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SUBJECT: GUIDANCE REQUEST -- OSCE PC -- RESPONSE TO

PA BRUCE GEORGE

REF: EMAIL USOSCE-EUR/RPM 09/02/03

1. POST IS AUTHORIZED TO PRESENT THE FOLLOWING STATEMENT AT THE SEPTEMBER 03 PC MEETING IN VIENNA.

BEGIN TEXT:

THANK YOU MR. CHAIRMAN. WE WELCOME PRESIDENT BRUCE GEORGE HERE TO THE PERMANENT COUNCIL AND THANK HIM FOR HIS REPORT ON THE ANNUAL SESSION OF THE OSCE PARLIAMENTARY ASSEMBLY IN ROTTERDAM, AS WELL AS FUTURE PA ACTIVITIES AND PRIORITIES. I ATTENDED THE ANNUAL SESSION, ACCOMPANYING A STRONG U.S. DELEGATION OF 8 MEMBERS OF CONGRESS.

WE WELCOME THE INVOLVEMENT AND INPUT FROM OUR PARLIAMENTARY COLLEAGUES. IN FACT, TODAY, THE

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CHAIRMAN-IN-OFFICE JAAP DE HOOP SCHEFFER, WILL TESTIFY BEFORE THE U.S. CONGRESSIONAL COMMISSION ON SECURITY AND COOPERATION IN EUROPE CONCERNING THE DUTCH LEADERSHIP OF THE OSCE. THIS ILLUSTRATES JUST HOW IMPORTANT THE OSCE IS TO OUR CONGRESS.

WE ARE ALSO PLEASED TO HAVE A REPRESENTATIVE OF THE PARLIAMENTARY ASSEMBLY, AMBASSADOR NOTHELLE, RESIDENT HERE IN VIENNA. AMBASSADOR NOTHELLE'S PARTICIPATION IN VARIOUS MEETINGS HAS GREATLY CONTRIBUTED TO THE FLOW OF INFORMATION BETWEEN THE PA AND THE PC. WE LOOK FORWARD TO A CONTINUING CLOSE WORKING RELATIONSHIP WITH HIM.

WE SUPPORT INCREASED INVOLVEMENT OF PARLIAMENTARIANS IN OSCE ACTIVITIES. PARLIAMENTARIANS HAVE BEEN PARTICULARLY INVOLVED IN ELECTION OBSERVATION. THE PA DEMOCRACY TEAMS AND AD HOC COMMITTEES HAVE ALSO BEEN VERY USEFUL. WE BELIEVE WE SHOULD LOOK AT EVEN MORE TYPES OF ACTIVITIES IN WHICH WE CAN BENEFIT FROM THE EXPERIENCE AND EXPERTISE OF OUR PARLIAMENTARIANS.

AS WE SAID WHEN AMBASSADOR NOTHELLE BRIEFED THE PERMANENT COUNCIL ON THE RESULTS OF THE ROTTERDAM MEETING, THE U.S. DELEGATION SPONSORED SEVERAL SUPPLEMENTAL RESOLUTIONS, AND ADDITIONAL AMENDMENTS TO THE COMMITTEE RESOLUTIONS, THAT WE HOPE WILL RECEIVE FURTHER OSCE ACTION. THESE ITEMS CONCERN IDPS, COMBATING ANTI-SEMITISM, WELCOMING <<AFGHANISTAN>> AS A PARTNER FOR COOPERATION, AND COMBATING TRAFFICKING AND EXPLOITATION OF CHILDREN.

CONGRESSMAN SMITH INTRODUCED AMENDMENTS CONCERNING INTERNALLY DISPLACED PERSONS (IDPS) WHICH WAS ADOPTED, RECOMMENDING THAT THE OSCE LOOK AT WHAT CAN BE DONE TO BETTER THE SITUATION OF IDPS IN OUR REGION. WE LOOK FORWARD TO DISCUSSION OF THIS ISSUE IN THE COMING MONTHS, AS WE PREPARE FOR MAASTRICHT.

WE ALSO LOOK FORWARD TO DISCUSSION OF HOW WE CAN INCREASE INVOLVEMENT OF <<AFGHANISTAN>> AS AN ACTIVE OSCE PARTNER TAKING ADVANTAGE OF THE MANY MEETINGS THIS FALL, INCLUDING THE HUMAN DIMENSION IMPLEMENTATION MEETING AND THE MINISTERIAL IN MAASTRICHT.

I WOULD LIKE TO NOTE THAT OUR CONGRESSMEN USED THE OPPORTUNITY PRESENTED THEM IN ROTTERDAM TO CONTINUE

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FOLLOW-UP CONCERNING COMBATING ANTI-SEMITISM. THEY CONTINUE TO GATHER SIGNATURES FROM FELLOW PARLIAMENTARIANS IN SUPPORT OF A U.S./GERMAN PARLIAMENTARY ACTION PLAN ON THE SUBJECT. WE LOOK FORWARD TO DISCUSSION OF HOW TO FOLLOW UP RECOMMENDATIONS COMING OUT OF THE ANTI-SEMITISM CONFERENCE AND THE SPECIAL TOPIC DAY DEVOTED TO THIS - AS WELL AS TOMORROW'S CONFERENCE ON RACISM, XENOPHOBIA, AND DISCRIMINATION - DURING THE HUMAN DIMENSION IMPLEMENTATION MEETING. WE HOPE THAT WE CAN ADDRESS THESE ISSUES AS WE LOOK TOWARD THE MAASTRICHT MINISTERIAL.

WE ALSO WELCOME THE ADOPTION IN JULY OF THE ANTI-TRAFFICKING ACTION PLAN. WE TAKE NOTE OF THE PARLIAMENTARY ASSEMBLY'S ENDORSEMENT OF A POSSIBLE NEW OSCE MECHANISM TO MAKE OUR EFFORTS AT COMBATING THIS SCOURGE EVEN MORE EFFECTIVE, AND LOOK FORWARD TO FURTHER DISCUSSIONS ON THIS AS WE PREPARE FOR THE MINISTERIAL.

FINALLY, I WOULD LIKE TO NOTE THAT IN KEEPING WITH THE COMMITMENT MR. SMITH MADE IN ROTTERDAM TO VISIT <<DETAINEEES>> IN GUANTANAMO, HE LED A DELEGATION THERE FROM THE U.S. COMMISSION ON SECURITY AND COOPERATION IN EUROPE ON JULY 26. I UNDERSTAND THAT A SHORT REPORT ON THE VISIT WILL BE SENT TO MR. GEORGE IN THE NEAR FUTURE.

THANK YOU, MR. CHAIRMAN.

TO USE ONLY IF RAISED: DEPARTMENT GUIDANCE  
GUANTANAMO BAY <<DETAINEEES>>:

MILITARY COMMISSIONS  
TRIAL BY MILITARY COMMISSION IS A COMMON AND WELL-ESTABLISHED PRACTICE RECOGNIZED BY INTERNATIONAL LAW.

THE U.S. HAS USED MILITARY COMMISSIONS SINCE THE REVOLUTIONARY WAR, INCLUDING IN THE MEXICAN-AMERICAN WAR, THE U.S. CIVIL WAR, AND WWII. THE EUROPEANS ALSO USED MILITARY COMMISSIONS EXTENSIVELY IN THE 19TH AND 20TH CENTURIES, INCLUDING IN WWI AND WWII.

AS A MATTER OF HISTORIC PRECEDENT, THE U.S. AND ITS EUROPEAN ALLIES HAVE CONVENED MILITARY COURTS OR COMMISSIONS PRIMARILY IN CONNECTION WITH WAR-RELATED OFFENSES.

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THE THIRD GENEVA CONVENTION OF 1949 EXPRESSLY CREATES A PRESUMPTION THAT PRISONERS OF WAR "SHALL BE TRIED ONLY BY A MILITARY COURT" UNLESS THE EXISTING LAW OF THE DETAINING COUNTRY EXPRESSLY PERMITS ITS CIVIL COURTS TO TRY A MEMBER OF ITS OWN ARMED FORCES.

U.S. MILITARY COMMISSIONS, IF CONVENED, WOULD BE CONSTITUTIONALLY AUTHORIZED. THE UNIFORM CODE OF MILITARY JUSTICE EXPRESSLY RECOGNIZES THE JURISDICTION OF MILITARY COMMISSIONS.

THE MILITARY COMMISSIONS WILL BE IMPARTIAL. THEY WILL PROVIDE FULL AND FAIR TRIALS. WE BELIEVE THAT THE PROCEDURES FOR THE COMMISSIONS PROVIDE APPROPRIATE DUE PROCESS SAFEGUARDS.

THE USE OF MILITARY COMMISSIONS TO TRY THE <<DETAINÉES>> AT GUANTANAMO WOULD BE CONSISTENT WITH THE PROCEDURAL SAFEGUARDS FOUND IN THE GENEVA CONVENTIONS OF 1949 AND ARTICLE 75 OF PROTOCOL 1 OF 1977 TO THE GENEVA CONVENTIONS. (THE <<UNITED>> <<STATES>> IS NOT A PARTY TO THE PROTOCOL.)

(NOTE: BELOW ARE MORE DETAILED POINTS ON THE PROCEDURES, FROM 02 STATE 20095 AND MORE RECENT DOCUMENTS CLEARED BY DOD.):

IN PARTICULAR, THE PROCEDURES INCLUDE THE FOLLOWING:

- THE PRESUMPTION OF INNOCENCE
- REPRESENTATION BY DEFENSE COUNSEL
- THE HIGH STANDARD OF PROOF OF GUILT BEYOND A REASONABLE DOUBT
- THE DEATH PENALTY CAN ONLY BE IMPOSED BY A UNANIMOUS DECISION OF A 7-MEMBER PANEL
- REVIEW BY AN IMPARTIAL, 3-MEMBER PANEL (POSSIBLY INCLUDING CIVILIANS WHO ARE TEMPORARILY COMMISSIONED)
- THE ACCUSED IS NOT REQUIRED TO TESTIFY, AND NO ADVERSE INFERENCE MAY BE DRAWN FROM A REFUSAL TO TESTIFY.
- THE ACCUSED MAY PRESENT EVIDENCE IN HIS DEFENSE

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AND MAY CROSS-EXAMINE WITNESSES PRESENTED BY THE PROSECUTION.

--PROCEEDINGS WILL BE OPEN TO THE PUBLIC "TO THE MAXIMUM EXTENT PRACTICABLE" (BUT THEY CAN BE CLOSED TO PROTECT NATIONAL SECURITY AND OTHER INTERESTS). AT ALL TIMES, INCLUDING IN ANY CLOSED PROCEEDINGS, THE ACCUSED WILL BE REPRESENTED BY COUNSEL.

--THE PROSECUTION WILL PROVIDE THE ACCUSED WITH ACCESS TO EVIDENCE THE PROSECUTION INTENDS TO INTRODUCE AT TRIAL AND WITH ACCESS TO EVIDENCE KNOWN TO THE PROSECUTION THAT IS INCONSISTENT WITH THE ALLEGED GUILT OF THE ACCUSED.

--THE REVIEW PANEL HAS THE AUTHORITY TO RETURN THE CASE FOR FURTHER PROCEEDINGS IF A MAJORITY OF ITS MEMBERS HAVE A DEFINITE AND FIRM CONVICTION THAT A MATERIAL ERROR OF LAW OCCURRED.

AUTHORITY TO DETAIN  
WE ARE AT WAR. THE <<UNITED>> <<STATES>> HAS THE AUTHORITY UNDER THE LAW OF ARMED CONFLICT AND THE RESPONSIBILITY TO DETAIN ENEMY COMBATANTS.

WE CONTINUE TO FIGHT AGAINST ENEMY COMBATANTS WHO ARE PLANNING AND CONDUCTING ATTACKS AGAINST US.

THE CAPTURE AND DETENTION OF ENEMY COMBATANTS, TO REMOVE THEM FROM THE FIGHTING, IS CONSISTENT WITH THE LAW OF ARMED CONFLICT. THE U.S. COMPLIES WITH THE LAW OF ARMED CONFLICT, INCLUDING THE TENET OF

HUMANE <<TREATMENT>> - A PRINCIPLE THAT THE TERRORISTS FLAGRANTLY VIOLATE.

IT IS NECESSARY TO REMOVE ENEMY COMBATANTS FROM THE BATTLEFIELD AND DETAIN THEM FOR THE SAFETY OF OUR MILITARY FORCES, AND TO PREVENT FUTURE ATTACKS.

IT IS A UNIVERSALLY RECOGNIZED PRINCIPLE UNDER THE LAW OF ARMED CONFLICT THAT ENEMY COMBATANTS ENGAGED IN WAR MAY BE CAPTURED AND DETAINED FOR THE DURATION OF THE CONFLICT. THIS HAS BEEN THE PRACTICE OF THE U.S. AND ITS ALLIES IN EVERY WAR THEY HAVE PARTICIPATED IN.

THE <<DETAINEES>> AT GUANTANAMO ARE, IN FACT, ENEMY COMBATANTS. AT THE TIME OF CAPTURE, THEY WERE

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BEARING ARMS AGAINST US OR OTHERWISE ACTING IN SUPPORT OF HOSTILE ARMED FORCES ENGAGED IN AN ONGOING ARMED CONFLICT.

## RIGHT TO COUNSEL

UNDER THE LAW OF ARMED CONFLICT, CAPTURED ENEMY COMBATANTS HAVE NO RIGHT TO COUNSEL, OR OF ACCESS TO A COURT, TO CHALLENGE THEIR DETENTION DURING HOSTILITIES.

IN THIS WAR, AS IN EVERY WAR, ENEMY COMBATANTS HAVE NO LEGAL RIGHT TO COUNSEL OR OF ACCESS TO COURTS FOR THE PURPOSE OF CHALLENGING THEIR DETENTION WHILE HOSTILITIES ARE ONGOING.

IF A <<DETAINEE>> IS CHARGED WITH A CRIME, HE WOULD HAVE ACCESS TO COUNSEL AND WOULD RECEIVE A FAIR TRIAL.

## STATUS

MEMBERS OF THE TALIBAN AND AL QAIDA ARE NOT ENTITLED TO PRISONER OF WAR STATUS UNDER THE GENEVA CONVENTION ON PRISONERS OF WAR.

ALTHOUGH THE U.S. NEVER RECOGNIZED THE TALIBAN AS THE LEGITIMATE AFGHAN GOVERNMENT, <<AFGHANISTAN>> IS A PARTY TO THE GENEVA CONVENTIONS, AND THE PRESIDENT DETERMINED THAT THE CONVENTIONS APPLY TO THE ARMED CONFLICT WITH THE TALIBAN.

UNDER THE TERMS OF THE THIRD GENEVA CONVENTION OF 1949, HOWEVER, THE TALIBAN ARE NOT ENTITLED TO POW STATUS. SPECIFICALLY, THE TALIBAN DID NOT QUALIFY AS LAWFUL COMBATANTS (OR POWS) UNDER ARTICLE 4 OF THE THIRD GENEVA CONVENTION OF 1949 BECAUSE THEY FAILED TO SATISFY THE CONDITIONS UNDER ARTICLE 4. THE TALIBAN HAVE NOT EFFECTIVELY DISTINGUISHED THEMSELVES FROM THE CIVILIAN POPULATION OF <<AFGHANISTAN>>. MOREOVER, THEY HAVE NOT CONDUCTED THEIR MILITARY OPERATIONS IN ACCORDANCE WITH THE LAWS AND CUSTOMS OF WAR.

## &lt;&lt;TREATMENT&gt;&gt;

THE <<UNITED>> <<STATES>> HAS TREATED AND WILL CONTINUE TO TREAT ENEMY COMBATANTS AT GUANTANAMO HUMANELY AND, TO THE EXTENT APPROPRIATE AND CONSISTENT WITH MILITARY NECESSITY, IN A MANNER CONSISTENT WITH THE PRINCIPLES OF THE THIRD GENEVA CONVENTION OF 1949.

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MR. CHAIRMAN, I HAVE ALREADY NOTED ON SEVERAL OCCASIONS U.S. CONCERN REGARDING THE ICC, BUT LET ME AGAIN SUMMARIZE THESE CONCERNS.

THE U.S. STRONGLY OBJECTS TO THE ICC'S CLAIMS OF JURISDICTION OVER THE NATIONALS, INCLUDING GOVERNMENT OFFICIALS AND SERVICE MEMBERS, OF STATES NOT PARTY TO THE TREATY. WE ARE CONCERNED THAT THE LACK OF ACCOUNTABILITY OVER THE ICC AND ITS PROSECUTORS WILL RESULT IN POLITICALLY MOTIVATED ATTEMPTS TO INVESTIGATE AND PROSECUTE U.S. SERVICE MEMBERS AND OTHER GOVERNMENT OFFICIALS. WE STRONGLY OBJECT TO THE ICC'S CLAIM TO BE ABLE TO UNILATERALLY DECIDE WHETHER AN U.S. INVESTIGATION OR PROSECUTION WAS ADEQUATE. WE THINK THE TREATY PROVIDES AN OPENING FOR THE ICC TO UNDERMINE THE ROLE OF THE UN SECURITY COUNCIL IN DETERMINING WHEN A STATE HAS COMMITTED AN ACT OF AGGRESSION.

WE HAVE BEEN CLEAR AND CONSISTENT IN COMMUNICATING OUR CONCERNS ABOUT THE ICC SINCE NEGOTIATIONS OF THE ROME STATUTE BEGAN.

WE RESPECT THE RIGHT OF ANY SOVEREIGN STATE TO BECOME PARTY TO THE ROME STATUTE; HOWEVER, WE ASK THAT THE SOVEREIGNTY OF THE <<UNITED>> <<STATES>> BE SIMILARLY RESPECTED AS WELL AS OUR RIGHT TO PROTECT U.S. PERSONS FROM JURISDICTION UNDER A TREATY TO WHICH THE U.S. HAS CHOSEN NOT BECOME A PARTY.

IN PURSUING ARTICLE 98 AGREEMENTS, WE ARE NOT ATTEMPTING TO UNDERMINE THE INTERNATIONAL CRIMINAL COURT; RATHER WE ARE WORKING WITHIN THE FRAMEWORK OF THE ROME STATUTE WHICH SPECIFICALLY PROVIDES FOR SUCH AGREEMENTS.

END TEXT.  
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