic states have attacked the prohibition on torture and ill-treatment in the name of enhancing national security, with the former setting example for the latter. While governments of longtime democracies have called for a rethinking of old rules in the face of the threat of terrorism, governments of more authoritarian countries have exploited the global "war on terrorism" to reinforce longstanding abusive policies.

These developments threaten to erode the integrity of the international human rights protection system. As international human rights bodies repeatedly have emphasized, there is no trade-off to be made between the prohibition on torture and cruel, inhuman or degrading treatment, on the one hand, and national security interests, on the other hand, since the prohibition is without exception in any circumstances.[1] Any admission of torture or other forms of ill-treatment amounts to a fundamental denial of human dignity – the recognition of which is the very foundation of the international protection of human rights. Moreover, any endorsement of abusive practices is, inevitably, the beginning of a slippery slope toward the uncontrollable and systematic use of torture and other inhumane methods. Thus, circumventing the prohibition on torture and ill-treatment in the fight against terrorism is not only illegal and immoral but also, ultimately, endangers the security of all.

In addition to human rights NGOs, a number of prominent representatives of international organizations have expressed alarm at attempts by states to call into question and circumvent the ban on torture and other ill-treatment in the context of the campaign against terrorism. For example, outgoing UN Secretary General Kofi Annan has stated: "Recent times have witnessed an especially disturbing trend of countries claiming exceptions to the prohibition on torture based on their own national security perceptions. Let us be clear: torture can never be an instrument to fight terror, for torture is an instrument of terror." This and a number of other relevant statements are compiled on page 7-8.

This briefing paper summarizes some major developments with respect to the trend of undermining the prohibition on torture and ill-treatment in the combat against terrorism in the OSCE region, which includes the countries of Europe, Central Asia and North America. Developments in four areas are covered: torture and ill-treatment in the interrogation and treatment of detainees; the use of evidence extracted under torture in terrorism-related

1 For a more detailed discussion, see the chapter on the ban on torture in international law.

proceedings; transfers and returns of terrorist suspects to countries where they are at risk of abuse; and "disappearances" and secret detention in the counter-terrorism campaign. The discussion in each chapter is in no way exhaustive but merely provides some examples of disturbing developments. The briefing paper also reviews relevant elements of the ban on torture and ill-treatment established by international law, and makes a number of general recommendations to the OSCE participating States on how to ensure respect for this ban in their continued counter-terrorism efforts.[2]

The briefing paper was prepared within the framework of the IHF Yearly Campaign 2006, which is devoted to counter-terrorism and human rights, with emphasis on measures undermining the absolute ban on torture. Other statements and report published as part of the yearly campaign are available under a special feature of the IHF website at http://www.ihf-hr.org/cms/cms.php?sec_id=49

2 For recommendations to specific governments, see IHF Interventions and Recommendations to the OSCE Human Dimension Implementation Meeting in Warsaw, 2-13 October 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4307

THE TREND OF UNDERMINING THE BAN ON TORTURE IN THE FIGHT AGAINST TERRORISM: QUOTES BY INTERNATIONAL OFFICIALS

"Recent times have witnessed an especially disturbing trend of countries claiming exceptions to the prohibition on torture based on their own national security perceptions. Let us be clear: torture can never be an instrument to fight terror, for torture is an instrument of terror. […] The international community must speak forcefully, and with one voice, against torture in all its forms."

***UN Secretary-General Kofi Annan**, Message on Human Rights Day, 10 December 2005*

"On the occasion of Human Rights Day, we express alarm at attempts by many States to circumvent provisions of international human rights law by giving new names to old practices. Whereas international instruments stress that human rights are at the foundation of any democratic society, more and more frequently they are portrayed as an obstacle to government efforts to guarantee security. This trend is illustrated by debates on the absolute prohibition of torture: a ban that recently had seemed an undisputed cornerstone of human rights law, anchored in numerous international legal instruments, but also accepted as a principle of jus cogens. […] As confirmed by article 2 of the Convention Against Torture and by articles 4 and 7 of the International Covenant on Civil and Political Rights, torture and any form of cruel, inhuman or degrading treatment or punishment are prohibited in all circumstances, including during a state of emergency."

*Statement issued by **33 independent UN human rights experts** on 9 December 2005*

"Particularly insidious are moves to water down or question the absolute ban on torture, as well as on cruel, inhuman or degrading treatment. Governments in a number of countries are claiming that established rules do not apply anymore: that we live in a changed world and that there is a 'new normal.' They argue that this justifies a lowering of the bar as to what constitutes permissible treatment of detainees. An illegal interrogation technique, however, remains illegal whatever new description a government may wish to give it. The intensity of international terrorism may be unprecedented, but its fundamental nature has not changed. Effective and intelligent law enforcement responses are called for. But no credible cause has been made for throwing away the progress achieved in extending the protection of the rule of law and human rights around the world. On the contrary, the fight against terrorism can only be won if human rights norms are fully respected. Torture is not simply immoral and illegal: it is ineffective. The emergence of a particularly vicious form of terrorist action has not changed that."

***UN High Commissioner for Human Rights Louise Arbour**, Statement 7 December 2005*

"I am deeply concerned about any attempts to circumvent the absolute nature of the prohibition of torture and other forms of ill-treatment in the name of countering terrorism. These attempts include, *inter alia*, narrow interpretations of the terms torture, cruel, inhuman or degrading treatment or punishment contrary to established case-law of competent international and regional human rights bodies; attempts at evading the application of

domestic or international human rights law by detaining and interrogating suspected terrorists abroad, by outsourcing interrogations with torture methods to private contractors or by returning suspected terrorists to countries which are well-known for their systematic torture practices; and attempts to admit confessions made under torture abroad as evidence in domestic judicial proceedings. From a legal point of view, the answer to these attempts is clear: Not only freedom from torture, but also the prohibition of other forms of cruel, inhuman or degrading treatment or punishment are absolute and non-derogable rights. […] [All] attempts at undermining the absolute and non-derogable nature of the prohibition of torture and other forms of ill-treatment are illegal under international law."

***UN Special Rapporteur on Torture Manfred Nowak**, Statement to the 61st Session of the UN Commission on Human Rights, 4 April 2005*

"It is, I think, quite easy to detect a wavering in our commitment to human rights in recent years in the face of new challenges and, on the part of many, a growing frustration at the restrictions that their respect is perceived to entail. This sentiment can perhaps best be summed up by the expression "the rules of the game are changing" and the feeling that in the face of new challenges old rules are no longer applicable – as though human rights were transient luxuries for when times are good; as though their respect and the effective administration of justice were not intimately linked, but somehow incompatible. […] This tendency can perhaps most clearly be seen in the response, in Europe and elsewhere, to the new threat of international terrorism. With a few exceptions, the real need to ensure a strong response has resulted in a calling into question of rights and liberties that would previously have been unthinkable. One need think only of the willingness of politicians and leaders to question the limits of torture and ill-treatment – precisely how much torture is acceptable? where can one do it? who can do it? and whose evidence obtained under what conditions can we use? These questions are all seriously being asked […and] the general tendency has been to place efficacy before rights. It is my firm conviction, however, based on the experience of my own country, that terrorism can only effectively be combated through the full respect for human rights."

***Former Council of Europe Commissioner for Human Rights Alvaro Gil-Robles**, Final Report, October 1999 - March 2006 (CommDH(2006)17)*

"Terrorism is an abhorrence. The murder of innocent persons in order to terrorize a whole society can never, ever be defended. However, to respond with illegal means is to capitulate to the evil forces. Experience has shown that torture and illegal detention are ineffective for the purpose of information gathering. But even if such methods would yield results in an individual case, they must still not be used – because they undermine the very values we want to defend in a society built on the respect for human rights."

***Council of Europe Commissioner for Human Rights Thomas Hammarberg**, Viewpoint, 26 June 2006*

THE BAN ON TORTURE AND ILL-TREATMENT IN INTERNATIONAL LAW

International law establishes an absolute prohibition against torture and other cruel, inhuman or degrading treatment or punishment. Thus, torture and ill-treatment are prohibited at all times and under all circumstances.

The ban on torture and ill-treatment is enshrined in the Universal Declaration of Human Rights (article 5)[3] as well as in numerous international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR)[4] (article 7), the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)[5] and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[6] (article 3). The OSCE participating States have also repeatedly affirmed their commitment to upholding the ban on torture and other ill-treatment.[7]

The ICCPR and the ECHR explicitly prohibit derogation from the provisions prohibiting torture, thereby affirming the absolute nature of the ban on torture. Similarly, the CAT provides that: "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" (article 2).

The prohibition of torture and ill-treatment is also a norm of customary international law, which means that it is binding on all states irrespective of what treaties they have ratified. In addition, the prohibition against torture is one of a few so-called jus cogens norms, which have the highest standing in international customary law and supersede all other norms.[8]

Given the absolute character of the ban on torture and other forms of ill-treatment, it is clear that it can never be "balanced" against national security interests, as some governments have argued. With reference to article 3 of the ECHR, the European Court of Human Rights has explicitly ruled out the possibility of such a balancing act by stating: "The Court is well aware of the difficulties faced by states in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[9]

The most authoritative and widely accepted definition of torture is the one included in the CAT. Article 1 of this treaty defines torture as any act committed, instigated, supported or tolerated by a person acting in an official capacity by which "severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as

3 Adopted by General Assembly Resolution 217 A of 10 December 1948. Available at http://www.unhchr.ch/udhr/index.htm

4 Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966. Available at http://www.ohchr.org/english/law/ccpr.htm

5 Adopted by General Assembly Resolution 39/46 of 10 December 1984. Available at http://www.ohchr.org/english/law/cat.htm

6 Adopted by the Council of Europe on 4 November 1950. Available

http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG

7 See OSCE Human Dimension Commitments: Thematic Compilation (2005), p. 98-101, at

http://www.osce.org/publications/odihr/2005/09/16237_440_en.pdf

8 See REDRESS, Bringing the International Prohibition of Torture Home, January 2006, p. 18, at

http://www.redress.org/publications/CAT%20Implementation%20paper%2013%20Feb%202006%203.pdf

9 European Court of Human Rights, Chahal v. the United Kingdom (2424/93), 15 November 1996, par. 79. The case law of the court is available at http://www.echr.coe.int/echr

obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind."

While there is no corresponding definition of cruel, inhuman or degrading treatment or punishment, such treatment is generally considered as mistreatment that is not as serious as torture, e.g. because the pain inflicted is less severe or the treatment is not intended to cause suffering.[10] The European Court of Human Rights has argued that while mistreatment must attain a minimum level of severity to fall within the scope of article 3 of the ECHR, the assessment of this minimum is relative and "depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the individual."[11] The UN Human Rights Committee (hereafter "Human Rights Committee") has stated that it does not consider it necessary to establish sharp distinctions between different kinds of treatment prohibited under article 7 of the ICCPR but that these distinctions will vary according to "the nature, purpose and severity of the treatment applied."[12]

The prohibition against torture and cruel, inhuman or degrading treatment and punishment establishes a number of obligations on states. In the following sections, those elements of the ban on torture and ill-treatment that are most relevant to the substantive discussion in this briefing paper are examined.

Obligation to prevent and remedy torture and other ill-treatment

States have an obligation to take effective legislative, administrative, judicial or other measures to prevent torture and other ill-treatment within their jurisdictions.[13] This obligation entails, inter alia, educating law enforcement officials about the ban on torture and ill-treatment and systematically reviewing interrogation rules and practices for the treatment of detainees to ensure that these do not facilitate abuse.[14] As pointed out by the UN Special Rapporteur on Torture (hereafter "Special Rapporteur on Torture"), regular inspections of places of detention by independent bodies are one of the most effective means of preventing torture.[15] In this respect, both the establishment of national monitoring bodies and cooperation with international monitoring mechanisms are essential.

While the International Committee of the Red Cross (ICRC) has monitored the treatment of detainees in conflict situations for more than 80 years, other international schemes for monitoring places of detention are a more recent development. The 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or

10 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975, art. 1.2. Available at http://www.ohchr.org/english/law/declarationcat.htm

11 European Court of Human Rights, Case of A v. the United Kingdom (100/1997/884/1096), 23 September 1998, par. 20.

12 Human Rights Committee, General Comment No. 20, 10 March 1992, par. 4, at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument

13 CAT, art. 2 and 16; Declaration on the Protection of All Persons from Being Subjected to Torture, art. 4.

14 CAT, art. 10, 11; Declaration on the Protection of All Persons from Being Subjected to Torture, art. 5, 6.

15 Report of the Special Rapporteur on the question of torture, Theo van Boven, submitted in accordance with Commission resolution 2002/38 (E/CN.4/2003/68), 17 December 2002, at http://daccessdds.un.org/doc/UNDOC/GEN/G02/160/49/PDF/G0216049.pdf?OpenElement

Punishment established the European Committee for the Prevention of Torture (CPT), an independent expert body that visits places of detention in Council of Europe member states on a regular basis and, if necessary, recommends improvements to states.[16] The Optional Protocol to the CAT (OPCAT), which entered into force in June 2006, provides for a new global system of periodic and complementary visits to places of detention by an international expert committee and national monitoring bodies. These bodies will also work together with national authorities to facilitate implementation of the recommendations they make.[17] Both CPT and the bodies created under the OPCAT enjoy unlimited access to places where people deprived of their liberty are held and have the right to conduct private interviews with detainees.

Moreover, states are obliged to ensure that complaints about torture and other ill-treatment are examined in a prompt, impartial and thorough manner and that an investigation is initiated whenever there are reasonable grounds to believe that such treatment has been committed, even if there has been no formal complaint.[18] If an investigation substantiate allegations of torture, the alleged perpetrator(s) must be criminally prosecuted and, if found guilty, given an appropriate penalty reflecting the gravity of the offence.[19] The jurisprudence of the UN Committee against Torture (hereafter "Committee against Torture") indicates that a significant prison sentence is generally an appropriate penalty for acts of torture.[20] When allegations of other forms of ill-treatment than torture are shown to be well-founded, the alleged offender(s) must be subject to either criminal or other appropriate proceedings.[21] The victims of prohibited mistreatment must be granted redress and fair and adequate compensation, including the means for as full rehabilitation as possible.[22]

Obligation not to use evidence extracted under torture

States have an obligation not to allow the use of information extracted under torture as evidence. According to article 15 of the CAT, states "shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." The Committee against Torture has emphasized that this article prohibits the use of evidence gained by torture wherever and by whomever obtained, meaning that it is also applies to situations in which the ill-treatment was perpetrated by officials of a foreign state in another country.[23] The Committee has also stressed that the article obliges states to

16 For more information, see the website of the CPT at http://www.cpt.coe.int/en/

17 See IHF and Rehabilitation and Research Centre for Torture Victims (RCT), "Joint Appeal: OSCE Participating States Should Demonstrate Commitment to Absolute Ban on Torture by Promptly Ratifying Optional Protocol to Torture Convention," 13 September 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=4300

18 CAT, art. 12, 13; Declaration on the Protection of All Persons from Being Subjected to Torture, art. 8, 9. See also REDRESS, Bringing the International Prohibition of Torture Home, p. 67-70, for discussion of obligation of states to investigate.

19 CAT, art. 7, 2; Declaration on the Protection of All Persons from Being Subjected to Torture, art. 10.

20 See discussion in REDRESS, Bringing the International Prohibition of Torture Home, p. 38.

21 Declaration on the Protection of All Persons from Being Subjected to Torture, art. 10.

22 CAT, art. 14; Declaration on the Protection of All Persons from Being Subjected to Torture, art. 11.

23 Conclusions and Recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland (CAT/C/CR/33/3), 25 November 2004, par. 4, at http://hei.unige.ch/~clapham/hrdoc/docs/CATUK2004.pdf

investigate the truth of allegations that statements invoked as evidence have been made under torture in any procedures for which they are competent, including extradition hearings.[24]

The Special Rapporteur on Torture has noted that the rationale behind article 15 of the CAT is twofold. First, confessions and other information extracted under torture is usually not a reliable source of evidence, and second, prohibiting the use of such evidence removes an important incentive for the use of torture.[25]

Obligation not to transfer persons to situations of abuse

A key element of the prohibition on torture and cruel, inhuman and degrading treatment is the obligation not to send anyone to a country where they would face a real risk torture or ill-treatment.

Article 3 of the CAT explicitly requires states not to "expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." While the ICCPR and the ECHR do not contain any corresponding provision, the Human Rights Committee and the European Court of Human Rights have interpreted the ban on sending persons to countries where they would be at risk of being subjected to torture or ill-treatment (non-refoulement) as being inherent in those articles of these treaties that prohibit torture and ill-treatment.[26]

Article 3 of the CAT provides that, when determining whether there are substantial grounds for believing that a person would be subjected to torture upon return, the authorities shall take into consideration all relevant considerations, including the possible existence in the receiving state of "a consistent pattern of gross, flagrant or mass violations of human rights." According to the Committee against Torture, other pertinent considerations are, for example, whether the person due to be returned has been tortured or maltreated in the receiving country in the past and whether he or she has engaged in political or other activities that would appear to make him or her particularly vulnerable to abuse.[27] The Committee has emphasized that while the risk of torture should be assessed "on grounds that go beyond mere theory or suspicion," the risk does not have to meet "the test of being highly probable."[28]

The ban on sending persons to countries where they would face a real risk of being subjected to prohibited mistreatment is equally absolute as the general ban on torture and ill-treatment.[29] The Human Rights Committee has emphasized that "[no] person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she

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24 Committee against Torture, P.E. v. France (CAT/C/29/D/193/2001), 19 December 2002, par. 6.3, at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4eb1a9508bff5a31c1256cd70031b4e4?Opendocument

25 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/61/259), 14 August 2006, par. 45, at http://daccessdds.un.org/doc/UNDOC/GEN/N06/468/15/PDF/N0646815.pdf?OpenElement

26 Human Rights Committee, General Comment No. 20, par. 9; European Court of Human Rights, Soering v. United Kingdom (14038/88), 7 July 1989.

27 Committee against Torture, General Comment No. 1 (A/53/44), 21 November 1997, par. 8, at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13719f169a8a4ff78025672b0050eba1?Opendocument

28 Ibid., par. 6.

29 The ban is therefore wider than the ban on refoulement established by the 1951 UN Refugee Convention, which allows for certain limitations in highly exceptional cases. Compare European Court of Human Rights, Chahal v. the United Kingdom, par. 79.

runs a risk of being subjected to torture or cruel, inhuman or degrading treatment."[30] In a similar vein, the European Court of Human Rights and the Committee against Torture have affirmed that the ban on torture or ill-treatment is absolute also in return cases by stressing that, whenever it has been shown that a person would be in danger of being subjected to proscribed treatment upon return, "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."[31]

Obtaining so-called diplomatic assurances from the receiving government does not absolve states from the obligation not to send anyone to a country where there are substantial grounds for believing that he or she may be subjected to torture or other ill-treatment. As noted by the Special Rapporteur on Torture, such assurances "are ineffective and unreliable in ensuring the protection of returned persons" and therefore "shall not be resorted to by States."[32] According to the Rapporteur, "[t]he fact that [diplomatic] assurances are sought shows in itself that the sending government perceives a serious risk of the deportee being subjected to torture or ill treatment upon arrival in the receiving country. Diplomatic assurances are not an appropriate tool to eradicate this risk."[33]

The Committee against Torture has, further, pointed out that the term "another State" used in article 3 of the CAT refers both to a state to which a person is returned in the first place as well as to any state where he or she may subsequently be sent.[34] The European Commission for Democracy through Law (known as the Venice Commission), an independent Council of Europe advisory body on legal matters, has concluded that the obligation of the member states of the Council of Europe not to send anyone to a country where there are substantial grounds for believing that he or she may be subjected to torture or ill-treatment also entails an obligation for these states not to allow for the transit of prisoners through their territories in cases where there is a real risk that those transferred may face proscribed treatment in the country of destination.[35]

Obligation not to "disappear" or hold anyone in secret detention

The ban on torture entails a ban on holding detainees in secret detention facilities outside the protection of the law, a practice that has been termed enforced disappearance. The ban on this practice is also absolute.[36]

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30 Concluding observations of the Human Rights Committee: Canada (CCPR/C/CAN/CO/5), 20 April 2006, at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7616e3478238be01c12570ae00397f5d?Opendocument

31 European Court of Human Rights, Chahal v. the United Kingdom, par. 80; Committee against Torture, Paez v. Sweden (CAT/C/18/D/39/1996), 28 April 1997, par. 14.5, at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ac83790666e4b33d802566f80062a76f?Opendocument

32 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/61/259), par. 2.

33 UN Press Release, "'Diplomatic Assurances' Not an Adequate Safeguard for Deportees, UN Special Rapporteur against Torture Warns," 23 August 2005, at http://www.unhchr.ch/huricane/huricane.nsf/view01/9A54333D23E8CB81C1257065007323C7?opendocument

34 Committee Against Torture, General Comment No. 1, par. 2.

35 Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, March 2006, par. 143, at http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp

36 Declaration on the Protection of All Persons from Enforced Disappearances adopted by General Assembly Resolution 47/133 of 18 December 1992, art. 7. Available at http://www.ohchr.org/english/law/disappearance.htm. See also discussion in Association for the Prevention of Torture (APT), Incommunicado, Unacknowledged, and Secret Detention under International Law, 2 March 2006, page 12, at http://www.apt.ch/secret_detention/Secret_Detention_APT.pdf

Enforced disappearances occur when ”persons are arrested, detained or abducted against their will or otherwise deprived of their liberty” followed by “a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.” Such acts can either be perpetrated by government officials or private individuals or groups acting on behalf of or with the support, consent or acquiescence of government.[37] As a result of enforced disappearances, detainees are placed in a situation of complete defenselessness where they are subject to the whim of their captors and especially vulnerability to abuse.[38] The UN Working Group on Enforced or Involuntary Disappearances has stated that disappearances are “often a precursor to torture and even to extrajudicial execution.”[39]

The UN Declaration on the Protection of All Persons from Enforced Disappearances requires states to hold persons deprived of liberty only in officially recognized places of detention and to ensure that they are brought before a judge promptly after detention. It, further, requires states to maintain official registers of detention and to make available accurate information on the detention of persons deprived of their liberty and their places of detention to family members, counsels and others with a legitimate interest in this information.[40] The Human Rights Committee has indicated that article 7 of the ICCPR also obliges states not to hold detainees in unrecognized places of detention or withhold the names and location of detainees.[41] Article 17 of the draft UN Convention for the Protection of All Persons from Enforced Disappearances explicitly state that “no one shall be held in secret detention.”[42]

The UN General Assembly has declared that “detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment.”[43] The Committee against Torture has held that detaining persons in secret detention facilities constitutes per se a violation of the Convention against Torture.[44]

According to the UN Declaration on the Protection of All Persons from Enforced Disappearances, states shall not transfer anyone to state where there are substantial grounds for believing that he or she would be in danger of enforced disappearance.[45] The international obligations of states with respect to torture and enforced disappearances are also engaged in the event that they participate in, consent to or fail to prevent the establishment or the operation of secret detention facilities on their territories or the abduction from or the transfer

37 Declaration on the Protection of All Persons from Enforced Disappearances, preamble.

38 Compare Human Rights Watch, “Questions and Answers: US Detainees Disappeared into Secret Prisons: Illegal under Domestic and International Law,” 9 December 2005, at http://hrw.org/backgrounder/usa/us1205/index.htm

39 Working Group on Enforced or Involuntary Disappearances, Report to the Commission on Human Rights (E/CN.4/2006/7), 12 December 2005, at http://daccessdds.un.org/doc/UNDOC/GEN/G05/166/48/PDF/G0516648.pdf?OpenElement

40 Article 10.

41 Human Rights Committee, General Comment No. 20, par. 11.

42 The draft convention was adopted by consensus by the Human Rights Council in June 2006 but has yet to be approved by the General Assembly.

43 Resolution adopted by the General Assembly: Torture and Other cruel, Inhuman or Degrading Treatment or Punishment (A/RES/60/148), 21 February 2006, at http://daccessdds.un.org/doc/UNDOC/GEN/N05/496/48/PDF/N0549648.pdf?OpenElement

44 Conclusions and Recommendations of the Committee against Torture: United States of America, 18 May 2006 (CAT/C/USA/CO/2), par. 17.

45 Article 8.

through their countries of individuals destined for such facilities.[46] The Venice Commission has stressed that the obligation of states to secure to everyone within their jurisdiction internationally agreed fundamental rights may also be violated by "acquiescence or connivance in the conduct of foreign agents" and has maintained that states have a "duty to investigate into substantial claims of breaches of fundamental rights by foreign agents, particularly in case of allegations of torture or unacknowledged detention."[47]

46 See APT, Incommunicado, Unacknowledged, and Secret Detention under International Law, page 18.

47 Venice Commission, Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, par. 155.

TORTURE AND ILL-TREATMENT IN THE INTERROGATION AND TREATMENT OF TERRORIST SUSPECTS

The United States

During the post-September 11 period, the United States has sought to circumvent its international obligations with respect to torture and ill-treatment in the interrogation and treatment of terrorist suspects, thereby establishing a problematic precedent for other, less democratic states.

A series of now notorious memos drafted by the US government in 2001-2002 defined torture in an excessively narrow fashion – as the pain associated with organ failure, impairment of bodily function or death – and authorized a number of abusive interrogation techniques.[48] Some problematic practices have subsequently been repudiated, but there are concerns that others may remain in use in counter-terrorism contexts. A set of revised army interrogation rules adopted in September 2006 explicitly prohibited a number of previously approved interrogation techniques, including forced nudity or sexual acts and simulated drowning known as "waterboarding." These rules do, however, not apply to intelligence services and President Bush has openly defended the continued use of "alternative procedures" by the CIA in the interrogation of terrorist suspects.[49] Recently adopted legislation grants the president discretion to sanction abusive interrogation methods that are considered not to amount to torture.[50]

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48 See Karen J. Greenberg, The Nation, "Secrets and Lies," 26 December 2005, http://www.thenation.com. See also IHF Open Letter to US Attorney General, John Ashcroft Concerning Torture, 16 June 2004, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=3882. In this letter the IHF expressed concern that the effect of the US approach on torture issues, as demonstrated by the controversial memos, "will reverberate far beyond the rights of those detained by US military and intelligence agencies. Indeed, it will very likely usher in a wave of torture by state authorities who will no longer be deterred by US human rights policy."

49 Brian Knowlton, International Herald Tribune, "Bush acknowledges CIA prisons exist," 7 September 2006, at http://www.iht.com/articles/2006/09/06/news/prexy.php; John Hendren, National Public Radio, "Manual Defines Limits of Prisoner Interrogation," 6 September 2006, http://www.npr.org/templates/story/story.php?storyId=5776992; Human Rights Watch, "U.S.: Bush Justifies CIA Detainee Abuse," 8 September 2006, http://www.hrw.org/english/docs/2006/09/06/usdom14139.htm; American Civil Liberties Union (ACLU), "Bush Guts Geneva Conventions Enforcement and Undermines Due Process," 6 September 2006, http://www.aclu.org/safefree/detention/26666prs20060906.html

50 In late 2005, the US Congress passed legislation that explicitly prohibited the use of ill-treatment by US officials anywhere in the world (the so-called Mc Cain amendment included in the Detainee Treatment Act). When signing this legislation, the president attached a statement indicating that he intended to reserve the right to waive the provision if he considers it necessary to prevent further terrorist attacks. Moreover, after the US Supreme Court ruled in June 2006 that everyone captured in the "war on terror" has the right to enjoy humane treatment as protected by common article 3 of the Geneva Conventions, the government proposed restricting the scope of a 1996 US law - the War Crimes Act - that criminalizes violations of this article. An agreement reached between the Bush administration and Republican lawmakers on 21 September 2006 introduced into the War Crimes Act a list of "serious" acts of cruelty not rising to the level of torture that constitute crimes under the law, while granting the president the authority to interpret the "meaning and application" of the common article 3 of the Geneva Conventions with respect to abuses that are considered to be of lesser gravity. This law was signed by President Bush in October 2006. See Charlie Savage, Boston Globe, "Bush could bypass new torture ban," 4 January 2006, http://www.boston.com/; R. Jeffrey Smith, Washington Post, "War Crimes Act Changes Would Reduce Threat of Prosecution," 9 August 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08 /AR2006080801276.html; John Sifton, Slate, "Criminal, Immunize Thyself," 11 August 2006, http://www.slate.com/id/2147585/; Washington Post, "White House, Senators Near Pact on Interrogation Rules," 22 September 2006, http://www.washingtonpost.com/wp-dyn/content/article/ 2006/09/21/ AR2006092100298.html?nav=rss_politics; International Herald Tribune, "Senators Reach Deal with Bush on Suspects," 22 September 2006,

According to the US government, cases of torture and ill-treatment against detainees apprehended in the counter-terrorism campaign have been few and exceptional and have not been the result of deliberate policy. However, credible and well-reputed international NGOs have reported widespread and systematic abuse against detainees held in US custody in Iraq, Afghanistan and at Guantánamo Bay and shown that officially approved procedures and polices have contributed to facilitating such abuse.[51] In addition, there are concerns that numerous terrorist suspects have been detained in secret detention facilities operated by the US for the specific purpose of being interrogated through abusive methods.[52]

Aggravating the situation, many cases of abuse have not been effectively investigated, virtually only lower-ranking officials have been prosecuted and those found guilty have typically been given lenient sentences, such as administrative penalties.[53] Both the Human Rights Committee and the Committee against Torture have criticized the apparent shortcomings in the measures taken by the US to investigate and punish acts of torture and ill-treatment.[54]

The Russian Federation

Shortly after September 11, President Putin linked the Russian campaign in Chechnya to the international ”war on terrorism” and portrayed Russia as a vanguard in the fight against religious extremism. Five years later, this so-called anti-terrorism operation still continues, characterized by gross human rights violations.

Although the Russian government claims that the situation in Chechnya is normalizing, and that the reintegration of the republic into the Russian Federation has been largely completed, the conflict remains unsolved and insecurity and impunity continue to reign in the republic. In their efforts to hunt down rebel fighters, federal and local law-enforcement authorities engage in torture, ill-treatment and related abuses with little or no accountability. Most violations are currently perpetrated by local pro-Russian forces, particularly forces under the direct control of Prime Minister Ramzan Kadyrov.[55]

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http://www.iht.com/articles/2006/09/22/news/detain.php. For an IHF comment on the McCain amendment, see IHF, Open letter to US President George W. Bush on the Ban on Torture, 15 December 2005, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=4167

51 See, for example, Amnesty International, USA - Supplementary Briefing to the UN Committee against Torture, May 2006, http://web.amnesty.org/library/Index/ENGAMR510612006?open&of=ENG-USA; Human Rights Watch, “No Blood, No Foul” - Soldiers’ Accounts of Detainee Abuse in Iraq, July 2006, http://www.hrw.org/reports/2006/us0706/.

52 For more information, see the chapter on “disappearances” and secret detention. See also Human Rights First, “Human Rights Issues Relating to the Nomination of General Michael V. Hayden to Be CIA Director,” at http://www.humanrightsfirst.org/us_law/etn/misc/backgrounder-hayden.html

53 New York University’s Center for Human Rights and Global Justice, Human Rights Watch and Human Rights First, By the Numbers - Findings of the Detainee Abuse and Accountability Project, April 2006, http://hrw.org/reports/2006/ct0406/.

54 Committee against Torture, United States: Conclusions and Recommendations (CAT/C/USA/CO/2), 18 May 2006, par. 25-26; UN Human Rights Committee, United States of America: Concluding Observations (CCPR/C/USA/Q/3/CRP4), July 2006, par. 14.

55 For more information, and references to further sources of information, see the chapter on the Russian Federation in IHF, Human Rights in the OSCE Region: Europe, Central Asia and North America. Report 2006 (Events of 2005), at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=71&d_id=4255; and IHF intervention to the 2006 OSCE Human Dimension Implementation Meeting on violations of international humanitarian law in the North Caucasus, Russian Federation, October 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4307. For a recent overview of torture problems in Chechnya, see also Human Rights Watch, Widespread Torture in the Chechen Republic - Briefing Paper for the 37th Session UN Committee against Torture, 13 November 2006, at http://hrw.org/backgrounder/eca/chechnya1106/

In a growing trend, suspected rebel fighters and supporters, as well as their relatives, are kidnapped and subjected to torture and ill-treatment in an attempt to force them to provide information. Some of those abducted are subsequently officially arrested or released e.g. for ransom, but others remain "disappeared."[56] It is believed that many of those "disappeared" are held in unofficial places of detention, without any safeguards against abuse.[57] The "disappeared" persons are also at serious risk of being extra-judicially executed. In 2005 the Russian human rights group Memorial registered a total of 316 cases of abductions and, at the end of the year, 127 of those targeted remained missing while 23 had been found dead.[58] Since the second conflict in Chechnya began in 1999, an estimated total of up to 5,000 people have "disappeared."[59]

Problems of torture and related human rights violations committed in the name of enhancing security have increasingly spread from Chechnya to other parts of the North Caucasus, in particular to the republics of Ingushetia, North Ossetia and Kabardino-Balkaria.[60]

Throughout the region, investigations into allegations of torture and other abuse are typically ineffective, and only few cases are ever brought to court.[61] Moreover, in most cases in which officials have been punished for abuse, the sanctions have been disciplinary or administrative in nature.[62] Further compounding the problem of impunity, many victims of abuse are reluctant to report their experiences to police because they fear that their complaints will not be effectively dealt with and that they will be subject to reprisals.[63] Because of the limited opportunities of obtaining redress for abuses within the Russian criminal justice system, an increasing number of victims of abuse in Chechnya and neighboring regions have brought their cases to the European Court of Human Rights.[64]

Central Asia

Crackdowns on opposition elements have been commonplace in Central Asia throughout the post-Soviet period. However, following September 11, the governments of the region have sought to justify such repressive policies, involving arbitrary detention, unfair trials, torture and other serious human rights violations, by referring to the need to undermine "extremist" forces seeking to destabilize their countries.[65]

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56 Ibid.

57 For more information, see chapter on "disappearances" and secret detention.

58 Memorial, Demos Center, IHF, FIDH and Norwegian Helsinki Committee, In a Climate of Fear, January 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=4205

59 Ibid.

60 See IHF, Ingushetia / North Ossetia / Kabardino Balkaria: The Spread of Chechnya-type Human Rights Violations, June 2005, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=54&d_id=4085

61 Human Rights Center "Memorial", Demos Cente, IHF, FIDH and Norwegian Helsinki Committee, In a Climate of Fear, January 2006.

62 Ibid.

63 Ibid.

64 For more information, and references to further sources of information, see the chapter on the Russian Federation in IHF, Human Rights in the OSCE Region: Europe, Central Asia and North America. Report 2006 (Events of 2005), at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=71&d_id=4255; and IHF intervention to the 2006 OSCE Human Dimension Implementation Meeting on violations of international humanitarian law in the North Caucasus, Russian Federation, October 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4307

65 For more background information, see the chapter on human rights abuses in Chechnya and Central Asia in IHF, Anti-terrorism Measures, Security and Human Rights, April 2003, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=72&d_id=4082

During the past decade, the Uzbek government has waged a persistent campaign of harassment against independent Muslims, who practice their beliefs outside of state-controlled institutions. In this campaign, which has been described as forming part of the ongoing "war on terrorism," the Uzbek authorities have imprisoned thousands of Muslims without making any distinction between those who advocate violent methods and those who peacefully express their convictions. In particular, members and supporters of Hizb-ut-Tahrir, a movement seeking to establish an Islamic state in Central Asia, have been targeted. Those accused of extremist activities have been routinely subjected to torture, and confessions extracted under torture have frequently served as the sole basis for convictions in trials conducted in gross violation of international standards.[66]

New arrests and abuses of religious opponents followed the May 2005 events in the city of Andijan, when hundreds of civilians died as a result of the indiscriminate and disproportionate use of force by police and security forces. The government argued that the shootings formed part of a legitimate law enforcement operation to capture a group of armed men who had initiated a prison break-out and committed other crimes and insisted that the responsibility for the disturbances rested with religious movements advocating extremist views.[67] In this way, the government sought to justify its longstanding campaign against independent Muslims.[68] In a series of trials related to the Andijan events, which began in late 2005, more than 200 defendants have been sentenced to lengthy prison terms in seriously flawed processes mostly conducted behind closed doors. There are concerns that many of those tried and convicted in such trials may have been subjected to torture and ill-treatment.[69]

Other governments of Central Asia have also attacked opponents in the name of enhancing national security. In Kazakhstan, Kyrgyzstan and Tajikistan, a considerable number of people accused of affiliation with Hizb-ut-Tahrir or other groups considered extremist have been arrested, tortured and convicted in unfair trials during the post-September 11 period. As in Uzbekistan, many religious activists have been targeted merely for exercising their beliefs in peaceful ways.[70] These and other governments of the former Soviet Union have also cooperated with the Uzbek government in its post-Andijan crackdown on alleged religious extremists by returning people seeking refuge in their countries to Uzbekistan.[71] In Turkmenistan, many of those imprisoned on charges related to the alleged assassination attempt against President Niyazov in late 2002 were reportedly subjected to torture and ill-treatment in pre-trial detention.[72] They are currently held incommunicado, and their fate

66 For more information, see the chapter on human rights abuses in Chechnya and Central Asia in IHF, Anti-terrorism Measures, Security and Human Rights, April 2003 and the chapters on Uzbekistan in the IHF annual reports published in 1998-2006, at http://www.ihf-hr.org/documents/index.php?s_doctype=4&sec_id=71

67 For more information, see the chapter on Uzbekistan in IHF, Human Rights in the OSCE Region – Report 2006 (Events of 2005).

68 Human Rights Watch, The Andijan Massacre: One Year Later, Still No Justice, May 2006, at http://hrw.org/english/docs/2006/05/11/uzbeki13336.htm

69 Ibid.

70 For more information, see the chapter on human rights abuses in Chechnya and Central Asia in IHF, Anti-terrorism Measures, Security and Human Rights, April 2003 and the chapters on Kazakhstan, Kyrgyzstan and Tajikistan included in the IHF annual reports from different years, at http://www.ihf-hr.org/documents/index.php?s_doctype=4&sec_id=71

71 For more information, see the chapter on transfers and returns of terrorist suspects.

72 See IHF, Human Rights in the OSCE Region: Report 2004 (Events of 2003), at http://www.ihf-hr.org/documents/index.php?s_doctype=4&sec_id=71

remains unknown. However, there are reports indicating that some of them have died and that others are seriously ill because of harsh treatment.[73]

73 Amnesty International, Concerns in Europe and Central Asia January-June 2005, at http://www.amnesty.org; "Overview of human rights issues in Turkmenistan" in Human Rights Watch World Report 2006.

THE USE OF EVIDENCE EXTRACTED UNDER TORTURE IN TERRORISM-RELATED PROCEEDINGS

Germany

In a 2005 trial related to the September 11 events, the Higher Regional Court of Hamburg admitted evidence possibly obtained through torture. The information consisted of summaries of statements made by three terrorist suspects held by the United States at undisclosed locations.[74] The US refused to allow for questioning of the suspects and also rejected a request to provide details about the circumstances in which they had been interrogated. The German authorities declined to make available information given to them by the US on grounds that this would lead to "the disruption of diplomatic and secret service relations." Despite numerous and credible reports by NGOs and media about torture and ill-treatment against terrorist suspects held in US custody, the court concluded that available information did not provide proof that the statements made by the three terrorist suspects had been extracted under duress and therefore accepted them as evidence. Among others, Amnesty International seriously criticized this decision, saying that it was in flagrant violation of Germany's obligations under international law to investigate complaints of torture and ill-treatment and to exclude such statements in court.[75]

According to the Special Rapporteur on Torture, it would have been incumbent on the court to declare the statements inadmissible, even if it could not be established that they had been extracted under torture. He pointed out that information available to the court clearly indicated that the men in question were victims of enforced disappearances and had been held in incommunicado detention for a prolonged period of time, a form of detention which does not only facilitate torture but can also in itself be considered to amount to torture or, at least, cruel, inhuman or degrading treatment.[76]

The United Kingdom

Establishing an important precedent, the judicial committee of the House of Lords (known as the "Law Lords") ruled in December 2005 that evidence extracted under torture must never be used in UK courts. The case dated back to 2002, when a number of foreign nationals certified as "suspected international terrorists" and subjected to indefinite detention without charge under the Anti-terrorism, Crime and Security Act 2001 (ATSCA) appealed against their detention to the Special Immigration Appeals Commission (SIAC). The men argued, among other things, that the decision to detain them was based on statements obtained through torture of detainees held by the United States. After considering the case, the SIAC confirmed the legality of the men's detention, concluding that the government was entitled to invoke evidence extracted under tortured inflicted by foreign officials provided that UK

74 Amnesty International, "Germany: Hamburg court violates international law by admitting evidence potentially obtained through torture," 18 August 2005, http://web.amnesty.org/library/print/ENGEUR230012005; Frankfurter Allgemeine Zeitung, "Nehm kritisiert Strafjustiz," 21 May 2005 and "Warten bis Blut fließt?" 27 May 2005.

75 Amnesty International, "Germany: Hamburg court violates international law by admitting evidence potentially obtained through torture," 18 August 2005.

76 Report by UN Special Rapporteur on Torture to General Assembly, "Torture and other cruel, inhuman or degrading treatment or punishment (A/61/259)," 14 August 2006, at http://daccess-ods.un.org/TMP/5042664.html. See also the chapter on "disappearances" and secret detention.

officials have "neither procured nor connived" at the torture. The SIAC decision was subsequently upheld by the Court of Appeal in August 2004 before the Law Lords unanimously overturned it, holding that torture evidence is always inadmissible before UK tribunals, even in terrorism cases.[77]

Human rights groups hailed the Law Lords ruling as landmark decision. So did the Special Rapporteur on Torture, who, however, also expressed certain concern regarding the test established by the Law Lords for determining whether evidence should be excluded on the grounds that it has been extracted under torture. The majority of the Law Lords agreed that evidence should not be admitted if it is established, by means of "diligent inquiries" and "on a balance of probabilities," that it was obtained by torture. A minority were of the opinion that evidence should not be admitted if it is deemed that there is a "real risk" that it has been obtained by torture. According to the Special Rapporteur, the procedure preferred by the former will place a burden of proof on appellants that "may well be impossible to meet" and he therefore found that the test suggested by the minority would be "most in line with the letter and spirit" of article 15 of the CAT, which provides that statements made under torture shall not be invoked as evidence except against a person accused of torture.[78]

The United States

The Military Commissions Act 2006, which was signed into law by President Bush in October 2006, enables the US government to try before military tribunals non-US citizens who have engaged in hostilities against the US or its allies or who have "purposefully and materially" supported such hostilities.[79] The new system of military commissions created by this law represents certain improvements over commissions introduced by the Bush administration shortly after the September 11 events, which were declared unlawful by the US Supreme Court in June 2006.[80] However, a number of problematic rules were retained. Among these are provisions concerning evidence. Although the new military commissions cannot use evidence obtained under torture, they are allowed to admit statements extracted through other forms of abuse if they consider these statements to be "reliable" and in "the interests of justice." In order to be admissible, evidence obtained under coercion should also have been made prior to the adoption in December 2005 of the so-called Detainee Treatment Act, which explicitly prohibited the use of ill-treatment by US officials anywhere in the

77 See Amnesty International, "Law Lords confirm that torture 'evidence' is unacceptable," 8 December 2005, at http://news.amnesty.org/index/ENGEUR450572005; Human Rights Watch, "Highest Court Rules Out Use of Torture Evidence," 8 December 2005, at http://hrw.org/english/docs/2005/12/08/uk12171.htm; Liberty, "House of Lords rule that torture evidence is not admissible in UK courts," 8 December 2005, at http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2005/lords-rule-torture-inadmissible.shtml; Report by UN Special Rapporteur on Torture to General Assembly, "Torture and other cruel, inhuman or degrading treatment or punishment (A/61/259)," 14 August 2006.

78 Report by UN Special Rapporteur on Torture to General Assembly, "Torture and other cruel, inhuman or degrading treatment or punishment (A/61/259)," 14 August 2006.

79 Human Rights Watch, "Q and A: Military Commissions Act of 2006," October 2006, at http://hrw.org/backgrounder/usa/qna1006/usqna1006web.pdf

80 See Charles Lane, "High Court Rejects Detainee Tribunals," Washington Post, 30 June 2006, at http://www.washingtonpost.com/wp-dyn/content/article/2006/06/29/AR2006062900928.html. For an IHF comment on the military commissions introduced shortly after September 11, see IHF Open Letter to President Bush, 18 November 2001, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=1120

world.[81] The military commissions can try individuals for numerous terrorism-related crimes and can impose any period of imprisonment as well as the death penalty.[82]

The Russian Federation

In the so-called counter-terrorism campaign in the Russian North Caucasus region, torture and ill-treatment are increasingly used to obtain "confessions" from people suspected of involvement in rebel activities for the purpose of pursuing fabricated criminal cases. In a typical pattern, purported rebel fighters are abducted and detained in unacknowledged facilities, where they are subjected to abuse until they agree to sign self-incriminating statements. They are thereafter officially arrested and criminally charged, without being granted access to independent lawyers or doctors who could document evidence of torture. In many cases, courts also ignore allegations of torture and ill-treatment and hand down confessions on the basis of convictions that defendants claim to have made under coercion.[83]

The following case is one of the few cases where a case against a rebel fighter forced to confess under torture eventually was dismissed by court:

- In May 2003, 20-year-old Mikhail Vladovsky was abducted from his home in Grozny and detained in a Ministry of Interior facility. His detention was unacknowledged for five days and he was held without charge for several weeks. During his detention, he was reportedly severely tortured in an attempt to force him to confess to accusations of involvement in terrorist activities. According to his own account, he was, inter alia, beaten with a truncheon and had a gas mask placed over his head until he nearly suffocated. He eventually confessed to buying and selling weapons to rebels, and was criminally charged and, in February 2004, convicted to two years' imprisonment. In a subsequent development, another person arrested on accusations of participation in terrorist activities confessed to these accusations under torture and mentioned Vladovsky as his accomplice, although the two of them had never met. During the investigation into these allegations, Vladovsky was again subjected to torture, which was so brutal that he required hospital treatment. In an unexpected turn of events, in March 2005, the Supreme Court of the Chechen Republic concluded that new charges against Vladovsky were groundless and acquitted and released him. Following his release, Vladovsky fled to Austria, where he sought asylum and initiated measures to pursue a legal case against those guilty of torturing hum during his prolonged detention. In the meantime, the prosecutor's office appealed the decision of the Chechen Supreme Court to the Supreme Court of the Russian Federation, which

81 Human Rights Watch, "Q and A: Military Commissions Act of 2006," October 2006; Joanne Mariner, "The Military Commissions Act of 2006: A Short Primer," FindLaw, 9 October 2006, at http://writ.news.findlaw.com/mariner/20061009.html

82 Human Rights Watch, "Q and A: Military Commissions Act of 2006," October 2006

83 For more information, and references to further sources of information, see the chapter on the Russian Federation in IHF, Human Rights in the OSCE Region: Europe, Central Asia and North America. Report 2006 (Events of 2005), at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=71&d_id=4255; and IHF intervention to the 2006 OSCE Human Dimension Implementation Meeting on violations of international humanitarian law in the North Caucasus, Russian Federation, October 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4307 See also the chapter on torture and ill-treatment in the interrogation and treatment of terrorist suspects.

overturned the decision of the lower court, meaning that Vladovsky is again wanted in Russia.[84]

Central Asia

In the long-standing campaigns against independent Muslims waged by Central Asian governments, in particular that of Uzbekistan, torture and other forms of ill-treatment have been routinely used to extract "confessions." Such confessions have also frequently been accepted into evidence and used as the basis for conviction. Those convicted have been sentenced to lengthy prison sentences on grounds such as membership in an illegal movement, distribution of illegal religious literature or "subversive" activities.[85]

This is a recent example of a case in which statements extracted under torture was admitted as evidence in a trial against suspected religious extremists in Uzbekistan:

- In April 2006, a Tashkent court found eight men guilty of establishing an illegal religious group with the aim of overthrowing the government and establishing an Islamic state and sentenced two of them to two years in a labor colony and the rest to two-three years of corrective labor. The verdict was based almost exclusively on confessions allegedly obtained under torture. During the court proceedings, the defendants revoked their earlier confessions and described how they had been subjected to abuse and named those who they accused of perpetrating it. The judge, however, admitted the confessions and concluded that the men had alleged torture only to avoid responsibility for their crimes.[86]

84 Memorial, Demos Center, IHF, FIDH and Norwegian Helsinki Committee, In a Climate of Fear, January 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=4205

85 For more information, see the chapter on human rights abuses in Chechnya and Central Asia in IHF, Anti-terrorism Measures, Security and Human Rights, April 2003 and the chapters on Uzbekistan and other Central Asian countries in the IHF annual reports published in different years, at http://www.ihf-hr.org/documents/index.php?s_doctype=4&sec_id=71 See also the chapter on n torture and ill-treatment in the interrogation and treatment of terrorist suspects.

86 Human Rights Watch, "Uzbekistan: Eight Convicted Despite Torture Allegations," 22 April 2006, at http://hrw.org/english/docs/2006/04/21/uzbeki13240.htm

TRANSFERS AND RETURNS OF TERRORIST SUSPECTS TO COUNTRIES WHERE THEY ARE AT RISK OF ABUSE

In the aftermath of September 11, there have been a growing number of cases in which OSCE governments have violated their international obligations by sending individuals to countries where there are substantial grounds for believing that these individuals may be in danger of being subjected to torture or ill-treatment. This chapter reviews two developments of major concern; transfers of terrorist suspects implemented in the context of the US-led "war on terrorism" and returns of alleged religious extremists to Uzbekistan following the bloody events in the city of Andijan in May 2005. In addition, the chapter discusses the disturbing attempts of some governments to challenge jurisprudence of the European Court of Human Rights confirming absoluteness of the ban on sending individuals to countries where they are at risk of torture or ill-treatment.

Violations in the context of the US-led "war on terrorism"

In its post-September 11 campaign against terrorism, the US government has repeatedly transferred terrorist suspects to countries with well-established records of torture and ill-treatment for the purpose of detention and interrogation. These transfers have frequently been carried out through so-called extraordinary rendition, whereby suspects have been apprehended and handed over to other countries without any formal legal procedure.[87]

The US government has claimed that it does not send persons to countries where it is "more likely than not" that they will be subjected to torture and, when deemed appropriate, it seeks "assurances" from receiving countries that those transferred will not be tortured.[88] There is, however, ample evidence that such assurances do not provide effective protection against abuse, and in many cases, there are strong indications that US transfers of terrorist suspects have been carried out with the specific aim of facilitating abusive interrogation. As noted by the Human Rights Committee, there are "numerous well-publicized and documented allegations" that persons sent to third countries by the US government have received treatment "grossly violating" the ban on torture and ill-treatment.[89] Among cases that have been disclosed are the renditions of terrorist suspects to abuse in countries such as Egypt, Syria, Morocco, Saudi Arabia and Jordan.[90]

In other cases, terrorist suspects have "disappeared" into secret detention facilities operated by the US, where so-called enhanced techniques have been used to interrogate detainees.[91]

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87 See, for example, Amnesty International, Below the Radar – Secret Flights to Torture and 'Disappearance,' 5 April 2006, http://web.amnesty.org/library/index/ENGAMR510512006; Human Rights Watch, Still at Risk – Diplomatic Assurances No Safeguard against Torture, 12 May 2005, at http://www.hrw.org/reports/ 2005/eca0405/; and Human Rights Watch Report to the Canadian Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, 7 June 2005, at http://hrw.org/backgrounder/eca/canada/arar/

88 See second state report submitted by the United States to the UN Committee against Torture, 6 May 2006, http://www.ohchr.org/english/bodies/cat/cats36.htm.

89 UN Human Rights Committee, United States of America: Concluding Observations (CCPR/C/USA/Q/3/CRP4), July 2006, par. 16, at http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf

90 See, for example, Amnesty International, Below the Radar – Secret Flights to Torture and 'Disappearance,' 5 April 2006; and Human Rights Watch, Still at Risk – Diplomatic Assurances No Safeguard against Torture, 12 May 2005.

91 See the chapter on "disappearances" and secret detention.

A number of other OSCE governments have – directly or indirectly, actively or passively – cooperated with the US government in the transfer of terrorist suspects to countries with known records of torture or to clandestine detention facilities, thereby facilitating abuse. The role of European countries in US rendition policies have been investigated by the Council of Europe and the European Parliament, both of which have confirmed that several European governments have either closed their eyes to or, to varying degrees, participated in the illegal seizure, removal, abduction and detention of terrorists suspects within their territories.[92]

The cases below are two of the most publicized cases of individuals transferred to countries with serious records of torture in the US-led "war on terror."

The case of Ahmed Agiza and Muhammad El-Zary

A few months after September 11, two Egyptian asylum seekers – Ahmed Agiza and Muhammad El-Zary – were expelled from Sweden to Egypt because of alleged connections to terrorist groups. Their expulsion was carried out with active participation of US security agents, and an investigation by the Swedish parliamentary ombudsman has shown that the Swedish officials involved in the operation relinquished control to their US colleagues and allowed these to subject the two men to inhuman and degrading treatment.[93] Agiza and El-Zary have alleged that they have been ill-treated and tortured upon return to Egypt and they both remain at risk of abuse. El-Zary was released in 2003 but remains under surveillance, while Agiza is serving a 15-years prison sentence handed down in a trial conducted in gross violation of international standards.[94]

Both the Committee against Torture and the Human Rights Committee have examined this case. The Committee against Torture held in May 2005 decision that the Swedish government had violated the non-refoulement provision of the CAT (article 3) when forcibly returning Agiza to Egypt, despite the assurances for his and El-Zary's safety it claimed to have obtained from the Egyptian government. The committee noted that the Swedish authorities should have known that the use of torture is "consistent and widespread" in Egypt and that detainees held for political and security reasons are at particular risk of such treatment and concluded that the procurement of diplomatic assurances "did not suffice to protect against this manifest risk."[95] In October 2006, the Human Rights Committee likewise found that the expulsion of El-Zary against insufficient diplomatic assurances was in violation of the prohibition of torture and ill-treatment under the ICCPR (article 7). The committee also held the Swedish government responsible for the mistreatment that Alzery was subjected to during the enforcement of the expulsion order by arguing that although

92 See Dick Marty, Rapporteur for the Committee on Legal Affairs and Human Rights of the Council of Europe, Alleged secret detentions and inter-state transfers involving Council of Europe member states, June 2006, http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf; and interim report the Temporary European Parliament Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, http://www.europarl.europa.eu/comparl/ tempcom/tdip/default_en.htm.

93 For more information, see the chapter on Sweden in IHF, Human Rights in the OSCE Region: Report 2006 (Events of 2005), at http://www.ihf-hr.org/documents/index.php?s_doctype=4&sec_id=71

94 Information from Swedish Helsinki Committee (SHC) to the IHF.

95 UN Committee against Torture, Communication No. 233/2003: Sweden, 24 May 2005.

these acts were perpetrated by US officials, they were imputable to the Swedish government because they occurred within Swedish jurisdiction and in the presence of Swedish officials.[96]

As of this writing, the Swedish government had not taken any effective measures in response to the either decision of the Committee against Torture or the Human Rights Committee, thereby displaying a lack of commitment to its international obligations on torture and ill-treatment. The Swedish government had also not ruled out the possibility of using diplomatic assurances again in future.[97]

The case of Maher Arar

Maher Arar, a dual Canadian-Syrian citizen, was detained by US officials at John F. Kennedy International Airport in New York in September 2002 and deported to Syria because of alleged connections to terrorist groups.[98] The deportation was carried out despite the fact that Syria has a well-documented record of torture and Arar had expressed fears that he would be subjected to torture there.[99] According to the US government, it had received assurances from the Syrian government that Arar would be treated humanely. However, these assurances were evidently not effective: Arar has recounted that he was repeatedly tortured and ill-treated in Syria, where he was held for ten months before being released without charge.[100]

After his return to Canada in October 2004, Arar demanded a public inquiry into his case. The Canadian government eventually responded to this demand and, in early 2005, established a commission to investigate the actions of Canadian officials in the case.[101] This commission published its findings in September 2006, concluding that there is no evidence that Arar ever was linked to terrorist groups or constituted a threat to national security and criticizing the Canadian national police for giving misleading intelligence information about Arar to US authorities. According to the commission, while Canadian authorities did not participate or acquiesce in the detention and removal of Arar from the United States, the national police force provided inaccurate information about his person that most likely served as the basis for these operations.[102]

Following his release, Arar also brought a suit against the US government, alleging violations of the ban on torture as incorporated into US law. However, in February 2006, this suit was

96 Human Rights Committee, Communication No. 1416/2005, 25 October 2006. See also IHF, "United Nations Human Rights Committee Says that Expulsion of Terrorist Suspect from Sweden Violated Torture Ban on Numerous Counts," 8 November 2006; and SHC, Sweden criticized for not investigating events at Bromma Airport, 8 November, both at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4340

97 For more information, see the chapter on Sweden in IHF, Human Rights in the OSCE Region: Report 2006 (Events of 2005).

98 For a detailed chronology of the case, see http://www.amnesty.ca/library/canada/Arar_Chronology.pdf.

99 Arar told US officials that he feared that he would be subjected to torture inter alia because he did not carry out his military service before leaving Syria and a member of his family has been accused of membership in the illegal Muslim Brotherhood. Ibid.

100 Human Rights Watch, Still At Risk – Diplomatic Assurances No Safeguard Against Torture, p. 33, at http://hrw.org/reports/2005/eca0405/

101 "Ottawa promises inquiry will get to the bottom of Arar case," CBC News, 28 January 2006, at http://www.cbc.ca/news/story/2004/01/28/arar_inquiry040128.html

102 Press release of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 18 September 2006, at http://www.ararcommission.ca/eng/ReleaseFinal_Sept18.pdf

dismissed by a US federal judge, who cited the need for secrecy in cases involving national security issues, thereby following the reasoning of the US government.[103]

Post-Andijan developments

Following the May 2005 Andijan events,[104] hundreds of people fled from Uzbekistan to other countries in the region because of fear of persecution. The Uzbek authorities have subsequently sought the extradition of numerous of these refugees, accusing them of crimes related to the Andijan violence, such as membership in illegal religious groups and extremist activities. In a number of cases, Andijan refugees have also been forcibly sent back to Uzbekistan despite an apparent risk that they may be subjected to torture and ill-treatment upon return. These returns, which sometimes have been implemented outside of formal extradition procedures, have been in apparent violation of the non-refoulement principle.

The Uzbek government has a notorious record of abuse against alleged religious extremists and new violations have been reported in the aftermath of the Andijan violence, which the authorities blamed on extremist groups. Torture and ill-treatment have been widely used against those accused of involvement in the uprising.[105] Only limited information is available about the fate of those forcibly returned to Uzbekistan after the Andijan events, but there are serious concerns for their safety.[106]

Kyrgyzstan

On the basis of an extradition request from the Uzbek government, the Kyrgyz authorities returned in June 2005 four Uzbek asylum seekers who had fled their home country after the Andijan massacre. Three of them have reportedly been sentenced to lengthy prison sentences following their return to Uzbekistan.[107] In August 2006, the Kyrgyz authorities extradited another five Uzbeks who had been detained shortly after seeking protection in Kyrgyzstan following the Andijan events. Four of these men had already been recognized as refugees by the UN High Commissioner for Refugees, which also had identified permanent resettlement sites for them.[108] The Uzbek government reportedly offered the Kyrgyz government assurances that the men would not be subjected to torture upon return, but as repeatedly noted in this briefing paper, such assurances do not provide adequate protection against abuse.[109]

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103 Tim Harper, "US ruling dismisses Arar lawsuit," Toronto Star, 17 February 2006, at http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Render&c=Article&cid=1140130214126&call_pageid=968332188492

104 For more information about these events, see the chapter on torture and ill-treatment in the interrogation and treatment of terrorist suspects.

105 Ibid.

106 Human Rights Watch, The Andijan Massacre – One Year Later, Still No Justice, 11 May 2006, at http://www.hrw.org/backgrounder/eca/uzbekistan0506/

107 Human Rights Watch, " Kyrgyzstan: Uzbek Asylum Seekers Sent Back," 10 June 2005, at http://hrw.org/english/docs/2005/06/10/kyrgyz11113.htm; and Human Rights Watch, The Andijan Massacre – One Year Later, Still No Justice, 11 May 2006.

108 See IHF, Open Letter to the President of the Kyrgyz Republic, 11 August 2006, at , at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=4283

109 Human Rights Watch, "Do Not Trade Refugees for Empty Promises," 12 January 2006, at http://hrw.org/english/docs/2006/01/12/kyrgyz12404.htm. See also and IHF, "Kyrgyzstan: denying Asylum to Uzbek Refugees in Violation of International Human Rights Standards," 14 June 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4263

Several Uzbek asylum seekers have also disappeared in Kyrgyzstan, raising concern that they may have been forcibly returned to Uzbekistan.[110]

Kazakhstan

In late 2005, at least 15 Uzbeks suspected of religious extremism were forcibly returned from Kazakhstan to Uzbekistan. Several of these were reportedly wanted by the Uzbek authorities in connection with the Andijan uprising.[111]

The Russian Federation

In August 2006, Russian authorities decided to extradite to Uzbekistan 12 Uzbeks and one Kyrgyz charged with funding and organizing the uprising in Andijan. The men, who had been held in detention since June 2005, had been granted UN refugee status. The Uzbek government had reportedly provided written assurances that the men would not be tortured or sentenced to death upon return.[112] The extradition was, however, suspended after the European Court of Human Rights requested that it be halted while it considers the case.[113]

In another case, in October 2006, an Uzbek asylum seeker was forcibly returned from Russia to Uzbekistan although the European Court of Human Rights also had intervened in this case and asked the Russian authorities to suspend the return pending its examination of the case. The man was first arrested in February 2006 on the request of the Uzbek government, which accused him of membership in a banned religious group and involvement in the Andijan events. The extradition request was rejected by a Russian court in early October 2006, after which the man was released. However, only days later, he was rearrested on charges of violating Russian immigration legislation and ordered to be deported.[114]

Ukraine

Ten Uzbeks accused of involvement in the Andijan events were sent back from Ukraine to Uzbekistan in February 2006. The men, who had all registered as asylum seekers or were in the process of doing so, had been arrested on the basis of an extradition request from the

110 See IHF, "Kyrgyzstan: IHF Concerned about Safety of Missing Uzbek Asylum Seekers," 28 August 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=4288

111 Human Rights Watch, "EU: Kazakhstan, Kyrgyzstan Must Protect Uzbek Refugees," 17 July 2006, at http://hrw.org/english/docs/2006/07/17/eu13754.htm; Human Rights Watch, The Andijan Massacre – One Year Later, Still No Justice, 11 May 2006.

112 Gulnoza Saidazimova, "Uzbekistan: Russian Prosecutors Order Extradition of Andijon Refugees," 4 August 2006, at http://www.rferl.org/featuresarticle/2006/08/bb024f08-7b25-452a-8cd3-b752d49f0f80.html; "Groups Fight Uzbek Extradition," Inter Press Service News Agency, August 2006, at http://ipsnews.net/news.asp?idnews=34360

113 "Russia suspends extradition of 13 people to Uzbekistan," Ferghana.ru information agency, 15 August 2006, at http://enews.ferghana.ru/article.php?id=1553

114 See IHF and Moscow Helsinki Group, "Russian Federation: Uzbek Asylum Seeker Forcibly Returned to Uzbekistan despite Intervention by European Court of Human Rights," 25 October 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4332

Uzbek authorities.[115] They were charged with terrorism, membership in extremist organization and anti-constitutional activities upon return.[116]

Attempts to challenge the jurisprudence of the European Court of Human Rights

Following the 7 July 2005 bombings in London, the UK government announced its intentions to change its approach to the deportation of terrorist suspects to countries where they are at risk of torture. Prime Minister Blair stated that "the rules of the game are changing" and that his government believes that it can get "the necessary assurances" from the countries to which people will be deported that they will not be subjected to torture or ill-treatment.[117] The government subsequently invited countries with well-established records of torture to sign so-called memoranda of understanding, which formally guarantee that those deported to these countries will be treated humanely. Such agreements have already been entered into with Jordan, Lebanon and Libya, while negotiations reportedly are under way with Algeria, Morocco and Egypt.[118] Human rights NGOs and the Special Rapporteur against Torture have condemned this policy, pointing out that non-torture assurances given by countries where torture is systematically practiced are, in fact, meaningless.[119]

In accordance with its proclaimed new approach on deportation issues, the UK government has also, along with the governments of Lithuania, Portugal and Slovakia, intervened in a case currently pending before the European Court of Human Rights, urging the Court to reconsider its jurisprudence in *Chahal v. UK*.[120] In this case, the Court affirmed the absolute nature of the prohibition on torture and inhuman or degrading treatment by holding that individuals may not be deported to a country where they would face a real risk of such treatment even if they are considered to pose a threat to national security.[121] The UK government has argued that the risk of torture should be "balanced" against the alleged threat a person poses to national security when it is determined whether or not a deportation is to be implemented.[122]

The UK intervention has been seriously criticized by NGOs, and the UK joint parliamentary committee on human rights has expressed concern that the arguments advanced by the UK

115 UNHCR, "UNHCR extremely concerned over the fate of 11 Uzbek asylum seekers deported from Ukraine," 24 February 2006, at http://www.unhcr.org/news/NEWS/43feea312f.html; Amnesty International, "Ukraine: Ten asylum-seekers forcibly returned to Uzbekistan," 20 February 2006.

116 Human Rights Watch, The Andijan Massacre – One Year Later, Still No Justice, 11 May 2006, at http://news.amnesty.org/library/Index/ENGEUR500012006?open&of=ENG-2U4

117 The text of the prime minister's statement of 5 August 2005 is available at http://politics.guardian.co.uk/terrorism/story/0,15935,1543385,00.html.

118 House of Lords and House of Commons, Joint Committee on Human Rights – Nineteenth Report (Session 2005-06), par. 105, http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/18502.htm

119 See, for example, UN Press Release, "'Diplomatic Assurances' Not an Adequate Safeguard for Deportees, UN Special Rapporteur against Torture Warns," 23 August 2005; Amnesty International, "Jordan Assurances Not Worth the Paper They Are Written On," 20 July 2005; Human Rights Watch, "Torture Risk Makes Deportation Illegal," 16 August 2005; Cage Prisoners and Stop Political Terror, "Cage Prisoners and Stop Political Terror Angered over Deportation of Control Order Detainees," 11 August 2005.

120 Press release issued by the Registrar of the European Court of Human Rights, "Application lodged with the Court – Ramzy v. the Netherlands," 20 October 2005.

121 Chahal v. UK (22414/93), 15 November 1996.

122 See, Human Rights Watch, Dangerous Ambivalence: UK Policy on Torture Since 9/11, November 2006, p. 28-29, at http://www.hrw.org/backgrounder/eca/uk1106/

government ”may send a signal that the absolute prohibition on torture may in some circumstances be overruled by national security considerations.”[123] As of this writing, no date for a hearing of the *Ramzy v. the Netherlands* case had been set.

123 House of Lords and House of Commons, Joint Committee on Human Rights – Nineteenth Report (Session 2005-06), par. 26.

”DISPPEARANCES” AND SECRET DETENTION IN THE COUNTER-TERRORISM CAMPAIGN

The United States

In an article published in November 2005, the *Washington Post* reported that the United States was holding terrorist suspects in numerous secret detention facilities around the world.[124] These reports were corroborated by research findings of NGOs, which already previously had alerted that the US government was using tactics of “disappearances” and secret detention in its “war on terror.”[125] At the time, the allegations were neither confirmed nor denied by the US government. However, in September 2006, President Bush eventually acknowledged the existence of a program of secret prisons run by the CIA. Without disclosing the exact locations of any secret detention facilities, he said that those held at these detention facilities had been interrogated through an ”alternative set of procedures,” which reinforced concerns about the use of interrogation techniques amounting to torture and ill-treatment.[126] President Bush claimed that the program of secret detention had been discontinued following the transfer of 14 high-profile terrorist suspects from CIA custody to the US detention facility at Guantánamo Bay, but he did not rule out the possibility of using this practice again in the future.[127]

By holding an unknown number of terrorist suspects in undisclosed detention facilities, in some cases apparently for several years, the United States effectively placed these persons outside the protection of the law. Their treatment was not monitored by court or independent bodies, such as the International Committee of the Red Cross, and they were not allowed to be in contact with their lawyers or families. They were in effect “disappeared.”[128] Already before the US government admitted the existence of secret prisons, the Human Rights Committee Torture expressed concern about allegations that the US “has seen fit to engage in the practice of detaining people secretly and in secret places for months and years on end,” thereby violating the right to liberty and security of a person and the right not to be subjected to torture.[129] Likewise the Committee against Torture in May 2006 called on the US to close any clandestine detention facilities under its control, pointing out that the secret detention constitutes per se a violation of the CAT.[130]

Investigations undertaken by the Council of Europe and the European Parliament have shown that European governments have cooperated with the US in its problematic post-September 11 rendition policies, thereby facilitating disappearances and secret detention. Allegations

124 Dana Priest, “CIA Holds Terror Suspects in Secret Prisons,” Washington Post, 2 November 2005.

125 See, for example, Human Rights Watch, The United States’ “Disappeared” – the CIA’s Long-term “Ghost-Detainees,” October 2004; and Human Rights First, Ending Secret Detentions, June 2004.

126 For more information, see the chapter on torture and ill-treatment in the interrogation and treatment of terrorist suspects.

127 Brian Knowlton, “Busch acknowledges CIA prisons exist,” International Herald Tribune, 7 September 2006; “Bush admits to CIA secret prisons,” BBC, 7 September 2006; Gail Russell Chaddock, “Just how far can CIA interrogators go?,” The Christian Science Monitor, 20 September 2006.

128 Compare Amnesty International, USA: Amnesty International’s Supplementary Briefing to the UN Committee against Torture, April 2006.

129 UN Human Rights Committee, United States of America: Concluding Observations (CCPR/C/USA/Q/3/CRP4), July 2006.

130 Committee against Torture, United States: Conclusions and Recommendations (CAT/C/USA/CO/2), 18 May 2006.

that some US-operated secret detention facilities have been based in East European countries have yet to be confirmed. [131]

The Russian Federation

The practice of secret detention also forms part of the so-called counter-terrorism campaign in Chechnya. The IHF and its local partner organizations in Russia have documented the continued existence of numerous unofficial places of detention in various parts of the republic, including several in the capital Grozny. These facilities are run either by Russian security services or by local pro-Russian forces, in particular forces operating under the direct control of Chechen Prime Minister Ramzan Kadyrov (so-called Kadyrovtsy). Earth pits, concrete bunkers, barracks and underground pedestrian street crossings have all been used as secret prison facilities and official places of detention have sometimes served the same purpose with the detention of those held in such facilities not being duly registered.[132]

The practice of secret detention is closely related to problems of "disappearances," torture and extrajudicial executions, which continue to characterize the conflict in Chechnya. In a common pattern, people suspected of involvement in the activities of rebel groups are abducted and detained in clandestine prison facilities, where they are subjected to torture in an attempt to force them to "confess" to crimes of which they are accused. Such self-incriminating statements are often subsequently used to "legalize" the detention of the suspects in question and to bring formal charges against them. The detention of many of those abducted is, however, never acknowledged and they thus remain "disappeared" and at serious risk of torture and extrajudicial execution.[133]

The European Committee for the Prevention of Torture (CPT) deplored ill-treatment and torture of detainees held in unofficial places of detention in Chechnya in a 2003 statement,[134] and during two recent visits to the region the committee examined this issue in more detail.[135] Mission reports issued by this body are, however, confidential and not made public unless the state concerned explicitly allows it. The Russian Federation has not agreed to the publication of any of the reports prepared by the CPT following missions to this country.[136] In a report published in June 2006, Dick Marty, Rapporteur of the Parliamentary Assembly of the Council of Europe on alleged secret detentions and unlawful transfers, noted that allegations

131 See Dick Marty, Rapporteur for the Committee on Legal Affairs and Human Rights of the Council of Europe, Alleged secret detentions and inter-state transfers involving Council of Europe member states, June 2006, http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf; and interim report the Temporary European Parliament Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, http://www.europarl.europa.eu/comparl/ tempcom/tdip/default_en.htm.

132 See IHF, Unofficial Places of Detention in the Chechen Republic, 15 May 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=4249

133 See IHF, Unofficial Places of Detention in the Chechen Republic, 15 May 2006; and IHF intervention on Violations of International Humanitarian Law in the North Caucasus to the 2006 Human Dimension Implementation Meeting of the OSCE, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4307

134 CPT, "Public statement concerning the Chechen Republic of the Russian Federation," 10 July 2005, at http://www.cpt.coe.int/documents/rus/2003-33-inf-eng.htm

135 See CPT press releases from 9 May and 13 September 2006, at http://www.cpt.coe.int/en/states/rus.htm

136 Short press releases concerning all CPT visits to Russia are, however, available at http://www.cpt.coe.int/en/states/rus.htm

about secret prisons in Chechnya "deserve to be investigated in the same way as the violations committed by American [secret] services."[137]

The European Court of Human Rights has recently handed down several judgments in disappearance cases related to Chechnya, finding the Russian government in violation of its obligations under the ECHR. [138] Many other similar cases are currently pending before the court.

137 Dick Marty, Rapporteur for the Committee on Legal Affairs and Human Rights of the Council of Europe, Alleged secret detentions and inter-state transfers involving Council of Europe member states, June 2006, p. 49.

138 IHF intervention on Violations of International Humanitarian Law in the North Caucasus to the 2006 Human Dimension Implementation Meeting of the OSCE, October 2006; and IHF, "Rulings of the European Court of Human Rights regarding Disappearances in Chechnya," 10 November 2006, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4341

RECOMMENDATIONS TO THE OSCE PARTICIPATING STATES

Based on the discussion in this briefing paper, the IHF would like to make the following recommendations to the OSCE participating States.

Demonstrating commitment to the ban on torture and ill-treatment

- Reaffirm the absolute character of the prohibition on torture and other cruel, inhuman or degrading treatment or punishment and recognize that they are strictly bound by this prohibition, as established by international law, in the implementation of all their counter-terrorism activities;

- Publicly condemn all forms of torture and ill-treatment whenever they occur and make clear to police, security and judicial authorities at all levels that abusive practices will never be tolerated and that those guilty of such practices will be held accountable;

- Ensure that their international obligations relating to torture and ill-treatment are adequately reflected in national legislation and cooperate constructively with international human rights mechanisms monitoring compliance with international standards, including by facilitating visits by such bodies to their countries;

- Promptly ratify/accede to the OPCAT if they have not yet done so and take constructive efforts to ensure its effective implementation.

Preventing the use of torture and ill-treatment in the interrogation and treatment of detainees

- Ensure that all agencies of government, including security and intelligence services, are strictly bound by rules consistent with international standards prohibiting torture and other forms of ill-treatment in the interrogation and treatment of detainees;

- Organize comprehensive education on the ban on torture and ill-treatment for law enforcement officials and others dealing with detainees;

- Allow for national and international monitoring of all detention facilities under their control;

- Investigate all complaints and allegations of torture or other ill-treatment by government officials or other persons acting on behalf of or with the consent of the government in a prompt, thorough and impartial manner and ensure that anyone found responsible of such treatment is brought to justice and punished in accordance with the seriousness of the crimes he or she has committed;

- Ensure that victims of torture and ill-treatment obtain effective redress, including restitution, fair and adequate financial compensation and appropriate medical care and

rehabilitation.

Prohibiting the use of evidence obtained under torture

- Investigate promptly and thoroughly any allegations that information invoked as evidence in legal, administrative or other proceedings were made as a result of torture or ill-treatment;

- Ensure that no information allegedly extracted through torture or ill-treatment – whether committed by representatives of their own or other states – is admitted as evidence by courts unless it can be proven beyond reasonable doubt that it was not extracted through coercion;

- Review any cases in which defendants have been convicted on the basis of evidence allegedly extracted under torture or ill-treatment and release those imprisoned on such grounds.

Preventing transfers and returns in violation of the ban on torture

- Never send anyone to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture, inter alia, because torture and ill-treatment are widely used in that country and/or the individual in question has been engaged in political or other activities rendering him or her particularly vulnerable to abuse;

- Ensure that anyone subject to return or transfer has the right to challenge the legality of this measure before an independent tribunal, including with respect to its compliance with the ban on torture, and that he or she has an effective right of appeal;

- Do not request, negotiate or rely upon so-called diplomatic assurances, or other formal guarantees, to send individuals to countries where they risk being subjected to torture or other ill-treatment.

Ending secret detention and enforced disappearance

- Ensure that any practices of unlawful abduction and secret detention practiced by government agencies or private groups acting on behalf of or with the support, consent or acquiescence of authorities are immediately discontinued and that everyone apprehended in the context of the campaign against terrorism are detained only in officially recognized places of detention and brought promptly before a judge;

- Grant all detainees access to legal counsel and family members and keep these informed about the conditions and whereabouts of the detainees;

- Ensure that those responsible for unlawful abductions and "disappearances" are held accountable and that victims of such crimes, as well as their families, receive effective redress.

Preventing cooperation undermining the ban on torture

- Refrain from participating in any joint counter-terrorism activities where there are grounds to believe that these activities, in direct or indirect ways, may promote, facilitate, contribute to or serve to condone the use of torture or other forms of ill-treatment prohibited by international law;

- Do not allow foreign states to engage in unlawful abduction and/or unacknowledged detention of terrorist suspects within their territories and do not permit or tolerate transfers of terrorist suspects from or through their territories when these are at risk of torture or ill-treatment in the country of destination;

- Investigate, in an effective, open and transparent manner, any alleged cases of past counter-terrorism cooperation – active and passive – undermining the prohibition on torture and ill-treatment with a view to holding accountable any officials guilty of complicity or participation in acts of torture or ill-treatment and to preventing such illegal cooperation from re-occurring in future.