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Blueprint for the Special Task Force on Interrogation and Transfer Policies

How to Strengthen the Ban on Torture and Cruel Treatment

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BLUEPRINT

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How to Strengthen the Ban on Torture and Cruel Treatment

ON JANUARY 22, 2009, his second full day in office, President Obama issued an executive order on "Ensuring Lawful Interrogations," putting an end to the polices of torture and abusive interrogation and closing secret CIA prisons.[1] The order wiped clean flawed existing orders and legal interpretations of interrogation standards and required the CIA to follow the military's manual on interrogation of detainees in armed conflict. President Obama's decision to make a clean break with past policies of abuse reflects his oft-stated view that it is in the national interest for all U.S. agencies to adhere to transparent, humane interrogation guidelines.

President Obama's interrogation order did not, however, end the discussion on how U.S. prisoner treatment practices can be improved. Instead, the order established a Special Task Force to:

- Examine whether the practices and techniques laid out in the 2006 Army Field Manual on Human Intelligence Collector Operations 2-22.3 (Army Field Manual) are "appropriate" when employed by other departments or agencies outside the military, and whether interrogators have the proper guidance needed to protect U.S. national security, and "if warranted" recommend "additional or different guidance."
- Study how practices of transferring individuals to other nations "ensure that such practices comply" with U.S. domestic and international legal obligations not to transfer to torture, and ensure that U.S. practices do not undermine or circumvent U.S. obligations to provide humane treatment of individuals in its custody or control.

The new Task Force presents a valuable opportunity for the Obama Administration to explore additional steps to reinforce humane treatment standards. Such reinforcement is essential if the United States is to avoid repeating the mistakes of the past.

THE TASK FORCE RECOMMENDATIONS SHOULD:

- Reinforce the importance of a single standard of interrogation for all detainees in armed conflict.
- Ensure transparency in interpretation and enforcement of humane treatment standards.
- Provide interrogators with improved training and professional support.
- Recognize that U.S. obligations not to transfer to torture apply extraterritorially.
- Ensure independent reviews for all rendered persons.
- Provide transferred and removed persons an opportunity to challenge the reliability of assurances against torture and cease relying on such assurances from countries that systematically engage in torture.

[1] Executive Order no. 13,491, *Ensuring Lawful Interrogations* (January 22, 2009).

Details

REINFORCE THE IMPORTANCE OF A SINGLE STANDARD OF INTERROGATION FOR ALL DETAINEES IN ARMED CONFLICT

Adopt interrogation guidance that will govern the interrogation of any detainee in U.S. custody.

In accordance with President Obama's view on humane treatment, the Task Force's examination of the appropriateness of the Army Field Manual should be focused on preserving a single transparent standard for the treatment of all prisoners. Applying relaxed standards to certain categories of prisoners or keeping certain standards secret would be inconsistent with President Obama's clearly stated goal and would send a confused message to interrogators, creating a slippery slope where the more permissive standard is always employed. A dual standard risks the safety not only of those detained by the United States, but also of American service members abroad.[2] The Task Force should make recommendations for improvements which reinforce the single standard that protects our troops and provides interrogators with unambiguous guidance.

By requiring that all interrogations of armed conflict detainees in the custody or effective control of the United States adhere to the Army Field Manual, President Obama rightly put an end to the dangerous situation where the military operated under one set of interrogation rules and the CIA operated under a separate, secret set of rules. It is important to note, however, that Appendix M of the current Army Field Manual deviates from the single standard approach in that it creates a separate, more permissive interrogation standard applicable only to so-called "unlawful enemy combatants" (UEC). The term "unlawful enemy combatant" has no meaning in international humanitarian law and is not a useful distinction for interrogation purposes. In articulating its position of who can continue to be lawfully detained at Guantánamo Bay in the habeas litigation before the U.S. District Court for the District of Columbia, the Obama Administration rightly refrained from using the term "enemy combatant."[3]

Appendix M allows for use of the "restricted interrogation technique" of "separation" on UECs that goes far beyond the normal segregation of prisoners permitted for intelligence purposes. The use of this restricted technique risks treatment—such as isolation, prolonged sleep deprivation, and sensory deprivation—known to result in severe psychiatric harm in violation of domestic and international law.[4] In fact, Appendix M is so readily susceptible to abuse that the manual requires "[m]ore stringent than normal safeguards" when techniques included in Appendix M are used.

In considering how to best uphold a single standard of humane treatment going forward, the Task Force should prohibit the exceptional use of any technique that cannot be used in the interrogation of all detainees. Instead, the Task Force should recommend providing all U.S. intelligence collectors with a clear single standard for humane interrogation that complies with international legal obligations, whether that standard is the existing or a revised Army Field Manual for interrogation that applies across agencies, or a new agency-wide "U.S. government manual for interrogations," as suggested by the Director of National Intelligence, Admiral Dennis Blair, in his confirmation hearing.[5]

[2] *See* Human Rights First, "Top Interrogators Declare Torture Ineffective in Intelligence Gathering," press release, June 24, 2008, http://www.humanrightsfirst.org/media/etn/2008/alert/313/ (contains a list of principals on interrogation and humane treatment that all 15 participants agreed to); Letter from 49 Admirals and Generals to the Senate Armed Services Committee, September 12, 2006, http://www.humanrightsfirst.org/media/etn/2006/alert/107/index.htm.

[3] Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re* Guantanamo Bay Detainee Litigation, no. 08-442 (D.D.C. Mar. 13, 2009).

[4] *See Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, Human Rights First and Physicians for Human Rights, August 2007, pp. 30-34.

[5] Testimony of Admiral Dennis Blair, Senate Select Committee on Intelligence, Executive Nomination, 111th Cong., 1st sess., January 22, 2009.

ENSURE TRANSPARENCY IN INTERPRETATION AND ENFORCEMENT OF HUMANE TREATMENT STANDARDS

Maintain the transparency established in Executive Order no. 13,491 by making public any new interrogation guidance or interpretation of the laws governing interrogation.

Over the past seven years, the Bush Administration engaged in a virtual legal shell game with treatment standards by hiding authorized abuse behind secret, flawed legal opinions made public only after they were replaced. Executive Order no. 13,491 increased transparency with a public declaration that the Army Field Manual would be the standard for interrogation and by mooting any related post-9/11 legal interpretations issued under the Bush Administration. To make clear to the world that the United States has abandoned the practice of using secret law to hide abuse, the Special Task Force should ensure that its recommendations preserve the transparency that the executive order establishes.

Publicly demonstrating how our government is enforcing and interpreting treatment standards makes us more, not less, secure. When the Army Field Manual was revised in September 2006, the military considered and rejected the idea of including a classified appendix because it would have provided little practical advantage while inhibiting collaboration with our allies and frustrating interrogator training.[6] Making the interrogation guidance public, on the other hand, facilitates ally cooperation and strengthens the humane treatment norms that protect U.S. troops.

Whether the Special Task Force concludes that the Army Field Manual is the appropriate interrogation guide for U.S. interrogators or recommends additional or reformed guidelines, all such guidance should be made public *in its entirety*. Admiral Blair recognized the need for uniform declassified guidance in his confirmation hearing during which he assured the Senate Select Committee on Intelligence that he would not use classification to engage in the game of what he described as: "Here's this public document. Just kidding. Here's the real stuff."[7]

The details of individual interrogation plans need not be declassified, but it is in the best interest of U.S. national security that the general boundaries of humane approaches to the interrogation included in U.S. interrogation manuals are made public. Similarly, if the Special Task Force determines that any new legal interpretations are necessary to clarify the law governing interrogations, such interpretations, which generally disclose no operational information, should likewise be publicly available.

PROVIDE INTERROGATORS WITH IMPROVED TRAINING AND PROFESSIONAL SUPPORT

Provide specific recommendations for improving interrogation practices, training, and research to further professionalize the field of intelligence collection.

Intelligence experts agree that abusive interrogation practices impede efforts to elicit actionable intelligence and that non-coercive, rapport-building techniques provide the best opportunity for obtaining accurate and complete information.[8] To ensure that government agents are better able to undertake effective intelligence gathering efforts, the United States must be prepared to invest increased resources in effective human intelligence collection.

As a foundation for this investment, the Special Task Force should review U.S. military and civilian intelligence programs and provide specific recommendations for improving human intelligence collection. As we suggested in our 2008 blueprint for the incoming administration, *How to End Torture and Cruel Treatment*,[9] this review should examine, among other things:

- Best practices, techniques, and lessons learned relating to human intelligence collection.
- Provision of professional education and development in specialized intelligence skills, including specialized language and cultural skills.

[6] Army Deputy Chief of Staff for Intelligence Lt. Gen. John Kimmons, Department of Defense Press Briefing, September 6, 2006, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3712.

[7] Confirmation Hearing of Blair, *supra* note 5.

[8] *Supra* note 2; *Educing Information: Interrogation: Science and Art: Intelligence Science Board Study Report on Educing Information, Phase 1* (Washington, D.C.: National Defense Intelligence College Press, September 2006).

[9] *How to End Torture and Cruel Treatment: Blueprint for the Next Administration*, Human Rights First, November 2008.

- Promotion and facilitation of research on human intelligence collection.
- Enhancement of cooperation between human intelligence collectors in the intelligence community.
- Development of clear, comprehensive, and consistent training programs for intelligence personnel regarding their humane treatment obligations.
- Establishment of a national center on human intelligence collection that focuses on improving human intelligence collection and professionalizing the training and career development of interrogators across agency lines.

Based on this review, the Special Task Force should make recommendations to implement these human intelligence-collection and interrogation reforms to enhance the effectiveness of U.S. intelligence efforts and their compliance with legal obligations. These reforms undoubtedly will require the commitment of additional resources, which the Obama Administration should seek from Congress.

RECOGNIZE THAT U.S. OBLIGATIONS NOT TO TRANSFER TO TORTURE APPLY EXTRATERRITORIALLY

Recommend that the U.S. government take the position that Article 3 of the Convention against Torture applies to all persons under the effective control of the U.S. government.

Despite U.S. assertions that it refrains "as a matter of policy" from transferring persons outside of U.S. territory to places where they face a substantial risk of torture, the United States seized individuals abroad and transferred them to third countries where, in many instances, the individuals have been tortured or subjected to other cruel, inhuman or degrading treatment. Such transfers to abuse clearly undermine and circumvent U.S. commitments to ensure the humane treatment of individuals in its custody or control.[10] The Special Task Force should recommend revision of this legal interpretation and a clear affirmation that U.S. obligations under Article 3 of the Convention against Torture not to transfer individuals to places where they face a substantial risk of torture apply to all persons under the effective control of the U.S. government, no matter where they are.

The Committee against Torture takes the position that Article 3 applies to "all persons under the effective control of [the state party's] authorities"—what is known as the "personal control test."[11] The Special Task Force should recommend that the U.S. government adopt the "personal control test" under which Article 3 would apply to all transfers of persons under the effective control of the United States, no matter where the transfer originates.

PROTECT THE HUMAN RIGHTS OF PERSONS TRANSFERRED BY THE UNITED STATES

Ensure that the process for transferring individuals from U.S. custody abroad to a third country protects those individuals' human rights, including by requiring an opportunity to challenge the legality of detention and to present a reasonable fear of torture.

The United States government has for several years used renditions, involving the extrajudicial transfer of terrorism suspects from U.S. government custody to the custody of another government, essentially to "outsource" abusive interrogation and detention. Current CIA Director Leon Panetta made clear in his confirmation hearing that such intentional outsourcing of abuse will not continue under the Obama Administration, but that he considered renditions to the jurisdiction of another country for prosecution to be acceptable.[12] This position was espoused by several Justice Department nominees in

[10] *See, e.g.,* Memorandum from Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, to William J. Haynes, II, General Counsel, Department of Defense, "Re: The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations," March 13, 2002 ("The Rendition Memo"), http://www.usdoj.gov/opa/documents/memorandumpresidentpower03132002.pdf; Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, § 2242(a) ("The United States [shall] not … expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.")

[11] *See* Office of the U.N. High Commissioner for Human Rights [OHCHR], Committee Against Torture, *Conclusions and Recommendations, United States of America*, ¶ 13, U.N. Doc. CAT/C/USA/C/2 (May 18, 2006).

[12] Testimony of Leon Panetta, Senate Select Committee on Intelligence, Executive Nomination, 111th Cong., 1st sess., February 5, 2009.

confirmation testimonies, including that of the Attorney General.[13]

Taking individuals into U.S. custody and transferring them outside of the extradition process could constitute a crime and triggers a number of human rights concerns. Because of the lack of process for evaluating any claims of risk of torture and the legality of the detention, even the so-called "renditions to justice" that Mr. Panetta referred to can and have resulted in breaches of U.S. obligations not to transfer to torture.[14] Moreover, forcefully removing an individual from the territory of a state without process may violate that individual's right against arbitrary detention,[15] to remain in one's own country,[16] or if the individual is an alien, his or her right against arbitrary expulsion.[17] In the context of armed conflict, such transfers may violate U.S. obligations under the Geneva Conventions not to remove civilians from occupied territory, to protect Prisoners of War, or, under Common Article 3, to provide certain protections to all prisoners detained in armed conflict.[18]

If the U.S. government transfers an individual to a foreign jurisdiction it has an obligation to ensure that the human rights of the individual are protected in the transfer process. Providing individuals with the opportunity to meaningfully challenge the legality of their removal and detention in an independent forum before a neutral and impartial decision maker will not only help ensure that the United States upholds its obligations under the Convention against Torture but will also protect against detention mistakes, such as that made in the case of Khaled al-Masri, a case of apparent mistaken identity.[19]

PROVIDE AN OPPORTUNITY FOR INDIVIDUALS BEING TRANSFERRED TO CHALLENGE THE RELIABILITY OF ASSURANCES AGAINST TORTURE AND CEASE RELYING ON SUCH ASSURANCES FROM COUNTRIES THAT SYSTEMATICALLY ENGAGE IN TORTURE

Provide all individuals removed from U.S. territory or transferred out of U.S. custody and across national borders with a fair opportunity to challenge the reliability of any assurance against torture provided by the destination government. Cease relying on assurances from governments that systematically engage in torture.

A number of Obama Administration Justice Department and intelligence officials have already stressed the importance of securing assurances in rendition cases in order to protect against transfers to torture.[20] But in the past these diplomatic assurances have not been effective in preventing torture, particularly when given by countries with a record of pervasive prisoner abuse.[21]

Reliance on diplomatic assurances has been problematic not only in the context of extrajudicial transfers but also in the context of immigration removal and extraditions,[22] the review of which falls squarely within the Special Task Force's mandate. Recently, in the immigration context, at least one federal appeals court has ruled that, under existing statutes and regulations, individuals facing

[13] Testimony of Eric Holder, Senate Committee on the Judiciary, 111th Cong., 1st sess., January 15, 2009; Testimony of David Kris, Senate Select Committee on Intelligence, 111th Cong., 1st sess., March 10, 2009.

[14] Stephen Grey, "Five Facts and Five Fictions About CIA Rendition," *Frontline*, http://www.pbs.org/frontlineworld/stories/rendition701/updates/updates.html.

[15] International Covenant on Civil and Political Rights art. 9.1 & 9.4, Dec. 16, 1966, 999 U.N.T.S. No. 14668 ("ICCPR").

[16] ICCPR art. 13.

[17] ICCPR art. 12; U.N. OHCHR *Human Rights Committee, General Comment 27 on Freedom of Movement* (art.12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 174, U.N. Doc. HRI/GEN/1/Rev.6 (2003) (stating that the right of a person to enter his or her own country "implies the right to remain in one's own country").

[18] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[19] Frank Davies and Warren P. Strobel, "Ex-prisoner Sues Former CIA Head," *Miami Herald*, December 7, 2005.

[20] Confirmation Hearing of Panetta, *supra* note 12; Confirmation Hearing of Kris, *supra* note 13; Confirmation Hearing of Blair, *supra* note 5.

[21] Letter from Human Rights First to Rep. Edward Markey, March 6, 2007, http://www.humanrightsfirst.info/pdf/07306-usls-markey-support-ltr.pdf.

[22] 8 C.F.R. § 208.18(c) (2008); 8 C.F.R. § 1208.18(c) (2005); 22 C.F.R. § 95.

removal are entitled to see and challenge diplomatic assurances.[23] Specifically, the Special Task Force should recommend amendments to the relevant regulations that ensure that any individual removed from U.S. territory or transferred out of U.S. custody across national borders is provided with an opportunity to challenge the sufficiency of diplomatic assurances.

There are a number of factors that must be met to ensure that transferred individuals are given sufficient opportunity to challenge a diplomatic assurance. In particular: 1) the government must provide the individual with a copy of the assurance and with any additional available information supporting the reliability of the assurance; 2) the individual must be allowed to make arguments on his own behalf challenging the assurance with access to a lawyer; and 3) there must be an individualized determination by an impartial decision maker about the reliability of the assurance.[24]

As the Committee against Torture recommended in its 2006 report, the United States government should refrain from seeking assurances from foreign governments that the U.S. State Department has determined systematically violate the Convention against Torture.[25] Assurances from governments involved in systematic violations should be considered to be inherently unreliable.

[23] Khouzam v. Attorney Gen. of United States, 549 F.3d 235 (3rd Cir. 2008).

[24] *See id*. at 258 (describing why the government failed to meet its constitutional obligation to provide the petitioner with due process before he was removed).

[25] U.N. OHCHR, Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture*, CAT/C/USA/CO/2 (July 25, 2006), p. 5.

Conclusion

President Obama has taken many positive steps to reinforce the ban against torture and other forms of official cruelty. But further efforts are needed to prevent a return to abusive and ineffective prisoner treatment in the face of new security challenges. Further fortifying legal standards that prohibit and punish torture will help prevent repetition of past mistakes and rebuild U.S. moral authority.

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