



Questions and Answers: U.S. Detainees Disappeared into Secret Prisons: Illegal under Domestic and International Law

December 9, 2005

The United States is holding an unknown number of terrorism suspects in secret overseas locations, and refusing either to acknowledge the detentions or to give information on the fate or the whereabouts of these detainees. These detainees have been held incommunicado, without trial, some for as many as four years. Some of the detainees are reported to have been tortured in custody.¹

Several reports indicate that the CIA has held detainees in secret facilities in Eastern Europe, with Poland and Romania named as possible locations.² While refusing to directly address the existence of such detention centers, the U.S. asserts that its actions are consistent with its obligations under international law. Meanwhile, the Council of Europe and a number of European states have launched investigations into the allegations of violations of international and domestic laws.

The following questions and answers address legal issues concerning U.S. detainees disappeared into secret prisons.

What laws apply to the cases of U.S. detainees disappeared into secret prisons?

¹ "U.S. Holding at Least Twenty-Six "Ghost Detainees": List of Detainees Published by Human Rights Watch," Human Rights Watch, press release, December 1, 2005, available at <http://hrw.org/english/docs/2005/11/07/usint11995.htm>; Richard Esposito and Brian Ross, "Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons," ABC News, December 5, 2005; Dana Priest, "CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11," Washington Post, November 2, 2005.

² Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," Washington Post, November 2, 2005; "Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe," Human Rights Watch, press release, November 2005, available at <http://hrw.org/english/docs/2005/11/07/usint11995.htm>; ABC News Radio Broadcast, "Brian Ross Investigates: Secretary of State Condoleezza Rice is off to Europe Today and the Timing Could Not be Worse," December 6, 2005.

International human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR)³ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴ govern individual rights to liberty, to a fair trial, and to be free from torture and other cruel, inhuman or degrading treatment. European governments are also bound by similar provisions in the European Convention on Human Rights.⁵ The Geneva Conventions address the detention, treatment and trial of prisoners of war and civilians during armed conflict or military occupation.⁶

International human rights and humanitarian law (the laws of war) ensure that the fundamental rights of all individuals are protected at all times. When the laws of war do not apply, international human rights law still protects that person's rights. Furthermore, certain protections are so well established, such as the prohibitions on torture and other cruel, inhuman or degrading treatment, and prolonged arbitrary detention, that they have become customary obligations that are binding legal obligations independent of specific treaty agreements.⁷ The domestic laws of states whose territories or nationals are implicated also apply.

Does holding someone without trial violate international human rights law?

Human rights law has long recognized that everyone has a right to liberty and security of person, and the right to a fair trial. These rights are guaranteed in the Universal Declaration of Human Rights,⁸ the ICCPR,⁹ and the ECHR.¹⁰ The ICCPR and the

³ International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, available at: http://www.unhcr.ch/html/menu3/b/a_ccpr.htm. Each State Party to the ICCPR pledges to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the convention, regardless of such distinctions as race, religion, political or other opinion, or national or social origin. Art. 2. The ICCPR has been ratified by a total of 154 countries, including the United States, the United Kingdom, Germany, Italy, Poland, Spain, Romania, Portugal, the Netherlands, Austria, Sweden and Norway.

⁴ Convention Against Torture, General Assembly resolution 39/46, entered into force on June 26, 1987, in accordance with article 27 (1), available at <http://www.ohchr.org/english/law/cat.htm>. The Convention against Torture has been ratified by a total of 140 countries, including the United States, the United Kingdom, Germany, Italy, Poland, Spain, Romania, Portugal, the Netherlands, Austria, Sweden and Norway.

⁵ European Convention on Human Rights (ECHR), Rome, 4.XI.1950, available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>. The ECHR obligates each State Party to secure this right to everyone within its jurisdiction. Art.1. The European Convention binds 46 countries, including the United Kingdom, Germany, Italy, Poland, Spain, Romania, Portugal, the Netherlands, Austria, Sweden and Norway.

⁶ International Committee of the Red Cross, International Humanitarian Law database, available at: <http://www.icrc.org/ihl>. All of these countries are bound by the Geneva Conventions.

⁷ Restatement (Third) of Foreign Relations Law of the United States, Sec. 702 (Customary International Law of Human Rights). The Restatement, prepared by the American Law Institute, is generally considered to be an authoritative statement of the law of the United States.

⁸ Universal Declaration of Human Rights, arts. 3 and 11.

ECHR specify that no one shall be deprived of his or her liberty except as established by law. Anyone arrested or detained on a criminal charge must have a fair and public trial within a reasonable time.¹¹

International law permits the detention of persons without trial (administrative detention) under certain narrowly defined circumstances. In accordance with the ICCPR, there must be a public emergency that threatens the life of the nation. Administrative detainees under states of emergency should enjoy as a minimum the following rights and guarantees:

- (a) The right to be brought before a judicial authority promptly after arrest;
- (b) The right to receive an explanation of rights upon arrest in their own language or soon thereafter and to be informed of the specific reasons for the deprivation of liberty;
- (c) The right of immediate access to family, legal counsel and a medical officer;
- (d) The right to communicate with and be visited by a representative of an international humanitarian agency, such as the ICRC;
- (e) The right to challenge, in a fair hearing and periodically if necessary, the lawfulness of the detention and to be released if the detention is arbitrary or unlawful;
- (f) The right to complain to a judicial authority about mistreatment;
- (g) The right to seek and obtain compensation if the detention proves to be arbitrary or unlawful.

Does holding persons in secret violate international human rights law?

When a person is forcibly detained by government officials who refuse to acknowledge the detention and who keep the person from the protection of the law, this is called a *forced disappearance*.¹² The U.S. has long condemned other countries that engage in forced disappearances, and was instrumental in drafting and approving United Nations statements that condemn all enforced disappearances with no exceptions for national

9 Each State Party to the ICCPR pledges to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the convention, regardless of such distinctions as race, religion, political or other opinion, or national or social origin., art. 2.

10 The ECHR obligates each State Party to secure this right to everyone within its jurisdiction, art. 1.

11 ICCPR, art. 9; ECHR, art. 5-6.

12 "The United States' "Disappeared": The CIA's Long-Term "Ghost Detainees", Human Rights Watch Briefing Paper, October 2004.

security or emergencies.¹³ As described by the ICRC, “No matter how legitimate the reasons for a person's detention, no one has the right to keep that person's fate or whereabouts secret or to deny that he or she is being detained.”¹⁴

“Disappeared” detainees are cut off from the outside world and from the protection of the law and thus subject to the whim of their captors. This has the effect of suspending the rights of “disappeared” persons and placing them in a situation of complete defenselessness, making them especially vulnerable to torture and other ill-treatment.

Do the laws of war apply to these detainees?

The U.S. has claimed that all persons captured in the “global war on terror” are “enemy combatants” who may be detained without charges for the duration of the conflict. Even if this were the case, a view Human Rights Watch contests,¹⁵ the U.S. has not met even its basic obligations for detainees held under the laws of war. The U.S. has never stated the legal basis for the detention of any of detainees disappeared into secret prisons, the circumstances of their capture, or their individual status as combatants or terrorism suspects – the U.S. does not even acknowledge they are being held.

Does secret detention without trial violate the laws of war?

The customary laws of war prohibit secret detention. Consistent with the prohibition on enforced disappearance, states are required to record the personal details of detainees and provide information to family members on the fate of missing persons,¹⁶ and detainees should be allowed to correspond with relatives and receive visits to the degree practicable.¹⁷

During an international armed conflict, the Third and Fourth Geneva Conventions require that the ICRC have access to all detainees and places of detention. Prisoners

¹³ Declaration on the Protection of all Persons from Enforced Disappearance, GA Res 47/133, entry into force December 18, 1992.

¹⁴ International Committee of the Red Cross, “Enforced Disappearance Must Stop,” August 30, 2003, available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwplList581/8AE1907FEC3D5CA0C1256D92005202B3>.

¹⁵ “Letter to Secretary Rumsfeld on the ‘Joint Doctrine for Detainee Operations’,” Human Rights Watch letter, April 7, 2005, available at: <http://hrw.org/english/docs/2005/04/07/usdom10439.htm>; “US: Pentagon Detention Guidelines Entrench Illegality: Enemy Combatants Could be Held as “Ghost Detainees”,” Human Rights Watch press release, April 7, 2005, available at: <http://hrw.org/english/docs/2005/04/07/usdom10440.htm>.

¹⁶ See ICRC, Customary International Humanitarian Law, rules 123 and 117.

¹⁷ Ibid, rules 125-26.

should be documented, and their whereabouts must be made known to their family. Visits from the ICRC may only be prohibited for “reasons of imperative military necessity” and then only as “an exceptional and temporary measure.”¹⁸ In all cases, including where civilians can legitimately be held as spies or saboteurs, detainees must be treated with humanity and, if charged with a criminal offense, afforded a fair and regular trial.¹⁹ In all cases, the Geneva Conventions prohibit torture or inhumane treatment.

What is the connection between secret incommunicado detentions and torture?

The prohibition on secret incommunicado detention is not just a protection of individuals’ right to liberty and security, but is an important safeguard against abuse in detention or during interrogations, including torture and other forms of cruel inhuman or degrading treatment. Historically, secret detention has been a gateway to abuse.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as the intentional infliction of severe physical or mental pain or suffering by someone acting in an official capacity for a specific purpose.²⁰

News reports citing current or **former intelligence officers and interrogators** have confirmed that detainees in U.S. custody have been subjected to abuse.²¹ U.S. government officials, speaking anonymously to the media, have described a number of interrogation techniques authorized for use by the CIA which constitute torture, and which the United States has historically considered as such when conducted by other governments, including “waterboarding” (mock drowning), forced standing for over 40 hours, extended sleep deprivation, and exposure to extreme temperatures.²²

18 Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), art 126. and Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 143.

19 See e.g. article 3(1)(d) common to the four Geneva Conventions of 1949; Third Geneva Convention, arts. 93, 103, 105, 107; Fourth Geneva Convention, art. 71.

20 Convention against Torture, art. 1. The ECHR likewise prohibits torture and inhuman or degrading treatment or punishment. ECHR, art. 3.

21 Richard Esposito and Brian Ross, “Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons,” ABC News, December 5, 2005; Neil A. Lewis, “Fresh Details Emerge on Harsh Methods at Guantanamo,” *New York Times*, January 1, 2005.

22 “CIA Whitewashing Torture: Statements by Goss Contradict U.S. Law and Practice,” Human Rights Watch press release, November 21, 2005, available at: <http://hrw.org/english/docs/2005/11/21/usdom12069.htm>; “Descriptions of Techniques Allegedly Authorized by the CIA,” Human Rights Watch background briefing, November 21, 2005, available at: <http://hrw.org/english/docs/2005/11/21/usdom12071.htm>.

What international laws prohibit torture and cruel, inhumane and degrading treatment?

Torture and cruel, inhuman or degrading treatment are prohibited by such treaties as the ICCPR, the Convention against Torture, and the European Convention on Human Rights, among other treaties.

Torture and cruel, inhuman or degrading treatment is also prohibited under international law even for states that have not ratified human rights treaties. The ban is powerful enough to stand as customary international law. Torturers have been compared to slavers, *genocidaires* and pirates as “enemies of all mankind.”²³

All states are obligated under both international humanitarian and human rights law to prohibit, prevent and prosecute instances of torture and other ill-treatment of persons in custody. The prohibition against mistreatment applies to the United States during times of peace, armed conflict, or a state of emergency. Any person is protected, whether a U.S. national or a non-citizen. It is irrelevant whether the detainee is determined to be a prisoner-of-war, a protected person, or a so-called “security detainee” or “unlawful combatant.” And the prohibition is in effect within the territory of the United States or any place anywhere U.S. authorities have effective control over a person. In short, the prohibition against torture and ill-treatment is absolute.

Does rendition to a country where a person is likely to be tortured violate human rights law?

States are absolutely prohibited from returning persons to another state where there are substantial grounds for believing that they would be subjected to torture or other ill-treatment.²⁴ This ban against *refoulement* is expressly stated in numerous major human rights agreements, and has been authoritatively interpreted as part of the general prohibition against torture even where not expressly stated.²⁵

A note on terminology: *Rendition* is any transfer of a person between governments. *Extradition* is a rendition from one country to another through a legal process normally

23 Restatement (Third) of Foreign Relations Law, §102, and reporter's note 6 (1986).

24 Convention against Torture, art. 3.

25 “Still at Risk: Diplomatic Assurances No Safeguard Against Torture,” Human Rights Watch report, April 2005, available at: <http://hrw.org/reports/2005/eca0405/>.

on the basis of a bilateral treaty. *Extraordinary rendition* is a non-legal term that has come to mean the transfer of a person from one country to another outside of any legal process. *Rendition to risk of torture* is a rendition where the detainee faces the risk of being tortured by the receiving state.

Can U.S. officials be held criminally responsible for these violations?

The United States has incorporated international prohibitions against torture and mistreatment of persons in custody into its domestic law. The United States has reported to the Committee against Torture that: “Every act of torture within the meaning of the Convention is illegal under existing federal and state law, and any individual who commits such an act is subject to penal sanctions as specified in criminal statutes. Such prosecutions do in fact occur in appropriate circumstances. Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer.”

[The War Crimes Act of 1996](#) (18 U.S.C. § 2441) makes it a criminal offense for U.S. military personnel and U.S. nationals to commit war crimes as specified in the 1949 Geneva Conventions. War crimes under the act include grave breaches of the Geneva Conventions. It also includes violations of common Article 3 to the Geneva Conventions, which prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ...outrages upon personal dignity, in particular humiliating and degrading treatment.

[A federal anti-torture statute](#) (18 U.S.C. § 2340A), enacted in 1994, provides for the prosecution of a U.S. national or anyone present in the United States who, while outside the U.S., commits or attempts to commit torture. Torture is defined as an “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” A person found guilty under the act can be incarcerated for up to 20 years or receive the death penalty if the torture results in the victim’s death.

Military personnel who mistreat prisoners can be prosecuted by a court-martial under various provisions of the [Uniform Code of Military Justice](#) (UCMJ), arts. 77-134).

Are these offenses under domestic laws of the host countries?

European countries criminalize such acts as kidnapping, assault, homicide, and unlawful detention, and impose legal requirements regarding the treatment of detainees, the length of their detention, their right to a fair trial, and their right to challenge the legal basis of their detention. Government officials directly or indirectly involved in unlawful detention and abuse may be held accountable under domestic law. Some European countries, including the United Kingdom, France, Italy and the Netherlands, have domestic laws that incorporate the universal jurisdiction provisions in relation to torture, and allow for the prosecution of acts of torture committed anywhere in the world.²⁶

The Council of Europe, the European Commission, and several European countries, including Austria, Germany, Italy, the Netherlands, Norway, Portugal, Spain, and Sweden, are investigating allegations of CIA kidnappings on European territory or the use of European airports and airspace to transport detainees. International law requires states to give effect to prohibitions on prolonged arbitrary detention and torture and other forms of cruel, inhuman or degrading treatment by adopting laws and regulations to investigate and punish offenders and ensure compensation to the victims.

German and Italian prosecutors are investigating the case of Abu Omar, an Egyptian imam allegedly kidnapped by CIA operatives in Milan in 2003 who transported him through U.S. air bases at Aviano, Italy, and Ramstein, Germany, before flying him to a prison in Egypt, where he says he was tortured. Among other offenses, German law criminalizes abduction and coercion. Italy has formally indicted 22 undercover CIA agents with crimes related to the abduction.

²⁶ REDRESS/FIDH, "Legal Remedies for Victims of 'International Crimes' Fostering an EU Approach To Extraterritorial Jurisdiction, Final Report, March 2004.