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Introduction

Thank you to the North Carolina Commission of Inquiry on Torture for the opportunity to provide this testimony. My comments today will address three things: the international law obligations that govern the U.S. government's (USG) rendition, detention, and interrogation (RDI) program; how these obligations also bind authorities in North Carolina; and the ways in which the planning, execution, and failure to investigate the RDI program violated international law.

What obligations does the USG have under international law that are relevant to, and that govern, its post-9/11 rendition, detention, and interrogation program?

U.S. obligations under international law comprise a series of complementary protections under international human rights, humanitarian, refugee, and criminal law. These obligations derive both from treaties that the United States has ratified, as well as from customary international law, meaning norms that are binding on all nations although not necessarily always codified in law. Of the nine core human rights treaties, there are three that are particularly relevant: the United States is a party to the International Covenant on Civil and Political Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Elimination of All Forms of Racial Discrimination.

When the U.S. government ratifies human rights treaties—including these three—it conditions its consent to them on a number of grounds, including an understanding that they will be applied consistent with the U.S. federal system, as well as that they are non-self-executing, meaning that the treaties need implementing legislation to be able to be directly enforced in U.S. courts. Such conditions do not affect U.S. obligations under international law, but they can affect how they get domestically implemented and judicially enforced.

Do these obligations apply to North Carolina?

On this point of domestic implementation, a key question before the Commission is whether these human rights treaties apply to authorities in North Carolina. The answer is yes. As a matter of international law as well as U.S. domestic law, state and local authorities are bound by human rights treaties that the United States has ratified. Under international law, the federal state is considered a single entity. This means that when a federal state enters into a human right treaty, it binds all levels of government which are then each required to comply with the obligations in these treaties to the extent that the subject matter of those treaties is within their competence (which depends on how domestic laws divide power between the different subnational entities). The U.S. government has explicitly recognized that its federal system of government does not exempt state or local officials from complying with international law.

State and local authorities of the United States are also bound by international human rights law under U.S. domestic law itself. Pursuant to the Supremacy Clause of the Constitution, these treaties are the "supreme law of the land" and bind the federal executive, as well as state and local authorities. As such, state and local authorities have an obligation under domestic law to implement these human treaties by whatever means are necessary, e.g., legislative, administrative, or other actions to ensure compliance with international law obligations.

All of this means that under both international and domestic law, North Carolina could not allow its public infrastructure to be used to commit acts in violation of the human rights treaties, including for torture or conspiracy to torture, and must investigate all such allegations.

Was the RDI program compliant with U.S. obligations under international law?

Turning to the content of those obligations in more detail and whether the U.S. post-9/11 rendition, interrogation, and detention program violated obligations under human rights treaties. The short and resounding answer, is yes. Program planning, execution, and failure to investigate and punish, all engage international law obligations that bind the United States. For example, what happened to individuals at all stages in the program—including in the lead up to rendition flights (including their initial apprehension and treatment on tarmacs of foreign airports by CIA Rendition Teams), on rendition flights, in secret detention and through interrogation using brutal tactics referred to as EITs, and in the failure to get justice—engages international law obligations that bind the United States and was in clear violation of human rights treaties.

These treaties contain multiple rules that are relevant here, but for purposes of time will focus on the prohibitions of: torture and cruel, inhuman, and degrading treatment or punishment (CIDT), transfer to torture or CIDT ("extraordinary rendition"), and disappearances.

- International human rights law prohibits torture, as well as cruel, inhuman, or degrading treatment or punishment. This torture prohibition is absolute and non-derogable under U.S. treaty obligations, meaning that it a right so fundamental that it cannot be set aside or suspended, or violated under any circumstances. The absolute ban on torture means that from a legal perspective there is simply no room for discussions about whether torture does or does not work. Instead the United States must prevent, criminalize, prosecute, and punish four things; a) direct torture, b) complicity in torture, c) attempted torture, and d) aiding and abetting in torture by state actors and also non-state actors acting under the direction or with the consent or acquiescence of a state actor. Outside of the United States, particularly in the European Court of Human Rights, the rendition, interrogation, and secret detention of men on board flights leaving from North Carolina and the failure of governmental authorities to investigate, has been found to violate the ban on torture. I would be happy to further elaborate on this in the Q&A.

- International human rights law prohibits the transfer or *refoulement* of individuals to situations where they may be in danger of torture and CIDT. When the U.S. government transferred individuals to the custody of foreign states for coercive interrogation it violated this norm and is also legally responsible for what happened to those individuals when in subsequent captivity. The same is true for transfer to secret CIA custody.

- International human rights law prohibits enforced disappearances, meaning deprivation of liberty by agents of the state or by persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person. Incommunicado detention in CIA "black sites" is *per se* a violation of the ban on enforced disappearances, which also constitute a form of torture. What we refer to as the RDI program was, in fact and in law, an enforced disappearances and torture program.

- As we heard cogently in testimony yesterday, additional rights that are violated include:
  - The right to liberty and security of the person;
  - The right to life, when the person is killed or threatened (e.g., mock executions);
  - The right to an identity;
  - The right to a fair trial and to judicial guarantees;
  - The right to know the truth, including regarding the circumstances of a disappearance;

- The right to family life; and
- The right to privacy.

Across all of the human rights treaties, there is also a right to an effective remedy, including reparation and compensation for violations that are committed. This means that the human rights treaties that the United States has ratified govern what the government does or does not do long after the program itself has ended. As such, the failure by American authorities to investigate and prosecute allegations of human rights itself gives rise to a breach by the United States of its obligations under human rights treaties.

Did these obligations apply during the "War on Terror," including to actions abroad?

It is also important to note that with all of these international obligations, no war, no state of exception, no reason of national security can justify torture or CIDT, transfer to torture or CIDT, enforced disappearance, or the failure to prevent, investigate, and punish these actions. Human rights treaties applied during the "War on Terror," despite the USG's assertions at the time—much disputed, since revised—to the contrary, including that other international obligations (e.g., international humanitarian law) were governing law. And they continue to apply now in determining the response to allegations about what occurred between 2001 and 2008.

These human rights treaties apply to what happened on U.S. territory (e.g., authorizations through Torture Memos, trainings of interrogators, use of airports) but also extraterritorially wherever the USG exercised effective control over an individual e.g., in CIA "black sites" in locations such as Thailand and Poland, as well on rendition aircraft even when in the airspace(s) of another country or in international airspace. This is important to emphasize because one of the ways in which the United States sought to avoid accountability during the Bush Administration was to argue—again incorrectly—that America's human rights treaties did not apply outside of the sovereign territory of the United States, that they quite literally stopped at the border. However, just as no state, group or individual is above the law, so too can no person can be placed outside the law. Acts such as enforced disappearance in CIA "black sites" or efforts to create a legal fiction of "human rights free zones" that give a blank check to interrogations provided they are not on U.S. soil tried to do this and in so doing, infringed international human rights law.

Who is bound by these obligations and how much do they require regulation of private actors?

As we have heard, the U.S. post-9/11 RDI program relied on a unique number of partnerships to sustain its covert nature. This includes partnerships with foreign governments to use airspace and territory, as well as with private companies to transport individuals on board what was described yesterday as "torture chambers in the sky." Under human rights treaties, there is legal accountability for these different kinds of arrangements that governments make.

Under international law, governmental authorities—including those in North Carolina—are liable for the acts or omissions of their own officials that violate rights guaranteed under the treaties. But the U.S. government is also liable for the actions of other individuals or groups acting under its instruction, direction, control, or acquiescence, including private actors such as companies that act effectively as an arm of the government. And finally, even where there isn't a very close nexus between the government and the private actor, the U.S. government can be held liable for a failure to exercise due diligence to prevent, investigate, and punish activities by private actors that impair rights enshrined in international law.

In short, under human rights law that binds the United States and all of its governmental authorities, a government can't violate rights, outsource to private actors to do so, or turn a blind eye when private actors do—either at the time these things are happening or afterward in failing to investigate, prosecute, and punish.