NYU School of Law Center for Human Rights and Global Justice

Statement for International Commission of Jurists (ICJ) Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights United States Hearing

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(To be checked against delivery)

Thank you for inviting the Center for Human Rights and Global Justice at NYU School of Law to share its views on the important issues before the Panel. In particular, this statement will focus on one issue: how the principle of *non-refoulement* has been compromised through transfers of terrorism suspects. The contours of this comprise became clearer yesterday when the Office of the Director of National Intelligence released a Summary of the High Value Terrorist Detainee Program and President Bush made a statement on war on terror detainees. Both the statement and summary outlined three practices that have serious implications for the *non-refoulement* principle. First, that there are 86 individuals, nearly half of whom have been removed i.e. transferred from the "battlefield" by the U.S. and its allies. The summary did not tell us where all of these individuals have ended up – but it did confirm in a few particular examples that such individuals are "in the custody of a foreign state." The second practice described was the transfers of detainees out of Guantánamo Bay to either their countries of origin or other countries interesting in prosecuting the individuals. Third, in addition to transfers out of Guantánamo, President Bush also went on record yesterday to confirm that 14 individuals who have been held in secret CIA custody have been transferred into the U.S. Naval Base at Guantánamo. This statement will address these new developments in the context of a broader discussion around how the U.S. transfers terrorism suspects and the legality or illegality of such transfers.

A starting point for this discussion is to clear up some of the confusion around the terms that are used to describe practices for transfer of terrorism suspects. This confusion arises because different actors alternately refer to "rendition"; "extraordinary rendition;" or "irregular rendition" with different meanings attaching to their use. As a general rule, when the U.S. administration talks on the record about "rendition" it is referring to a practice also known as "rendition to justice" which was developed in the 1980s and reportedly authorized by President Ronald Reagan in 1986. This apparently allowed U.S. law enforcement personnel to covertly apprehend individuals in "lawless" states and bring them to the U.S. or other states for trial or questioning. It is this long acknowledged practice to which Secretary Rice was referring in her December 5, 2005 address, when she confirmed that the U.S. had used "renditions" in situations where traditional means of transfer were not

feasible. Again, this acknowledgement was nothing new. Moreover, U.S. courts have generally accepted that "renditions to justice" in the U.S. – when free of torture or maltreatment - do not preclude U.S. courts from exercising jurisdiction over the transferred individuals.

In contrast to the U.S. administration's use of the term "rendition," human rights and other bodies use the terms "rendition" or "extraordinary rendition" to refer to a perversion of the historical "rendition to justice" practice; a perversion which is marked by credible and well-documented allegations that transferees are subject to torture or cruel, inhuman or degrading (CID) treatment. Under this new or extraordinary form of rendition, the object is not to bring terrorism suspects into recognized justice and accountability mechanisms, but instead to put them outside of the purview of any legal process.

So, where does the statement yesterday by President Bush and the Summary issued fit in this taxonomy? First, legitimate concerns remain regarding the fate of those individuals which the Administration has indicated that it has removed from the "battlefield." Second, with respect to the information that 14 individuals are being transferred from secret detention to Guantánamo, it is our concern, that the repeated assertion that this transfer is so that these individuals can now face *justice* through military commissions, along with the attempts to present Guantánamo as a "model prison" is a concerted attempt to fit these transfers within the historical "rendition" or "rendition to justice" practice, which the Administration clearly thinks is legal.

Turning specifically to the well documented allegations that individuals are transferred where there are substantial grounds for believing that they will be subject to torture or CID treatment. The U.S. has repeatedly stated that it complies with its legal obligations when transferring terrorism suspects. However, the significance of this commitment is diminished by the extent to which the U.S. has defined these obligations. The U.S. has *generally* sought to circumscribe the import of the *non-refoulement* principle, through questioning the overall applicability of the treaties containing this and other relevant obligations. It has done this either through characterizing human rights law as irrelevant to current circumstances or denying that treaties govern individuals under their jurisdiction but outside of its territory.

Alongside these more general statements regarding applicable law, there have also been a number of particularized attempts to limit the *non-refoulement* principle by paying close definitional attention to the concepts of *non-refoulement*, torture, CID treatment both in and of themselves and how they relate to one another. For example, the U.S. applies a "more likely than not" standard to assess an individual's risk of torture on transfer. Under U.S. law this standard means that transfer is only prohibited where there is a greater than 50% likelihood of torture; a standard that is much less protective than that under international law and about which the Human Rights Committee has expressed concern.

Also, it is the U.S. position that there is no international legal obligation that prohibits *refoulement* to CID treatment. U.S. obligations under CAT Article 3 were implemented in section 2242 of The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) but, significantly, this law tracks the fact that CAT only prohibits transfer to *torture*, and not CID treatment. This creates a huge legal loophole not only because of the restrictive definition of torture and expansive definition of CID treatment employed by the U.S, but also because the U.S. has explicitly rejected other non-CAT prohibitions on *refoulement*. Notably, one such rejection has been of the Human Rights Committee's position that ICCPR Article 7 prohibits the *refoulement* of individuals where they may be "at risk of" either torture or CID treatment (or both). Both the limited definition of what acts constitute torture, plus the approach of the Government to introduce a stringent *mens rea* requirement for torture to be made out, mean that the oft-repeated assurance of the U.S. that it does not transport detainees for the "purpose of torture" is a hollow guarantee.

Another practice that has dramatic implications for the *non-refoulement* principle has been the use of "diplomatic assurances" to effect transfer of terrorism suspects. The U.S. has stated that it seeks assurances that transferees will not be tortured "where appropriate," although it has stopped short of either identifying when it will be appropriate to seek such assurances or outlining the procedures to obtain assurances for rendition. Irrespective of the precise procedures used, evidence regarding the fallibility of these assurances (e.g. as with those secured with respect to Maher Arar) and the fact that the U.S. seeks to gain assurances when they are worried that a transferee will not be treated properly, suggests that diplomatic assurances in such circumstances are unlikely to be legally sufficient.

Turning now to an equally pressing question: the implications of the transfer of detainees from secret detention to Guantánamo Bay both for the *non-refoulement* principle and for ensuring accountability of U.S. actions both before and post-transfer. Media and other reports document serious and credible allegations that prior to being put in DOD custody, these 14 individuals (among others) have been subject to illegal transfers; illegal in the sense that they have been marked by torture or CID treatment. It appears that the transfer of these detainees to Guantánamo essentially purports to undo or even erase the illegality of their previous transfer and treatment, and the violations of the *non-refoulement* principle that this entails. In does this in a few ways. One key way, as mentioned earlier, is to cast the move to Guantánamo as a *transfer to justice*; and a transfer that could not be effected until the U.S. had gained useful information from the detainees. But there are some questions that remain about how much justice this transfer will afford. For example, to what extent will these individuals be able to challenge violations pre-transfer? It is not clear from the *Hamdan* decision whether *Detainee Treatment Act 2005* works to deny habeas rights to those lodging petitions after the passing of the Act, but, this would be a perverse outcome when the very reason why petitioners did not lodge habeas claims earlier is because they were kept in secret detention conditions designed to prevent access to courts. If such habeas rights are denied, then the intended fate for these individuals is for them to be brought before military commissions, the nature of which are set out in the Bill also proposed by President Bush yesterday and which raise separate questions concerning the legality of practices contained therein. Finally, aside from concerns about the ability to challenge earlier transfers and treatment, the principle of *non-refoulement* is also undermined here if there has not been a mechanism for challenging either the decision to transfer to Guantánamo or transfer into the enemy combatant system. This is an important aspect of the prohibition on the *non-refoulement* which has been recognized in the European context and by the CAT Committee.

Finally, it is also worth flagging in more general terms the implications that may flow from the post-*Hamdan* emphasis on Common Article 3 for these individuals and for those subject to other forms of transfer. While the precise implications of Common Article 3 for transfers requires further consideration, it is our opinion that common Article 3's prohibition on all "cruel treatment", torture, "outrages upon personal dignity", and "humiliating and degrading treatment" should be read to include a prohibition on all activities that facilitate this treatment, including *refoulement*. The line of reasoning here follows that adopted by the Human Rights Committee in reading a *non-refoulement* requirement into Article 7 of the ICCPR and by the European Court and the European Commission's interpretation of Article 3 of the European Convention to prohibit transfers to torture or to CID treatment or punishment. Moreover, a focus on Common Article 3 as the only determinative law would ignore the jurisprudence of the International Court of Justice and statements of various legal authorities regarding the applicability of human rights treaties in conflict, and in particular the norms within these treaties that unequivocally prohibit transfers to torture or CID treatment, irrespective of the acts of which individuals are suspected.