

conducting interrogations for intelligence purposes.³⁰² The directive is applicable to all who interrogate detainees in DOD custody.

The directive assigns responsibilities for interrogation activities to senior DOD officials; requires interrogation techniques sought by Army field commanders to be reviewed by the Secretary of Defense's office; requires training and certification of all interrogators; and establishes procedures for reporting violations of the policy. The directive specifically prohibits the use of "[m]ilitary working dogs, contracted dogs, or any other dog in use by a government agency . . . as part of an interrogation approach not to harass, intimidate, threaten, or coerce a detainee for interrogation purposes."³⁰³ The directive prohibits "[a]cts of physical or mental torture," but fails to affirmatively prohibit cruel, inhuman or degrading treatment or punishment.

The Detainee Treatment Act enacted by Congress in December 2005 in response to detainee abuse explicitly prohibits cruel, inhuman or degrading treatment or punishment, as prohibited by the Fifth, Eighth, and Fourteenth Amendment, of anyone in U.S. custody and physical control irrespective of geographical location. It limits interrogations to standards codified in the Army Field Manual 34-52, which has been updated and at this writing is not yet released.³⁰⁴ The army field manual, however, is not applicable to the CIA. The press has reported that an annex to the amended manual will remain secret. The ACLU is concerned that the annex may reintroduce the administration's claim, made in August 2002 and still not repudiated, that the President has "commander-in-chief-authority" to order torture. This concern is supported by the President's signing statement to the Detainee Treatment Act which suggests that the President as commander-in-chief can authorize unlawful acts by government agencies under his control, thereby nullifying the applicability of the law.

G. Unlawful Renditions (Articles 1, 3, 16)

We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.

—Unnamed U.S. government official.³⁰⁵

The United States openly defends the practice of rendition as a counterterror technique and has used it in ways which violate the prohibitions against refoulement, torture, and cruel, inhuman or degrading treatment.³⁰⁶ Renditions involve the clandestine abduction and detention, without legal process, of persons suspected of terrorist activities. These

³⁰² Dep't of Defense, *DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*, DoD Directive 3115.09, Nov. 3, 2005, available at

http://www.dtic.mil/whs/directives/corres/pdf/d311509_110305/d311509p.pdf.

³⁰³ *Id.*

³⁰⁴ Detainee Treatment Act, *supra* note 5, § 1002(a).

³⁰⁵ Priest and Gellman, *U.S. Decries Abuse But Defends Interrogations*, *supra* note 299.

³⁰⁶ Press Release, U.S. Dep't of State, Rice Says United States Does Not Torture Terrorists (Dec. 5, 2005), available at <http://usinfo.state.gov/eur/Archive/2005/Dec/05-471726.html> (includes transcript of Sec'y Rice's remarks upon her departure for Europe on Dec. 5, 2005) ("Renditions take terrorists out of action, and save lives Such renditions are permissible under international law.").

suspects are transferred by the U.S. to foreign intelligence services for interrogation, in countries where torture is routine. Rendition also includes the transfer of terror suspects into CIA custody in unknown secret detention centers overseas.

The former Director of the Central Intelligence Agency, George J. Tenet, described rendition as one of the United States' key counter-terrorism policies. Tenet has stated publicly that in an unspecified period before September 11, the U.S. had undertaken over seventy such renditions, adding that the CIA had “racked up many successes, including the rendition of many dozens of terrorists prior to September 11, 2001.”³⁰⁷ The news media reported that the practice of “rendering” individuals was developed by military or CIA lawyers and “vetted by Justice Department’s office of legal counsel” and has been applied to hundreds of individuals in post-9/11 terrorism interrogations.³⁰⁸ Using civilian aircrafts, which have permission to land on U.S. military airfields worldwide, the CIA flies captured terrorist suspects from one country to another for detention and interrogation.³⁰⁹

The exact number of persons rendered post September 11 is not known. The news media has reported that more than 100 suspected terrorists were sent by the CIA to foreign intelligence services and to CIA-run secret detention centers overseas.³¹⁰ About two dozen high-level terror suspects are in CIA custody in secret detention centers.³¹¹ The remaining—a group considered less important, with less direct involvement in terrorism and having limited intelligence value—have been transferred to countries including Egypt, Jordan, Saudi Arabia, and Syria for interrogations purposes.³¹² In a May 2005 television interview, Prime Minister of Egypt, Ahmed Nazif, openly acknowledged that since September 11 the Egyptian government had cooperated with the United States in the rendition of some sixty to seventy suspected terrorists to Egypt alone.³¹³ The U.S. Department of State Human Rights Reports for these countries consistently states that the use of torture during interrogations in these countries is “routine.”

The news media, quoting unnamed U.S. officials, reported that detainees were deliberately moved to countries known for their use of torture to ease constraints on their interrogations. An official who had supervised the capture and transfer of accused terrorists said, “If you don’t violate someone’s human rights some of the time, you

³⁰⁷ National Commission on Terrorist Attack Upon the United States, *Intelligence Policy, Staff Statement No. 7*, at 2, available at http://www.9-11commission.gov/staff_statements/staff_statement_7.pdf. *Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States*, at 19 (Mar. 24, 2004) (statement of George Tenet, former Director of CIA), available at http://www.9-11commission.gov/hearings/hearing8/tenet_statement.pdf.

³⁰⁸ Dana Priest and Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons is Coming to Light*, WASH. POST, May 11, 2004 (detailing the existence of “interrogation rooms of foreign intelligence services—some with documented records of torture—to which the U.S. government delivers or ‘renders’ mid or low-level terrorism suspects for questioning”).

³⁰⁹ Dana Priest, *Jet is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004.

³¹⁰ Priest, *CIA Holds Terror Suspects in Secret Prisons*, *supra* note 195; Douglas Jehl and David Johnson, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005.

³¹¹ Priest, *CIA Holds Terror Suspects in Secret Prisons*, *supra* note 195.

³¹² *Id.*; Jehl and Johnson, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, *supra* note 310.

³¹³ David Morgan, *U.S. has sent 60-70 terror suspects to Egypt – PM*, REUTERS, May 15, 2005.

probably aren't doing your job . . . I don't think we want to be promoting a view of zero tolerance on this."³¹⁴

Pursuant to the practice of rendition to foreign intelligence services, U.S. officials claim that they obtain "diplomatic assurances" from the governments concerned that detainees will not be tortured. U.S. Attorney General Alberto Gonzales, in defending the practice of rendition, has stated that the purpose of U.S. policy is not to send detainees "to countries where we believe or we know that they're going to be tortured." He added that if a country has a long history of torture, the United States seeks diplomatic assurances that torture will not be used. However, he acknowledged that it was not possible to "fully control" what other nations do.³¹⁵

In practice, officials do nothing to monitor whether those assurances will be honored. They reportedly suggest questions to foreign intelligence interrogators and then turn a blind eye to the methods employed to extract the information.³¹⁶ The U.S. Report states that it "is aware of allegations that it has transferred individuals to third countries where they have been tortured," but maintains that the government does not transfer persons to countries where the U.S. believes it is "more likely than not" that they will be tortured, and obtains "assurances, as appropriate, from the foreign government."³¹⁷

The ACLU considers diplomatic assurances to be unreliable and ineffective in protecting against torture and abuse even with so-called post-return monitoring mechanisms. Such "assurances" are inherently unreliable, not legally binding, and provide no recourse for the person who has been transferred.

The case of Maher Arar strikingly illustrates the dangers of the U.S. rendition program. Arar, a Syrian-born Canadian in transit from a family vacation through John F. Kennedy airport in New York, was detained by U.S. authorities in 2002. After holding him for nearly two weeks, U.S. authorities flew him to Jordan, where he was driven across the border and handed over to Syrian authorities following assurances from the Syrian government that he would not be subjected to torture or other abuse. Arar told U.S. officials that he would be tortured in Syria and repeatedly requested to be sent home to

³¹⁴ Priest and Gellman, *U.S. Decries Abuse but Defends Interrogations*, *supra* note 299.

³¹⁵ R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005. See also Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (Apr. 2005), available at <http://hrw.org/reports/2005/eca0405/>. See also Association of the Bar of the City of New York and the Center for Human Rights and Global Justice at NYU School of Law, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (Oct. 14, 2004), available at <http://www.nyuhr.org/docs/TortureByProxy.pdf>.

³¹⁶ Priest and Gellman, *U.S. Decries Abuse but Defends Interrogations*, *supra* note 299 (quoting senior United States official as stating that after an individual is rendered, the CIA are "still very much in control" and that they will often "feed questions to their investigators"). See also Rajiv Chandrasekaran and Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002; David E. Kaplan, *et al.*, *Playing Offense: The Inside Story of How U.S. Terrorist Hunters Are Going After Al Qaeda*, U.S. NEWS & WORLD REPORT, June 2, 2003 (describing rendition of individuals to Jordan, Egypt, Morocco and Syria). For a comprehensive news report on the practice of rendition see Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005.

³¹⁷ U.S. Report, *supra* note 1, § II ¶30.

Canada. Arar, whom the United States asserts has links to al-Qaeda, was released without charge from Syrian custody ten months later. During his confinement in a Syrian prison, Arar alleged that he was repeatedly tortured, often with cables and electrical cords. Syrian authorities denied Arar's claims and the U.S. government accepted the Syrian denial of torture at face value. (See discussion below on Arar's civil suit in U.S. courts).

1. Khaled El-Masri

Khaled El-Masri, a German citizen of Lebanese descent, was forcibly abducted while on holiday in Macedonia, held in incommunicado detention, handed over to United States agents, then beaten, drugged, and transported to a secret prison in Afghanistan. There he was beaten, kicked, confined in squalid conditions, and detained without charge or public disclosure for several months.³¹⁸ Five months after his abduction, El-Masri was deposited at night, without explanation, on a hill in Albania.³¹⁹ Not long after El-Masri was flown to Afghanistan, Central Intelligence Agency officials realized that they had abducted and detained an innocent man, yet El-Masri's unlawful detention continued for two additional months.³²⁰

On December 13, 2005, the ACLU filed suit on behalf of El-Masri against George Tenet, former director of the CIA, and the airline companies that facilitated his rendition for the injuries El-Masri suffered as a consequence of the rendition process, including prolonged arbitrary detention, torture and other cruel, inhuman or degrading treatment.³²¹

2. Ahmed Agiza and Mohammed El Zery

On December 18, 2001, Ahmed Agiza and Mohammed El Zery, Egyptian citizens then seeking asylum in Sweden, were arrested on the street of their home towns in Sweden and handed over by Swedish security police to U.S. and Egyptian agents. The latter beat them, stripped them both naked, rammed suppositories into their rectums, and dressed them in diapers and prison uniforms. Both men were then placed on an aircraft where they were drugged and chained spread-eagled to the floor of the aircraft for the duration of the eight-hour flight to Cairo.³²²

³¹⁸ Complaint ¶¶ 1, 23-48, *El-Masri v. George Tenet*, No. 1:05cv1417 (D.D.C. filed Dec. 6, 2005), (hereinafter "El-Masri Complaint") available at http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf.

³¹⁹ *Id.* at ¶ 54.

³²⁰ *Id.* at ¶ 2. German Chancellor Angela Merkel told a joint news conference in Berlin with Secretary of State Condoleezza Rice that the United States had acknowledged it made a mistake in the case of Khaled el-Masri. U.S. administration officials later said the U.S. government did not admit to a "mistake" regarding El-Masri and that the U.S. had informed Germany about El-Masri's detention and release. Saul Hudson and Mark Trevelyan, *U.S. Germany Differ on CIA Abduction Case*, REUTERS, Dec. 6, 2005.

³²¹ El-Masri Complaint, *supra* note 318.

³²² Human Rights Watch, "Empty Promises: Diplomatic Assurances No Safeguard against Torture," at 34-36 (April 2004), available at <http://hrw.org/reports/2004/un0404/diplomatic0404.pdf>; *Agiza v. Sweden*, Decisions of the Committee Against Torture under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/34/D/233/2003 (May 2005), available at <http://www.worldlii.org/int/cases/UNCAT/2005/10.html>; Amnesty International, *Sweden: Concerns over*

In Cairo, the men were transferred to the custody of Egyptian security police. Once in their custody, they were subject to lengthy interrogations. While being interrogated, they were subjected to torture and other inhumane treatment, including attachment of electric cables to their testicles, frequent beatings, and threats to their wives and families. They were held incommunicado and Egyptian officials denied their repeated requests to speak with a lawyer or family members. After five weeks under these conditions, the men were finally permitted to see the Swedish Ambassador and members of their families.³²³

Mr. Agiza was subsequently sentenced to twenty-five years in prison after a six-hour trial before an Egyptian military tribunal. Agiza's request for a forensic medical examination to prove his allegations of torture was denied by the tribunal. His trial, which was observed by a Human Rights Watch trial monitor, failed to comport with any recognized standards of due process. Without any explanation, the tribunal later reduced the sentence to fifteen years imprisonment.³²⁴

Mr. Al-Zery was released after being tortured and interrogated, but at this submission he is not permitted to leave Egypt and is under constant surveillance by Egyptian security police.³²⁵

H. Failure to Conduct Prompt and Impartial Investigations (Article 12)

1. Inadequate Government Investigations into Abuse in Afghanistan, Iraq and Guantánamo

I really doubt whether the Defense Department can investigate itself, because there's a possibility the secretary himself authorized certain actions. This cries out for an outside commission to investigate.

—Retired U.S. Army General Wayne A. Dowling, May 2004.³²⁶

Torture and cruel, inhuman or degrading treatment in detention facilities in Afghanistan, Iraq and Guantánamo will continue to thrive if allegations of abuses, including deaths in custody, are not thoroughly investigated and perpetrators brought to trial. Investigations that have taken place regarding abuse of detainees in U.S. custody in Afghanistan, Iraq, and Guantánamo thus far have lacked scope and independence. The ACLU also discovered, by reviewing documents produced in the FOIA litigation, that whistleblowers were not taken seriously and were pressured to stay silent.

the treatment of deported Egyptians (May 28, 2004), available at <http://web.amnesty.org/library/print/ENGEUR420012004>.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ Bradley Graham, *Some Seek Broad, External Inquiry on Prisoner Abuse*, WASH. POST, May 27, 2004 (Dowling headed a Pentagon task force which investigated the 1996 bombing in Saudi Arabia of a U.S. Air Force barracks).