MATERIALS ON TORTURE AND OTHER ILL-TREATMENT

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A. QUESTIONS

1. What was the first international human rights prohibition against torture? What is the legal force of that prohibition?

2. Did that first prohibition relate only to torture or also to ill-treatment?

3. How different are the prohibitions in humanitarian law as to torture and ill-treatment from the prohibitions in human rights law?

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4. Under what circumstances, if any, might torture be permissible under international law?

5. Under what circumstances, if any, might cruel, inhuman or degrading treatment be permissible under international law?

6. What is the most authoritative definition of torture? What are the principal aspects of that definition?

7. What sorts of conduct qualify as torture? ill-treatment? What sources of interpretation are most pertinent?

8. What characteristics distinguish torture from ill-treatment?

9. What distinction, if any, does the Convention Against Torture draw between torture and other ill-treatment?

10. What is the legal import of the U.S. reservations with regard to cruel, inhuman or degrading treatment?

11. What is the legal import of the U.S. understanding in regard to the meaning of torture?

12. Does President Bush's pronouncement on February 7, 2002, with regard to the "Humane Treatment of al Qaeda and Taliban detainees" constitute a commitment to treating detainees humanely consistent with the traditional respect of the U.S. for human rights? Could President Bush's pronouncement also be seen as a bold and treacherous attack on the international legal prohibition of torture and ill-treatment? What language in the February 7th pronouncement would you cite for either of these views?

   a. What was the legal authority for President Bush's pronouncement on February 7, 2002, with regard to the "Humane Treatment of al Qaeda and Taliban detainees"? What do you think of the legal authority?

   b. Do the Geneva Conventions apply to the treatment of al Qaeda and Taliban detainees?

   c. Is the "war on terror" an international armed conflict?

d. Does the "war on terror" fit within the protections of Common Article 3 to the Geneva Conventions?

e. Does the Convention Against Torture apply to the treatment of al Qaeda and Taliban detainees? Did Present Bush consider the Convention Against Torture?

f. Does the Civil and Political Covenant apply to the treatment of al Qaeda and Taliban detainees? Did Present Bush consider the Covenant?

13. What was the impact of President Bush's pronouncement on February 7, 2002?

14. What do you think of Secretary of State Colin Powell's concerns about the advice President Bush was getting prior to his pronouncement on February 7, 2002?

15. What was the objective of the August 1, 2002, memo from the Office of Legal Counsel (OLC) in the U.S. Department of Justice?

16. If you were given the task of advising U.S. interrogators what objective would you have pursued?

17. How did the OLC memo of August 1, 2002, interpret torture? How did that interpretation differ from the Torture Convention definition? the U.S. understanding?

18. To what extent did the OLC memo of August 1, 2002, focus on cruel, inhuman, or degrading treatment?

19. What was the operational impact of the U.S. understanding as to cruel, inhuman, or degrading treatment?

20. The OLC memo of August 1, 2002, did not focus on Article 10 of the Covenant on Civil and Political Rights. Was there any U.S. reservation or understanding in regard to that provision?

21. Were the instructions given to U.S. interrogators by Secretary of Defense Rumsfeld on December 2, 2002, consistent with U.S. humanitarian law or human rights obligations? Was he calling for torture? cruel, inhuman, or degrading treatment?

22. How do Rumsfeld's instructions of December 2nd compare with the Army's Field Manual 34-52? What is the significance, if any, of that comparison?

23. What is the difference between the OLC advice given to U.S. interrogators on August 1, 2002, and the OLC advice given on December 30, 2004?

24. Were the instructions given to U.S. interrogators by Secretary of Defense Rumsfeld on April 16, 2003, consistent with U.S. humanitarian law or human rights obligations? Was he calling for torture? cruel, inhuman, or degrading treatment?

25. To the extent that there is information about the actual conduct of U.S. interrogators and forces with regard to detainees in Afghanistan, Guantánamo, and Iraq, does that conduct constitute torture? cruel, inhuman, or degrading treatment?

26. To what extent was that conduct the responsibility of low-level, ill-trained, and unauthorized military personnel?

27. Was that conduct authorized by the highest levels of the U.S. Government?

28. What has the U.S. done to investigate and/or remedy violations of human rights and humanitarian law as to torture? cruel, inhuman, or degrading treatment?

29. What more should the U.S. Government do?

30. What more should other governments do?

31. What further questions do you have about these developments?

B. TREATIES AND OTHER INTERNATIONAL INSTRUMENTS RELATING TO TORTURE AND OTHER ILL-TREATMENT – U.S. COMMITMENTS

CHARTER OF THE UNITED NATIONS, June 26, 1945, 59 Stat. 1031, T.S. NO. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945: . . .

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . .

> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55. . . .

Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

NOTE: The U.S. has formally obligated itself to comply with prescriptions of the U.N. Charter, which entered into force on October 24, 1945. There are 191 States parties to the U.N. Charter.

UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

NOTE: Mrs. Eleanor Roosevelt, as the U.S. Ambassador to the Commission on Human Rights, was very much involved in drafting the Universal Declaration. The Universal Declaration is considered an authoritative interpretation of the treaty obligations under the U.N. Charter. Article 5 and other Universal Declaration provisions are also considered customary international law.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted. . .

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the

intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation. . . .

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation. . . .

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

NOTE: There are 154 States parties to the Covenant. During the first Bush Administration, the U.S. ratified the Covenant on Civil and Political Rights on June 8, 1992; the treaty entered into force for the U.S. on September 8, 1992. It was encumbered by five reservations, five understandings, four declarations, and one proviso. 102 Cong. Rec. S4781-4784 (daily ed., April 2, 1992).

The first U.S. report to the Human Rights Committee was to be submitted on September 7, 1993, however, it was submitted on July 29, 1994, and the Committee considered the initial report at its fifty-third session in March 1995. The second U.S. report was due in September 1998 and had not been submitted by May 2005. In 1996, Thomas Buergenthal became the first U.S. member of the Human Rights Committee. He was replaced by Louis Henkin in September 1999. In September 2002 Ruth Wedgewood became a member of the Committee.

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

Article 1

1. For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another. State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph I of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

NOTE: The U.N. General Assembly adopted the Convention Against Torture on December 10, 1984. There are 139 States parties to the Convention Against Torture. On April 18, 1988, the U.S. signed, and on May 20, 1988, President Reagan submitted the treaty to the Senate. He attached a letter from the Secretary of State suggesting reservations, understandings, and declarations that might be attached to the treaty. *Letter from Secretary of State George Shultz to President Reagan (May 10, 1988)*, *Message from the President of the United States transmitting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 100th Cong., 2d Sess. (1988).

In 1989 the Administration President George H.W. Bush indicated that the Treaty Against Torture had higher priority for ratification than any other human rights treaty. When the Senate gave its advice and consent, it adopted 2 reservations, 5 understandings, and 2 declarations. 136 CONG. REC. S17486-92 (daily ed., Oct. 27, 1990). The reservations, declarations, and understandings that were eventually accepted by the Senate are set forth below in part B of these materials. The U.S. deposited its instrument of ratification on October 21, 1994, and the treaty came into force with regard to the U.S. on November 20, 1994. The treaty required a U.S. report to the Committee Against Torture by November 21, 1995, and the U.S. produced its first report on October 15, 1999. In November 1999, a second periodic report was due. Nonetheless, in November 1999 Felice Gaer, the first U.S. member of the Committee Against Torture was elected and she was re-elected in November 2003 after having been re-nominated by the George W. Bush Administration. On May 6, 2005, the U.S. Government submitted its second periodic report to the Committee. Excerpts are reproduced below.

AMERICAN CONVENTION ON HUMAN RIGHTS, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. . . .

Article 27. Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other

obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

NOTE: The U.S. has signed, but has not ratified the American Convention on Human Rights. There are 25 States parties to the American Convention.

[EUROPEAN] CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols Nos. 3, 5, and 8 *which entered into force* on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment. . . .

Article 15 – Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. . . .

NOTE: The U.S. is not eligible to ratify the European Convention because it is not a member of the Council of Europe.

AFRICAN [BANJUL] CHARTER ON HUMAN AND PEOPLES' RIGHTS, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation

of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

NOTE: The U.S. not eligible to ratify the African Charter. The African Charter contains no provisions relating to derogation.

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950. (Third Geneva Convention)

Article 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 2

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them,

even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment. . . .

Article 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. . . .

Article 17

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5 x 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind. . . .

Article 87

Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts. . . .

Collective punishment for individual acts, corporal punishments, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden. . . .

Article 129

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. . . .

Article 130

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention. . . .

NOTE: The U.S. has ratified the Third Geneva Convention, which came into force for the U.S. on February 2, 1956. There are 188 States parties to the Third Geneva Convention and the U.S. submitted no reservations as to this treaty.

GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950. (Fourth Geneva Convention)

Article 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 2

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3

[Common Article 3 is the same for all four Geneva Conventions.]

Article 32

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person but also to any other measures of brutality whether applied by civilian or military agents.

Article 146

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. . . .

Article 147

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

NOTE: The U.S. has ratified the Fourth Geneva Convention, which came into force for the U.S. on February 2, 1956. There are 188 States parties to the Fourth Geneva Convention and the U.S. submitted one reservation as to this treaty not related to torture.

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978.

Article 75. -Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) Violence to the life, health, or physical or mental well-being of persons, in particular:

(i) Murder;

(ii) Torture of all kinds, whether physical or mental;

(iii) Corporal punishment ; and

(iv) Mutilation;

(b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) The taking of hostages;

(d) Collective punishments; and

(e) Threats to commit any of the foregoing acts. . . .

NOTE: The U.S. has signed but has not ratified Additional Protocol I. In signing Additional Protocol I the U.S. submitted two understandings unrelated to torture. There are 146 States parties to Additional Protocol I.

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.

Article 4.-Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:

> (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; . . .

NOTE: The U.S. has signed but has not ratified Additional Protocol II. In signing Additional Protocol II the U.S. submitted one understanding unrelated to torture. There are 138 States parties to Additional Protocol II.

STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3, *entered into force* July 1, 2002.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . .

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; . . .

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; . . ..

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health; . . .

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; . . .

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; . . .

NOTE: The U.S. signed the Statute, but in a communication received on May 6, 2002, the Government of the United States of America informed the U.N. Secretary-General of the following: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. . . ." There are 98 States parties to the Statute of the ICC.

See also: Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. A/RES/57/199, *adopted* Dec. 18, 2002 [*reprinted in* 42 I.L.M. 26 (2003)] (U.S. has not signed or ratified this treaty); Inter-American Convention to Prevent and Punish Torture, 25 I.L.M. 519, Dec. 9, 1985, *entered into force* Feb. 28, 1987 (16 States parties) (U.S. has not signed or ratified this treaty); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. 126, *entered into force* Feb. 1, 1989 (U.S. has not signed or ratified this treaty).

C. U.S. RESERVATIONS TO HUMAN RIGHTS TREATIES RELATING TO TORTURE

U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

I. The Senate's advice and consent is subject to the following reservations:

. . .

(3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States. . . .

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing. . . .

(2) . . . The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President: Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

Several parties to the Covenant objected to various limitations placed on the U.S.'s ratification of the Civil and Political Covenant. Eleven European countries, for instance, objected to the reservation preserving the right to impose the death penalty on juvenile offenders. They contended that it is incompatible with the object and purpose of the treaty. Eight countries objected to the reservation limiting the meaning of "cruel, inhuman or degrading treatment or punishment."

U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(2) That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe

physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(2) That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

(3) That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

(5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that

the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.

III. The Senate's advice and consent is subject to the following declarations:
(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

(2) That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:
The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

Assessing the Validity of the U.S. Reservations

In assessing limitations to human rights treaties, the Vienna Convention on the Law of Treaties, Art. 2(1)(d), 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1979), *entered into force* January 27, 1980, defines a reservation as a "unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state . . .."

The International Court of Justice, in *Advisory Opinion on Reservations to the Genocide Convention*, 1951 I.C.J. 16, 24, delineated an authoritative standard for the assertion of reservations to a multilateral human rights treaty:

Object and purpose of the Convention limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation or accession as well as for the appraisal by a State in objecting to the reservation.

Article 19 of the Vienna Convention on the Law of Treaties codified this principle: "A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty."

Article 20 of the Vienna Convention establishes the process for governments to make objections to reservations to treaties. Articles 20 and 21 indicate that objections by other governments to particular reservations will not preclude the entry into force of the treaty. Unless an objecting government otherwise specifies, the treaty can go into force between the two governments but the provisions to which the reservation relates do not apply as between those governments.

The use of extensive limitations to minimize the effect of a treaty on domestic practices of parties may contravene established principles of international law. The Vienna Convention on the Law of Treaties restates in Article 27 the fundamental relationship between domestic and treaty law: "A party may not invoke the provisions of its domestic law as justification for its failure to perform a treaty." Although the U.S. government could formally evade this rule by incorporating domestic law into the treaty by way of reservation or other limitations, such an attempt would violate the spirit of Article 27.

In November 1994, the Human Rights Committee — the UN body authorized to interpret and implement the Civil and Political Rights Covenant — issued a General Comment criticizing the increasing number of reservations states add to treaties before ratifying. Human Rights Committee, *General Comment No. 24*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994). The Committee noted that it is often difficult to distinguish between reservations and declarations, and indicated that it would acknowledge distinctions based on the intent of the party rather than on the form of the instrument:

> If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation. Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation. *Id.* ¶ 3 (footnote omitted).

The Committee acknowledged that reservations "serve a useful function" by enabling States that might otherwise have difficulty guaranteeing all the rights in the Covenant to nonetheless ratify, but stressed its desire that states accept the full range of obligations imposed by the treaty. *Id.* ¶ 4. The Committee went on to assess the compatibility of certain types of reservations, discuss its authority to make determinations concerning compatibility, and propose consequences for "unacceptable" reservations:

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. . . . [P]rovisions in the Covenant that represent customary international law . . . may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty

unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be. . . .

10. The Committee has further examined whether categories of reservations may offend the "object and purpose" test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. . . . While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant consists not just of specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3 of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. The Covenant also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. . . . Accordingly, a reservation that rejects the Committee's competence to interpret the requirement of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

12. The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party's jurisdiction. . . . Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed. . . .

The U.S. State Department objected to certain aspects of the Human Rights Committee's General Comment 24. Letter from Conrad Harper to Francisco José Aguilar-Urbina, Chairman, U.N. Human Rights Committee (Mar. 28-29, 1995):

1. Role of the Committee

[The General Comment] can be read to present the rather surprising assertion that it is contrary to the object and purpose of the Covenant not to accept the Committee's views on the interpretation of the Covenant. This would be a rather significant departure from the Covenant scheme, which does not impose on States Parties an obligation to give effect to the Committee's interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant. The drafters of the Covenant could have given the Committee this role but deliberately chose not to do so. . . .

Moreover, the Committee appears to dispense with the established procedures for determining the permissibility of reservations and to divest States Parties of any role in determining the meaning of the Covenant . . . and of the extent of their treaty obligations. . . .

The Committee's position, while interesting, runs contrary to the Covenant scheme and international law.

2. Acceptability of Reservations: Governing Legal Principles

The question of the status of the Committee's views is of some significance in light of the apparent lines of analysis concerning the permissibility of reservations in paragraphs 8-9. . . .

It is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot [choose] to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations.

The proposition that any reservation which contravenes a norm of customary international law is *per se* incompatible with the object and purpose of this or any other convention, however, is a much more significant and sweeping premise. It is, moreover, wholly unsupported by and is in fact contrary to international law. As recognized in paragraph 10 analysis of non-derogable rights, an "object and purpose" analysis by its nature requires consideration of the particular treaty, right, and reservation in question. . . .

3. Specific Reservations

The precise specification of what is contrary to customary international law, moreover, is a much more substantial question than indicated by the Comment. Even where a rule is generally established in customary international law, the exact contours and meaning of the customary law principle may need to be considered.

Paragraph 8, however, asserts in a wholly conclusory fashion that a number of propositions are customary international law which, to speak plainly, are not. . . .

4. Domestic Implementation

The discussion in paragraph 12, as it stands, is very likely to give rise to misunderstandings. ... The Committee here states, with regard to implementing the Covenant in domestic law, that such laws "may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level *will be needed to allow the Covenant rights to be enforceable at the local level.* " (Emphasis added in original.)

. . . [T]his statement may be cited as an assertion that States Parties *must* allow suits in domestic courts based directly on the provisions of Covenant. Some countries do in fact have such a scheme of "self-executing" treaties. In other countries, however, existing domestic law already provides the substantive rights reflected in the Covenant as well as multiple possibilities for suit to enforce those rights. . . .

As a general matter, deciding on the most appropriate means of domestic implementation of treaty obligations is, as indicated in Article 40, left to the internal law and processes of each State Party. . . .

D. INTERNATIONAL INTERPRETATIONS OF THE PROHIBITION AGAINST TORTURE AND ILL-TREATMENT

1. The Committee Against Torture

The Committee Against Torture – the international body that monitors the implementation of the Convention Against Torture – has determined that several methods of interrogation constitute torture as defined by Article 1 of the Convention. In its concluding remarks on the periodic report submitted by Israel in 1997, the Committee decided that the following acts may be considered torture, particularly when used in combination: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill.[2] The Committee also considered these methods to constitute cruel, inhumane or degrading treatment.

a. U.S. Report

[2] Conclusions and recommendations of the Committee against Torture, Israel, U.N. Doc. A/52/44, paras. 253-260 (1997). Available at http://www1.umn.edu/humanrts/cat/observations/israel1997.html. See also Conclusions and recommendations of the Committee against Torture, Republic of Korea, U.N. Doc. A/52/44, paras. 44-69 (1996). Available at http://www1.umn.edu/humanrts/cat/observations/korea1996.html. Conclusions and recommendations of the Committee against Torture, New Zealand, U.N. Doc. A/48/44, paras. 133-160 (1993). Available at http://www1.umn.edu/humanrts/cat/observations/newzealand1993.html. Inquiry under Article 20: Committee Against Torture, Findings concerning Peru (2001), U.N. Doc. No. A/56/44, at para. 35.

As a party to the Convention Against Torture, the US submitted its initial report to the Committee in October 1999. CAT/C/28/Add.5 (2000). The formal consideration of the US report took place on May 10, 11, and 15, 2000. The US explained in its initial report to the Committee that 18 U.S.C. 2340 et seq. "extends United States criminal jurisdiction over any act of (or attempt to commit) torture outside the United States by a United States national or by an alleged offender present in the United States regardless of his or her nationality. The statute adopts the Convention's definition of torture, consistent with the terms of United States ratification. It permits the criminal prosecution of alleged torturers in federal courts in specified circumstances."

In addition, the US stated that "the obligations of article 3 ("non-refoulement") have been effectively implemented through federal administrative process and procedure and regulations. See 22 C.F.R. Parts 3, 103, 208, 235, 238, 240, 241 and 253, reprinted in 64 Federal Register 33 at 8478-8496 (19 February 1999) (INS regulations); 22 C.F.R. Part 95, reprinted in 64 Federal Register 38 at 9435-9437 (26 February 1999) (Department of State regulations).

Here are the conclusions and recommendations of the Committee:

Conclusions and Recommendations of the Committee against Torture: United States of America. 15/05/2000. A/55/44, paras.175-180. (2000):

175. The Committee considered the initial report of the United States of America (CAT/C/28/Add.5) at its 424th, 427th and 431st meetings, on 10, 11 and 15 May 2000 (CAT/C/SR.424, 427 and 431), and adopted the following conclusions and recommendations.

1. Introduction

176. The Committee welcomes the submission of the comprehensive initial report of the United States of America, which, although almost five years overdue, was prepared in full accordance with the guidelines of the Committee.

177. The Committee also thanks the State party for its sincere cooperation in its dialogue with the Committee and takes note of the information supplied in the extensive oral report.

2. Positive aspects

178. The Committee particularly welcomes the following:

(a) The extensive legal protection against torture and other cruel, inhuman or degrading treatment or punishment that exists in the State party and the efforts pursued by the authorities to achieve transparency of its institutions and practices;

(b) The broad legal recourse to compensation for victims of torture, whether or not such torture occurred in the United States of America;

(c) The introduction of executive regulations preventing refoulement of potential torture victims;

(d) The State party's contributions to the United Nations Voluntary Fund for the Victims of Torture;

(e) The creation by executive order of an inter-agency working group to ensure coordination of federal efforts towards compliance with the obligations of the international human rights treaties to which the United States of America is a party;

(f) The assurances given by the delegation that a universal criminal jurisdiction is assumed by the State party whenever an alleged torturer is found within its territory;

(g) The obviously genuine assurances of cooperation to ensure the observance of the Convention extended to the Committee by the delegation of the State party.

3. Subjects of concern

179. The Committee expresses its concern about:

(a) The failure of the State party to enact a federal crime of torture in terms consistent with article 1 of the Convention;

(b) The reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention…

4. Recommendations

180. The Committee recommends that the State party:

(a) Although it has taken many measures to ensure compliance with the provisions of the Convention, also enact a federal crime of torture in terms consistent with article 1 of the Convention and withdraw its reservations, interpretations and understandings relating to the Convention;

(b) Take such steps as are necessary to ensure that those who violate the Convention are investigated, prosecuted and punished, especially those who are motivated by discriminatory purposes or sexual gratification;

(c) Abolish electro-shock stun belts and restraint chairs as methods of restraining those in custody; their use almost invariably leads to breaches of article 16 of the Convention…

* * * * *

On May 6, 2005, the U.S. submitted its second periodic report. Although the U.S. was six years late in submitting its report, many other nations are even later in submitting their reports. Here is an excerpt from the U.S. report relating to U.S. armed forces treatment of detainees:

Second Periodic Report of the United States of America to the Committee Against TortureSubmitted by the United States of America to the Committee Against Torture, May 6, 2005

http://www.state.gov/g/drl/rls/45738.htm

ANNEX I . . .

PART ONE

INDIVIDUALS UNDER THE CONTROL OF U.S. ARMED FORCES CAPTURED DURING OPERATIONS AGAINST AL-QAIDA, THE TALIBAN AND THEIR AFFILIATES AND SUPPORTERS

I. BACKGROUND ON THE WAR AGAINST AL-QAIDA, THE TALIBAN AND THEIR AFFILIATES AND SUPPORTERS

The United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters. There is no question that under the law of armed conflict, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. Like other wars, when they start we do not know when they will end. Still, we may detain combatants until the end of the war.

At the same time, the commitment of the United States to treat detainees humanely is clear and well documented. A discussion of allegations of mistreatment of detainees appears in Part One, III.B and Part Two, III.B.

To understand U.S. actions in continuing to detain members of al-Qaida, the Taliban, and their affiliates and supporters, whether captured committing acts of belligerency themselves or directly supporting hostilities in aid of such enemy forces, the United States submits a brief summary of events in its war against al-Qaida, the Taliban, and their affiliates and supporters.

Summary of Unlawful Belligerent Acts committed by al-Qaida

Although the events of September 11, 2001 indisputably brought conflict to U.S. soil, al-Qaida had engaged in acts of war against the United States long before that date. The reality is that for almost a decade before September 11, 2001, al-Qaida and its affiliates

waged a war against the United States, although it did not show the depth of its goals until the morning of September 11, 2001.

In 1996, Usama bin Ladin issued a fatwa declaring war on the United States. In February 1998, he repeated the fatwa stating that it was the duty of all Muslims to kill U.S. citizens – civilian or military – and their allies everywhere. Six months later, on August 7, 1998, al-Qaida attacked two U.S. Embassies in Kenya and Tanzania, killing over 200 people and injuring approximately 5,000.

In 1999, an al-Qaida member attempted to carry out a bombing plot at the Los Angeles International Airport during the Millennium Celebrations. U.S. law enforcement foiled this attack, arresting Ahmed Ressam at Port Angeles at the U.S./Canadian border. The United States now knows that in October 2000, al-Qaida directed the attack on a U.S. naval warship, the USS Cole, while docked in the port of Aden, Yemen. This attack killed 17 U.S. sailors and injured 39.

The horrific events of September 11, 2001 are well known. On that day, the United States suffered massive and brutal attacks carried out by nineteen al-Qaida suicide hijackers who crashed three U.S. commercial jets into the World Trade Center and the Pentagon, and were responsible for the downing of one commercial jet in Shanksville, Pennsylvania. These attacks resulted in approximately 3,000 individuals of 78 different nationalities reported dead or missing.

The United Nations Security Council immediately condemned these terrorist acts as a "threat to international peace and security" and recognized the "inherent right of individual or collective self-defense in accordance with the United Nations Charter." U.N. Sec. Council Res. 1368, U.N. Doc. No. S/RES/1368 (Sept. 12, 2001) (at <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement> (Visited March 1, 2005)); *see* U.N. Sec. Council Res. 1373, U.N. Doc. No. S/RES/1373 (Sept. 28, 2001) (at <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm> (visited March 1, 2005)) (deciding that all States shall take certain steps to combat terrorism).

On September 12, 2001, less than 24 hours after the terrorist attacks against the United States, NATO declared the attacks to be an attack against all the 19 NATO member countries. The Allies – for the first time in NATO's history – invoked Article 5 of the Washington Treaty, which states that an armed attack against one or more NATO member countries is an attack against all. NATO followed this landmark decision by implementing practical measures aimed at assisting the United States. (At <http://www.nato.int/terrorism/index.htm#a> (visited February 26, 2005)).

On September 11, 2001, the Organization of American States (OAS) General Assembly immediately "condemned in the strongest terms, the terrorist acts visited upon the cities of New York and Washington, D.C." and expressed "full solidarity" with the government and people of the United States. Immediately thereafter, the foreign ministers of the States Parties to the 1947 Inter-American Treaty of Reciprocal Assistance (the Rio

Treaty) declared, “these terrorist attacks against the United States of America are attacks against all American states.” The ministers passed a resolution agreeing to “use all legally available measures to pursue, capture, extradite, and punish” anyone in their territories believed to be involved in terrorist activities. (At <http://www.oas.org/Assembly2001/assembly/gaassembly2000/GAterrorism.htm> (visited February 28, 2005)).

The Prime Minister of Australia also considered the attacks to be an armed attack justifying action in self-defense under Article IV of the ANZUS Treaty. *See* Statement of the Prime Minister, *Application of Anzus Treaty to Terrorist Attacks on the United States*, September 14, 2001, (at <http://www.pm.gov.au/news/media_releases/2001/media_release1241.htm> (visited February 26, 2005)).

The seriousness of the threat al-Qaida and its supporters posed to the security of the United States compelled it to act in self-defense. On October 7, 2001, President Bush invoked the United States' inherent right of self-defense and, as Commander in Chief of the Armed Forces of the United States, ordered U.S. Armed Forces to initiate action against terrorists and the Taliban regime harboring them in Afghanistan. The U.S. Armed Forces “initiated actions designed to prevent and deter further attacks on the United States . . . [including] measures against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.” Letter from John Negroponte, U.S. Permanent Representative to the U.N., to Richard Ryan, President of the U.N. Security Council, U.N. Doc. No. S/2001/946 (Oct. 7, 2001), 40 I.L.M. 1281 (2001). (At <http://www.un.int/usa/s-2001-946.htm> (visited March 1, 2005)). The attacks commenced when United States and coalition forces launched “strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan . . . designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime.” (At <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> (visited March 1, 2005)).

President Bush later stated that “[i]nternational terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.” U.S. Military Order; Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), 66 Fed. Reg. 57,833 (2001), at Section 1(a). (At <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> (visited March 1, 2005)).

Al-Qaida continues to wage armed conflict against the United States and its allies. On December 22, 2001, an al-Qaida associate, Richard Reid, attempted to destroy a U.S. airliner using explosives concealed in his shoe, a plot that the airline passengers foiled. In April 2002, al-Qaida firebombed a synagogue in Djerba, Tunisia, killing at least 20 people and injuring dozens. In June 2002, al-Qaida detonated a bomb outside the U.S.

Consulate in Karachi, Pakistan, killing 11 persons and injuring 51. On October 6, 2002, al-Qaida was most likely responsible for a suicide attack against the French oil tanker, the MV Limburg, off the coast of Yemen, killing one and injuring four. On October 8, 2002, al-Qaida gunmen attacked U.S. Marines on Failaka Island in Kuwait, killing one U.S. Marine and wounding another. On November 28, 2002, in Mombasa, Kenya, al-Qaida detonated a car bomb in front of the Paradise Hotel, killing 15 persons and wounding 40 others. That same day, terrorists launched two anti-aircraft missiles at a civilian aircraft, and narrowly missed downing a Boeing 757 taking off from Mombassa en route to Israel. Al-Qaida claimed responsibility for the attacks.

On May 12, 2003, al-Qaida suicide bombers in Saudi Arabia attacked three residential compounds for foreign workers, killing 34, including 10 U.S. citizens, and injuring 139 others. On November 9, 2003, al-Qaida was responsible for the assault and bombing of a housing complex in Riyadh, Saudi Arabia, that killed 17 and injured 100 others. On November 15, 2003, two al-Qaida suicide truck bombs exploded outside the Neve Shalom and Beth Israel Synagogues in Istanbul, killing 20 and wounding 300 more. On November 20, 2003, two al-Qaida suicide truck bombs exploded near the British consulate and the HSBC Bank in Istanbul, killing 30, including the British Consul General, and injuring more than 309. In December 2003, al-Qaida conducted two assassination attempts against Pakistan President Musharraf.

In 2004, the Saudi-based al-Qaida network and associated extremists launched at least 11 attacks, killing more than 60 people, including 6 Americans, and wounding more than 225. Al-Qaida primarily focused on targets associated with U.S. and Western presence and Saudi security forces located in Riyadh, Yanbu, Jeddah, and Dhahran.

In October 2004, Abu Mus'ab al-Zarqawi announced a merger between his organization, Jama`at al-Tawhid was-al-Jihad or JTJ and Usama bin Ladin's al-Qaida. Bin Ladin endorsed Zarqawi as his official emissary in Iraq in December. The new organization, Al-Qaida of Jihad organization in the Land of the Two Rivers or QJBR, has the immediate goal of establishing an Islamic state in Iraq. Prior to the merger of the two organizations, Zarqawi's groups had been conducting a number of attacks in Iraq, including the attack responsible for the death of the Secretary-General's Special Representative for Iraq.

In conclusion, it is clear that al-Qaida and its affiliates and supporters have planned and continue to plan and perpetrate armed attacks against the United States and its coalition partners, and they directly target civilians in blatant violation of the laws of war.

II. DETAINEES – CAPTURING, HOLDING, RELEASING, AND/OR TRYING

A. Brief Overview of the Detainee Populations Held by the U.S. Armed Forces at Guantanamo Bay and in Afghanistan

During the course of the war in Afghanistan, the U.S. Armed Forces and allied forces have captured or procured the surrender of thousands of individuals fighting as part of the al-Qaida and Taliban effort. The law of war has long recognized the right to detain combatants until the cessation of hostilities. Detaining enemy combatants prevents them from returning to the battlefield and engaging in further armed attacks against innocent civilians and U.S. forces. Further, detention serves as a deterrent against future attacks by denying the enemy the fighters needed to conduct war. Interrogations during detention enable the United States to gather important intelligence to prevent future attacks during ongoing hostilities.

The first group of enemy combatants captured in the war against al-Qaida, the Taliban, and their affiliates and supporters arrived in Guantanamo Bay, Cuba, in January 2002. The United States has approximately 520 detainees in custody at Guantanamo (at http://www.defenselink.mil/releases/2005/nr20050419-2661.html (visited April 28, 2005)) and slightly more than 500 detainees in Afghanistan. These numbers represent a small percentage of the total number of individuals the United States has detained, at one point or another, in fighting the war against al-Qaida and the Taliban.

Since the war began in Afghanistan (and long before the U.S. Supreme Court decisions in the detainee cases of June 2004), the United States has captured, screened and released approximately 10,000 individuals. It transferred to Guantanamo fewer than ten percent of those screened. The United States only wishes to hold those enemy combatants who are part of or are supporting Taliban or al-Qaida forces (or associated forces) and who, if released, would present a threat of reengaging in belligerent acts or directly aiding and supporting ongoing hostilities against the United States or its allies. We have made mistakes: of the detainees we have released, we have later recaptured or killed about 5% of them while they were engaged in hostile action against U.S. forces.

Detainees in Afghanistan and Guantanamo include many senior al-Qaida and Taliban operatives and leaders, in addition to rank-and-file jihadists who took up arms against the United States. The individuals currently held by the United States were at one time actively committing belligerent terrorist acts as part of al-Qaida, the Taliban or their affiliates and supporters who engaged in hostilities against the United States and its allies. Generally, the enemy combatants held at Guantanamo Bay comprise enemy combatants who are part of al-Qaida, the Taliban, or affiliated forces, or their supporters, whether captured committing acts of belligerency themselves or directly supporting hostilities in aid of such enemy forces. Examples of enemy combatants held in U.S. custody include:

- Terrorists linked to major al-Qaida attacks on the United States, such as the East Africa U.S. Embassy bombings and the USS Cole attack;
- Terrorists who taught or received training on arms, explosives, surveillance, and interrogation resistance techniques at al-Qaida camps;
- Terrorists continuing to express their desire to kill Americans if released. In particular, some have threatened their guards and the families of the guards;
- Terrorists who have sworn personal allegiance (“bayat”) to Usama bin Ladin; and

- Terrorists linked to several al-Qaida operational plans, including the targeting of U.S. facilities and interests.

Representative examples of specific Guantanamo detainees include:

- An al-Qaida explosives trainer who has provided information on the September 2001 assassination of Northern Alliance leader Ahmad Shah Masoud;
- A Taliban fighter linked to al-Qaida operatives connected to the East Africa U.S. Embassy bombings;
- An individual captured on the battlefield, with links to a financier of the September 11th plots, who attempted to enter the United States in August 2001 to meet hijacker Mohammed Atta;
- Two individuals associated with senior al-Qaida members developing remotely detonated explosive devices for use against U.S. forces;
- A member of an al-Qaida supported terrorist cell in Afghanistan that targeted civilians and was responsible for a grenade attack on a foreign journalist's automobile;
- An al-Qaida member who plotted to attack oil tankers in the Persian Gulf;
- An individual who served as a bodyguard for Usama bin Ladin;
- An al-Qaida member who served as an explosives trainer for al-Qaida and designed a prototype shoe bomb and a magnetic mine; and
- An individual who trained al-Qaida associates in the use of explosives and worked on a plot to use cell phones to detonate bombs.

B. Status of Detainees at Guantanamo Bay and in Afghanistan

On February 7, 2002, shortly after the United States began operations in Afghanistan, President Bush's Press Secretary announced the President's determination that the Geneva Convention "appl[ies] to the Taliban detainees, but not to the al Qaeda international terrorists" because Afghanistan is a party to the Geneva Convention, but al Qaeda – an international terrorist group – is not. Statement by the U.S. Press Secretary, The James S. Brady Briefing Room, in Washington, D.C. (Feb. 7, 2002) (at http://www.state.gov/s/l/38727.htm (visited March 1, 2005)). Although the President determined that the Geneva Convention applies to Taliban detainees, he determined that, under Article 4, such detainees are not entitled to POW status. *Id.* He explained that:

Under Article 4 of the Geneva Convention, . . . Taliban detainees are not entitled to POW status . . . .

The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. . . .

Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty.

Statement by the U.S. Press Secretary, The James S. Brady Briefing Room, in Washington, D.C. (Feb. 7, 2002) (at <http://www.state.gov/s/l/38727.htm> (visited March 1, 2005)); *see also*, White House Memorandum - Humane Treatment of al Qaeda and Taliban Detainees, February 7, 2002, at 2(c) & (d) (released and declassified in full on June 17, 2004). (At <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf > (visited March 1, 2005)).

After the President's decision, the United States concluded that those who are part of al-Qaida, the Taliban or their affiliates and supporters, or support such forces are enemy combatants whom we may detain for the duration of hostilities; these unprivileged combatants do not enjoy the privileges of POWs (*i.e.*, privileged combatants) under the Third Geneva Convention. International law, including the Geneva Conventions, has long recognized a nation's authority to detain unlawful enemy combatants without benefit of POW status. *See, e.g.,* Ingrid Detter, The Law of War 148 (2000) ("Unlawful combatants . . . though they are a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status."); *see also United States v. Lindh*, 212 F. Supp. 2d. 541, 558 (E.D. Va. 2002) (confirming the Executive branch view that "the Taliban falls far short when measured against the four GPW criteria for determining entitlement to lawful combatant immunity.")

Because there is no doubt under international law as to the status of al-Qaida, the Taliban, their affiliates and supporters, there is no need or requirement to review individually whether each enemy combatant detained at Guantanamo is entitled to POW status. For example, Article 5 of the Third Geneva Convention requires a tribunal in certain cases to determine whether a belligerent (or combatant) is entitled to POW status under the Convention only when there is doubt under any of the categories enumerated in Article 4. The United States concluded that Article 5 tribunals were unnecessary because there is no doubt as to the status of these individuals.

After the decisions of the U.S. Supreme Court in *Rasul v. Bush,* 124 S.Ct. 2686 (2004), and *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), which are described below in Section G, the U.S. Government established a process on July 7, 2004, to conduct Combatant Status Review Tribunals (CSRTs) at Guantanamo Bay. (At <www.defenselink.mil/transcripts/2004/tr200440707-0981.html> (visited March 1, 2005) (Department of Defense Briefing on Combatant Status Review Tribunal, dated July 7, 2004)). Consistent with the Supreme Court decision in *Rasul*, these tribunals supplement the prior screening procedures and serve as fora for detainees to contest their designation as enemy combatants and thereby the legal basis for their detention. The tribunals were established in response to the Supreme Court decision in *Rasul* and draw upon guidance contained in the U.S. Supreme Court decision in *Hamdi* that would apply to citizen-enemy combatants in the United States.

C. Combatant Status Review Tribunals (CSRTs) for Detainees at Guantanamo Bay

Between August 2004 and January 2005, various Combatant Status Review Tribunals (CSRTs) have reviewed the status of all individuals detained at Guantanamo, in a fact-

based proceeding, to determine whether the individual is still classified as an enemy combatant. As reflected in the Order establishing the CSRTs, an enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." CSRT Order ¶B (at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (visited March 1, 2005)). Each detainee has the opportunity to contest such designation. The Deputy Secretary of Defense appointed the Secretary of the Navy, The Honorable Gordon England, to implement and oversee this process. On July 29, 2004, Secretary England issued the implementation directive for the CSRTs, giving specific procedural and substantive guidance. (At <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> (visited March 1, 2005)). On July 12-14, 2004, the United States notified all detainees then at Guantanamo of their opportunity to contest their enemy combatant status under this process, and that a federal court has jurisdiction to entertain a petition for habeas corpus brought on their behalf. The Government has also provided them with information on how to file habeas corpus petitions in the U.S. court system. (At http://www.defenselink.mil/news/Dec2004/d20041209ARB.pdf (visited March 1, 2005)). When the Government has added new detainees, it has also informed them of these legal rights.

CSRTs offer many of the procedures contained in US Army Regulation 190-8. The Supreme Court specifically cited these Army procedures as sufficient for U.S. citizen-detainees entitled to due process under the U.S. Constitution. For example:

- Tribunals are composed of three neutral commissioned officers, plus a non-voting officer who serves as a recorder;
- Decisions are by a preponderance of the evidence by a majority of the voting members who are sworn to execute their duties impartially;
- The detainee has the right to (a) call reasonably available witnesses, (b) question witnesses called by the tribunal, (c) testify or otherwise address the tribunal, (d) not be compelled to testify, and (e) attend the open portions of the proceedings;
- An interpreter is provided to the detainee, if necessary; and
- The Tribunal creates a written report of its decision that the Staff Judge Advocate reviews for legal sufficiency. *See* CSRT Implementation Memorandum, July 29, 2004 (at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> (visited March 1, 2005)).

Unlike an Article 5 tribunal, the CSRT guarantees the detainee *additional* rights, such as the right to a personal representative to assist in reviewing information and preparing the detainee's case, presenting information, and questioning witnesses at the CSRT. The rules entitle the detainee to receive an unclassified summary of the evidence in advance of the hearing in the detainee's native language, and to introduce relevant documentary evidence. *See* CSRT Order ¶g(1); Implementation Memorandum Encl. (1) ¶¶ F(8), H (5); CSRT Order ¶g(10); Implementation Memorandum Encl. (1) ¶ F (6). In addition, the

rules require the Recorder to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee should not be designated as an enemy combatant." *See* Implementation Memorandum Encl. (2), ¶B(1). The detainee's Personal Representative also has access to the government files and can search for and provide relevant evidence that would support the detainee's position.

A higher authority (the CSRT Director) automatically reviews the result of every CSRT. He has the power to return the record to the tribunal for further proceedings if appropriate. *See* CSRT Order ¶ h; Implementation Memorandum Encl. (1) ¶¶ I (8). The CSRT Director is a two-star admiral – a senior military officer. CSRTs are transparent proceedings. Members of the media, the International Committee of the Red Cross (ICRC), and non-governmental organizations may observe military commissions and the unclassified portions of the CSRT proceedings. They also have access to the unclassified materials filed in Federal court. Every detainee now held at Guantanamo Bay has had a CSRT hearing. New detainees will have the same rights.

As of March 29, 2005, the CSRT Director had taken final action in all 558 cases. Thirty-eight detainees were determined no longer to be enemy combatants; twenty-three of them have been subsequently released to their home countries, and at the time of this Report's submission, arrangements are underway for the release of the others. (At <http://www.defenselink.mil/releases/2005/nr20050419-2661.html> (visited April 25, 2005)).

D. Assessing Detainees for Release/Transfer

1. Guantanamo Bay

The detention of each Guantanamo detainee is reviewed annually by an Administrative Review Board (ARB), established by an order on May 11, 2004 (*Review Procedure Announced for Guantanamo Detainees*, Department of Defense Press Release, May 18, 2004) (at <http://www.defenselink.mil/releases/2004/nr20040518-0806.html> (visited February 28, 2005)) and supplemented by an implementing directive on September 14, 2004. *See Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (at <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf> (visited February 28, 2005)).

The ARB assesses whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention. The process permits the detainee to appear in person before an ARB panel of three military officers to explain why the detainee is no longer a threat to the United States or its allies, and to provide information to support the detainee's release.

Each enemy combatant is provided with an unclassified written summary of the primary factors favoring the detainee's continued detention and the primary factors favoring the detainee's release or transfer from Guantanamo. The enemy combatant is also provided

with a military officer to provide assistance throughout the ARB process. In addition, the review board will accept written information from the government of nationality, and from the detainee's relatives through that government, as well as from counsel representing detainees in habeas corpus proceedings. Based on all of this information, as well as submissions by U.S. Government agencies, the ARB makes a written assessment by majority vote on whether there is reason to believe that the enemy combatant no longer poses a threat to the United States or its allies in the ongoing armed conflict and any other factors bearing on the need for continued detention. The Board also makes a written recommendation on whether detention should be continued. The recommendations of the board are reviewed by a judge advocate for legal sufficiency and then go to the Designated Civilian Official (currently Secretary of the Navy Gordon England), who decides whether to release, transfer or continue to detain the individual.

As of April 26, 2005, the Department of Defense (DoD) has announced its intent to conduct Administrative Review Board reviews for 254 detainees; it has informed the detainees' respective host countries and asked them to notify the detainees' relatives; and it has invited them to provide information for the hearings. (At <www.defenselink.mil/news/combatant_Tribunals.html> (visited April 28, 2005)). The first Annual Administrative Review Board began on December 14, 2004, and 91 Administrative Review Boards have been conducted as of April 26, 2005.

The United States has no interest in detaining enemy combatants any longer than necessary. On an ongoing basis, even prior to the Annual Administrative Review Boards, the U.S. Government has reviewed the continued detention of each enemy combatant. The United States releases detainees when it believes they no longer continue to pose a threat to the United States and its allies. Furthermore, the United States has transferred some detainees to the custody of their home governments when those governments 1) are prepared to take the steps necessary to ensure that the person will not pose a continuing threat to the United States or its allies; and/or 2) are prepared to investigate or prosecute the person, as appropriate. The United States may also transfer a detainee to a country other than the country of the detainee's nationality, when the country requests transfer for purposes of criminal prosecution.

As of April 26, 2005, the United States has transferred 234 persons from Guantanamo — 169 transferred for release and 66 transferred to the custody of other governments for further detention, investigation, prosecution, or control. Of the 66 detainees who were transferred to the control of other governments, 29 were transferred to Pakistan, seven to Russia, five to Morocco, nine to the United Kingdom, six to France, four to Saudi Arabia, two to Belgium, one to Kuwait, one to Spain, one to Australia, and one to Sweden.

In some situations, it has been difficult to find locations to which to transfer safely detainees from Guantanamo when they do not want to return to their country of nationality or when they have expressed reasonable fears if returned. Until the United States can find a suitable location for the safe release of a detainee, the detainee remains in U.S. control.

It is often difficult to assess whether an individual released from Guantanamo will return to combat and pose a threat to the United States or its allies. Determining whether an individual truly poses a threat is made more difficult by information that is often ambiguous or conflicting, as well as by denial and deception efforts on the part of the individual detainees. Based on information seized at al-Qaida camps in Afghanistan and elsewhere, the United States is aware that Taliban and al-Qaida fighters are trained in counter-interrogation techniques and instructed to claim, for example, that they are cooks, religious students, or teachers. It has proven challenging to ascertain the true facts and has required a great deal of time to investigate fully the background of each detainee. There is a concerted, professional effort to assess information from the field, from interrogations, and from other detainees. In spite of rigorous U.S. review procedures, some detainees who were released from Guantanamo have returned to fighting in Afghanistan against U.S. and allied forces. Based on a variety of reports, as many as twelve individuals have returned to terrorism upon return to their country of citizenship.

Some examples of detainees who have returned to the fight include:

- A former Guantanamo detainee who reportedly killed an Afghan judge leaving a mosque in Afghanistan;
- A former Guantanamo detainee (released by the United States in January 2004) who was recaptured in May 2004 when he shot at U.S. forces and was found to be carrying a letter of introduction from the Taliban; and
- Two detainees (released from Guantanamo in May 2003 and April 2004, respectively) who were killed in the summer of 2004 while engaged in combat operations in Afghanistan.

The fact that some detainees upon their release are returning to combat underscores the ongoing nature of the armed conflict with al-Qaida and the practical reality that in defending itself against al-Qaida, the United States must proceed very carefully in its determination of whether a detainee no longer poses a threat to the United States and its allies.

2. Afghanistan

Detainees under DoD control in Afghanistan are subject to a review process that first determines whether an individual is an enemy combatant. The detaining Combatant Commander, or designee, shall review the initial determination that the detainee is an enemy combatant. This review is based on all available and relevant information available on the date of the review and may be subject to further review based upon newly discovered evidence or information. The Commander will review the initial determination that the detainee is an enemy combatant within 90 days from the time that a detainee comes under DoD control. After the initial 90-day status review, the detaining combatant commander, on an annual basis, is required to reassess the status of each detainee. Detainees assessed to be enemy combatants under this process remain under DoD control until they no longer present a threat. The review process is conducted under the authority of the Commander, U.S. Central Command (USCENTCOM). If, as a result

of the periodic Enemy Combatant status review (90-day or annual), a detaining combatant commander concludes that a detainee no longer meets the definition of an enemy combatant, the detainee is released.

E. Transfers or Releases to Third Countries

After it is determined that a detainee no longer continues to pose a threat to the U.S. security interests or that a detainee no longer meets the criteria of enemy combatant and is eligible for release or transfer, the United States generally seeks to return the detainee to his or her country of nationality. The Department of Defense has transferred detainees to the control of their governments of nationality when those governments are prepared to take the steps necessary to ensure that the detainees will not pose a continuing threat to the United States and only after the United States receives assurances that the government concerned will treat the detainee humanely and in a manner consistent with its international obligations. A detainee may be considered for transfer to a country other than his country of nationality, such as in circumstances where that country requests transfer of the detainee for purposes of criminal prosecution. Of particular concern to the United States is whether the foreign government concerned will treat the detainee humanely, in a manner consistent with its international obligations, and will not persecute the individual because of his race, religion, nationality, membership in a social group, or political opinion. In some cases, however, transfers cannot easily be arranged.

U.S. policy is not to transfer a person to a country if it is determined that it is more likely than not that the person will be tortured or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds. If a case were to arise in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government unless the concerns were satisfactorily resolved. Circumstances have arisen in the past where the Department of Defense elected not to transfer detainees to their country of origin because of torture concerns.

With respect to the application of these policies to detainees at Guantanamo Bay, the U.S. Government in February of 2005 filed factual declarations with a Federal court for use in domestic litigation. These declarations describe in greater detail the application of the policy described above as it applies to the detainees at Guantanamo Bay, and are attached as Tab 1 to this Annex.

F. Military Commissions to Try Detainees Held at Guantanamo Bay

In 2001, the President authorized military commissions to try those detainees charged with war crimes. *See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,* November 13, 2001 (at <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> (visited February 28, 2005)). The Geneva Conventions recognize military fora as legitimate and appropriate to try those persons who engage in belligerent acts in contravention of the

law of war. The United States has used military commissions throughout its history. During the Civil War, Union Commanders conducted more than 2,000 military commissions. Following the Civil War, the United States used military commissions to try eight conspirators (all U.S. citizens and civilians) in President Lincoln's assassination. During World War II, President Roosevelt used military commissions to prosecute eight Nazi saboteurs for spying (including at least one U.S. citizen). A military commission tried Japanese General Yamashita for war crimes committed while defending the Philippine Islands. In addition to the international war crimes tribunals, the Allied Powers, such as England, France, and the United States, tried hundreds of lesser-known persons by military commissions in Germany and the Pacific theater after World War II.

To date, the President has designated fifteen individuals as eligible for prosecution by military commission. Of those, the United States has since transferred three to their country of nationality, which has released them. Four Guantanamo detainees have been charged and have had preliminary hearings before a military commission. These four cases are currently in abeyance, pending appellate court review of the recent U.S. District Court for the District of Columbia's decision of November 8, 2004, in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).

The U.S. District Court ruled that Hamdan, the petitioner, may not be tried by military commission unless and until a competent tribunal determines he is not entitled to Prisoner of War status under the Third Geneva Convention and until a procedural rule is altered regarding closure of the commission hearing to the accused. On November 12, 2004, the U.S. Government appealed that ruling to the U.S. Court of Appeals for the District of Columbia Circuit. The U.S. Court of Appeals ordered an expedited case schedule and held oral argument on April 7, 2005.

In light of this pending case, it will not be possible to address the Military Commissions in further detail at this time.

G. Access to U.S. Courts

In 2003, petitions for writ of habeas corpus were filed in U.S. courts on behalf of some of the detainees at Guantanamo seeking review of their detention. On June 28, 2004, the United States Supreme Court, the highest judicial body in the United States, issued two decisions pertinent to many enemy combatants. One of the decisions directly pertained to enemy combatants detained at Guantanamo Bay, and the other pertained to a citizen enemy combatant held in the United States. *See Rasul v. Bush,* 124 S.Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004); *see also Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004) (involving a decision on which U.S. Federal court has jurisdiction over habeas action). In *Rasul v. Bush,* the Supreme Court decided only the question of jurisdiction. The Court ruled that the U.S. District Court for the District of Columbia had jurisdiction to consider habeas challenges to the legality of the detention of foreign nationals at Guantanamo. 124 S.Ct. at 2698. The Court held that aliens apprehended abroad and detained at Guantanamo Bay, Cuba, as enemy combatants, "no less than citizens," could invoke the habeas jurisdiction of a district court. *Id.* at 2696. The Supreme Court left it to

the lower courts to decide "[w]hether and what further proceedings may become necessary after [the United States Government parties] make their response to the merits of petitioners' claims." *Id.* at 2699. In *Hamdi v. Rumsfeld,* the Supreme Court held that the United States is entitled to detain enemy combatants, even American citizens, until the end of hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms. The Court recognized the detention of such individuals is such a fundamental and accepted incident of war that it is part of the "necessary and appropriate" force that Congress authorized the President to use against nations, organizations, or persons associated with the September 11 terrorist attacks. 124 S.Ct. at 2639-42 (plurality op.); *id.,* at 2679 (Thomas J., dissenting).

A plurality of the Court addressed the entitlements of a U.S. citizen designated as an enemy combatant and held that the Due Process Clause of the U.S. Constitution requires "notice of the factual basis for [the citizen-detainee's] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 2648. A plurality of the Court observed: "There remains the possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," and proffered as a benchmark for comparison the regulations titled, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, §1-6 (1997). *Id.* at 2651

These Supreme Court rulings have resulted in further proceedings at the Federal trial and appellate court levels. As of April 27, 2005, there are 55 habeas corpus cases involving 153 Guantanamo detainees pending before ten district court judges. These include thirty-nine Yemenis, twenty-six Saudis, eleven Kuwaitis, eleven Moroccans, ten Algerians, six Bahrainis, seven Tunisians, five Jordanians, five Sudanese, four Syrians, four Mauritanians, three Chinese, three Egyptians, three Libyans, two each from Palestine and Chad; and one from each of the following: Qatar, Kazakhstan, Tajikistan, Uganda, Iraq, Australia, Canada, Somalia, Turkey, Afghanistan, Pakistan and Ethiopia. Additionally, a habeas corpus petition has been filed under the name of "John Doe" on behalf of all detainees who do not currently have habeas corpus petitions pending. Other detainees may have since filed habeas corpus petitions. Due to the recent transfer of four British, one Australian and one Kuwaiti detainee, the government has moved to dismiss their petitions. Those motions are still pending.

The various habeas corpus petitions seek the detainees' release, claiming that the detentions violate the Fifth, Sixth, Eighth and Fourteenth Amendments, and the War Powers and Article I Suspension clauses of the Constitution. Some of the petitions have also alleged claims under the Administrative Procedure Act, the Alien Tort Statute, Army Regulation 190-8, customary international law, and international treaties including the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Geneva Conventions of 1949.

During the course of these habeas corpus proceedings, the Federal courts have reviewed or are reviewing numerous motions and other requests including motions to dismiss the petitions, motions to enjoin tribunal proceedings, including military commission

prosecutions and transfers to foreign governments and requests for discovery. For example, in August 2004, the Federal District Court in the cases of *Gherebi v. Bush*, No. 04-CV-1164-RBW (D.D.C.) (unpublished ruling of Jul. 27, 2004), *Boumediene v. Bush,* No. 04-CV-1166-RJL (D.D.C.) (unpublished ruling of Aug. 3, 2004), and *El-Banna v. Bush,* No. 04-CV-1144-RWR (D.D.C.) (unpublished ruling of August 6, 2004) separately denied requests by petitioners for relief enjoining ongoing CSRT proceedings. *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005). The judges ruled that the courts could address any alleged defect in the CSRT proceedings if petitioners later sought any relief with regard to their detention. Further, pursuant to briefing orders issued by Judge Green, the senior district court judge who was, until recently, coordinating the numerous detainee cases, the government filed factual returns in a number of the cases, indicating both the classified and unclassified factual bases for the enemy combatant status of each petitioner-detainee based on the record of CSRT proceedings. The court has full access to the records of the CSRT proceedings.

In January 2005, two district court judges reached conflicting decisions regarding the constitutional rights of enemy combatants at Guantanamo. In *Khalid v. Bush*, Judge Richard J. Leon determined that Congress had authorized the President to capture and detain enemy combatants and that the enemy combatants at Guantanamo do not have rights under the U.S. Constitution and that there was no viable theory under federal law, international treaties or customary international law that would make their detention unlawful. 355 F.Supp.2d 311 (D.D.C. 2005). In contrast, Judge Joyce Hens Green ruled that at least certain rights under the U.S. Constitution apply at Guantanamo and that that CSRT procedures were unconstitutional, as they did not comport with the Fifth Amendment right to due process. *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005). Judge Green ruled that if the detainee was not going to have access to classified material, then counsel with access to such material should be permitted to advocate for the detainee at the CSRT. She also found that the inquiry conducted had been inadequate in cases where detainees alleged that coercion or torture was used during interrogations.

The parties have appealed two conflicting decisions to the U.S. Court of Appeals for the District of Columbia Circuit on an expedited basis.

In conclusion, domestic judicial proceedings are ongoing, which may address allegations of mistreatment that have arisen with respect to Guantanamo Bay. As described elsewhere in this report, individuals who engage in torture or other physical abuse of detainees are subject to prosecutions and other sanctions under U.S. law.

III. DETAINEES – TREATMENT

A. Description of Conditions of Detention at Department of Defense Facilities

1. Guantanamo Bay

The Department of Defense has released to the public several photographs of the detention facilities in Guantanamo Bay. (At <http://www.defenselink.mil/home/features/gtmo> (visited March 17, 2005)). These photographs reflect U.S. policy and practices regarding treatment of detainees at Guantanamo Bay, including the U.S. requirement that all detainees receive adequate housing, recreation facilities, and medical facilities.

Detainees receive:

- Three meals per day that meet cultural dietary requirements;
- Adequate shelter, including cells with beds, mattresses, and sheets;
- Adequate clothing, including shoes, uniforms, and hygiene items;
- Opportunity to worship, including prayer beads, rugs, and copies of the Koran;
- The means to send and receive mail;
- Reading materials, including allowing detainees to keep books in their cells; and
- Excellent medical care.

All enemy combatants get state-of-the art medical and dental care that is comparable to that received by U.S. Armed Forces deployed overseas. Wounded enemy combatants are treated humanely and nursed back to health, and amputees are fitted with modern prosthetics.

Detainees write to and receive mail from their families and friends. Detainees who are illiterate, but trustworthy enough for a classroom setting, are taught to read and write in their native language so they, too, can communicate with their families and friends.

Enemy combatants at Guantanamo may worship as desired and in accordance with their beliefs. They have access to the Koran and other prayer accessories. Traditional garb is available for some detainees.

Where security permits, detainees are eligible for communal living in a new Medium Security Facility, with fan-cooled dormitories, family-style dinners, and increased outdoor recreation time, where they play board games like chess and checkers, and team sports like soccer.

The United States permits the International Committee of the Red Cross to visit privately with every detainee in DoD control at Guantanamo. Communications between the U.S. Government and the ICRC are confidential.

In addition, legal counsel representing the detainees in habeas corpus cases have visited detainees at Guantanamo since late August 2004. As of late April 2005, counsel in nineteen cases had personally met with the 74 detainees they represent, and counsel in seventeen of those cases have made repeat visits to Guantanamo. To date, every request by American counsel of record in the habeas cases to visit detainees at Guantanamo has been granted, after that counsel has received the requisite security clearance and agreed to the terms of the protective order issued by the Federal court. The Government does not

monitor these meetings (or the written correspondence between counsel and detainees), which occur in a confidential manner. The Government also allows foreign and domestic media to visit the facilities.

2. Afghanistan

The Department of Defense holds individuals in Afghanistan in a safe, secure, and humane environment. The primary focus of DoD detainee operations in Afghanistan is to secure detainees from harm, recognizing the reality that the U.S. Armed Forces continue to engage in combat in Afghanistan.

The Department of Defense operates theater internment facilities at Kandahar and Bagram. These facilities house enemy combatants identified in the war against al-Qaida, the Taliban and their affiliates. The Department of Defense has registered with the ICRC individuals held under its control in Afghanistan. ICRC has access to these DoD facilities and conducts private interviews with detainees. In addition, the U.S. Armed Forces operates forward operating bases that, from time to time, may house on a temporary basis individuals detained because of combat operations against al-Qaida, Taliban, and affiliated forces.

The Department of Defense provides detainees in Afghanistan with adequate food, shelter, clothing, and opportunity to worship. In addition, DoD initiatives will increase available resources for literacy and education training. The Department of Defense also gives Afghani detainees information regarding the establishment of the new Afghan government, as well as a copy of the Afghan Constitution.

The U.S. Government is also in a process of improving the detention facilities at both Bagram and Kandahar. Improved facilities should be available to detainees later in 2005.

B. Allegations of Mistreatment of Persons Detained by the Department of Defense

1. Introduction

The United States is well aware of the concerns about the mistreatment of persons detained by the Department of Defense in Afghanistan and at Guantanamo Bay, Cuba. Indeed, the United States has taken and continues to take all allegations of abuse very seriously. Specifically, in response to specific complaints of abuse in Afghanistan and at Guantanamo Bay, Cuba, the Department of Defense has ordered a number of studies that focused, *inter alia,* on detainee operations and interrogation methods to determine if there was merit to the complaints of mistreatment.

Although these extensive investigative reports have identified problems and proffered recommendations, none of them found that any governmental policy directed, encouraged or condoned these abuses. The reports pertaining to Guantanamo Bay are summarized in Section B.2 below and those pertaining to Afghanistan are summarized in Section B.3 below.

In general, for both Afghanistan and Guantanamo Bay, these reports have assisted in identifying and investigating all credible allegations of abuse. When a credible allegation of improper conduct by DoD personnel surfaces, it is reviewed, and when factually warranted, investigated. As a result of investigation, administrative, disciplinary, or judicial action is taken as appropriate. Those credible allegations were and are now being resolved within the Combatant Command structure.

Concerns have also been generated by an August 1, 2002, memorandum prepared by the Office of Legal Counsel (OLC) at the U.S. Department of Justice (DOJ), on the definition of torture and the possible defenses to torture under U.S. law and a DoD Working Group Report on detainee operations, dated April 4, 2003, the latter of which was the basis for the Secretary of Defense's approval of certain counter resistance techniques on April 16, 2003. The 2002 DOJ OLC memorandum was withdrawn on June 22, 2004 and replaced with a December 30, 2004, memorandum interpreting the legal standards applicable under 18 U.S.C. 2340-2340A, also known as the Federal Torture Statute. *See* Annex 2.

On March 10, 2005 Vice Admiral Church (the former U.S. Naval Inspector General) released an executive summary of his report, which included an examination of this issue. His Report examined the precise question of "whether DoD had promulgated interrogation policies or guidance that directed, sanctioned or encouraged the abuse of detainees." Church Report, Executive Summary, at 3, released March 10, 2005 (relying upon data available as of September 30, 2005) (at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (visited March 23, 2005)). In his Report, he wrote that "this was not the case," *id.*, finding that "it is clear that *none* of the approved policies – no matter which version the interrogators followed – would have permitted the types of abuse that occurred." *Id.*, at 15. In response to intensive questioning before the U.S. Senate Armed Services Committee as to whether the 2002 DOJ memo or subsequently authorized interrogation practices had contributed to individual soldiers committing abuses, he responded that "clearly there was no policy, written or otherwise, at any level, that directed or condoned torture or abuse; there was no link between the authorized interrogation techniques and the abuses that, in fact, occurred." Transcript at 7. Although Vice Admiral Church's investigation is the most comprehensive to date on this issue, it was consistent with the findings of earlier investigations on this point. *See, e.g.*, Army Inspector General Assessment, released July 2004 (at <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/index.html > (visited March 1, 2005)).

Vice Admiral Church's finding was also consistent with earlier statements by high-level U.S. officials, including by the previous White House Counsel Alberto Gonzales, who had stated:

The administration has made clear before and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws.

. . . .

. . . [L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable.

Press Briefing by White House Counsel Judge Alberto Gonzales, DoD General Counsel William Haynes, DoD Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander, June 22, 2004, (at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (visited February 28, 2005)).

Subsequent to the release of the December 2004 DOJ memo interpreting the Federal Torture Statute, the Deputy Secretary of Defense ordered a "top-down" review within the Department to ensure that the policies, procedures, directives, regulations, and actions of the department comply fully with the requirements of the new Justice Department Memorandum. The Office of Detainee Affairs in the Office of the Under Secretary of Defense for Policy coordinates this process of review.

2. Reports of Abuses, Summary of Abuse Investigations and Actions to Hold Persons Accountable - Guantanamo Bay

As described above in the introductory section, there have been multiple reports resulting from/investigations concerning the treatment of detainees at Guantanamo Bay. For example, the Naval Inspector General reviewed the intelligence and detainee operations at Guantanamo Bay to ensure compliance with DoD orders and policies. The review, conducted in May 2004, concluded that the Secretary of Defense's directions with respect to humane treatment of detainees and interrogation techniques were fully implemented. The Naval Inspector General documented eight minor infractions involving contact with detainees as stated below (two additional incidents occurred after this investigation was completed). In each of those cases, the chain of command took swift and effective action. Administrative actions ranging from admonishment to reduction in grade.

In a subsequent report, the Naval Inspector General engaged in a comprehensive review of DoD detention operations and detainee interrogation operations covering not only Guantanamo, but Iraq and Afghanistan. This report expanded upon his earlier finding with respect to interrogation operations at Guantanamo, noting that while "there have been over 24,000 interrogation sessions since the beginning of interrogation operations, there are only three cases of closed, substantiated interrogation-related abuse, all consisting of minor assaults in which MI interrogators, exceeded the bounds of approved interrogation policy." Church Report, Executive Summary, at 14, released March 10, 2005 (using data as of September 30, 2004) (at <www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (visited March 23, 2005)). He highlighted that "[w]e found no link between approved interrogation techniques and detainee abuse." *Id.,* at 13.

One investigation remains ongoing and will be completed soon. On December 29, 2004, the Commander U.S. Southern Command appointed a General Officer to investigate the facts and circumstances surrounding allegations of detainee abuse contained in documents recently released under the Freedom of Information Act, including those released by the Federal Bureau of Investigation, and to conduct an inquiry into any credible allegation contained in those documents.

Therefore, although there have been allegations of serious abuse of detainees at Guantanamo Bay, the United States has not found evidence substantiating such claims. Instead, it has identified 10 substantiated incidents of misconduct at Guantanamo:

- A female interrogator inappropriately touched a detainee on April 17, 2003 by running her fingers through the detainee's hair, and made sexually suggestive comments and body movements, including sitting on the detainee's lap, during an interrogation. The female interrogator received a written admonishment and additional training.
- On April 22, 2003, an interrogator assaulted a detainee by directing military policemen repeatedly to bring the detainee from a standing to a prone position and back. A review of medical records indicated superficial bruising to the detainee's knees. The interrogator received a letter of reprimand.
- A female interrogator, at an unknown date, in response to being spit upon by a detainee, assaulted the detainee by wiping red dye from a red magic marker on the detainee's shirt and telling the detainee that the red stain was blood. The interrogator received a verbal reprimand for her behavior.
- In October 2002, an interrogator used duct tape to tape shut the mouth of a detainee who was being extremely disruptive during an interrogation. The tape did not harm the detainee and the interrogator received a verbal reprimand for his behavior.
- A military policeman (MP) assaulted a detainee on September 17, 2002, by attempting to spray him with a hose after the detainee had thrown an unidentified, foul-smelling liquid on the MP. The MP received non-judicial punishment that included seven days restriction and reduction in grade from Specialist (E-4) to Private First Class (E-3).
- On March 23, 2003, after a detainee threw unidentified liquid on an MP, the MP sprayed the detainee with pepper spray. The MP declined non-judicial punishment, and he was subsequently tried by special court-martial where he was acquitted of all charges.
- On April 10, 2003, after a detainee had struck an MP in the face (causing the MP to lose a tooth) and bitten another MP, the MP struck the detainee with a handheld radio. This MP was given non-judicial punishment, received 45 days extra-duty, and was reduced in grade from Specialist (E-4) to Private First Class (E-3).
- On January 4, 2004, an MP platoon leader received an initial allegation that one of his guards had thrown cleaning fluid on a detainee and later made inappropriate comments to the detainee. The platoon leader, however, did not properly investigate the allegation or report it to his chain of command. The initial allegation against the guard ultimately turned out to be substantiated. The MP was

given non-judicial punishment and received forfeiture of pay of $150 per month for two months and reduction in grade from Private (E-2) to Private (E-1). The platoon leader was issued a reprimand for dereliction of duty.
- On February 10, 2004, an MP inappropriately joked with a detainee, and dared the detainee to throw a cup of water on him. After the detainee did so, the MP threw a cup of water on the detainee. The MP was removed from further duty because of these inappropriate actions.
- On February 15, 2004, a barber intentionally gave two detainees unusual haircuts, including an "inverse Mohawk," in an effort to frustrate the detainees' request for similar haircuts as a sign of unity. The barber and his company commander were both counseled because of this incident.

The above list of substantiated abuses and the subsequent punishment of those responsible at Guantanamo Bay demonstrates that misconduct will not be tolerated.

3. Reports of Abuses, Summary of Abuse Investigations and Actions to Hold Persons Accountable – Afghanistan

The United States acted swiftly in response to allegations of serious abuses by DoD personnel in Afghanistan. There have been 23 investigations into allegations of abuse of detainees in Afghanistan, of which 22 were substantiated and one was unsubstantiated. Seven investigations are open and continue to be investigated. As of March 1, 2005, penalties have varied and include 2 courts-martial, 10 non-judicial punishments, and two reprimands. A number of actions are still pending.

What follows are a few examples of substantiated abuses and a summary of the status:

- The investigations into the death of two detainees (Mr. Mullah Habibullah and Mr. Dilawar) at the Bagram detention facility on December 4 and 10, 2002 identified 28 military members who may have committed offenses punishable under the UCMJ. Investigations determined that the detainees had been beaten by several military members. Commanders are considering the full range of administrative and disciplinary measures, including trial by court-martial. As of this writing, charges have been preferred against two military members.
- The Naval Criminal Investigation Service (NCIS) opened an investigation in May 2004 involving allegations of an Afghan police officer who claimed he was abused in while under coalition control in Gardez and Bagram. This investigation remains open.

As described in the Introduction to this Section, there have been multiple important substantive reports resulting from investigations into alleged detainee abuse in DoD facilities in Afghanistan, none of which found a governmental policy directing, encouraging, or condoning abuse:

- *Major General Ryder's report*

This assessment of detention operations was completed on November 6, 2003. His report covered specific operations in Iraq and Afghanistan relating to the conduct of detention operations, identifying some difficulties and making some recommendations.

- *Army IG Assessment*

The Army Inspector General (IG), LTG Mikolashek, released a report in July 2004 that reviewed U.S. Army detainee operations in Afghanistan and Iraq. As a part of this review, the Army IG inspected internment, detention operations, and interrogation procedures. The inspection was not an investigation into specific incidents but rather a comprehensive review of how the Army conducts detainee operations in those two countries. The Army IG found that the Army is properly accomplishing its mission with regard to the capture, care, and custody of detainees, and in its interrogation operations. Although cases of abuse were noted and numerous recommendations were made, the Report found that there was no systemic problem in detainee handling or flawed policy, doctrine, or training, and that the overwhelming majority of leaders and subordinate personnel understand and adhere to the requirement to treat detainees humanely and consistent with the laws of land warfare. The Report considered the abuse cases to be the result of individual instances of indiscipline, and not representative of policy, doctrine, or training. This report was released in July 2004. This report is available at http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/index.htm (visited March 1, 2005).

- *Jacoby Review*

In May 2004, Lieutenant General Barno, Commander, Combined Forces Command-Afghanistan, initiated an inspection of detainee operations in his area of responsibility in Afghanistan. The inspection was conducted by Brigadier General Jacoby during the period May 19 through June 26, 2004. The primary purpose of this inspection was to ascertain the standard of treatment provided to persons detained by U.S. forces throughout the detention process from capture to release or detention. The Jacoby report did not disclose new allegations of abuse or misconduct. The consistent and overarching observation that flowed from the inspection was that forces assigned to the command understood the concept of humane treatment and were providing humane treatment to detainees consistent with the principles of the Geneva Conventions.

- *Church Report*

On May 25, 2004, the Secretary of Defense directed the Naval Inspector General at that time, Vice Admiral Albert T. Church, III, to conduct a comprehensive review of DoD Detention Operations and Detainee Interrogation Techniques in Guantanamo Bay, Cuba, Iraq, and Afghanistan. The Executive Summary of the Report was released on March 10, 2005, and relied upon data available as of September 30, 2004. Vice Admiral Church found that “the vast majority of detainees held” under DoD control “have been treated humanely, and that the overwhelming majority of U.S. personnel have served honorably.” Executive Summary at 21. He found that “without exception, that the DoD

officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely which is fundamentally inconsistent with the notion that such officials or commanders ever accepted that detainee abuse would be permissible." *Id,* at 3. Although noting a number of "missed opportunities in the policy development process," for example, that "no specific guidance on interrogation techniques was provided to the commanders responsible for Afghanistan and Iraq…," he concluded that "authorized interrogation techniques have not been a causal factor in detainee abuse." *Id.,* at 13, 21. He could not identify a single overarching reason for abuse but addressed the stressful combat situation, particularly at the point of capture, commenting that "a breakdown of good order and discipline in some units could account for some incidents of abuse." *Id.*, at 16. Although he candidly pointed out: "[d]issemination of interrogation policy in Iraq and Afghanistan was generally poor and interrogators fell back on their training and experience, often relying on a broad interpretation of Army Field Manual F.M. 34-52," he continued, "[w]hile these problems of policy dissemination and compliance were certainly cause for concern, we found that they did not lead to the employment of illegal or abusive interrogation techniques." *Id.,* at 10. He found that interrogators knew that abusive behavior was prohibited. *Id.*, at 10, 15. The Executive Summary of this Report is available online (at www.defenselink.mil/news/Mar2005/d20050310exe.pdf (visited March 23, 2005)).

- *Naval Inspector General Report*

On January 13, 2005, the Deputy Secretary of Defense directed the Naval Inspector General, Vice Admiral Route, to review documents related to detainees recently released under the Freedom of Information Act, including those released by the Federal Bureau of Investigation, and to conduct an inquiry into any credible allegations contained in those documents with respect to Afghanistan and Iraq. The Naval Inspector General will take any additional actions with respect to these documents, as he deems appropriate. The report is expected to be finalized soon.

IV. TRAINING OF U.S. ARMED FORCES

Personnel assigned to detention operations go through an extensive professional and sensitivity training process to ensure they understand the procedures for protecting the rights and dignity of detainees.

- Personnel mobilizing to detention operations receive training prior to deployment on detention facility operations, self-defense, safety, and rules on the use of force. Before beginning work, personnel again receive training on the law of armed conflict, the rules of engagement, the Standard Operating Procedures, military justice, and specific policies applying to detention operations in their area of responsibility. This is true of all service members deploying to serve in detention operations. All U.S. service members receive general training on the law of armed conflict, including the Geneva Conventions, as well as further law of armed conflict training commensurate with their duties.

- During their operational tours, U.S. service members continue to receive briefings and are briefed again before every detainee movement on the rules, procedures, and policies in operating detention facilities.
- Mobile training teams are visiting and training at every field detention site to conduct training as required by commanders on the proper handling of detainees.
- All interrogators and counterintelligence personnel are required to undergo 10 days of in-theater certification training. This certification process ensures all applicable standards are understood and enforced.
- Cultural awareness training is conducted for all military personnel during pre-deployment train-up and periodically while in the theater of operations.
- The Combat Training Centers operated by the U.S. Armed Forces in the United States and Germany include the synchronization and integration of detainee operations into every military unit's training rotation prior to deployment. The U.S. Army Military Police School sends a Mobile Training Team to conduct "train the trainer" education for their observer controllers on detainee operations. This training covers detainee operations, personal safety, forced cell movements, restraint procedures, communications with detainees, and case studies.
- It is a violation of the Uniform Code of Military Justice (UCMJ) for military personnel to abuse detainees and to fail to report instances of abuse. DoD personnel are trained on this requirement and briefed regularly on their responsibilities and the appropriate treatment of detainees, including the duty to report mistreatment.

PART TWO
INDIVIDUALS UNDER THE CONTROL OF U.S. ARMED FORCES IN IRAQ CAPTURED DURING MILITARY OPERATIONS

I. BACKGROUND ON U.S. MILITARY OPERATIONS IN IRAQ

The United States has approximately 150,000 U.S. military personnel currently deployed in Iraq as a part of the United Nations Security Council-authorized Multi-National Force in Iraq (MNF-I). This force includes 28 other nations and the North Atlantic Treaty Organization (which is providing training support) that are contributing approximately 25,000 military personnel to conduct stability operations in Iraq. Recognizing the importance of Iraq's successful transition to a democratically elected government and aware that the situation in Iraq continues to pose a threat to international peace and security, the Security Council authorized MNF-I to "take all necessary measures to contribute to the maintenance of security and stability in Iraq . . . ." U.N. S.C. Res. 1546 (June 8, 2004). (At http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement (visited March 5, 2005)). MNF-I plays a key role in supporting first the Iraqi Interim Government and now the Iraqi Transitional Government (ITG) in its effort to stabilize the current security situation to allow democracy and freedom to take root.

In January 2005, Iraq held its first democratic elections since the collapse of the Saddam Hussein regime. Even though Iraq has elected a National Assembly, there are still many hostile forces in Iraq that seek to thwart the country's transition to democracy and the rule of law by destabilizing the country through hostile armed attacks against civilian targets and MNF-I forces in Iraq. Saddam loyalists, former Baathists, international terrorists, and Islamic jihadists—knowing that they cannot win at the ballot box—have sustained a terrorist campaign designed to spread fear and instability.

MNF-I and Iraqi forces remain actively engaged in combating these hostile forces across Iraq. An essential tool in the effort to contain and end the violence is the ability of MNF-I to capture and detain hostile forces. UN Security Council Resolution 1546 authorizes MNF-I to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters to the President of the Security Council from Dr. Ayad Allawi and Secretary of State Colin Powell. The letter from Secretary Powell noted the MNF-I's readiness to undertake those tasks necessary to counter the security threats posed by forces seeking to influence Iraq's future through violence, including the internment of individuals "where this is necessary for imperative reasons of security...." (At http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement (visited March 5, 2005)). In addition, because hostilities are ongoing, MNF-I may continue to detain enemy prisoners of war ("EPWs"). MNF-I may also continue to detain civilian internees who were detained prior to June 28, 2004, as long as their detention remains necessary for imperative reasons of security. Finally, in accordance with UN Security Council Resolution 1546 and the authorities contained in Coalition Provisional Authority Memorandum No. 3 (Revised) (at http://cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf (visited March 1, 2005)), which continues in effect under the Transitional Administrative Law (TAL), MNF-I may apprehend individuals who are suspected of having committed criminal acts and who are not considered security internees. MNF-I may retain such criminal detainees in its facilities at the request of appropriate Iraqi authorities.

II. DETAINEES – CAPTURING, HOLDING, AND/OR RELEASING

A. Brief Overview of the Detainee Population Held by MNF-I

As of April 1, 2005, MNF-I was detaining approximately 10,000 persons in Iraq. The vast majority of the detainee population is composed of individuals who are held for imperative reasons of security, consistent with UN Security Council Resolution 1546. In addition to security internees, the MNF-I holds a small number of enemy prisoners of war (EPWs) and, on behalf of the ITG, a number of persons suspected of violating Iraqi criminal laws. The MNF-I has established several detention facilities in various locations throughout Iraq that are operated by the U.S. Army under the Commander, MNF-I. The U.S. Army operates three theater internment facilities: Abu Ghraib (Baghdad Central Correction Facility), Camp Cropper, and Camp Bucca.

B. Status Review of Detainees

Detainees under DoD control in Iraq undergo the review process described herein in order to confirm their status and ensure that they are being lawfully detained. Upon capture by a detaining unit, a detainee is moved as expeditiously as possible to a theater internment facility. A military magistrate reviews an individual's detention to assess whether to continue to detain or to release him or her. If detention is continued, the Combined Review and Release Board assumes the responsibility for subsequently reviewing whether continued detention is appropriate.

With regard to individuals detained on suspicion of having committed criminal acts, those individuals must be handed over to Iraqi authorities as soon as reasonably practicable, but may be held by MNF-I at the request of appropriate Iraqi authorities based on security or detention facility capacity considerations. If MNF-I retains custody at the request of appropriate Iraqi authorities, CPA Memorandum No. 3 (Revised) establishes a series of procedural protections for the detainee, including the right to remain silent, to consult with an attorney within 72 hours, to be promptly informed in writing of charges, to be brought before a judicial officer within 90 days, and to be visited by the ICRC. (At http://cpa-Iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf (visited March 1, 2005)).

C. Decisions on Continued Detention or Release of Detainees

The Combined Review and Release Board (CRRB) was created to provide detainees a method by which to have their detention status reviewed. The CRRB first met on August 21, 2004. It consists of nine members: three MNF-I officers, and two members each from the Iraqi Ministry of Justice, Ministry of Interior, and Ministry of Human Rights. The CRRB meets and reviews detention cases several times per week and reviews approximately 100 detainee files at each meeting. Consistent with the Geneva Conventions, the case of each detainee who remains in MNF-I custody is reviewed at least once every six months. The CRRB reviews the status of each detainee and recommends one of three options: release, conditional release, or continued detention. A detainee may file an appeal of internment to the CRRB for its consideration.

III. DETAINEES – TREATMENT

A. Description of Conditions of Detention in U.S. Department of Defense Facilities

The primary goal of U.S. detention operations in Iraq has been to operate safe, secure, and humane facilities consistent with the Geneva Conventions. U.S. and other MNF-I forces continue to make physical improvements to various facilities throughout Iraq. Since the incidents of abuse at Abu Ghraib, the United States has made substantial improvements in all areas of detention operations, including facilities and living conditions. Families may visit detainees at visitation centers set up at each detention facility. Detainees are provided with prayer materials and allowed the open and free

expression of religion in detention. Detainees also have access to medical facilities, consistent with the Geneva Conventions.

As set forth in CPA Memorandum No. 3 (Revised), and consistent with the provisions of the Geneva Conventions, the ICRC is provided with notice of detainees under the control of the U.S. contingent of MNF-I as soon as reasonably possible and is provided access to such detainees unless reasons of imperative military necessity require otherwise.

B. Allegations of Mistreatment of Persons Detained by the Department of Defense

1. Legal Framework

As noted above, UN Security Council Resolution 1546 provides authority for MNF-I security operations in Iraq, including detention operations. The United States contingent to MNF-I conducts its detention operations consistent with the Geneva Conventions, including pursuant to CPA Memorandum No. 3 (Revised), for operations after June 28, 2004. The Geneva Conventions prohibit the torture or inhumane treatment of protected persons. U.S. Armed Forces in Iraq are instructed to act consistently with these provisions with regard to all detainees and to treat all detainees humanely. Detainees under the control of U.S. Armed Forces receive shelter, food, clothing, water, and medical care, and are able to practice their religion.

U.S. military interrogators are instructed to conduct interrogations consistent with the Geneva Conventions. Further, military regulations strictly regulate permissible interrogation techniques. DoD policy prohibits the use of force, mental and physical torture, or any form of inhumane treatment during an interrogation.

Army Regulation (AR) 190-8 provides policy, procedures, and responsibilities for the administration and treatment of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI), and other detainees in the custody of U.S. Armed Forces. (At <http://www.usapa.army.mil/pdffiles/r190_8.pdf>(visited March 1, 2005)). A.R. 190-8, paragraph 1-5 provides:

General Protection Policy
a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:
(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.
(2) All persons taken into custody by U.S. forces will be provided with the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) until some other legal status is determined by competent authority.
(3) The punishment of EPW, CI, and RP known to have, or suspected of having committed serious offenses will be administered [in accordance with] due process of law and under legally constituted authority per the GPW, [the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War], the Uniform Code of

Military Justice and the Manual for Courts Martial.
(4) The inhumane treatment of EPW, CI, and RP is prohibited and is not justified under the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

DoD Directive 5100.77 further requires that all possible, suspected, or alleged violations of the law of war committed by United States persons be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action. December 9, 1998, (at <http://www.dtic.mil/whs/directives/corres/pdf2/d510077p.pdf > (visited February 28, 2005)). For instance, U.S. forces are subject to the Uniform Code of Military Justice (UCMJ), which provides that those who commit acts of abuse, whether or not during an armed conflict, are criminally liable for their actions. Article 93 of the UCMJ provides: "Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct." A member of the U.S. forces suspected of mistreating or abusing persons in U.S. detention is subject to prosecution under this and other applicable UCMJ articles.

In the context of detainee abuse cases, however, not every potentially applicable offense under the UCMJ has a parallel federal offense in the U.S. Code. For example, Failure to Obey a Lawful Order or Regulation (Article 92, UCMJ) and Dereliction of Duty (Article 92, UCMJ) have no comparable federal offenses in this context. Additionally, the Federal Torture Statute requires a much higher level of proof than does Article 93 of the UCMJ, which punishes cruelty and maltreatment of prisoners.

Interrogation techniques are developed and approved to ensure compliance with legal and policy requirements. Throughout the conflict in Iraq, military, policy, and legal officials have met and continue to meet regularly to review interrogation policy and procedures to ensure their compatibility with applicable domestic and international legal standards. The United States will continue to review and update its interrogation techniques in order to remain in full compliance with applicable law.

2. Reports of Abuses and Summary of Abuse Investigations

Allegations of detainee abuse at the Abu Ghraib prison in Iraq became known with incidents documented in photographs and reported in the media throughout the world. These photographs, which depict acts of abuse and mistreatment of detainees by certain members of the U.S. Armed Forces in Iraq, were abhorrent to the people of the United States and others around the world. These incidents, which to date could implicate 54 military personnel, involved blatant violations of the UCMJ and the law of war. The United States deeply regrets these abuses. Indeed, on May 6, 2004, the President of the United States said that he "was sorry for the humiliation suffered by the Iraqi prisoners and the humiliation suffered by their families" and that "the wrongdoers will be brought to justice…." Remarks by President Bush and His Majesty King Abdullah II of the Hashemite Kingdom of Jordan (at

<http://www.whitehouse.gov/news/releases/2004/05/20040506-9.html> (visited March 1, 2005)).

In response to these allegations of abuse, the U.S. Government has acted swiftly to investigate and take action to address the abuses. The United States is investigating allegations of abuse thoroughly and making structural, personnel, and policy changes necessary to reduce the risk of further such incidents. All credible allegations of inappropriate conduct by U.S. personnel are thoroughly investigated. A rapid response to allegations of abuse, accompanied by accountability, sends an unequivocal signal to all U.S. military personnel and the international community that mistreatment of detainees will not be tolerated under any circumstances. To the extent allegations of misconduct have been levied against private contractors, the U.S. Department of Justice has conducted or initiated investigations. For example, following the reports at Abu Ghraib, the Department of Justice received referrals from Military Investigators regarding contract employees and their potential involvement in the abuses. DOJ subsequently opened an investigation.

At the direction of the President, the Secretary of Defense, and the military chain of command, nine different senior-level investigative bodies convened to review military policy from top-to-bottom in order to understand the facts in these cases and identify any systemic factors that may have been relevant. The assignment of these entities was to identify and investigate the circumstances of all alleged instances of abuse, review command structure and policy, and recommend personnel and policy changes to improve accountability and reduce the possibility of future abuse.

The United States has ordered a number of studies and reports subsequent to allegations of mistreatment in Iraq, particularly at Abu Ghraib. Again, as described in Part One of this Report, it is impossible to characterize and summarize fully these reports, but it can be stated that although these investigations identified problems and made recommendations, none found a governmental policy directing, encouraging, or condoning the abuses that occurred. What follows is a brief summary of each of the investigative reports:

- *Miller Report*

Major General Miller's report on detention and interrogation operations in Iraq was completed on September 9, 2003. General Miller's report assessed the conditions and operations of detention facilities in Iraq.

- *Ryder Report*

Major General Ryder's assessment of detention operations in Iraq was completed on November 6, 2003, as described in Part 1, Section III.B.3. General Ryder's report covered specific operations in Iraq and Afghanistan relating to the conduct of detention operations.

- *Taguba Report*

Major General Taguba completed his investigation into detainee operations and the 800th Military Police Brigade on March 12, 2004. This report focused primarily on the allegations of detainee abuse at the Abu Ghraib detention facility arising from disclosures made by U.S. service members.

- *The Army Inspector General Report*

The Army Inspector General conducted a review of alleged detainee abuse committed by U.S. Army personnel in Iraq and Afghanistan, which was released in July 2004, as described in Part 1, Section III.B.3. (At <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf > (visited March 1, 2005)).

- *Report by Major General Fay, Lieutenant General Jones, and General Kern*

This was completed on August 13, 2004. This report covered Military Intelligence (MI) and DoD contractor interrogation policies in Iraq. This report revealed that 27 military personnel or civilians appeared to have abused Iraqi prisoners due to criminal activity or confusing interrogation rules. Twenty-three military intelligence personnel and four civilian contractors were alleged to be involved in abuse. Eight others, including six military officers and two civilians, were alleged to have learned of the abuse and to have failed to report the abuse to authorities. This report found 44 cases of abuse. In an interview after the report's release, General Kern told reporters, "We found that the pictures you have seen, as revolting as they are, were not the result of any doctrine, training or policy failures, but violations of the law and misconduct." (At http://www.defenselink.mil/transcripts/2004/tr20040825-1224.html (visited April 5, 2005)). The report found that the abuses were carried out by a small group of "morally corrupt" soldiers and civilians and caused by a lack of discipline by leaders and soldiers of the brigade and a "failure or lack of leadership by multiple echelons" within a unit within the U.S. military forces in Iraq. *See* Report at 2. This report was publicly released and can be found online (at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> (visited February 28, 2005)).

- *Schlessinger Report*

This Report was completed in August 2004. The Secretary of Defense named a panel of four distinguished former public officials, including two former Secretaries of Defense, to evaluate the areas under review in the ongoing investigations and to determine if there was a need for additional areas of investigation. The Report found that "[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities." *See* Report at 5. It stated that "the most egregious instances of detainee abuse were caused by the aberrant behavior of a limited number of soldiers and the predilections of the non-commissioned officers on the night shift of Tier 1 at Abu Ghraib," although noting that

"commanding officers and their staffs at various levels failed in their duties and that such failure contributed directly or indirectly to detainee abuse." *See* Report at p. 43. This report was publicly released and can be found online (at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (visited February 28, 2005)).

- *Formica Report*

Brigadier General Formica initiated a report on May 15, 2004 that focuses on allegations of abuse by Special Operations Forces in Iraq. The investigation is complete. The report's contents are classified because of the highly sensitive operations that were examined and that remain ongoing.

- *Church Report*

Vice Admiral Church's comprehensive review of DoD Detention Operations and Interrogation Techniques was completed on March 10, 2005 and is described in Part One, Section III.B.3. of this Annex. The Executive Summary of the Report is available at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (visited March 23, 2005).

- *Naval Inspector General Report* The Naval Inspector General (Vice Admiral Route) is conducting a review of documents related to detainees recently released under the Freedom of Information Act and is expected to release his findings soon as described in Part 1, Section III.B.3.

From the nine reports that have been completed, it is clear that serious abuses occurred, but it is also clear that the vast majority of the 150,000 military personnel who that have been stationed in Iraq have conducted themselves honorably. The U.S. Armed Forces is committed to ensuring that those who committed abuses are accountable and that such abuses do not occur again.

It is important to remember that the U.S. Armed Forces began the process of assessing detainee operations, investigating allegations of abuse, and implementing changes at Abu Ghraib, well before the media and the international community began to focus on detainee abuse at that facility. Both before and after the public disclosure of these abuses, the United States pursued swift and thorough investigations of problems.

In conducting the major reviews, the United States reached out broadly, interviewed more than 1,700 people, and compiled more than 13,000 pages of information to address detainee abuse. Much of this information is publicly available. In an effort to be transparent and keep the public and our government informed, the Department of Defense delivered more than 60 briefings to the U.S. Congress.

The Department of Defense has improved its detention operations in Iraq and elsewhere, improvements have been made based upon the lessons learned, and in part because of the

broad investigations and focused inquiries into specific allegations. These comprehensive reports, reforms, investigations and prosecutions make clear the commitment of the Department of Defense to do everything possible to ensure that detainee abuse such as occurred at Abu Ghraib never happens again.

Finally, the highest levels of the Department of Defense are reviewing and acting on all of the reports and investigations. The Department has established an inter-departmental committee, called the Senior Leadership Oversight Committee, that comprises senior members of the Joint Staff, the Provost Marshal General's Office, the Office of Detainee Affairs, and the Military Departments engaged in detention operations.

This group is specifically responsible for ensuring that the recommendations of the panels and investigations are followed through to their conclusion, and for monitoring changes made by combatant commands and the relevant offices in the Department of Defense. To date, the committee has met three times and has reviewed more than 600 recommendations. The Department has already implemented a significant number of recommendations and is examining the remainder of them. The Oversight Council will continue to meet on a periodic basis until the recommendations of the investigations and panels have been addressed fully.

3. Summary of Actions to Hold Persons Accountable

The Department of Defense takes all allegations of abuse seriously and investigates them. Those people who are found to have committed unlawful acts are held accountable and disciplined as the circumstances warrant. Investigations are thorough and have high priority.

Some criminal investigations have been completed and others continue with respect to abuse of detainees in Iraq. Although it would be inappropriate to comment on the specifics of on-going investigations, as of March 1, 2005, 190 incidents of abuse have been substantiated. Some are minor, while others are not: penalties have ranged from administrative to criminal sanctions, including 30 courts-martial, 46 non-judicial punishments, 15 reprimands, and 15 administrative actions, separations, or other administrative relief. A number of actions are pending.

Some examples of service members convicted at a court-martial for acts related to detainee maltreatment include:

(1) A Staff Sergeant, charged with numerous offenses related to maltreatment of detainees at the Abu Ghraib Detention Facility, pled guilty on October 21, 2004, at a General Court-Martial to conspiracy, maltreatment of detainees, simple battery, and indecent acts. The Military Judge sentenced him to 10 years confinement, total forfeitures of pay and allowances, reduction from Staff Sergeant (a non-commissioned officer rank) to the lowest enlisted grade (enlisted grade of Private), and discharge from the U.S. Army with a dishonorable discharge. Because of a plea agreement, the Staff Sergeant will ultimately be confined for eight years, if he cooperates with future prosecutions per the

plea arrangement.

(2) A Sergeant, charged with numerous offenses related to maltreatment of detainees at the Abu-Ghraib Detention Facility, pled guilty on February 4, 2005, to battery, dereliction of duty, and false official statement. A court-martial panel sentenced him to confinement for 6 months, reduction to the lowest enlisted grade, and discharge from the U.S. Army with a bad conduct discharge.

(3) A Specialist charged with conspiracy to maltreat subordinates, dereliction of duty, and maltreatment of detainees at the Abu Ghraib Detention Facility, pled guilty to all charges at a Special Court-Martial on May 19, 2004. The Military Judge sentenced him to confinement for a period of 12 months, reduction in rank to the lowest enlisted grade, and a discharge from the U.S. Army with a bad conduct discharge.

(4) A Specialist, charged with numerous offenses related to maltreatment of detainees at the Abu Ghraib Detention Facility, was convicted on January 7, 2005, by a 10-member panel of five counts, including assault, maltreatment, and conspiracy. He was sentenced to 10 years confinement, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge from the U.S. Army.

(5) A Specialist, charged with participating in and directing the abuse of two Iraqi detainees by handcuffing the detainees together naked at the Abu Ghraib Detention Facility, was tried at a Special Court-Martial on September 1l, 2004, and convicted of conspiracy to maltreat detainees and the maltreatment of the detainees. The Specialist was sentenced to confinement for eight months, a reduction to the lowest enlisted grade, and a bad conduct discharge from the U.S. Army.

Over the course of 2005, substantially more information will become public on these matters as accountability processes come to completion. Accordingly, the United States will be prepared to present further information on the status of its investigations and prosecutions during its presentation of this Report to the Committee Against Torture.

C. Remedies for Victims of Abuse

The United States is committed to adequately compensating the victims of abuse and mistreatment by U.S. military personnel in Iraq. The U.S. Army is responsible for handling all claims in Iraq. Several claims statutes allow the United States to compensate victims of misconduct by U.S. military personnel. The primary mechanism for paying claims for allegations of abuse and mistreatment by U.S. personnel in Iraq is through the Foreign Claims Act (FCA), 10 U.S.C. § 2734. Under the FCA, Foreign Claims Commissions are tasked with investigating, adjudicating, and settling meritorious claims arising out of an individual's detention. There are currently 78 Foreign Claims Commission personnel in Iraq. Claims may be submitted to the claims personnel, who regularly visit detention facilities, or they may be presented to the Iraqi Assistance Center. For persons with U.S. residency, claims may be brought pursuant to the Military Claims Act, 10 U.S.C. § 2733. All allegations of detainee abuse are investigated by the

U.S. Army Claims Service (USARCS), and the Department of the Army Office of the General Counsel is the approval authority.

In addition, the Secretary of Defense has directed the Secretary of the Army to review all claims for compensation based on allegations of abuse in Iraq and to act on them in his discretion. In instances where meritorious claims are not payable under the FCA or the MCA, the Secretary of the Army is responsible for identifying alternative authorities to provide compensation and either to take such action or forward the claim to the Deputy Secretary of Defense with a recommendation for action.

IV. TRAINING OF U.S. ARMED FORCES

As discussed in the section on training in Part 1, Section IV, of this Annex, U.S. Armed Forces receive significant training before being deployed and during their deployment. The United States incorporates by reference that section and reiterates that all employees and Armed Forces deployed in detention missions receive extensive training and education on the laws and customs of armed conflict, including humane treatment procedures and the obligations of the United States in conducting detention operations. With respect to Iraq, U.S. Armed Forces serving as interrogators and detention personnel are also trained to conduct themselves in accordance with the principles (including the prohibition on torture) set forth in the Geneva Conventions and to treat detainees humanely regardless of status.

Since allegations of abuse became known, corrections specialists are now stationed at detention facilities to provide additional skills and experience to the detention mission. In addition, the Department of Defense is developing procedures and policies to ensure that contractors used by the Department receive training and understand the U.S. Government's commitments and policies before being deployed in detention operations.

V. LESSONS LEARNED AND POLICY REFORMS

It is clear that certain individual service members committed serious abuses during U.S. detention operations in Iraq. Apart from proceedings to hold accountable the perpetrators of abuse, the U.S. Armed Forces have been studying the larger question of how to ensure that these types of abuses will not occur in the future. The nine detainee reports released to date have made more than 300 recommendations for short and long-term changes to improve detainee handling, accountability, investigation, supervision, and coordination. Further investigations remain in progress. The Office of the Secretary of Defense, the Military Departments, the Combatant Commands, and the Joint Staff have each taken concrete steps to implement many of these changes and will continue to do so.

The Department of Defense has responded to the abuses committed by taking steps designed to improve senior-level supervision and coordination of detainee matters. The Secretary of Defense has:

- Established a Detainee Affairs office overseen by the Deputy Assistant Secretary of Defense for Detainee Affairs;
- Established a Joint Detainee Coordination Committee on Detainee Affairs;
- Issued a policy for "Handling of Reports from the International Committee of the Red Cross";
- Issued a policy on "Procedures for Investigations into the Death of Detainees in the Custody of the Armed Forces of the U.S."; and
- Initiated a department-wide review of detainee-related policy directives.

Other steps that the Department of Defense has taken include:

- Designation of a Major General as Deputy Commanding General for Detainee Operations, MNF-I. He is the Department's primary point of contact with the Iraqi Transitional Government for detainee operations. He is responsible for ensuring that all persons captured, detained, interned, or otherwise held in under MNF-I control are treated humanely and consistent with the Geneva Conventions and all applicable law from the moment they fall into the hands of U.S. forces until their final release from MNF-I control or their repatriation. He ensures that it is made clear that inhumane treatment is prohibited and is a punishable violation under the Uniform Code of Military Justice. All service members have an obligation to report allegations of detainee abuse to the responsible command or law enforcement agency.
- The posting of the Geneva Conventions and Camp rules in a language the detainee can understand.
- Ensuring widespread publication of the findings of reports and investigations by publishing unclassified information on the Department of Defense website http://www.defenselink.mil. The Department has established an entire sub-site on detainee operations.

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2. The Human Rights Committee

The Human Rights Committee – the international body that monitors the implementation of the Covenant on Civil and Political Rights – has provided some guidance on what treatment constitutes a violation of Article 7. While not drawing a definite distinction between treatment that amounts to torture and that which constitutes cruel, inhuman or degrading treatment, the Committee has determined that beatings[3]; electric shocks[4]; mock executions[5]; forcing prisoners to stand for prolonged periods[6];

[3] Lucia Arzuada Gilboa v. Uruguay, Communication No. 147/1983, U.N. Doc. Supp. No. 40 (A/41/40) at 128 (1986). Available at http://www1.umn.edu/humanrts/undocs/session41/147-1983.htm.

[4] Delia Saldias de Lopez v. Uruguay, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88 (1984). Available at http://www1.umn.edu/humanrts/undocs/html/52_1979.htm.

[5] Linton v. Jamaica, Communication No. 255/1987, U.N. Doc. CCPR/C/46/D/255/1987 (1992). Available at http://www1.umn.edu/humanrts/undocs/html/dec255.htm.

[6] Esther Soriano de Bouton v. Uruguay, Communication No. 37/1978, U.N. Doc. CCPR/C/OP/1 at 72 (1984). Available at http://www1.umn.edu/humanrts/undocs/html/37_1978.htm.

incommunicado detention[7]; and denial of food, water, and medical care for an extended period of time[8] violate Article 7 as either torture and/or cruel, inhumane, or degrading treatment.

For example, in *Miha v. Equatorial Guinea*, UN Doc. CCPR/C/51/D/414/1990 (1994), Mr. Miha was denied food and water for a week, then suffered ill-treatment for two days, followed by another month or so of a near denial of food and a denial of medical care. The denial of medical care resulted in an infection in the complainant's elbow. The Human Rights Committee held that this course of conduct amounted to a violation of Article 7 of the Covenant on Civil and Political Rights.

3. European Court of Human Rights

Article 3 of the European Convention on Human Rights states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." While Article 3 of the European Convention is similar to Article 7 of the Civil and Political Covenant, the two provisions are not identical.

<u>Threshold of severity (intensity of suffering) and intent</u>

In *Ireland v. United Kingdom*, 1976 Y.B. Eur. Conv. on Hum. Rts. 512, 748, 788-94 (Eur. Comm'n of Hum. Rts.), the European Commission of Human Rights considered the detention and interrogation of persons in Northern Ireland by British authorities. The authorities used a combination of five techniques including: forcing detainees to stand for periods of several hours leaning against a wall, keeping black hoods over the detainees' heads at all times except during interrogation, holding detainees pending interrogation in a room where there was a continuous loud hissing noise, depriving detainees of sleep pending interrogation, and depriving detainees of adequate food and drink during the period of detention. The Government of Ireland lodged an application with the European Commission, alleging that these interrogation practices violated Article 3 of the European Convention. The Commission unanimously considered the combined use of the five methods to amount to torture, on the grounds that (1) the intensity of the stress caused by techniques creating sensory deprivation "directly affects the personality physically and mentally"; and (2) "the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been known over the ages…a modern system of torture falling into the same category as those systems applied in previous times as a means of obtaining information and confessions."[9]

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[7] El-Megreisi v. Libyan Arab Jamahiriya, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994). Available at http://www1.umn.edu/humanrts/undocs/html/vws440.htm.

[8] F. Birindwa ci Bithashwiwa, E. Tshisekedi wa Mulumba v. Zaire, Communication Nos. 241/1987and 242/1987, U.N. Doc. CCPR/C/37/D/242/1987 (1989). Available at http://www1.umn.edu/humanrts/undocs/session37/241-1987.html.

[9] Language of the Commission as quoted in Nigel S. Rodley, *The Treatment of Prisoners under International Law* 91-92 (Oxford 2000), pp. 91-92. Many commentators have found the Commission's view to be more persuasive than the Court's. *See Ibid.* at 90-95.

On appeal in *Ireland v. United Kingdom*, the European Court of Human Rights found five interrogation methods used by the United Kingdom in its counter-terrorism efforts against the IRA to be violations of Article 3, but not torture. The Court attempted to distinguish torture from inhuman or degrading treatment:

> In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted. The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.[10]

Further, the Court introduced the idea of "minimum threshold of severity," reasoning that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.[11] In this case the Court did not, in contrast with the Commission, consider the five methods to be torture, the suffering having not met "sufficient threshold of severity."

In *Tyrer v. United Kingdom* (1978), the Court reinforced a "hierarchical" interpretation of Article 3, attempting to distinguish acts of torture from acts of inhumane treatment and acts of degrading treatment based upon a threshold of severity: torture presents a higher degree of seriousness than inhumane treatment, which is more severe than degrading treatment.[12]

The first time that the Court made a finding of torture was in *Aksoy v. Turkey*. In that case, the Court found that, while held in police custody, Mr. Aksoy was subjected to what is known as "Palestinian hanging." The Court expressed its view that

> this treatment could only have been deliberately inflicted . . .. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time . . .. The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.[13]

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[10] Ireland v. United Kingdom, Case No. 5310/71, Judgment of the Eur. Ct. H.R., 18 January 1987, para. 167.

[11] *Ibid*., para. 162.

[12] Tyrer v. United Kingdom, Case No. 5856/72, Judgment of the Eur. Ct. H.R., 25 April 1978, para. 29.

[13] Aksoy v. Turkey, Case No. 21987/93, Judgment of the Eur. Ct. H.R., 18 December 1996.

Since then, the Court has ruled that treatment such as rape and sexual assault by the police of a detainee[14] and severe beating by the police of a detainee,[15] amount to torture. In *Aydin v. Turkey*, ECHR judgment of 25 September 1997, Reports 1997-VI, by a margin of fourteen votes to seven, the Court held that the combined rape and other ill-treatment – being beaten, sprayed with cold water from high pressure jets, and spun round and round in a car tire while naked -- amounted to torture. While the Court found that all-together this treatment amounted to torture, they also stated that the same conclusion would have been reached on either ground individually. The seven dissenters argued that there was not enough evidence to prove the claims. Two of these stated, however, that if the allegations were proven they would constitute an "extremely serious violation" of Article 3.

In its most significant decision on torture and ill-treatment since *Ireland v. United Kingdom*, the European Court in *Selmouni v. France* (1999), noted that the Court's view on these issues was evolving with time so that the kinds of conduct that might have been considered ill-treatment in 1987 might eventually be viewed as torture. The Court ruled that a range of factors comes into play when establishing whether a victim's pain or suffering is so severe as to constitute "torture," as distinct from other prohibited ill-treatment. According to *Selmouni v. France* (1999), determining whether the treatment in a particular case constituted "torture" depends on all the circumstances of the case.[16] The Court stressed the fact that:

> [T]he [European Convention on Human Rights] is a living instrument which must be interpreted in the light of present-day conditions…and that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future…[T]he increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[17]

Supporting the Commission's reasoning in *Ireland v. United Kingdom*, the Court ruled in *Ilhan v. Turkey* (2000) that in order for an act to be considered torture, it must be committed with certain intent:

> In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating.[18]

Police custody and use of force

In respect of a persons deprived of their liberty the Court ruled in *Ribitsch v. Austria* that "any recourse to physical force which has not been made strictly necessary

[14] Aydin v. Turkey, Case No. 23178/94, Judgment of the Eur. Ct. H.R., 25 September 1997.
[15] Selmouni v France, Case No. 2503/94, Judgment of the Eur. Ct. H.R., 28 July 1999.
[16] *Ibid.*
[17] *Ibid.*
[18] Ilhan v. Turkey, Case No. 22494/93, Judgment of the Eur. Ct. H.R., 27 June 2000, para.85.

by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention."[19] The Court, however, has demonstrated in several judgments a reluctance to find prison conditions to be in breach of Article 3, perhaps because of the high burden that would be placed on very poor countries.[20]

In *Tomasi v. France* (1992) the Court ruled that "any use of physical force in respect of a person deprived of his liberty which is not made strictly necessary as a result of his own conduct violates human dignity and must therefore be regarded as a breach of the right guaranteed under Article 3 of the Convention. At the most the severity of the treatment is relevant in determining, where appropriate, whether there has been torture."[21]

Expulsion and extradition

The prohibition of torture or inhuman treatment has become an important factor in evaluating the permissibility of deportations. The Court ruled in *Soering v. United Kingdom* (1989) that Article 3 prohibits the extradition of a person who is threatened with torture or inhuman or degrading treatment or punishment in the requesting country. Extradition in such circumstances would, according to the Court, "plainly be contrary to the spirit and intendment of the Article" and would "hardly be compatible with the underlying values of the Convention."[22] In two cases decided in 1991 the Court held that the same considerations apply to expulsion cases.[23]

Importantly, Article 3 protects against torture and ill-treatment irrespective of what a person has done or has been accused of doing, even if an individual is a suspected terrorist. In *Chahal v. the United Kingdom*, for example, the U.K. wished to deport Mr. Chahal to India because his alleged terrorist activities posed a risk to the national security of the U.K. The Court, however, confirmed that, "Article 3 enshrines one of the most fundamental values of democratic society. . . The Court is well aware of the immense difficulties faced by States in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[24]

Failure to investigate

In *Assenov v. Bulgaria*, the Court concluded that a violation of Article 3 had occurred, not for ill-treatment *per se* but for a failure to carry out effective official investigation on the allegation of ill treatment. The Court recognized that

> circumstances, where an individual raises an arguable claim that he has been seriously ill treated by the police or other such agents of the State, unlawfully and in breach of Article 3, that provision, read in conjunction with Article 1 of the

[19] Ribitsch v. Austria, Case No. 18896/81, Judgment of the Eur. Ct. H.R., 4 December 1995.

[20] *For example, see* Zhu v. the United Kingdom, Case No. 36790/97, Judgment of the Eur. Ct. H.R. 12 September 2000; or Assenov v. Bulgaria, Case No. 24764/94, Judgment of the Eur. Ct. H.R., 28 October 1998.

[21] Tomasi v. France, Case No. 12850/87, Judgment of the Eur. Ct. H.R., 27 August 1992.

[22] Soering v. U.K. Case No. 14038/88, Judgment of the Eur. Ct. H.R., 7 July 1989.

[23] Cruz Varas et al. v. Sweden, Case No. 15576/89, Judgment the Eur. Ct. H.R., 20 March 1991; Vilvarajah et al. v. U.K., Case No. 13163/87, Judgment of the Eur. Ct. H.R., 30 October 1991.

[24] Chahal v. U.K., Case No. 22414/93, Judgment of the Eur. Ct. H.R., 15 November 1996.

> Convention "to secure everyone within their jurisdiction the rights and freedoms in the Convention," requires by implication that there should be an effective official investigation. This obligation should be capable of leading to the identification and punishment of those responsible. If this is not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.

Inhuman and Degrading Treatment

Inhuman treatment is conduct which "caused, if not actual bodily injury, at least intense physical and mental suffering."[25] Degrading treatment was "such as to arouse in [its] victims feelings of fear anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[26]

In *Ribitsch v. Austria*, European Court of Human Rights judgment of 4 December 1995, Series A, No. 336, while being detained illegally along with his wife, Ribitsch received punches to the head, kidneys, and arm and kicks to the upper leg and kidneys. He was pulled to the ground by his hair and his head was banged against the floor. The Court held that such actions constituted ill-treatment which amounted to both inhuman and degrading treatment. Three dissenters found there to be reasonable doubt as to Ribitsch's claims.

4. Inter-American System

a. Inter-American Court of Human Rights

The Inter-American Court has affirmed an absolute prohibition of torture in all its forms, ruling in *Maritza Urrutia v. Guatemala* (2003) that

> [a]n international juridical regime of absolute prohibition of all forms of torture, both physical and psychological, has been developed and, with regard to the latter, it has been recognized that the threat or real danger of subjecting a person to physical harm produces, under determined circumstances, such a degree of moral anguish that it may be considered 'psychological torture.' The absolute prohibition of torture, in all its forms, is today part of international *jus cogens*.[27]

The Court ruled in *Loayza Tamayo* (1997) that, "even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment." According to the Court, "the degrading aspect of a treatment is characterized by fear, anxiety, and inferiority induced for the purpose of humiliating and degrading the victim and breaking the victim's

[25] *See* Soering v. U.K. Case No. 14038/88, Judgment of the Eur. Ct. H.R., 7 July 1989.
[26] *Ibid.*
[27] Maritza Urrutia Case, Judgment of November 27, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 103 (2003), para. 92. Available at http://www1.umn.edu/humanrts/iachr/C/103-ing.html.

physical and moral resistance." The degrading aspect of the treatment can be exacerbated by the vulnerability of a person who is unlawfully detained (i.e. children, women, non-nationals). The Court further specified that "any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person in violation of Article 5 of the American Convention." Recognizing the position that extreme measures may be used in the protection of national security, the Court ruled that "the exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person's right to physical integrity." Specific acts were considered to constitute cruel, inhuman or degrading treatment, including "*incommunicado* detention, being exhibited through the media wearing a degrading garment, solitary confinement in a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence, and a restrictive visiting schedule."[28]

The Inter-American Court had been particularly critical of circumstances in which individuals are held *incommunicado* for long periods of time in poor conditions. In the case of *Velásquez Rodríguez* (1988) which concerned the involuntary disappearance of Mr. Velásquez, the Inter-American Court held that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being."[29] Further, in the case of *Suárez Rosero* (1997), the Inter-American Court of Human Rights stated that

> [t]he mere fact that the victim was for 36 days deprived of any communication with the outside world, in particular with his family, allows the Court to conclude that Mr. Suárez Rosero was subjected to cruel, inhuman and degrading treatment, all the more so since it has been proven that his incommunicado detention was arbitrary and carried out in violation of Ecuador's domestic laws. The victim told the Court of his suffering at being unable to seek legal counsel or communicate with his family. He also testified that during his isolation he was held in a damp underground cell measuring approximately 15 square meters with 16 other prisoners, without the necessary hygiene facilities, and that he was obliged to sleep on newspaper; he also described the beatings and threats he received during his detention. For all those reasons, the treatment to which Mr. Suárez Rosero was subjected may be described as cruel, inhuman and degrading.[30]

In *Cantoral Benavides v. Peru* (2000), when establishing a violation of Article 5 of the American Convention, the Court considered that certain acts that, in the past, were classified as inhuman or degrading treatment, "may be classified differently in the future, that is, as torture, since the growing demand for the protection of fundamental rights and

[28] Loayza Tamayo, Judgment of September 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997), paras. 57-8. Available at http://www1.umn.edu/humanrts/iachr/C/33-ing.html.

[29] Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988). Available at http://www1.umn.edu/humanrts/iachr/C/4-ing.html.

[30] Suárez Rosero Case, Judgment of November 12, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 35 (1997). Available at http://www1.umn.edu/humanrts/iachr/C/35-ing.html.

freedoms must be accompanied by a more vigorous response in dealing with infractions of the basic values of democratic societies."[31]

In *Hilaire, Constantine and Benjamin et al.* (2002) the Inter-American Court considered treatment to constitute cruel, inhuman and degrading treatment in which persons were held for a prolonged period of time in solitary confinement on death row; in prison conditions where they were in confined conditions with inadequate hygiene, ventilation and natural light; were allowed out of their cells infrequently; were abused by police and prison staff; and in some instances were provided inadequate medical care.[32]

b. Inter-American Commission on Human Rights

In the *Luis Lizardo Cabrera Case*, the Commission ruled that "inhuman treatment is that which deliberately causes severe mental or psychological suffering, which, given the particular situation, is unjustifiable" and that "treatment or punishment of an individual may be degrading if he is severely humiliated in front of others or he is compelled to act against his wishes or conscience."[33] The Commission similarly ruled that treatment must attain a minimum level of severity in order to be considered "inhuman or degrading." The evaluation of this "minimum" level is relative and depends on the circumstances in each case, such as the duration of the treatment, its physical and mental effects, and, in some cases, the sex, age, and health of the victim.[34]

In addition, with regard to the conceptual difference between the term "torture" and "inhuman or degrading treatment," the Inter-American Commission in the *Luis Lizardo Cabrera* case has shared the view of the European Commission on Human Rights that the concept of "inhuman treatment" includes that of "degrading treatment," and that torture is an aggravated form of inhuman treatment perpetrated with a purpose, namely to obtain information or confessions or to inflict punishment.[35] The Inter-American Commission has also relied upon the European Court of Human Rights' view that the essential criterion to distinguish between torture and other cruel, inhuman or degrading treatment or punishment "primarily results from the intensity of the suffering inflicted."[36]

Also in the *Luis Lizardo* case, the Commission considered that both the American Convention and the Inter-American Convention to Prevent and Punish Torture provide the Commission with certain latitude in assessing whether, in view of its seriousness or intensity, an act or practice constitutes torture or inhuman or degrading punishment or

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[31] Cantoral Benavides Case, Judgment of August 18, 2000, Inter-Am Ct. H.R. (Ser. C) No. 69 (2000), para. 99. Available at http://www1.umn.edu/humanrts/iachr/C/69-ing.html.

[32] Hilaire, Constantine and Benjamin *et al.* Case, Judgment of June 21, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 94 (2002), paras. 84, 168-9. Available at http://www1.umn.edu/humanrts/iachr/C/94-ing.html.

[33] Luis Lizardo Cabrera v. Dominican Republic, Case 10.832, Report Nº 35/96, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 821 (1997). Available at http://www1.umn.edu/humanrts/cases/1997/domrep35-96.html.

[34] *Ibid,* para. 78.

[35] *Ibid.,* para. 79.

[36] *Ibid*, para. 80.

treatment. Such classification should be done on a case-by-case basis, taking into account the duration of the suffering; the physical and mental effects on each specific victim; and the personal circumstances of the victim.[37]

5. International Criminal Tribunals

International Criminal Tribunal on Former Yugoslavia has determined that several acts constitute torture, including rape and solitary confinement, to the extent that it can be shown to pursue one of the prohibited purposes of torture and cause the victim severe pain and suffering.

The International Criminal Tribunal on Rwanda found in the *Prosecutor v. Akayesu*, , Case No. ICTR-96-4-T, Judgment, ICTR TC, 2 September 998 (1998) that rape constitutes a crime against humanity.

6. Other Non-Treaty Standards

The following international standards also prohibit torture and ill-treatment:

Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

Code of Conduct on Law Enforcement, G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979)

Principles of Medical Ethics relevant to the Role of Health Personnel particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc A/37/51 (1982)

Body of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988)

Basic Principles for the Treatment of Prisoners, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc A/45/49 (1990)

[37] *Ibid.* paras. 82-83.

The international instruments cited above establish certain obligations that States must respect to ensure protection against torture. Office of the High Commissioner for Human Rights, Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 2001.

These include:

1. Taking effective legislative, administrative, judicial or other measures to prevent acts of torture. No exceptions, including war, may be invoked as a justification of torture (Article 2 of the Convention Against Torture; Article 3 of the Declaration on the Protection Against Torture);

2. Not expelling, returning ("refouler") or extraditing a person to a State where there are substantial grounds for believing he would be tortured (Article 3 of the Convention Against Torture);

3. Criminalizing acts of torture, including complicity or participation therein (Article 4 of the Convention Against Torture; Principle 7 of the Body of Principles on Detention; Article 7 of the Declaration on the Protection Against Torture; paragraphs 31, 32 and 33 of the Standard Minimum Rules for the Treatment of Prisoners);

4. Undertaking to make torture an extraditable offense and assist other States parties in connection with criminal proceedings brought in respect of torture (Articles 8 and 9 of the Convention Against Torture);

5. Limiting the use of incommunicado detention; ensuring that detainees are held in places officially recognized as places of detention, as well as for the names of persons responsible for their detention to be kept in registers readily available and accessible to those concerned, including relatives and friends; recording the time and place of all interrogations, together with the names of those present; and, granting doctors, lawyers and family members access to detainees (Article 11 of the Convention Against Torture; Principles 11, 12, 13, 15, 16, 17, 18, 19 and 23 of the Body of Principles on Detention; paragraphs 7, 22 and 37 of the Standard Minimum Rules for the Treatment of Prisoners);

6. Ensuring that education and information regarding the prohibition of torture is included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other appropriate persons (Article 10 of the Convention Against Torture; Article 5 of the Declaration on the Protection Against Torture; paragraph 54 of the Standard Minimum Rules for the Treatment of Prisoners);

7. Ensuring that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings except against a person accused of torture as evidence that the statement was made (Article 15 of the Convention Against Torture; Article 12 of the Declaration on the Protection Against Torture);

8. Ensuring that the competent authorities undertake a prompt and impartial investigation wherever there are reasonable grounds to believe that torture has been committed (Article 12 of the Convention Against Torture; Principles 33 and 34 of the Body of Principles on Detention; Article 9 of the Declaration on the Protection Against Torture); and

9. Ensuring that victims of torture have the right to redress and adequate compensation (Articles 13 and 14 of the Convention Against Torture; Article 11 of the Declaration on the Protection Against Torture; paragraphs 35 and 36 of the Standard Minimum Rules for the Treatment of Prisoners).

10. Ensuring that the alleged offender or offenders shall be subject to criminal proceedings if an investigation establishes that an act of torture appears to have been committed. If an allegation of other forms of cruel, inhuman or degrading treatment or punishment is considered to be well-founded, the alleged offender or offenders shall be subject to criminal, disciplinary or other appropriate proceedings. (Article 7 of the Convention Against Torture; Article 10 of the Declaration on the Protection Against Torture.)

E. U.S. CONSTITUTIONAL PROTECTIONS

1. Fifth and Fourteenth Amendments

> "No person shall be … deprived of life, liberty, or property, without due process of law."
>
> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

a. Shocks the conscience standard

Only conduct which "shocks the conscience," will give rise to a claim under the Fifth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). This test is derived from Justice Cardozo's statement in *Snyder v. Commonwealth of Massachusetts*, that substantive due process protects norms "so rooted in the traditions and conscience of our people as to be ranked as fundamental." 291 U.S. 97, 105 (1934).

In *Rochin v. People of California*, 342 U.S. 165 (1952), the Court found a violation of the 5th and 14th Amendments when law enforcement forced defendant's stomach to be pumped after witnessing him taking pills. This conduct violated the 14th Amendment because it shocked the conscience of the court. *Id* at 172. But see, *Breithaupt v. Abram*¸ 352 U.S. 432 (1957), where the Court held that a blood test taken from an unconscious man to test his blood alcohol level did not shock the conscience when performed by a skilled technician. The defendant had been driving his pickup truck and struck another vehicle head-on killing the other driver. An empty whiskey bottle in

the truck and the smell of alcohol on the driver motivated the Emergency Room staff to call the sheriff who requested the test. The test showed the driver was above the legal limit for blood-alcohol. The defendant argued under *Rochin* and lost.

b. Pre-trial confinement

The Eighth Amendment only offers protection if the action of the state is a "punishment." If the state is acting with a purpose other than punishment, the Eighth Amendment affords no protection.

In *Shall v. Martin*, the Supreme Court reiterated that a pretrial detainee cannot be punished under the Due Process clause. 467 U.S. 253, 269 (1984). In this case a juvenile was detained after it was determined that he lacked proper supervision at home and was likely to commit further crimes. A 6-3 majority of the Supreme Court held that the state had a legitimate purpose, that the disability imposed was "but an incident of" this legitimate purpose, and that there were adequate procedural safeguards in place.

In *Bell v. Wolfish,* 441 U.S. 520 (1978) the court applied the 5th Amendment's Due Process clause to a federally operated facility (the "MCC") in New York City that housed pretrial detainees. The district court enjoined the MCC from double bunking, using common areas as housing, prohibiting the receipt of outside food or personal property, body cavity searches, and that inmates be required to stay outside of their cells during searches.[38] The lower courts held that since the detainee was presumed innocent he should have the "rights afforded unincarcerated individuals" except those that "inhere in their confinement itself or which are justified by compelling necessities of jail administration." The Supreme Court held that the standard was less than the compelling standard the lower courts had used. The court held that all the above named conditions were not "punishment" but "conditions or restrictions of detention."

c. Indefinite detention of military detainees

In *Re Guantánamo Detainee Cases*, 355 F. Supp.2d 443 (D.D.C. 2005) the court held that under the Due Process Clause of the 5th Amendment the detainees could not be held incommunicado indefinitely and that if the only form of trial they are to receive is a military tribunal it must be in accordance with Due Process. That meant that the military tribunal in this case could not use information allegedly received as a result of torture and must provide counsel. The procedural posture of this case was only the denial of summary judgment so the court only ruled that the plaintiffs stated a case.

2. Eighth Amendment:

[38] The district court also granted relief for length of confinement, law library facilities, the commissary, use of typewriters, social and attorney's visits, telephone service, mail inspection, uniforms, exercise facilities, food service, bathroom access in visitation area, Muslim diets, and women's "lock-in" though none of these rulings were appealed to the Supreme Court.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This Amendment must be interpreted in a "flexible and dynamic manner." *Fierro v. Gomez*, 77 F3d 301 (9th Cir. 1996) citing *Gregg v. Georgia*, 428 U.S. 153, 171 (1976). The treatment must be measured against, "the evolving standards of decency that mark the progress of a maturing society." *Fierro v. Gomez*, 77 F3d 301, 306 (9th Cir. 1996) citing *Trop v. Dulles*, 356 U.S. 153, 171 (1958) (plurality opinion).

The Eighth Amendment is only applicable after there has been a formal adjudication of guilt. *Ingraham v. White*, 430 U.S. 651, n.40 (1977); *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 243-44 (1983). In *Ingraham v. Wright*, 430 U.S. 651 (1977) the Supreme Court held that a boy who received corporal punishment could not receive the protection of the Eighth or Fourteenth Amendments. The Court stated that as to the Eighth Amendment the boy had not been convicted of a crime and as to the Fourteenth Amendment the court said that there were sufficient safeguards and openness to the process, including review by the principal, to protect against a wrongful punishment.

To determine if there is a violation of the Eighth Amendment a court looks to the two part test in *Farmer v. Brennan*, 511 U.S. 825 (1994): The prisoner's condition must be objectively serious and the state officials must act with the requisite level of culpability which is "deliberate indifference."

In *Reed v. McBride*, 178 F.3d 849 (7th Cir. 1999) the plaintiff alleged that when he went to the hospital for medical treatment on Fridays upon his return prison officials would not let him retrieve his ID badge until the following Monday or Tuesday. Without the badge, defendant could not receive food or medication. The court held that this was a sufficiently serious violation to meet the first part of the *Farmer* test and that there was an issue of fact to resist summary judgment as to culpability.

In *Taylor v. Adams*, 221 F.3d 1254 (11th Cir. 2000) the court held that the actions of police and firefighters in a case resulting in the death of an arrested suspect did not rise to the level of an Eighth Amendment violation because neither the firefighters nor the police nurse met the four-part test the court laid out which required (1) an objectively serious need, (2) an objectively insufficient response to the need, (3) subjective awareness of the need, and (4) an actual inference of required action form the facts. The court would also require that in order to find a violation of the 8th Amendment based on a failure to provide medical care there would need to be an intent to punish which the court seemed to believe was absent here.

F. U.S. STATUTORY PROVISIONS

1. No criminal prohibition per se.

There is no federal law criminalizing torture per se, but the US asserted in its initial report to the Committee Against Torture that "any act falling within the

Convention's definition of torture is clearly illegal and prosecutable everywhere in the country, for example as an assault or battery, murder or manslaughter, kidnapping or abduction, false arrest or imprisonment, sexual abuse, or violation of civil rights."

2. U.S. Legislation regarding torture

a. Implementing the Convention against Torture

The US's attempt to comply with its obligation under the Convention Against Torture to criminalize torture outside the U.S. is codified in 18 U.S.C. §2340 et seq.

As used in this chapter –
(1) "torture" means 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;
(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from –
(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(C) the threat of imminent death; or
(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
(3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

Section 2340A:
(a) Offense. – Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction. – There is jurisdiction over the activity prohibited in subsection (a) if –
(1) the alleged offender is a national of the United States; or
(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy. – A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

Section 2340B:
Nothing in this chapter shall be construed as precluding the application of State or local

laws on the same subject, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding.

b. Criminalization of War Crimes

War Crimes Act, 18 U.S.C. Sec. 2441 (2004) provides criminal penalties for persons who, whether inside or outside the United State, commit a war crime. War crime is defined as a grave breach of the Geneva Conventions or protocols to those conventions to which the U.S. is a party; conduct prohibited by Article 23, 25, 27 or 28 of the Hague Convention IV respecting the laws and customs of War on Land; conduct violating Common Article 3 of the Geneva Conventions; and conduct which willfully kills or causes serious injury to civilians contrary to Protocol on Prohibitions or Restriction on the Use of Mines, Booby-Traps and Other Devices, when the U.S. is party to such Protocol.

c. Federal jurisdiction in civil suits for torture

U.S. Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73, 28 U.S.C. §1350. The TVPA and ATCA (28 U.S. §1350) open U.S. courts to suits for civil damages against individuals who, under actual or apparent authority or color of law subject an individual to torture or to extrajudicial killing.

G. U.S. GOVERNMENT POSITIONS AND PRACTICES

The U.S. Army Intelligence Interrogation Field Manual (FM 34-52), issued in 1987 states, "[the Geneva Conventions] and U.S. policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army. Acts in violation of these prohibitions are criminal acts punishable under the [Uniform Code of Military Justice]." The Field Manual (FM 34-52) is available in its entirety at http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/.[39]

* * * * * *

President George W. Bush to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs and Chairman of the Joint Chiefs of Staff, memorandum, "Humane Treatment of al Qaeda and Taliban

[39] The Army announced in April 2005 that 34-52 would be replaced by a new interrogation manual. Although the new manual remains confidential, the press reported that the new manual specifically forbids practices that were portrayed in the Abu Ghraib photos, such as stripping prisoners, keeping them in "stress" positions, imposing dietary restrictions, employing police dogs to intimidate prisoners, and using sleep deprivation as an interrogation method. While human rights groups have acknowledged that the new manual is an improvement from 34-52, some have expressed concern that the manual is only applicable to the Army, and
not for other military or intelligence operations, such as the CIA. Eric Schmitt, *Army, in manual, limiting tactics in interrogations*, New York Times, April 28, 2005, at A1.

Detainees," February 7, 2002. Available at
http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/dir_20020207_Bush_Det.pdf:

UNCLASSIFIED

THE WHITE HOUSE

Washington

February 7, 2002

Memorandum for the VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

I. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By it terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principals of Geneva.

II. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

1. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the

world because among other reasons, al Qaeda is not a High Contracting Party to Geneva.

2. I accept the legal conclusion of the Attorney General and the department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

3. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

4. Based on the facts supplied by the Department of Defense, and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war

III. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles. of Geneva.

IV. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

V. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

VI. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

* * * * *

United State Department of State
Washington, DC 20520

MEMORANDUM

T0: Counsel to the President
Assistant to the President for National Security Affairs

FROM: Colin L. Powell [initialed January 26, 2002]

SUBJECT: Draft Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan

I appreciate the opportunity to comment on the draft memorandum. I am concerned that the draft does not squarely present to the President the options that are available to him. Nor does it identify the significant pros and cons of each option. I hope that the final memorandum will make clear that the President's choice is between

> Option 1: Determine that the Geneva Convention on the treatment of Prisoners of War (GPW) does not apply to the conflict on "failed State" or some other grounds. Announce this position publicly. Treat all detainees consistent with the principles of the GPW;

and

> Option 2: Determine that the Geneva Convention does apply to the conflict in Afghanistan, but that members of al Qaeda as a group and the Taliban individually or as a group are not entitled to Prisoner of War status under the Convention. Announce this position publicly. Treat all detainees consistent with the principles of GPW.

The final memorandum should first tell the President that both options have the following advantages – that is there is no difference between them in these respects:

Both provide the same practical flexibility in how we treat detainees, including with respect to interrogations and length of detention.

Both provide flexibility to provide conditions of detention and trail that take into account constraints such as feasibility under the circumstances and necessary security requirements.

Both allow us not to give the privileges and benefits of POW status to al Qaeda and Taliban.

Neither option entails any significant risk of domestic prosecutions against U.S. officials.

The memorandum should go on to identify the separate pros and cons of the two options as follows:

Option 1 - Geneva Convention does not apply to the conflict

Pros:

This is an across-the-board approach that on its face provides maximum flexibility, removing any question of case-by-case determination for individuals.

Cons:

It will reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.

It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy.

It will undermine public support among critical allies, making military cooperation more difficult to sustain.

Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice.

It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops. . . .

* * * * * *

Memorandum from the U.S. Department of Justice Office of Legal Counsel (Jay S. Bybee, Assistant Attorney General) to Alberto R. Gonzales, Counsel to the President, Standards for Conduct for Interrogation under 18 U.S.C. Sec. 2340-2340A (August 1, 2002) as found in
http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf

You have asked for our Office's views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340–2340A of title 18 of the United States Code. As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States. We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture. We conclude by examining possible defenses that would negate any claim that certain interrogation methods violate the statute.

. . .

In Part I, we examine the criminal statute's text and history. We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party. The legislative history simply reveals that Congress intended for the statute's definition to track the Convention's definition of torture and the reservations, understandings, and declarations that the United States submitted with its ratification. We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.

. . .

Here, because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective.

. . .

Although these statutes address a substantially different subject from Section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain. They treat severe pain as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment. Such damage must rise to the level of death, organ failure, or the permanent impairment of a significant body function. These statutes suggest that "severe pain," as used in Section 2340, must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture.[3]

* * * * * *

A memo citing the memoranda from February and August 2002 and signed by Secretary of Defense Donald Rumsfeld on December 2, 2002, authorizes interrogation techniques for detainees in Guantánamo, including: (1) identifying the interrogator as coming from a country with a reputation for harsh treatment of detainees; (2) the use of stress positions (like standing), for a maximum of four hours (there is no indication, however, how often that stress positions may be repeated or how much time the detainee would have between the use of techniques.[40] Also, Secretary Rumsfeld in approving the document handwrote a complaint: "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?") ; (3) use of the isolation facility for up to 30 days with extensions to be approved by the Commanding General; (4) deprivation of light and auditory stimuli; (5) hooding; (6) use of 20-hour interrogations; (7) removal of all comfort items (including religious items); (8) removal of clothing; (9) forced grooming (shaving of facial hair, etc.); (9) use of detainees individual phobias (such as fear of dogs) to induce stress; (10) in some cases, use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family; (11) exposure to cold weather or water; (12) use of a wet towel and dripping water to induce the misperception of suffocation; etc. In addition, the CIA was reportedly given permission by the Justice Department to use "waterboarding," the practice of forcing the detainees head under water for prolonged periods of time.[41] These techniques can be used cumulatively or all at once.

The OLC's extremely narrow definition of torture of August 1, 2002, – particularly as to the threshold of pain required – was withdrawn by the Justice Department sometime during fall 2004 and was replaced in a memo of December 30, 2004 – just prior to the confirmation hearings of Alberto Gonzales who had been the recipient of the August 2002 memo. James B. Comey, Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A (December 30, 2004), available at http://www.usdoj.gov/olc/dagmemo.pdf (2004). Further information may be found at http://texscience.org/reform/torture/. One aspect of the U.S. position, however, has not changed, that is, the failure effectively to prohibit "cruel, inhuman or degrading treatment or punishment" as required by the Civil and Political Covenant and the Convention against Torture.

In December 2002 and January 2003, the Federal Bureau of Investigation (FBI)[42] and Judge Advocates[43] complained to the Defense Department about aggressive

[40] William J. Haynes II, General Counsel of the Department of Defense, Action Memo for Secretary of Defense (November 27, 2002), Approved by Secretary of Defense (December 2, 2002).

[41] Human Rights Watch, "Getting Away with Torture: Command Responsibility for the U.S. Abuse of Detainees" 12 (April 2005).

[42] In a letter obtained by The Associated Press, Thomas Harrington, an FBI counterterrorism expert suggested the Pentagon did not act on FBI complaints about several incidents that occurred in Guantánamo, including a female interrogator grabbing a detainee's genitals and bending back his thumbs, another where a prisoner was gagged with duct tape, and a third where a dog was used to intimidate a detainee who later was thrown into isolation and showed signs of "extreme psychological trauma." Paisley Dodds, "FBI letter complains of aggressive interrogation techniques at Guantánamo starting in 2002," *Associated Press*, December 6, 2004. The ACLU has obtained a number of emails documenting the interrogation techniques and abuse observed by FBI agents. Available at http://www.aclu.org/International/International.cfm?ID=13962&c=36.

interrogation methods that were resulting in abuse and several deaths. In January 2003, Secretary of Defense Rumsfeld rescinded his blanket approval of the techniques he had authorized in December 2002. Instead, requests for using the harshest interrogation methods were to be forwarded directly to him, along with a "thorough justification" and "a detailed plan for the use of such techniques."[44]

In addition, Rumsfeld established a Working Group to assess legal and policy issues for detainee interrogation. The Working Group's report was sent to Rumsfeld on April 4, 2003,[45] recommending thirty-five interrogation techniques, many of which seemed to mirror Rumsfeld's December 2002 guidelines, including hooding, prolonged standing, sleep deprivation, face slap/stomach slap, and removal of clothing in order to create a feeling of vulnerability.[46] The Working Group reasoned that "[d]ue to the unique nature of the war on terrorism . . . it may be appropriate . . . to authorize as a military necessity the interrogation of such unlawful combatants in a manner beyond that which may be applied to a prisoner of war who is subject to the protections of the Geneva Conventions." On April 16, 2003, Rumsfeld approved twenty-four of the techniques recommended by the Working Group, including dietary and environmental manipulation, sleep adjustment, and isolation such as:

- "Fear Up Harsh: Significantly increasing the fear level in a detainee"
- "Pride and Ego Down: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW";
- "Environmental Manipulation: Altering the environment to create moderate discomfort . ...."
- "Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment."[47]

Several descriptions of proposed interrogation techniques contained cautionary language regarding perceived inconsistencies with the Third Geneva Convention (Prisoners of War). Regarding "Pride and Ego Down," for example, Rumsfeld cautions

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[43] James Gordon Meek, "At war with Gitmo grilling: Military counsel fought and lost," *New York Daily News*, February 13, 2005.

[44] Memo from Secretary of Defense Rumsfeld to General Counsel, U.S. Dept. of Defense (January 15, 2003). Available at http://news.findlaw.com/hdocs/docs/dod/rums11503mem.pdf.

[45] *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*. The Working Group was chaired by Mary L. Walker, General Counsel, U.S. Air Force. Available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf.

[46] The U.S. Army Intelligence Interrogation Field Manual (FM 34-52) states, "[the Geneva Conventions] and U.S. policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army. Acts in violation of these prohibitions are criminal acts punishable under the [Uniform Code of Military Justice]." The Field Manual (FM 34-52) is available in its entirety at http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/.

[47] "Counter-Resistance Techniques in the War on Terrorism," memo from the Secretary of Defense for the Commander U.S. Southern Command (April 16, 2003). Available at http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf.

"Article 17 of Geneva III provides, 'Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.' Other nations that believe that detainees are entitled to POW protections may consider this technique inconsistent with the provisions of Geneva."[48]

b. Treatment of Detainees in Iraq

On September 14, 2003, Lieutenant General Ricardo Sanchez of the U.S. Army sent a memo to the Commander of the Combined Joint Task Force Seven (CJTF-7), who was responsible for the overseeing of interrogation policy. Sanchez described 29 interrogation techniques, including the 24 which had been approved by Secretary of Defense Donald Rumsfeld for use on detainees at Guantánamo Bay, and an additional five techniques:

- "Presence of Military Working Dog: Exploits Arab fear of dogs while maintaining security during interrogation. Dogs will be muzzled and under control of MWD handler at all times to prevent contact with detainee."
- "Sleep Management" Detainee provided minimum 4 hours of sleep per 24 hour period, not to exceed 72 continuous hours."
- "Yelling, Loud Music, and Light Control: Used to create fear, disorient detainee and prolong capture shock. Volume controlled to prevent injury."
- "Deception: Use of falsified representations including documents and reports."
- "Stress Positions: Use of physical postures (sitting, standing, kneeling, prone, ect.) for no more than 1 hour per use. Use of technique(s) will not exceed 4 hours and adequate rest between use of each position will be provided."

In August 2003, Major General Geoffrey Miller, who had been responsible for interrogations in Guantánamo, was sent to Iraq to "gitmo-ize" Iraqi detention facilities, or according to a subsequent inquiry by Maj.or Taguba, Miller's task was "to review current Iraqi Theater ability to rapidly exploit internees for actionable intelligence." Miller reportedly suggested that prison guards be used to "soften up" prisoners for interrogations, and it is now known that he was often present at Abu Ghraib.[49] In September 2003, Lt. General Sanchez authorized twenty-nine interrogation techniques (mirroring Rumsfeld's April 16 techniques) for use in Iraq, including the use of dogs, stress positions, sensory deprivation, loud music, and light control.[50]

Since January 9, 2002 – the day the Department of Justice lawyers sent that first memo to the Pentagon arguing that the Geneva conventions do not apply to the war in Afghanistan, or to members of Al-Qaeda or the Taliban – until the present, numerous accounts of detainee abuse and some deaths have been reported. In May 2003, the ICRC

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[48] Memorandum from Secretary of Defense Donald H. Rumsfeld to Commander of US Southern Command, on Counter-resistance Techniques in the War on Terrorism, Tab A, at 1-2 (Apr. 16, 2003).

[49] Eric Schmitt, "Official Declines to Pin Blame for Blunders in Interrogations," *New York Times*, March 11, 2005.

[50] Memo from Lt. Gen. Ricardo S. Sanchez to Commander, U.S. Central Command (September 14, 2003). Available at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17851&c=206.

reported to U.S. Central Command 200 cases of alleged detainee abuse in U.S. custody in Iraq, and continued to express concern confidentially about the abuse of the detainees throughout 2003.[51] In December 2003, a secret U.S. Army report detailed abuses committed by a task force of Military Operations and CIA officers, known as Task Force 121, against detainees in Iraq.[52] In January 13, 2004, Joseph Darby gave Army criminal investigators a CD containing the Abu Ghraib photographs depicting detainee torture and abuses that had occurred from September to December 2003. On February 24, 2004, the ICRC issued a confidential report to the Coalition Provisional Authority documenting widespread abuse in various detention facilities in Iraq and command failures to take corrective action. The report was eventually leaked, revealing that the ICRC had observed abusive methods being used at Camp Cropper in Iraq, including "hooding a detainee in a bag, sometimes in conjunction with beatings, thus increasing anxiety as to when blows would come;" applying handcuffs so tight the skin would be broken; beating with rifles and pistols; issuing threats against family members; and stripping detainees naked for several days in solitary confinement in a completely dark cell.[53] During its Press Conference on May 7, 2004, a representative of the ICRC said that ". . . what appears in the report of February 2004 are observations consistent with those made earlier on several occasions orally and in writing throughout 2003. In that sense the ICRC has repeatedly made its concerns known to the Coalition Forces and requested corrective measures prior to the submission of this particular report."[54]

Two days after the ICRC report was transmitted, Maj. Gen. Taguba completed an informal investigation of the detention and internment operations in Iraq, reporting "systematic" and "sadistic, blatant and wanton criminal abuses" at Abu Ghraib.[55] Examples of detainee treatment from the Taguba report include: "Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick, and using military dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee."[56] Further, Taguba reported that the CIA kept some detainees in Abu Ghraib prison off the official rosters. This practice of allowing "ghost detainees" at the prison was, in Taguba's words, "deceptive, contrary to Army Doctrine, and in violation of

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[51] Human Rights Watch, "The Road to Abu Ghraib," June 2004, p. 30.

[52] Josh White, "U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds," *Washington Post*, December 1, 2004.

[53] "Report of the International Committee of the Red Cross (ICRC) on the treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during arrest, internment and interrogation," February 2004. Available at http://www.informationclearinghouse.info/article6170.htm.

[54] For a transcript of the press conference, see http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/iraq?OpenDocument#Press%20briefing

[55] Major Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade, February 26, 2004. Available at http://news.findlaw.com/cnn/docs/iraq/tagubarpt.html.

[56] *Ibid.*

international law." He concluded that the purpose of this practice was to hide the prisoners from the Red Cross.[57]

Following the Taguba Report, which indicated that the abuses that occurred at Abu Ghraib were not isolated events, the Pentagon initiated a number of investigations, including the "Schlesinger Panel," the Fay-Jones Report, and the Church Report. Nearly all of these reports, however, involved the military investigating itself. In addition, all of the investigators placed the blame on lower-level troops, claiming to find no evidence that senior U.S. officials played a direct role in ordering the abuses.[58] The investigators' sharpest criticism, perhaps, was that senior officials had created conditions for the abuse to occur. The "Schlesinger Panel," for example, stated that the abuse occurred due to confusion in the field as to what techniques were authorized.[59] Further, the "Church Report" concluded that there was "no single, overarching explanation" for the "few" cases in which detainees had not been treated humanely, and that "there is no link between approved interrogation techniques and detainee abuse."[60]

On March 3, 2005, pursuant to litigation by the American Civil Liberties Union (ACLU) under the Freedom of Information Act, the Army released more than 1,000 pages of criminal investigations. Amongst the facts included in the documents are one undetermined manner of death, three justifiable homicides, one alleged rape, one alleged larceny, seven alleged assaults or cruelty and maltreatment. The allegations and circumstances in each of these thirteen cases were investigated and the cases were closed; however, the investigations failed to result in any criminal charges.[61] On March 16, 2005, the Army reported to the New York Times that twenty-six deaths of inmates in Afghanistan and Iraq might be cases of homicide.[62]

H. DOES THE PRESIDENT HAVE LEGAL AUTHORITY AS COMMANDER-IN-CHIEF TO VIOLATE INTERNATIONAL AND NATIONAL LAWS PROHIBITING TORTURE IN THE INTEREST OF PROTECTING NATIONAL SECURITY?

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[57] *Ibid.*

[58] On May 6, 2005, Brig. Gen. Janis Karpinski of the Army Reserve was demoted to colonel and relieved of command of the 800th Military Police Brigade. Karpinski commanded detention operations at Abu Ghraib prison during the time the now-famous photos of abuse were taken. On May 12, 2005, the U.S. Army found Col. Thomas Pappas, the officer whose military intelligence unit was in charge of interrogations at the Abu Ghraib prison, guilty of two counts of dereliction of duty and was subsequently reprimanded and fined $8,000.

[59] "Final Report of the Independent Panel to Review DoD Operations," also called the "Schlesinger Panel," August 24, 2004. Available at http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf.

[60] U.S. Department of Defense, "Executive Summary," available to the public since March 2005, the "Church Report." (Only 21 pages of 400 are declassified.) Available at http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf.

[61] Documents available at http://www.aclu.org/International/International.cfm?ID=13962&c=36.

[62] Douglas Jehl and Eric Schmitt, "U.S. Military Says 26 Inmate Deaths May Be Homicide," *New York Times*, March 16, 2005.

Justice Department lawyers have asserted the President has unlimited discretion to determine the appropriate means for interrogation of enemy combatants detained in the War on Terror. "Memorandum from Jay S. Bybee, Assistant Attorney General to Alberto R. Gonzales, Counsel to the President, Standards for Conduct for Interrogation under 18 U.S.C. Sec. 2340-2340A, at 39 (August 1, 2002) as found in http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf ("Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President . . .. Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decision on the battlefield"). The Justice Department failed to cite any authority for this broad claim of executive prerogative.

1. Superseding memo does not amend Commander-in-Chief position.

While the August 1, 2002, Bybee memorandum was superseded by a subsequent legal interpretation, Memorandum from Daniel Levin, Acting Assistant Attorney General to James B. Comey, Deputy Attorney General, Legal Standards applicable under 18 U.S.C. 2340-2340A (December 30, 2004), as found in http://www.usdoj.gov/olc/dagmemo.pdf . The question of the President's Commander-in-Chief power was not addressed by the superseding memo ("Because the discussion concerning the President's Commander-in Chief power and the potential defenses to liability was – and remains—unnecessary, it has been eliminated from the analysis that follows.") *Id*. at 2.

2. Gonzales confirmation testimony.

In response to questions at his January 6, 2005 confirmation hearing in the Senate Foreign Relations Committee, Attorney General nominee Alberto R. Gonzales would not give a legal opinion on the issue:

"LEAHY: Now, as attorney general, would you believe the president has the authority to exercise a commander-in-chief-override and immunize acts of torture?

GONZALES: First of all, Senator, the president has said we're not going to engage in torture under any circumstances. And so you're asking me to answer a hypothetical that is never going to occur. This president has said we're not going to engage in torture under any circumstances, and therefore that portion of the opinion was unnecessary and was the reason that we asked that that portion be withdrawn."

Transcript from the U.S. Senate Judiciary Committee hearing on the nomination of Alberto Gonzales to be U.S. Attorney General, JANUARY 6, 2005, http://www.washingtonpost.com/wp-dyn/articles/A53883-2005Jan6.html (accessed April 14, 2005)

3. International Law Requires Good Faith Compliance with Treaty Obligations

International law prohibits states from using domestic necessity as a justification to violate treaty obligations. As a party to several international treaties prohibiting torture and cruel, inhuman and degrading treatment or punishment, the U.S. is required in good faith to prevent practices inconsistent with that prohibition.

Under the doctrine of *pacta sunt servanda* the U.S. is required to prevent acts of torture in any territory under its jurisdiction. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES SEC. 321 (1987) ("Every international agreement in force is binding upon the parties to it and must be performed by them in good faith."). The doctrine of *pacta sunt servanda* lies at the core of the law of international agreements and is perhaps the most important principle of international law. It includes the implication that international obligations survive restrictions imposed by domestic law.

The language of the Restatement is based on Article 26 of Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58, 8 I.L.M. 679 (1969) *entered into force* Jan. 27, 1980.

See also U.N. Charter, article 2(2): "All members…shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

4. Constitutional Separation of Powers Denies President Unilateral Authority to Immunize Acts of Torture

a. President's Duty to Execute Treaties

Under the Constitution, treaties are declared to be the supreme Law of the Land (Art. VI, cl. 2) and the President is obligated to "take Care that the laws be faithfully executed" (Art. II, § 3).

There is little case law addressing the relationship between treaties and the Take Care Clause. Supreme Court opinions that do address the topic, however, unanimously support the view that the President's duty to execute "the Laws" includes a duty to execute treaties. Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97, 161 (2004), citing United States v. Midwest Oil Co., 236 U.S. 459, 505 (1915) (President's duty under the Take Care Clause "is not limited to the enforcement of acts of Congress according to their express terms. It includes 'the rights and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 713 (1893) ("the power to exclude or expel aliens…is to be regulated by treaty or by act of congress, and to be executed by the executive authority," regardless of whether the rules are derived from treaties or statutes).

While the President may withdraw or violate an executive order without express approval of Congress, treaties differ from executive orders because they require joint action of the executive and legislative branches. Structurally, therefore, the

President must obtain Congress's approval to violate a treaty provision because treaties require Senate approval to become law. Jinks & Sloss at 161. The United States has a long-term interest in promoting the development of a system based on internationally agreed-upon rules. From a constitutional standpoint, the best way to promote the US's interest in the development of the international rule of law is to have constitutional arrangements that make it more difficult for the government to violate existing commitments. See Harold Hongju Koh, "The Spirit of the Laws," 43 Harv. Int'l L.J. 23, 23-24 (2002).

b. Congress and the Courts play a vital role in regulating the treatment of military detainees

Congress has the power under Article I "to make Rules for the Government and Regulation of the land and naval forces." Art. I, sec. 8, cl. 14. Congress has a history of prescribing rules that directly regulate the treatment of wartime detainees. See William Winthrop, Military Law and Precedents, 45, 931 (2d ed. 1920) (documenting history of congressional regulation of the conduct of war).

The Supreme Court rejected the Bush Administration's argument that there is executive prerogative regarding the treatment of military detainees in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 159 L.Ed.2d 578, 72 USLW 4607 (2004). Hamdi, a US citizen, was arrested in Afghanistan during armed conflict between US and Taliban and held without charge in US military detention. The Bush Administration claimed the authority to detain him indefinitely, "without formal charges or proceedings -- unless and until it [the executive branch] makes the determination that access to counsel or further process is warranted." The Supreme Court rejected the claim that the Executive branch has sole authority to regulate detention and interrogation of enemy combatants. The court distinguished between captures on the battlefield, which it could not review, and policies and procedures governing the detention of captured combatants: "While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of war…it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandate roles of reviewing and resolving [claims involving the continued detention of those who have been seized]." Id. at 2649.

US Courts have rejected Executive arguments, even during states of emergency, which claim unilateral authority to violate US law.

In April 1952, President Truman ordered seizure of the nation's steel mills in order to forestall a strike which, he claimed, would have seriously harmed the nation during the Korean conflict. Although the Taft-Hartley Act gave the president the power to impose an eighty-day "cooling off" period when a strike was threatened, Truman refused to act under that law, since he had opposed its passage in the first place. Neither did he ask Congress for special legislation. Instead, he chose to assume control of the companies under his emergency war powers as Commander in Chief.

The Supreme Court held that the seizure was an unconstitutional exercise of Executive authority and that the authority of the President to issue such an order cannot be implied from the aggregate of his powers under Article II of the Constitution. Writing for the majority, Justice Frankfurter wrote "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

The official information site of the United States government characterizes *Youngstown* as follows: "From a constitutional standpoint, Youngstown remains one of the 'great' modern cases, in that it helped to redress the balance of power among the three branches of government, a balance that had been severely distorted by the enormous growth of the executive branch and its powers first during the Depression, then during the war and the subsequent postwar search for global security." Information USA, http://usinfo.state.gov/usa/infousa/facts/democrac/59.htm (accessed April 18, 2005) ("INFORMATION USA is an authoritative resource for foreign audiences seeking information about official U.S. policies, American society, culture, and political processes.")

Justice O'Connor writing for the plurality in *Hamdi*, relied on *Youngstown*, stating, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."

In *Rasul v. Bush*, 124 S.Ct. 2686 (2004)**,** the Supreme Court held that the *habeas corpus* statute, 28 U.S.C.A. § 2241, provided jurisdiction for twelve Kuwaiti citizens and two Australian nationals captured in Afghanistan to challenge their detention at the Guantánamo Bay Naval Base in Cuba. The Court avoided any constitutional or international law issues at stake in the case.

The practice of the political branches is consistent with the view that Congress has the power to regulate the treatment of wartime detainees. President often adopts a broad interpretation of Article II powers during perceived emergencies and Congress often defers to Presidential judgments. If Congress agrees that the President responded wisely to the perceived emergency, then it can enact laws to immunize executive officials from any civil or criminal liability arising from the legal infractions they committed. On the other hand, if the legislature decides not to immunize executive officials, then those officials should be held accountable for their conduct in a court of law. See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97 (2004).

See also, *Apollon*, 22 U.S. 362, 366-67 (1824) ("It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are

properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity.")

While the Court may properly determine the legality of the treatment of detainees, it has not always had the power to enforce its legal decisions. *Ex parte Merryman* 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). Merryman, a leading secessionist agitator during the Civil War, was arrested and detained by the military at Fort McHenry. Chief Justice Taney personally issued the writ, ordering General Cadwalader to bring Merryman before him, despite the fact that President Lincoln had suspended habeas corpus. The General refused to produce the prisoner, citing as authority the President's order suspending the writ. Taney published an opinion declaring that the President's order suspending the writ and the subsequent detention of Merryman was illegal. The Court had no ability to enforce its ruling and President Lincoln continued to detain Merryman.

I. THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN U.S. COURTS

A treaty accepted by the U.S. is part of the supreme law of the land, equal in dignity to federal statutes:

U.S. Constitution, Article VI, § 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Conflicts between treaty clauses and existing law are resolved according to three rules. First, a treaty may not infringe on certain clauses of the U.S. Constitution. *Reid v. Covert*, 354 U.S. 1, 16-17 (1957). Second, if a treaty and a federal statute conflict, the more recent prevails. *Id.* at 18 n. 34. Third, if a treaty and state law conflict, the treaty controls. *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Clark v Allen*, 331 U.S. 503, 508 (1947); *see also Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (validity of treaty not undermined by possible infringement on states' rights under Tenth Amendment).

A well-settled rule is that courts should endeavor to construe a treaty and a statute on the same subject so as to give effect to both. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). Courts generally should construe a treaty "in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924).

A century and more ago a U.S. Supreme Court dictum suggested, in words seemingly applicable to all sources of international law, that a treaty

> depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations . . . [but] with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598 (1884). That dictum has been proved inaccurate. Courts here can and have done much with international norms. When a U.S. court refuses to enforce an international duty, its refusal says nothing about the existence or importance of the duty. The *Head Money* dictum rather suggests that the U.S. government (1) remains bound, (2) may in fact even be in default, and (3) may be subject to international sanctions such as diplomatic, political, economic, and even military measures.

While judges in the U.S. often seem reluctant to compel officials to comply with international obligations, they often have done so. Under the Supremacy Clause of Article VI, § 2 of the U.S. Constitution, they have required state governments to comply with international duties assumed by the U.S. government. International law also has been used to convince courts to interpret U.S. laws in the light of international law, to command administrative decision-makers, and to convince legislators to adjust statutes which are inconsistent with international standards.

In seeking to apply "better" international standards in U.S. forums, there are several ways in which international law is sometimes incorporated into national law. A few commentators have characterized U.S. law as evidencing elements of both "dualist" and "monist" approaches. *See Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 927, 937 (D.C. Cir. 1988), excerpted in part J, *infra* at *cf. Introductory Note*, 1 Restatement (Third) of the Foreign Relations Law of the United States 40-42 (1987); Ian Brownlie, Principles of Public International Law 32-35 (4th ed. 1990).

Countries that appear to adopt the monist view, such as Austria and Belgium, treat international law as an integral part of national law with status equal to or sometimes even supreme over national law. A few countries, such as the Netherlands, view international law as supreme even over its national constitution. In contrast, dualist countries such as Britain more generally do not consider treaties to be judicially enforceable unless there is implementing legislation. Brownlie, *supra*, at 48; Andrew Z. Drzemczewski, The European Convention in Domestic Law 177-87 (1983). International customary norms are usually judicially enforceable to the extent there is no conflicting legislative act or judicial decision. Brownlie, *supra*, at 43-47. Even the countries mentioned above as "monist" or "dualist", however, are not always consistent. In addition, many countries have not fit international law into this simplistic dichotomy. There is tremendous diversity among countries as to how international law gets incorporated into national law.

A country's adoption of a particular approach may be due partially to that country's attitude toward nationalism and international cooperation and partially to historical background. Under a monist system, international standards supplant domestic ones and partially delegate the country's power to define its domestic laws. In contrast, under a dualist approach, countries retain the power to define national law and choose which elements of international law to incorporate. *But see* Covenant on Civil and Political Rights, Article 2 (requiring that states provide an effective remedy for violations of the Covenant). Historically there has been a tendency for civil law countries to adopt a monist approach and for common law countries to adopt a dualist approach. The U.S. system, described in detail below, is essentially a compromise between the competing theories.

Federal and state courts, as well as administrative agencies in the U.S., have applied international law pursuant to four theories. First, if the right sought to be advanced is confirmed by a self-executing treaty clause, courts and agencies may apply the clause directly. Second, if the right is protected by a customary international norm, adjudicators may enforce it. Third, courts and agencies may find clauses of international instruments, whether or not they have attained the status of customary law, persuasive in construing open-ended provisions of national law. Fourth, a few human rights norms have been recognized as *jus cogens* or pre-emptory norms and could be applicable even if there is a contrary treaty reservation.

"Direct incorporation" of international law pursuant to the first two of those theories results in law that binds courts. For that reason direct incorporation may appear more powerful than the third theory – "indirect incorporation" – which leaves application of international law to the discretion of judges. But various rules of interpretation and application create obstacles to direct incorporation. Moreover, direct incorporation – a bolder step – gives rise to resistance among judges who seem reluctant to be compelled to apply international law. Also, litigators in state courts may have a special interest in urging indirect incorporation of international law into state law in order to develop independent state grounds and thus avoid creation of federal issues. *See* Paul L. Hoffman, *The Application of International Human Rights in State Courts: A View from California*, 18 Int'l Lawyer 61, 63 (1984). Therefore, in most cases, lawyers are better advised to pursue indirect incorporation.

Efforts to persuade courts and agencies to apply international law pursuant to any of the three theories are assisted by incorporation of, or at least reference to, international standards in federal and state statutes and regulations. For that reason, activists committed to advancing internationally recognized rights are well-advised to consider legislative as well as judicial and administrative strategies.

1. The Doctrine of Self-Executing Treaties

Though the Constitution states that treaties are supreme law of the land, courts have developed a doctrine that only self-executing clauses are judicially enforceable. Sometimes the rule is phrased in the alternative: treaty clauses are enforceable if they are

either self-executing or have been implemented by legislation. In the latter case it is the legislation and not the treaty that becomes judicially enforceable.

The Supreme Court introduced the requirement of self-execution in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 254 (1829). It declared that a treaty clause is self-executing and hence "equivalent to an act of the legislature, whenever it operates by itself without the aid of any legislative provision." Subsequent cases have focused on the intent of the parties. *See, e.g.*, *Cook v. United States*, 288 U.S. 102, 119 (1933). In *Frolova v. U.S.S.R.*, 761 F.2d 370, 373 (7th Cir. 1985) (structure altered), the court compiled this list of factors to be consulted in determining whether a treaty provision is self-executing:

(1) the language and purposes of the agreement as a whole;
(2) the circumstance surrounding its execution;
(3) the nature of the obligations imposed by the agreement;
(4) the availability and feasibility of alternative enforcement mechanisms;
(5) the implications of permitting a private right of action; and
(6) the capability of the judiciary to resolve the dispute.

For a similar list, see *People of Saipan v. U.S. Dep't of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

The Restatement (Third) suggests that "the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementing legislation."[63] If the intent is unclear, courts should look to "any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement."[64]

In multilateral treaties, however, parties rarely make clear the process by which they are expected to incorporate the treaty into national law. Countries have different methods of fulfilling international obligations, and few have incorporated treaties directly into national law or selectively incorporated them through the doctrine of self-execution.[65] Hence, the intent of the parties is neither a fruitful nor an appropriate inquiry.

The test that appears most relevant to multilateral human rights treaties is the three-step inquiry proposed by Professor Riesenfeld. Under this theory, a treaty ought to be deemed self-executing if it "(a) involves the rights and duties of individuals; (b) does not cover a subject for which legislative action is required by the Constitution; and (c) does not leave discretion to the parties in the application of the particular provision."

[63] Restatement (Third) of the Foreign Relations of the United States § 131, comment h, at 58 (1987).

[64] *Ibid.*

[65] Countries that have a self-execution doctrine include Argentina, Austria, Belgium, Cyprus, Egypt, France, Germany, Greece, Italy, Japan, Luxembourg, Malta, Mexico, the Netherlands, Spain, Switzerland, Turkey, and the European Communities. Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 373 n. 31 (1985).

Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 Am. J. Int'l L. 548, 550 (1970); *see also* Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 Am. J. Int'l L. 892, 896 (1980). That approach is amplified in the following excerpt.

Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 Tex. Int'l L.J. 291, 302 (1983) (footnotes omitted):

> Whether or not a clause is self-executing depends, therefore, on what obligations the clause creates. If the obligation is merely to negotiate a supplementary contract or to seek legislative action, the clause is not self-executing. Examples of clauses that are not self-executing include articles 43(3) and 45 of the United Nations Charter, which create duties to negotiate supplementary contracts and seek legislative action. Simply because a provision requires future negotiation or legislative action does not, however, render it non-self-executing if the provision also creates specific obligations or proscribes certain acts. For example, articles 25, 100, and 105 of the United Nations Charter have been interpreted as self-executing because they require governments to perform or to refrain from certain acts, even though the same articles also require governments to negotiate supplementary contracts and seek legislative action. *See Keeney v. United States*, 218 F.2d 843 (D.C. Cir. 1954).

2. Customary International Law

Article 38 of the Statute of the International Court of Justice includes within the sources of international law not only treaties, but also customary international norms and general principles of law recognized by the community of nations. Therefore, U.S. courts are bound to apply customary international law domestically, subject to restrictions created by statute and judicial precedent.

The Supreme Court has declared that customary law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). The Court limited this principle, however, to situations where no other controlling law exists, and expanded on the sources of customary law:

> Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. More recently the Court acknowledged the "frequently reiterated" principle that federal common law is necessarily informed by international law. *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983).

a. Proving a Customary Norm

Customary international norms may be used in connection with civil suits under the Alien Tort Statute. By way of review, a court faces several issues when confronted with the argument that it should apply a customary norm. It must decide first whether the asserted rule has indeed ripened into a customary norm. Second, it must determine whether the norm is judicially enforceable.

Although treaty and customary law are accorded the same status under international law, see 1 Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987), U.S. courts have treated them differently in certain important respects. Courts have upheld norms, as they have treaty clauses, in the face of inconsistent state and local laws, and have tried to construe customary norms and federal statutes so as to give effect to both. Nonetheless, when courts have found that a customary norm conflicts with a federal statute or executive act, they generally have given effect to the legislative or executive act even when the norm arguably crystallized after the act's adoption. *See Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 479 U.S. 889 (1986); *United States v. Aguilar*, 871 F.2d 1436, 1454 (9th Cir. 1989), amended August 14, 1989; *American Baptist Churches v. Meese*, 712 F.Supp. 756, 771-73 (N.D.Cal. 1989). Commentators have criticized those decisions on the ground that judicially enforceable norms should be accorded the same status as self-executing treaty clauses, that the later-in-time rule should prevail, and that executive acts should preempt customary norms only when the President exercises foreign affairs powers, *i.e.*, as commander-in-chief or chief diplomat. *See* Frederic L. Kirgis, Jr., *Federal Statutes, Executive Orders and "Self-Executing Custom"*, 81 Am. J. Int'l L. 371, 371-75 (1987).

Prohibitions against torture and prolonged arbitrary detention, among other things, had ripened into customary international norms for purposes of the Alien Tort Statute. In *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) (*Forti I*), the court concluded,

> There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention. The consensus is even clearer in the case of a state's *prolonged* arbitrary detention of its own citizens. The norm is obligatory, and is readily definable in terms of the arbitrary character of the detention.

The court therefore agreed the prohibition against arbitrary detention had ripened into a customary norm, and that the norm was judicially enforceable. It decided, however, that

the prohibition of cruel, inhuman and degrading treatment was not recognized as a customary norm, and would not grant relief on that ground.

U.S. courts have neither accepted nor rejected the view that general principles are part of customary law. A few have, however, discussed general principles in the course of discussing customary law. *See, e.g.*, *United States v. Arlington, Va.*, 702 F.2d 485, 487-88 (4th Cir. 1983) (foreign government-owned property used for public non-commercial purposes is exempt from local real estate taxation); *Jeanneret v. Vichey*, 693 F.2d 259 (2d Cir. 1982) (illegal export of an art object does not render a good-faith importer liable for reduction in value of object); *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985) (unlawful imprisonment of a foreign diplomat), *vacated on other grounds*, 736 F.Supp. 1 (D.D.C. 1990); *Chiriboga v. International Bank for Reconstruction & Dev.*, 616 F. Supp. 963 (D.D.C. 1985) (international organizations are immune from suits by employees arising out of the employment relationship).

3. Peremptory Norms

Vienna Convention on the Law of Treaties, 115 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1979), *entered into force* January 27, 1980:

Article 53

Treaties conflicting with a peremptory norm of general international law (jus cogens)

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64

Emergence of a new peremptory norm of general international law (jus cogens)

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Restatement (Third) of the Foreign Relations Law of the United States § 102, reporter's note 6 (1987):

> . . . The Vienna Convention requires that the norm (and its peremptory character) must be "accepted and recognized by the international community of States as a whole" . . ., which apparently means by "a very large majority" of states, even if over dissent by "a very small number" of states. . . .
>
> Although the concept of *jus cogens* is accepted, its content is not agreed. There is general agreement that the principles of the UN Charter prohibiting the use of force are *jus cogens*. . . . It has been suggested that norms that create "international crimes" and obligate all states to proceed against violations are also peremptory. . . . This might include rules prohibiting genocide, slave-trading and slavery, *apartheid* and other gross violations of human rights, and perhaps attacks on diplomats. . . .

4. Alien Tort Litigation and Torture

The Alien Torts Claims Act is only a single sentence, that is: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." The ATCA derives from the First Judiciary Act of 1789 and is found at 28 U.S.C. § 1350. It was hardly used until the U.S. Court of Appeals for the Second Circuit held in 1980 that the sister and father of a young Paraguayan man could institute a suit under the ATCA in a federal district court in Brooklyn, New York, against the chief of police of Ascunsion, Paraguay, for torturing the young man to death in Ascunsion.[66] The U.S. Court of Appeals reasoned that the sister and father from Paraguay were aliens, that is, non-citizens of the U.S. Torture is a tort, that is, a civil wrong which violates customary international law and today would also violate treaties of the United States. Here is the decision of the Court of Appeals that indicates how U.S. courts view torture:

Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (footnotes and several citations omitted):

IRVING R. KAUFMAN, Circuit Judge . . .

[Plaintiffs appealed the district court's decision dismissing their wrongful death action for lack of subject matter jurisdiction. The plaintiffs, Dr. Joel Filartiga and his daughter Dolly, are citizens of Paraguay, as is the defendant, Americo Norberto Peña-Irala. Dolly is present in the U.S. under a visitor's visas, and has applied for political asylum. Peña also entered the U.S. under a visitor's visa, but stayed beyond the term of his visa. . . .]

II

Appellants rest their principal argument in support of federal jurisdiction upon the Alien Tort Statute, 28 U.S.C. § 1350, [excerpted *supra*] . . .. Since appellants do not

[66] Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

contend that their action arises directly under a treaty of the United States, a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations. In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.

The Supreme Court has enumerated the appropriate sources of international law. The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." . . .

The Paquete Habana, 175 U.S. 677 . . . (1900), reaffirmed that

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treaty. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Modern international sources confirm the propriety of this approach.

Habana is particularly instructive for present purposes, for it held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into "a settled rule of international law" by "the general assent of civilized nations." Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. . . .

The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law. . . .

The United Nations Charter (a treaty of the United States, *see* 49 Stat. 1033 (1945)) makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern…

…While this broad mandate has been held not to be wholly self-executing, this observation alone does not end our inquiry. For although there is no universal agreement as to the precise extent of the "human rights and fundamental freedoms" guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of

customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948) which states in the plainest of terms, "no one shall be subjected to torture." The General Assembly has declared that the Charter precepts embodied in this Universal Declaration "constitute basic principles of international law." G.A. Res. 2625 (XXV) (Oct. 24, 1970).

Particularly relevant is the Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975) . . .. The Declaration expressly prohibits any state from permitting the dastardly and totally inhuman act of torture. . . .

Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations. . . . The international consensus surrounding torture has found expression in numerous international treaties and accords. . . . The substance of these international agreements is reflected in modern municipal – *i.e.* national – law as well. Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations, including both the United States and Paraguay. . . .[67]

Having examined the sources from which customary international law is derived – the usage of nations, judicial opinions and the works of jurists – we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens. . . . The treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them. . . .

NOTE: the sister and father of Joelito Filartiga obtained a judgment for 10.3 million dollars against the chief of police, Americo Norberto Peña-Irala, but by then the chief of police had departed from the United States and returned to Paraguay. The Paraguayan courts would not cooperate in respecting the judgment of the U.S. courts and so the Filartigas recovered nothing other than an official judgment finding Peña-Irala responsible for the torture and death of their young relative. The high level U.S. court judgment did help to publicize the human rights violations of the Stroessner Government in Paraguay and eventually led – along with many other pressures – to the end of that dictatorship.

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[67] The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law. As one commentator has put it, "The best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it. States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law." James Brierly, *The Outlook for International Law* 4-5 (Oxford 1944).

The U.S. Supreme Court in its June 2004 decision in *Sosa v. Alvarez-Machain,* 124 S.Ct. 2739 (2004) first had an opportunity to interpret the Alien Torts Claims Act. The Court cited historical evidence about the origins of the ATCA reflecting the contemporaneous international understanding of the "law of nations" against piracy and slavery and its evolution to cover torture:

> [F]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind . . . suggesting the "limits of section 1350's reach be defined by "a handful of heinous actions – each of which violates definable, universal and obligatory norms."

The *Sosa* Court also cites with approval the definition of customary international law contained in the well-respected Restatement of the Foreign Relations Law of the United States. In order to be considered a customary international norm, the norm must be accepted generally as a matter of legal obligation. The Restatement goes on to provide in regard to the customary international law of human rights that:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
>
> (a) genocide,
>
> (b) slavery or slave trade,
>
> (c) the murder or causing the disappearance of individuals,
>
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
>
> (e) prolonged arbitrary detention,
>
> (f) systematic racial discrimination, or
>
> (g) a consistent pattern of gross violations of internationally recognized human rights.[68]

[68] Restatement of the Law – Foreign Relations Law of the United States Restatement (Third) of Foreign Relations Law of the United States § 702 (2005).