

**ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON INTERNATIONAL HUMAN RIGHTS
COMMITTEE ON MILITARY AFFAIRS AND JUSTICE:**

**HUMAN RIGHTS STANDARDS APPLICABLE TO
THE UNITED STATES' INTERROGATION OF DETAINEES**

Executive Summary/Introduction

This Report is a joint effort of the Association of the Bar of the City of New York’s Committees on International Human Rights and Military Affairs and Justice, undertaken to consider allegations – reported in the press and by human rights and humanitarian organizations conducting their own investigations – that individuals detained by the United States at its military and intelligence facilities in connection with the initial War in Afghanistan and the subsequent ongoing conflict in Afghanistan, are being subjected to interrogation techniques that constitute torture or cruel, inhuman or degrading treatment.¹ We note at the outset, however, that although this project was initially motivated by allegations regarding the treatment of detainees from the War in Afghanistan, the international law and human rights standards discussed herein – with the exception of Geneva Convention protections applicable only to situations of international armed conflict – apply broadly and with equal force to the treatment of detainees captured in other situations, including detainees picked up in other countries in connection with the broader “War on Terror.”² In this Report, we will examine the international legal standards governing United States military and civil authorities in interrogating detainees and propose ways of assuring that those standards are enforced.

¹ For purposes of this Report, the term “War in Afghanistan” refers to the period of international armed conflict in Afghanistan – from October 2001 to June 2002, when the Taliban was the governing force in Afghanistan, and the phrase “ongoing conflict in Afghanistan” refers to the period after June 18, 2002 when Hamid Karzai was elected as Afghanistan’s transitional head of state, and the U.S. and other international parties were operating in Afghanistan at the invitation of this new Afghanistan government. This distinction becomes important in discussing the protections afforded to detainees by the Geneva Conventions. *See* Section II of this Report.

² An assessment of the parameters and legal implications of the “War on Terror,” a term coined by the Administration, is beyond the scope of this Report.

The Alleged Interrogation Practices

These allegations first surfaced in December 2002, when the U.S. military announced that it had begun a criminal investigation into the death of a 22 year-old Afghan farmer and part-time taxi driver who had died of “blunt force injuries to lower extremities complicating coronary artery disease” while in U.S. custody at Bagram Air Force Base in Afghanistan.³ Since then, details about interrogation techniques allegedly employed at U.S. detention facilities – most of which are off-limits to outsiders and some of which are in undisclosed locations – have come from government officials speaking on the condition that they would not be identified and from the few prisoners who have been released. Some examples of “stress and duress” interrogation “techniques” reportedly being practiced by U.S. Department of Defense (“DOD”) and Central Intelligence Agency (“CIA”) personnel at U.S. detention facilities include: forcing detainees to stand or kneel for hours in black hoods or spray-painted goggles, 24-hour bombardment with lights, “false-flag” operations meant to deceive a captive about his whereabouts, withholding painkillers from wounded detainees, confining detainees in tiny rooms, binding in painful positions, subjecting detainees to loud noises, and sleep deprivation.⁴

³ Carlotta Gall, *U.S. Military Investigating Death of Afghan In Custody*, N.Y. TIMES, Mar. 4, 2003, at A14. According to the *New York Times*, another Afghan man died of a pulmonary embolism or a blood clot in the lung while in U.S. custody at Bagram on December 3, 2002. Both men died within days of arriving at Bagram. Human Rights Watch has criticized the U.S. government for failing, one year after the first two deaths at Bagram – which were classified as homicides, to release the results of its investigation. See Press Releases & Documents, Voice of America, Rights Group Criticizes U.S. Military for Treatment of Afghan Detainees (Dec. 1, 2003) (printed at 2003 WL 66801402).

⁴ See, e.g., Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; “Stress and Duress” Tactics used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01; Eric Lichtblau & Adam Liptak, *Questioning to Be Legal, Humane and Aggressive, The White House Says Now*, N.Y. TIMES, Mar. 4, 2003, at A13; Jess Bravin & Gary Fields, *How do U.S. Interrogators Make A Captured Terrorist Talk*, WALL ST. J., Mar 4, 2003, at B1; Tania Branigan, *Ex-Prisoners Allege Rights Abuses*

In addition, the U.S. is reportedly “rendering” suspects to the custody of foreign intelligence services in countries where the practice of torture and cruel, inhuman or degrading treatment during interrogation is well-documented.⁵

The Administration’s Responses

The Association and others have written to U.S. government officials to ask whether there is any factual basis for these allegations and whether steps are being taken to ensure that detainees are interrogated in accordance with U.S. law and international standards prohibiting torture and “cruel, inhuman or degrading” treatment falling short of torture (“CID”).⁶

In response to inquiries from Human Rights Watch, U.S. Department of Defense General Counsel William J. Haynes has stated that: “United States policy condemns and prohibits torture” and that, when “questioning enemy combatants, U.S. personnel are required to

By U.S. Military, WASH. POST, Aug. 19, 2003, at A02. While standards and conditions of confinement – addressed by many of the international legal instruments examined in this Report – would be included in any exhaustive inquiry into the treatment of detainees at U.S. detention centers, in this Report we are focusing more narrowly on the legality of interrogation methods.

⁵ Captives have reportedly been “rendered” by the U.S. to Jordan, Egypt, Morocco, Saudi Arabia and Syria, in secret and without resort to legal process. *See, e.g.*, Peter Finn, *Al Qaeda Recruiter Reportedly Tortured; Ex-Inmate in Syria Cites Others’ Accounts*, WASH. POST, Jan. 31, 2003, at A14; Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; “Stress and Duress” Tactics used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01; Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A01.

⁶ *See, e.g.*, Letter from Kenneth Roth, Executive Director, Human Rights Watch to President George W. Bush (Dec. 26, 2002) (*available at* <http://www.hrw.org/press/2002/12/us1227.htm>); Letter from Human Rights Groups to President George W. Bush (Jan. 31, 2003); Letter from Ernest Duff, The National Consortium of Torture Treatment Programs to President George W. Bush (Feb. 5, 2003); Letter from Sen. Patrick Leahy to Condoleezza Rice (June 2, 2002); Letter from ABCNY Committees on Military Affairs and Justice and International Human Rights to Scott W. Muller, General Counsel, CIA (June 4, 2003); Letter from Sen. Patrick J. Leahy to William J. Haynes, II, General Counsel, DOD (Sept. 9, 2003).

follow this policy and applicable laws prohibiting torture.”⁷ CIA General Counsel Scott W. Muller, citing to the need to protect intelligence sources and methods, has responded to our inquiries by stating only that “in its various activities around the world the CIA remains subject to the requirements of U.S. law” and that allegations of unlawful behavior are reported by the CIA to the Department of Justice and are subject to investigation.⁸

In response to an inquiry made by U.S. Senator Patrick J. Leahy regarding U.S. policy, Haynes stated that U.S. policy entails “conducting interrogations in a manner that is consistent with the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”), as ratified by the U.S. in 1994, and with the Federal anti-torture statute, 18 U.S.C. §§ 2340 - 2340A, which Congress enacted to fulfill U.S. obligations under the CAT.”⁹ Haynes also stated that U.S. policy is “to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with” the U.S. obligation, pursuant to Article 16 of CAT, namely, “to prevent other acts of cruel, inhuman, or degrading

⁷ See Letter from William J. Haynes II, General Counsel, DOD, to Kenneth Roth, Executive Director, Human Rights Watch (Apr. 2, 2003). The Administration’s use of the terms “enemy combatants” and “unlawful combatants” to detain persons indefinitely without administrative or judicial proceedings is novel.

⁸ See Letter from Scott W. Muller, General Counsel, CIA to Miles P. Fischer and Scott Horton, chair of the Committee on Military Affairs and Justice and then-chair of the Committee on International Human Rights, respectively (June 23, 2003). A CIA senior official has informally indicated that the agency complies with applicable law in reliance on the advice of its legal staff. However, we have been unable to confirm what legal advice has been given by CIA counsel or what means have been used to assure compliance with that advice.

⁹ See Letter from William J. Haynes II, General Counsel, DOD, to Sen. Patrick J. Leahy (June 25, 2003). At the November 20-21, 2003, Annual Review of the Field of National Security Law conference of the American Bar Association’s Standing Committee on National Security Law, Muller stated publicly in response to a question by a member of the Committee on Military Affairs and Justice that Haynes’ June 25, 2003 letter to Sen. Leahy articulates the policy position of “the entire U.S. government.” Copies of the correspondence cited in fn. 6-9 are attached to this Report as Appendix A.

treatment or punishment which do not amount to torture” insofar as such treatment is “prohibited by the Fifth, Eighth, and/or Fourteenth Amendments.”¹⁰ Haynes assured Senator Leahy “that credible allegations of illegal conduct by U.S. personnel will be investigated and, as appropriate, reported to proper authorities.”¹¹ Furthermore, Haynes stated that the U.S. does not “expel, return (*refouler*) or extradite individuals to other countries where the U.S. believes it is ‘more likely than not’ that they will be tortured,” that “United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country,” and that “the United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored.”¹²

Both Haynes and Muller have declined, however, to give details concerning the specific interrogation methods used by U.S. personnel at U.S. military and CIA detention facilities.

Legal Standards Prohibiting Torture and Cruel, Inhuman or Degrading Treatment

Although we are not in a position to investigate the factual basis for the allegations of torture and cruel, inhuman or degrading interrogation practices at U.S. detention facilities that have been made, we can describe the legal principles which should guide our military and intelligence personnel in their conduct. Accordingly, in this Report we examine the international and U.S. law standards against which the interrogation practices used on detainees should be assessed. We also address the question of whether there are any circumstances posed

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

by the post-September 11 world in which abrogation of our country's obligations to prevent and punish torture and cruel, inhuman or degrading treatment should be permitted in the interrogation of terrorist suspects.

The Convention Against Torture

First and foremost, the U.S. obligation to prohibit and prevent the torture and cruel, inhuman or degrading treatment of detainees in its custody is set forth in the Convention Against Torture And Other Cruel, Inhuman, or Degrading Treatment (“CAT”), to which the U.S. is a party.¹³ When the U.S. ratified CAT in 1994, it did so subject to a reservation providing that the U.S. would prevent “cruel, inhuman or degrading treatment” insofar as such treatment is prohibited under the Fifth, Eighth, and/or Fourteenth Amendments.¹⁴ Thus, the U.S. is obligated to prevent not only torture, but also conduct considered cruel, inhuman or degrading under international law if such conduct is also prohibited by the Fifth, Eighth and Fourteenth Amendments. In interpreting U.S. obligations, we look to the U.N. Committee Against Torture's interpretations of CAT as well as U.S. case law decided in the immigration and asylum law context, under the Alien Tort Claims and Torture Victim Protection Acts and concerning the treatment of detainees and prisoners under the Fifth, Eighth and/or Fourteenth Amendments. We also examine the procedural mechanisms available under U.S. law to punish violations of CAT – including prosecution under federal criminal law (18 U.S.C. §§ 2340 - 2340A) and the Uniform Code of Military Justice (“UCMJ”).

¹³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, G.A. Res. 46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984) (“CAT”).

¹⁴ 136 Cong. Rec. S17486-01, 1990 WL 168442.

Other International Legal Standards which Bind the United States

While there is a dearth of U.S. case law applying CAT's prohibition against torture and cruel, inhuman or degrading treatment in the interrogation context, there is a wealth of international law sources which offer guidance in interpreting CAT. Some of these international legal standards are, without question, binding on the U.S., such as: the International Covenant on Civil and Political Rights (the "ICCPR"),¹⁵ the law of *jus cogens* and customary international law. Another international legal instrument which has been ratified by the U.S. and is relevant to the interrogation practices being examined by this Report is the Inter-American Declaration on the Rights and Duties of Man.¹⁶ Other sources, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁷ also provide guidance.

The applicability of the Geneva Conventions to the detainees from the War in Afghanistan, however, presents a more contentious issue. The Administration's official position is that the Geneva Conventions do not apply to Al Qaeda detainees, and that neither the Taliban nor Al Qaeda detainees are entitled to prisoner of war ("POW") status thereunder. Nevertheless, the Administration has stated that it is treating such individuals "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949," and that the detainees "will not be subjected to physical

¹⁵ G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316.

¹⁶ O.A.S. RES. XXX, OEA/Ser. L.V./II. 82 Doc. Rev. 1, at 17.

¹⁷ 213 U.N.T.S. 221.

or mental abuse or cruel treatment.”¹⁸ The Administration has never explained how it determines what interrogation techniques are “appropriate” or “consistent with military necessity,” or how it squares that determination with U.S. obligations under human rights and customary international law. For POW and civilian detainees who meet the relevant criteria of Geneva Convention (III) Relative to the Treatment of Prisoners of War (“Geneva III”) and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (“Geneva IV”), respectively, all coercion is prohibited.¹⁹ Moreover, any detainee whose POW status is in doubt is entitled to a hearing and determination by a competent tribunal and, pending such determination, any such detainee must be treated as a POW. Concern for the safety of U.S. forces weighs in favor of extending POW status liberally. At a minimum, all detainees – regardless of POW or civilian status – are entitled to humane treatment and prompt hearings under human rights and customary international law, including the protections of Article 3 common to all four Geneva Conventions (“Common Article 3”) and Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Related to the Protection of Victims of International Armed Conflicts (“Additional Protocol I”).²⁰ We urge the U.S. to promptly establish proper screening procedures for all detainees, whether or not they served with forces that met the specific criteria of Geneva III.

¹⁸ See *White House Fact Sheet: Status of Detainees at Guantánamo* (Feb. 7, 2002) (available at <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html>).

¹⁹ Geneva Convention (III) Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 1949 U.S.T. LEXIS 483 (“Geneva III”); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 1949 U.S.T. LEXIS 434 (“Geneva IV”).

²⁰ Additional Protocol I, *reprinted in* 16 I.L.M. 1391. While neither the United States nor Afghanistan is a signatory to Additional Protocol I, it is generally acknowledged that certain provisions are binding as a matter of customary international law. And although the terms of Common Article 3 specifically limit its scope to internal conflicts, it is considered by customary international law to have broader scope.

Legal Standards which the United States Should Look to for Guidance

Other relevant sources of law, such as the seminal 1999 Israeli Supreme Court decision on interrogation methods employed by the Israeli General Security Service, *Judgment Concerning The Legality Of The General Security Service's Interrogation Methods*,²¹ and decisions of the European Court of Human Rights, although not legally binding on the U.S., also offer useful guidance in our interpretation of CAT. These foreign decisions indicate that the “War on Terror” is not unprecedented. As the Israeli and Northern Ireland experiences demonstrate, the U.S. is not the only country to have faced terrorism within its borders, despite the unique tragedy of September 11 and the potential threat of weapons of mass destruction that could expand the loss of life by orders of magnitude. We can and should learn from the experience of other countries whose courts have grappled with the need to permit effective interrogation while at the same time upholding the standards of human rights and the rule of law.

Standards in the Time of Terror

There is an inherent tension between the need to obtain potentially life-saving information through interrogation of terrorist suspects and the legal requirement of upholding the standards set forth in CAT. We grappled with the question of whether there are any circumstances under which torture or cruel, inhuman or degrading treatment would be permissible in a post-September 11 world. While we acknowledge the real danger posed to the United States by Al Qaeda and other terrorist organizations, we concluded that there are no such exceptions to CAT’s absolute prohibition of torture.

Condoning torture under any circumstances erodes one of the most basic principles of international law and human rights and contradicts our values as a democratic state.

²¹ 38 I.L.M. 1471 (Sept. 6, 1999).

Permitting the abuse of detainees in U.S. custody, perhaps under so-called “torture warrants,” not only harms the detainees themselves; it compromises the moral framework of our interrogators and damages our society as a whole. If U.S. personnel are allowed to engage in brutal interrogation methods which denigrate the dignity and humanity of detainees, we sanction conduct which we as a nation (along with the international community) has clearly determined is wrong and immoral. Accordingly, we unanimously condemn the torture of detainees under any circumstances. We note that U.S. constitutional jurisprudence on “cruel, inhuman or degrading” treatment, which has been made relevant to CAT by the U.S. reservation, is an extremely important source of guidance on this subject. On the other hand, much of this jurisprudence evolved in the context of domestic criminal justice administration, and how these precedents would be applied in a case arising out of the interrogation and detention covered by this Report is, in the absence of more definitive authority, a matter of some speculation.

Recommendations

We applaud the statements in William Haynes’ June 25, 2003 letter to Senator Leahy affirming the policy of the U.S. regarding its commitment to CAT. To make that policy meaningful, we make the following recommendations:

1. Training and Education. All law enforcement personnel, civilian or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of anyone under any form of detention or imprisonment should be informed and educated regarding the prohibition against torture and cruel, inhuman or degrading treatment, as applied in practice. This requires, as provided in Article 11 of CAT, that the U.S. keep under systematic review interrogation rules, instructions, methods and practices as

well as arrangements for the custody and treatment of such detainees.²² Above all, commanders should not condone non-compliance nor permit an environment in which troops are encouraged to provide lip service to compliance but yet think that non-compliance is acceptable.

Given that CIA personnel are not generally subject to the UCMJ, possibly not even when accompanying the armed forces in the field, special procedures should be available to provide reasonable assurance that compliance with CAT is being taught and maintained by intelligence agencies. That assurance might best be provided by the applicable committees of the Congress exercising oversight responsibility in conjunction with the inspectors general of the applicable agencies.

2. Prompt Investigation of Violations. As required by Article 12 of CAT, the U.S. must ensure that allegations of abusive conduct are taken seriously and are fully and impartially investigated.²³ Thus, any individual who alleges that he or she has been subjected to torture must be provided with a meaningful opportunity to complain to, and to have his/her case promptly and impartially examined by, competent authorities. Steps must be taken to ensure that the complainant and witnesses are protected against all ill-treatment and intimidation.

3. Expand the Scope and Reach of Section 2340. Consistent with its obligation under Article 4 of CAT to ensure that all acts of torture are offenses under its criminal law²⁴ – and since 18 U.S.C. § 2340 does not, by its terms, apply to acts constituting torture committed in extraterritorial detention centers under U.S. jurisdiction – the U.S. must expand the

²² CAT, Art. 11.

²³ *Id.*, Art. 12.

²⁴ *Id.*, Art. 4.

geographic reach of Section 2340 so that the prescriptions of CAT are applicable at all U.S. detention centers.

4. Fully Utilize the UCMJ. The U.S. must more fully utilize the procedures and protections available under the UCMJ to prosecute all violations of CAT by the armed forces or others subject to the UCMJ.

5. Independent Investigation of Human Rights Compliance in Other Countries. As provided by Article 3 of CAT, the U.S. must not “render” detainees to other countries where there are substantial grounds for belief that the detainees would be in danger of being subjected to torture.²⁵ In determining whether there are “substantial grounds for belief” that a detainee would be in danger of torture if rendered to another country, U.S. authorities must take into account all the relevant considerations concerning that country, including independently investigating whether there exists a consistent pattern of gross, flagrant or mass violations of human rights in the country.²⁶

6. Grant POW Status to Detainees Whose Status is in Doubt and Possibly as a Matter of Policy. The U.S. should adhere to Geneva III’s requirement that any detainee whose POW status is in “doubt” is entitled to POW status – and, therefore, cannot be subjected to

²⁵ *Id.*, Art. 3.

²⁶ For example, a lawsuit was recently filed by the Center for Constitutional Rights on behalf of Maher Arar, a Syrian-born Canadian citizen alleging that U.S. authorities deported him to Jordan in September 2002, where he was driven across the border and handed over to Syrian authorities. The Arar Complaint alleges that, although the U.S. Department of State’s 2003 Country Reports designated Syria as a government that practices systemic torture, U.S. officials allegedly relied on assurances from the Syrian government that Arar would not be tortured. Arar has alleged that he was tortured repeatedly in a Syrian prison for 10 months, often with cables and electrical cords. *See* Complaint in *Maher Arar v. John Ashcroft, et al.* (available at http://www.ccr-ny.org/v2/legal/September_11th/docs/ArarComplaint.pdf).

coercive treatment – until a “competent tribunal,” which must be convened promptly, determines otherwise.²⁷ We urge the U.S. to consider the policy grounds for extending POW treatment to regular force combatants, whether or not legally required to do so, as it has done in prior conflicts.

7. Prompt Screening and Hearings for All Detainees. In keeping with the spirit of the Geneva Conventions and human rights law, we urge the U.S. to provide proper screening procedures and hearings to all detainees.²⁸

We now turn to a more detailed discussion of the international standards applicable to interrogation procedures.

THE CONVENTION AGAINST TORTURE

The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) is the primary source of international law relevant to the treatment of detainees.²⁹ CAT has been ratified by the U.S., and its prohibitions against torture and cruel, inhuman or degrading treatment or punishment have been implemented in our domestic law.

Specifically, U.S. law implements CAT’s prohibition against torture in the immigration and asylum contexts, under the Alien Tort Claims and Torture Victim Protection

²⁷ Geneva III, Art. 5.

²⁸ We note that the Department of Defense has recently circulated for comment administrative review procedures for enemy combatants at Guantánamo Bay Naval Base. *See* <http://www.defenselink.mil/news/Mar2004/d20040303ar.pdf>. While welcoming such a review process, we do not consider it to meet the requirement for status determination under the Geneva Conventions.

²⁹ *Supra* note 13.

Acts, by criminal statute and under the UCMJ. Under CAT, the U.S. is also obligated to prevent “cruel, inhuman or degrading treatment or punishment” as defined in international law; however, by express reservation, the U.S. interprets this obligation in keeping with standards of treatment required by the Fifth, Eighth and Fourteenth Amendments. Accordingly, under CAT, American military and intelligence personnel involved in the interrogation of detainees may not torture those detainees, nor may they subject them to cruel, inhuman or degrading treatment that is, or would be, forbidden under the Fifth, Eighth and/or Fourteenth Amendments.

CAT’s Definitions of – and Prohibitions against – Torture and Cruel,
Inhuman or Degrading Treatment

CAT defines and prohibits torture, as defined, and cruel, inhuman or degrading treatment or punishment in general terms. In addition, it also sets out steps ratifying countries must take to prevent, investigate, and criminalize acts of torture;³⁰ prohibits the extradition or other rendering (also known as “*refoulement*”) of a person to a country that would likely subject such person to torture;³¹ creates a Committee to oversee the implementation of CAT by ratifying countries; and sets forth procedures for inquiries, individual communications, and inter-State complaints.

CAT’s preamble acknowledges that torture and other cruel, inhuman or degrading treatment or punishment are already prohibited under Article 5 of the Universal Declaration of Human Rights and Article 7 of the ICCPR. Thus, rather than simply mirroring the prohibitions

³⁰ *Id.* Article 4.1 states: “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.”

³¹ *Id.* Article 3.1 states: “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.”

from these instruments, Article 1 of CAT provides additional guidance to states parties in preventing and punishing torture by setting forth an explicit definition of torture:

...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.

This definition makes it clear that the result of torture need not be physical pain or suffering, but can also be mental. In addition, torture is defined to include such conduct undertaken for the purpose of obtaining information. Finally, the prohibition is not directed at private citizens, acting independently of government; it applies rather to acts committed by government officials and agents, or persons acting with official consent or acquiescence.

CAT's prohibition of torture is absolute. An order from a superior officer or a public authority may not be invoked as a justification of torture. Specifically, Article 2(2) provides: "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."

Although CAT does not provide a definition of CID punishment or treatment, Article 16 requires ratifying countries to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture...." This language suggests that cruel, inhuman or degrading treatment is on a continuum with torture.

CAT requires each signatory state to prevent the commission of the prohibited acts within any territory under the state's jurisdiction. Specifically, each ratifying country must ensure that any official who may be involved in the interrogation of anyone under any form of detention or imprisonment is informed of and educated about the prohibitions against torture and cruel, inhuman or degrading treatment. CAT also requires each ratifying country to ensure that allegations of torture and CID treatment are fully and impartially investigated. *See* CAT Articles 12 and 16(1).

CAT's Prohibition against Torture and CID Treatment as Interpreted
by the U.N. Committee Against Torture

The U.N. Committee Against Torture, created by CAT, is charged with monitoring implementation of the treaty by ratifying countries through the determination of individual complaints, considering country reports submitted under CAT, and resolving inter-State disputes. Given the importance of international standards in interpreting U.S. domestic law³² as well as the recent *Lawrence v. Texas* decision, in which the U.S. Supreme Court expressly looked to foreign and international law for guidance,³³ U.N. Committee decisions are relevant to the assessment of whether the actions of U.S. personnel involved in the interrogation of detainees constitute torture or cruel, inhuman or degrading treatment.

³² *See Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (a statute "ought never to be construed to violate the law of nations, if any other possible construction remains"). *See also United States v. P.L.O.*, 695 F. Supp. 1456, 1468 (S.D.N.Y. 1988) (noting "the lengths to which our courts have sometimes gone in construing domestic statutes so as to avoid conflict with international agreements...").

³³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

The U.N. Committee has concluded that the following acts³⁴ constitute torture under CAT:

- daily beatings and detaining someone in a small, uncomfortable space for two weeks;³⁵
- forcing someone to sleep on the floor of a cell while handcuffed following interrogation;³⁶
- in severe cases, sleep deprivation;³⁷ and
- the threat of torture.³⁸

Furthermore, the U.N. Committee has recommended that the use of a blindfold during questioning be expressly prohibited.³⁹ More generally, the U.N. Committee has expressed concern that States have defined torture too narrowly, covering only “systematic blows or other violent acts.”⁴⁰ The U.N. Committee has also expressed concern whether the penal law of one

³⁴ This list is by no means comprehensive. Practices were selected for inclusion here because of their similarity to the practices allegedly used by U.S. agents with respect to detainees held in connection with the War in Afghanistan and the ongoing conflict in Afghanistan. The findings and concluding observations of the Committee Against Torture are available at <http://www.unhchr.ch/tbs/doc.nsf>.

³⁵ *Case of A. (name withheld) v. The Netherlands*, Committee Against Torture, Comm. No. 91/1997 (1998), U.N. Doc. No. CAT/C/21/D/91/1997.

³⁶ *See Inquiry under Article 20: Committee Against Torture, Findings concerning Peru (2001)*, U.N. Doc. No. A/56/44, at para. 35.

³⁷ *Concluding Observations concerning Republic of Korea (1996)*, U.N. Doc. No. A/52/44, at para. 56.

³⁸ *Concluding Observations concerning New Zealand (1993)*, U.N. Doc. No. A/48/44, at para. 148.

³⁹ *See Inquiry Under Article 20: Committee Against Torture, Findings concerning Turkey (1993)*, U.N. Doc. No. A/48/44/Add.1, at para. 48.

⁴⁰ *Concluding Observations concerning Azerbaijan (2003)*, U.N. Doc. No. CAT/C/CR/30/1, at para. 5(b).

State was too narrow in defining torture because it failed to prohibit “certain aspects of torture, such as psychological pressure, threats and intimidation.”⁴¹

The U.N. Committee has found that the following acts amount to cruel, inhuman or degrading treatment or punishment under CAT:

- depriving someone of food and/or water;⁴²
- in some cases, binding someone in a restraint chair;⁴³
- the use by prison authorities of instruments of physical restraint that may cause unnecessary pain and humiliation;⁴⁴ and
- long periods of detention (two weeks or more) in detention cells that are sub-standard (this conduct may amount to torture if the period of detention is extremely long).⁴⁵

The U.N. Committee has found that the following acts may amount to torture when used in combination with other forms of CID:

- being restrained in very painful conditions;
- being hooded;
- the sounding of loud music for prolonged periods;
- sleep deprivation for prolonged periods;

⁴¹ Concluding Observations concerning Germany (1993), U.N. Doc. No. A/48/44, at para. 167.

⁴² *Id.*; see also Concluding Observations concerning New Zealand (1998), U.N. Doc. No. A/53/44, at para. 175.

⁴³ Concluding Observations concerning the United States (2000), U.N. Doc. No. A/55/44, at para. 179(e).

⁴⁴ Concluding Observations concerning Australia (2000), U.N. Doc. No. A/56/44, at para. 52(b).

⁴⁵ *Supra* note 36.

- violent shaking; and
- using cold air to chill.⁴⁶

In sum, the U.N. Committee Against Torture has indicated that the classification of treatment as CID or torture is often a matter of severity, intensity, and the totality of the circumstances. Combining several forms of cruel, inhuman or degrading treatment will frequently amount to torture, and ratifying countries are required under CAT to refrain from all such practices, whether they reach the level of severity to be considered torture or not. Thus, according to U.N. Committee jurisprudence, alleged interrogation practices such as forcing detainees to stand or kneel for hours in black hoods or spray-painted goggles, 24-hour bombardment with lights, binding detainees in painful positions, withholding painkillers from wounded detainees, and subjecting detainees to loud noises and sleep deprivation, at a minimum, constitute cruel, inhuman or degrading treatment and may, depending on the circumstances, rise to the level of torture. U.N. Committee decisions critical of blindfolding, psychological pressure and threats and intimidation strongly suggest that “false-flag” operations meant to deceive detainees about their whereabouts and “stress and duress” interrogation techniques are also prohibited.

U.S. Law Implementing CAT’s Prohibitions against Torture and Cruel, Inhuman or Degrading Treatment or Punishment

The Senate adopted a resolution of advice and consent to U.S. ratification of CAT, subject to the declaration that it be deemed non-self-executing, on October 27, 1990.⁴⁷

⁴⁶ These techniques were found by the Committee to constitute “breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case.” Concluding Observations concerning Israel (1997), U.N. Doc. No. A/52/44, at para. 257.

The U.S. ratified CAT in October 1994, and CAT entered into force with respect to the United States on 20 November 1994.⁴⁷ The implementation in U.S. immigration, extradition, criminal and civil tort law of CAT's prohibition against torture, as well as the express application of U.S. constitutional standards to CAT's prohibition against CID treatment, indicates that many of the interrogation practices allegedly being used by the U.S. against detainees may be prohibited under international and U.S. law.

U.S. Understandings and Reservations in Ratifying CAT

The United States conditioned its ratification of CAT upon certain understandings related to CAT's definition of torture in Article 1. In one such understanding, the U.S. specified that mental pain or suffering within the meaning of "torture" 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

⁴⁷ See 136 CONG. REC. 36,198 (daily ed. Oct. 27, 1990). The instrument of ratification included the declaration that "the provisions of Articles 1 through 16 of [CAT] are not self-executing." See United Nations Treaty Collection: Declarations and Reservations, (*available at* http://www.unhchr.ch/html/menu3/b/treaty12_asp.htm).

In the case of a self-executing treaty, "no domestic legislation is required to give [it] the force of law in the United States." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). By contrast, a non-self-executing treaty is one that "must be implemented by legislation before it gives rise to a private cause of action." *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979).

⁴⁸ See Ratification Status for CAT, United States of America (*available at* www.unhchr.ch). The U.S. has not opted out of the inquiry procedure under Article 20. It has entered a declaration accepting the interstate complaint procedure set up by Article 21. The U.S. has not, however, accepted the competence of the Committee under Article 22 to receive and consider complaints on behalf of individuals subject to its jurisdiction who claim to be victims of a violation of CAT.

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 the personality.⁴⁹ Another U.S. understanding pertains to defects in criminal procedure: non-compliance with applicable legal procedural standards (such as Miranda warnings) does not per se constitute “torture.”⁵⁰

When ratifying CAT, the United States also took the following reservation: “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 Fourteenth Amendments to the Constitution of the United States.”⁵¹

The Implementation of CAT’s Prohibition against

Torture in U.S. Legislation, Regulation and Case Law

CAT’s prohibition of official acts amounting to torture has been implemented in the United States through legislation, regulations and case law pertaining to, *inter alia*, (1) immigration, (2) claims of torture in removal and extradition proceedings, (3) criminal sanctions for torture, and (4) tort claims alleging torture. Through the application of these

⁴⁹ See 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990).

⁵⁰ See 136 CONG. REC. 36192, 36198 (daily ed. Oct. 27, 1990).

⁵¹ Under international law, reservations are invalid if they violate the “object and purpose” of the treaty. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, at Art. 19(c). This Report assumes that the U.S. reservation with respect to Article 16 of CAT is valid.

implementing laws and regulations, U.S. courts have interpreted CAT's substantive provisions in a variety of contexts.⁵²

U.S. Immigration Law and Torture

As previously noted, all countries that ratify CAT are obligated to ensure that detainees are not deported or extradited to countries where they are likely to be tortured. In 1998, the United States enacted the Foreign Affairs Reform and Restructuring Act of 1998, § 2242, Pub. L. No. 105-277, Div. G, 112 Stat. 2681, 2681-822 (Oct. 21, 1998) (the "FARR Act"), implementing this obligation. In 1999, the Immigration and Naturalization Service ("INS") promulgated regulations effectuating the FARR Act in the immigration and asylum context, providing aliens in exclusion, deportation or removal proceedings with grounds to seek withholding of removal based on CAT. *See* 8 C.F.R. § 208.18 (2004), *et seq.* These regulations incorporate CAT's definition of torture verbatim, with the following qualification: "Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." *See* 8 C.F.R. § 208.18(a)(2) (2004). These regulations further define mental pain or suffering consistently with the U.S. understandings to CAT, and exclude from the definition of torture acts which result in "unanticipated or unintended severity of pain and suffering." *See* 8 C.F.R. § 208.18(a)(5) (2004).

A number of federal court cases and Board of Immigration Appeals ("BIA") decisions address torture claims in the immigration context. The BIA has held that the following abuses of detainees and prisoners, for example, amount to torture: "suspension for long periods

⁵² Because the focus of this Report is on what laws apply to agents of the United States government in detention centers located outside of United States territory, this discussion does not examine state or federal penal or civil rights statutes that would also apply to interrogation occurring on American soil.

in contorted positions, burning with cigarettes, sleep deprivation, and...severe and repeated beatings with cables or other instruments on the back and on the soles of the feet,' ...beatings about the ears, resulting in partial or complete deafness, and punching in the eyes, leading to partial or complete blindness.” *Matter of G-A-*, 23 I & N Dec. 366, 370 (BIA 2002) (internal citations omitted).⁵³ Furthermore, persons seeking asylum or withholding of removal have successfully challenged deportation under Sections 208 and 241(b)(3) of the Immigration & Nationality Act (“INA”) when they have a well-founded fear of future persecution. Although “persecution” is not defined in the INA, it is understood to encompass treatment falling short of torture.

U.S. Extradition of Fugitives Who Face Threat of Torture

In the extradition context, torture claims are governed by regulations enacted by the Department of State under the FARR Act. Under these regulations, individuals sought for extradition may present a claim that they are likely to be tortured if surrendered to the requesting state. These claims are considered by the U.S. Secretary of State, who is responsible for implementing CAT’s obligation not to extradite an individual to a State where he or she is in danger of being subject to torture. Specifically, section 95 of 22 C.F.R. (2004) provides, in relevant part, that the Secretary of State must consider whether a person facing extradition from the U.S. “is more likely than not” to be tortured in the State requesting extradition, and that appropriate policy and legal offices must review and analyze the information relevant to the

⁵³ This had also been the position of the Ninth Circuit. *See Al-Saher v. INS*, 268 F.3d 1143 (9th Cir. 2001) (holding that severe beatings and cigarette burns sustained over periods of days, weeks and months constitutes torture). More recently, however, the Ninth Circuit has held that neither serious persecution (*e.g.*, threats, unjust charges, fines, illegal searches and seizures) nor verbal abuse alone amount to torture. *See Gui v. INS*, 280 F.3d 1217 (9th Cir. 2002); *Quant v. Ashcroft*, 2003 U.S. App. LEXIS 6616 (9th Cir. 2003).

torture allegation. The extradition regulations, and the decisions interpreting them,⁵⁴ demonstrate that U.S. administrative bodies and courts view CAT's prohibition against extradition to torture as binding on the U.S. even when the extraditable individual is accused of wrongdoing.

U.S. Implementation of CAT's Criminal Law Requirements

18 U.S.C. §§ 2340 and 2340A were enacted to fulfill CAT's requirement that each ratifying country criminalize all acts of torture, including attempts to commit torture and complicity in torture.⁵⁵ Section 2340 defines torture as:

an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control. . .

“Severe mental pain or suffering” is also defined, using the same wording as the U.S. understandings concerning Article 1 of CAT set forth in Section I(C)(1) above. *See* 18 U.S.C. § 2340. As discussed further below, however, this statute applies only to U.S. nationals (or others present in the U.S.) who have committed or attempted or conspired to commit acts of torture “outside of the United States.”⁵⁶

⁵⁴ *See, e.g., Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1016-17 (9th Cir. 2000) (individuals certified as extraditable by the Secretary of State who fear torture may petition for judicial review of the Secretary's decision using CAT standards protecting against *non-refoulement*); *Mu-Xing Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003) (following *Cornejo-Barreto's* holding that habeas review is available for CAT claims, but in the context of removal); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207 (3d Cir. 2003) (same).

⁵⁵ The Senate Committee on the Judiciary acknowledged the relationship of 18 U.S.C. § 2340 to CAT and the Torture Victim Protection Act in a 2002 report. *See* S. REP. NO. 107-44 (2002), at 10-11.

⁵⁶ A restrictive interpretation of the scope of the statute is found in the U.S. Dept. of Justice, Criminal Resource Manual 20 (Oct. 1997), which provides: “Section 2340A of Title 18,

U.S. Case Law Interpretations of Torture in Tort Claims

Two U.S. statutes provide for civil suits against those who commit acts of torture abroad. The Alien Tort Claims Act of 1789 (“ATCA”), 28 U.S.C. § 1350, states that “[t]he 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 Torture Victim Protection Act of 1991 (“TVPA”), 28 U.S.C. § 1350, provides that:

[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation – (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.⁵⁷

The TVPA extends a civil remedy to U.S. citizen torture victims, while the ATCA provides a remedy for aliens only.

U.S. courts applying the ATCA and TVPA have found that the following acts constitute torture: subjecting detainees to interrogation sessions lasting 14 hours (*Xuncax v. Gramajo*, 886 F. Supp. 162, 170 (D. Mass 1995)); beating with hands (*Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 420-423 (S.D.N.Y. 2002); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1191, 1196 (S.D.N.Y. 1996); *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996)); threatening

United States Code, prohibits torture committed by public officials under color of law against persons within the public official’s custody or control. . . . The statute applies only to acts of torture committed outside the United States. There is Federal extraterritorial jurisdiction over such acts whenever the perpetrator is a national of the United States or the alleged offender is found within the United States, irrespective of the nationality of the victim or the alleged offender.”

⁵⁷ See S. REP. NO. 102-249 (1991) (stating that the TVPA would “carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990”).

with death (*Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996)); and using techniques to exacerbate pain or injury (*Abebe-Jira v. Negewo*, 72 F.3d 844, 845-6 (11th Cir. 1996)).

**Conclusion: CAT's Prohibition against Torture
as Implemented in U.S. Legislation and Regulation**

U.S. domestic laws prohibiting, or providing a cause of action to victims of, torture are consistent with the standards of CAT. However, these U.S. statutes and regulations are limited to specific contexts – such as, refugee claims, extradition of foreign fugitives, criminalizing acts of torture committed outside the U.S. by U.S. officials, and providing compensation to victims of torture committed by aliens. Accordingly, the U.S. has yet to fulfill its obligation, under CAT, to enact laws which adequately prevent U.S. officials and individuals acting with their consent from subjecting any detainee to torture and which punish such conduct wherever it occurs.

CAT's Prohibition against "Cruel, Inhuman or Degrading Treatment," as
Interpreted by United States Law

As previously noted, the U.S.'s reservation to Article 16 of CAT provides that the United States considers itself bound by Article 16 only insofar as CID treatment is understood to mean "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments."

The Senate Foreign Relations Committee report states that this reservation is the outgrowth of concern that "degrading treatment or punishment . . . has been interpreted as potentially including treatment that would probably not be prohibited by the U.S. Constitution" and cites, as an example of what the United States would not find "degrading" under the U.S. Constitution, a holding by the European Commission of Human Rights that the refusal of authorities to give formal recognition to an individual's change of sex might constitute degrading

treatment.⁵⁸ This explanation suggests that the reservation was intended to prevent the importation of foreign social values or mores into U.S. law, rather than any view that international norms of CID treatment are out of step with U.S. law.

In assessing interrogation conduct under Article 16 of CAT, the U.S. should look to international standards defining cruel, inhuman or degrading treatment. If such conduct is prohibited under international law, the U.S. is bound to prevent such conduct unless it would not be prohibited under the Fifth, Eighth and Fourteenth Amendments. The Committees take note that much of the case law under the three Amendments arises in the context of domestic criminal justice proceedings. How this jurisprudence would be applied in a case relating to the detention and interrogation of foreign combatants is not completely clear. For instance, on the one hand some of the special protections provided in the American criminal justice system with respect to interrogations would be of doubtful applicability, particularly considering an asserted state interest in national security. On the other, the absence of a legitimate state interest in punishment might mandate a higher standard of treatment of detainees generally.

Fifth and Fourteenth Amendment Standards

The Constitution's guarantee of due process forbids compulsion to testify, at least for domestic law enforcement purposes, by fear of hurt, torture or exhaustion. *See Adamson v. California*, 332 U.S. 46 (1947) (armed Texas Rangers on several successive nights took defendant from county jail into the woods, whipped him, asked him each time about a confession, interrogated him from approximately 11 p.m. to 3 a.m. and warned him not to speak to anyone about the nightly trips); *Brown v. Mississippi*, 297 U.S. 278 (1936) (confessions

⁵⁸ *See* Report of the Committee on Foreign Relations, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. EXEC. REP. NO. 30, 101st Cong., 2d Sess. 25 (1990) (statement of Mr. Pell) (citing *Case of X. v. Federal Republic of Germany* (No. 6694/74)).

obtained by mock executions and whippings); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) (defendant was taken into custody by police officers and for 36 hours thereafter was held incommunicado, without sleep or rest, and interrogated without respite by relays of officers, experienced investigators, and highly trained lawyers); *see also Ashcraft v. Tennessee*, 327 U.S. 274 (1946). However, the presence of unlawful police coercion motivated by “immediate necessity to find the victim and save his life” to extract a confession has been found by one appeals court to be insufficient to exclude a subsequent confession.⁵⁹

Due process also prohibits actions taken under color of law that are “so brutal and offensive to human dignity” that they “shock the conscience.”⁶⁰ The Supreme Court has given content to the phrase “shocks the conscience” by reference to the spectrum of fault standards in tort law. Intentional infliction of injury unjustifiable by any government interest is the sort of official action which could rise to the conscience-shocking level.⁶¹ All applicable sources of law are consistent in prohibiting such extreme conduct.

Eighth Amendment Standards

The Eighth Amendment prohibits “cruel and unusual punishments.”⁶² In the context of law enforcement, U.S. courts have long held that the norms articulated under the Cruel

⁵⁹ *Leon v. Wainwright*, 734 F.2d 770 n.5 (11th Cir. 1984) (kidnapping conviction confirmed based on a confession obtained following a prior coerced confession).

⁶⁰ *Rochin v. California*, 342 U.S. 165, 172 (1952).

⁶¹ *County of Sacramento v. Lewis*, 523 U.S. 833, 848-49 (1998).

⁶² The UCMJ, discussed below, provides that no “cruel or unusual punishment” may be adjudged by any court-martial or inflicted upon any person subject to the UCMJ (10 U.S.C.S. § 855). In general, military courts have applied the Supreme Court’s interpretation of the Eighth Amendment to claims raised under this provision. *See, e.g., United States v. Avila*, 53 M.J. 99, 2000 CAAF LEXIS 569 (C.A.A.F. 2000). Thus, under the UCMJ, POWs and persons who under the law of war are subject to trial for military offences by a military

and Unusual Punishment Clause establish a minimum level of protection, applicable even to pretrial detainees.⁶³

While the Supreme Court initially interpreted the Eighth Amendment as prohibiting only barbaric or torturous punishments, this interpretation was early broadened in two respects: (i) to prevent disproportionate punishments (*Weems v. United States*, 217 U.S. 349 (1910)) and (ii) to address non-physical forms of cruel and unusual punishment (*e.g.*, *Trop v. Dulles*, 356 U.S. 86 (1958) (in case involving denationalization as a punishment for desertion from the United States Army, the Court noted that “evolving standards of decency that mark the progress of a maturing society” should inform interpretation of the Eighth Amendment)). In 1947, the Supreme Court recognized that wanton or unnecessary infliction of pain also constitutes cruel and unusual punishment. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947).

In cases brought by prisoners under the Eighth Amendment alleging that excessive force was used against them by government officials, courts consider both the objective component (whether the wrongdoing was “harmful enough” to implicate the Eighth Amendment) and the subjective component (whether the officials acted with a sufficiently culpable state of mind) of the challenged conduct. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). In order to establish that the objective component of an Eighth Amendment violation is satisfied, a prisoner need not prove he has sustained significant injury. However, the extent of injury

tribunal are not to be punished in a cruel or unusual manner, within the meaning of the Eighth Amendment.

⁶³ *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). *See also County of Sacramento v. Lewis*, 523 U.S. 833, 849-50 (1998) (citation omitted) (“We held in *City of Revere v. Massachusetts Gen. Hospital* that ‘the due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner’”).

suffered is one factor that may suggest “whether the use of force could plausibly have been thought necessary” in a particular situation, “or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.”⁶⁴ The subjective component involves, in the context of force used by prison officials, “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.”⁶⁵

Enforcement of CAT under U.S. Law

18 U.S.C. §§ 2340 – 2340B

As stated above, the United States’ attempt to comply with its obligation under CAT to criminalize torture is codified in 18 U.S.C. § 2340A. Section 2340A criminalizes conduct by a U.S. national or a foreign national present in the U.S. who, acting under color of law, commits or attempts to commit torture outside the United States. The statute is exclusively criminal and may not be construed as creating any right enforceable in a civil proceeding. *See* 18 U.S.C. § 2340B. Section 2340A generally applies to acts committed by U.S. nationals overseas (everywhere *except* “all areas under the jurisdiction of the United States, including any of the places described in sections 5 and 7 of this title and Section 46501(2) of Title 49.”) When the Section was enacted the reach of the cross-referenced provisions, notably 18 U.S.C. § 7, was uncertain.⁶⁶ However, Section 7 was broadened in the USA PATRIOT Act to clarify jurisdiction

⁶⁴ *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 321 (1986)).

⁶⁵ *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

⁶⁶ *Compare U.S. v. Gatlin*, 216 F.3d 207 (2d Cir 2000) *with U.S. v. Corey*, 232 F.3d 1166 (9th Cir 2000). However, the question was substantially mooted for most purposes by the passage of the Military Extraterritorial Jurisdiction Act of 2000, PUB. L. 106-503, 112 STAT. 2488,

over crimes committed against U.S. citizens on U.S. property abroad by extending U.S. criminal jurisdiction over certain crimes committed at its foreign diplomatic, military and other facilities, and by cross-reference excluded those places from the reach of Section 2340A. The resulting drastic limitation of jurisdiction under 18 U.S.C. § 2340A appears unintended. We recommend that Congress amend Section 2340A to assure that it applies to U.S. government premises abroad without prejudice to the expansion of U.S. criminal jurisdiction under other statutes.

The U.S. did not enact a specific criminal statute outlawing torture within the United States, out of deference to federal-state relations and because it determined that existing federal and state criminal law was sufficient to cover any domestic act that would qualify as torture under CAT.⁶⁷ It is submitted that the inapplicability of state law to U.S. facilities abroad and the lack of other federal criminal law comparable to Section 2340A leaves a serious vacuum in carrying out the obligations of the U.S. under CAT.

Unfortunately the U.S. has never enforced 18 U.S.C. § 2340A, and has thereby fallen far short of its obligations under international law and its professed ideals. The United States has failed to utilize 18 U.S.C. § 2340A to prosecute either U.S. agents suspected of committing torture outside the jurisdiction of the U.S. or foreign torturers living within the United States. Indeed, Amnesty International reported in 2002 that in the eight years following the enactment of 18 U.S.C. § 2340 and § 2340A, not a single case had been brought under that section.⁶⁸

which subjects persons accompanying the armed forces abroad to U.S. civilian criminal jurisdiction, even if outside the “special maritime and territorial jurisdiction.”

⁶⁷ See U.S. Dept. of State, Initial Report of the United States of America to the U.N. Committee against Torture, U.N. Doc. CAT/C/28/Add.5 (1999), at para. 178.

⁶⁸ *Amnesty International Report Charges U.S. is “Safe Haven” for Torturers Fleeing Justice; Eight Years On, U.S. Has Failed to Prosecute Single Individual for Torture*, Amnesty

Uniform Code of Military Justice

The UCMJ may be used to prosecute in courts-martial certain acts of ill-treatment carried out, whether within the United States or overseas, by American military personnel and possibly certain civilians accompanying such personnel. This federal statute is essentially a complete set of criminal laws that includes both crimes that are normally part of a criminal code as well as uniquely military and wartime offenses.

As a jurisdictional matter, the UCMJ applies worldwide (10 U.S.C. § 805), and persons subject to the UCMJ include any U.S. service member (10 U.S.C. § 802) as well as certain civilians “[i]n time of war ... serving with or accompanying an armed force in the field” (10 U.S.C. § 802(a)(10)) and POWs (10 U.S.C. § 802(a)(9)).⁶⁹ Because courts-martial have jurisdiction to try “any person who by the law of war is subject to trial by a military tribunal” for any offense against the laws of war (10 U.S.C. § 818), the UCMJ would seem to apply also to “unlawful combatants” deemed by the Administration not to qualify for POW status under Geneva III.

The broad statutory application of the UCMJ to civilians associated in various ways with the armed forces has been judicially limited in deference to the requirements of Article III, Section II, of the Constitution and the Fifth and Sixth Amendments protecting the right to trial by jury. As so limited, the UCMJ does not apply to civilians who have no military status in peacetime, even if they are accompanying United States forces overseas as employees or dependents. Although courts’ interpretations of the terms “serving”, “accompanying” and “in

International Press Release (2002) (*available at* <http://www.amnestyusa.org/news/2002/usa04102002.html>). *See also* William J. Aceves UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS (Amnesty International USA Publications 2002), at 50.

⁶⁹ The UCMJ does not define the term POW. Thus it is uncertain whether POW in the UCMJ has the same meaning as in Geneva III.

the field” suggest a broad application, the “time of war” requirement is construed narrowly when applied to civilians.⁷⁰ As recently as 1998, the Court of Appeals for the Armed Forces⁷¹

analyzed the propriety of the application of the UCMJ to civilians and stated:

As a matter of constitutional law, the Supreme Court has held that Congress may not extend court-martial jurisdiction to cover civilians who have no military status in peacetime, even if they are accompanying United States forces overseas as employees or dependents.

Willenbring v. Neurauter, 48 M.J. 152, 157, 1998 CAAF LEXIS 43 (C.A.A.F. 1998). The line of cases in this area generally focuses on the application of the UCMJ to civilian contractors and civilian dependents of service members. *See, e.g., Robb v. United States*, 456 F.2d 768 (Ct. Cl. 1972) (civilian engineer employed by U.S. Navy in Vietnam was not subject to UCMJ); *Reid v. Covert*, 354 U.S. 1 (1957) (no jurisdiction over civilian dependents of service members stationed overseas in peacetime for capital offenses). No cases directly address whether CIA operatives conducting para-military operations with the regular armed forces or interrogations within a military base are considered civilians for purposes of UCMJ application. In *Reid v. Covert*, the Supreme Court stated, “[e]ven if it were possible, we need not attempt here to precisely define the boundary between ‘civilians’ and members of the ‘land and naval Forces.’ We recognize that

⁷⁰ *United States v. Averette*, 19 U.S.C.M.A. 363, 365-66, 41 C.M.R. 363, 365-66 (1970) (the phrase “in time of war” is limited to “a war formally declared by Congress”; even though the Vietnam conflict “qualified as a war as that word is generally used and understood[,] . . . such a recognition should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction”). *Cf. United States v. Anderson*, 17 U.S.C.M.A. 588, 589, 38 C.M.R. 386, 387 (1968) (United States’ involvement in Vietnam conflict “constitutes a ‘time of war’ . . . within the meaning of” Article 43(a) of the UCMJ, which provides that there is no statute of limitations over certain offenses committed “in time of war”).

⁷¹ The Court of Appeals for the Armed Forces (formerly the Court of Military Appeals) is a civilian Article I court hearing appeals from the intermediate appellate courts for each of the Army, Navy (and Marines) and Air Force, subject to possible appeal to the United States Supreme Court.

there might be circumstances where a person could be ‘in’ the armed services . . . even though he had not formally been inducted into the military or did not wear a uniform.” *See* 354 U.S. at 22.⁷² In any event, where a CIA operative is a detached service member who has not been formally discharged from military service (as is often the case in practice), the UCMJ would generally apply to such person in time of war or peace.

The UCMJ provides the strongest substantive basis for potential prosecution of torture or CID treatment in federal criminal law, specifically outlawing cruel or unusual punishment, torture under 18 U.S.C. § 2340 and a variety of related offenses. Article 55 of the UCMJ provides that:

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

10 U.S.C. § 855.⁷³ Article 55 is unique in its specific definition of “cruel or unusual punishment” as a standard of treatment.⁷⁴ While most military courts have followed the Supreme Court’s analytical framework of protections under the Eighth Amendment as they pertain to cruel and

⁷² As previously noted, the Military Extraterritorial Jurisdiction Act of 2000, *see supra* note 66, eliminated any gap in jurisdiction resulting from *Reid v. Covert* by conferring jurisdiction on federal courts over civilians accompanying the armed forces abroad.

⁷³ The protections of Article 55 apply to “any person subject to” the UCMJ. And as stated previously, the UCMJ would seem to apply to unlawful combatants under 10 U.S.C. § 818.

⁷⁴ The Articles of War preceding the UCMJ prohibited “cruel and unusual punishment,” but the phrase was changed to “cruel *or* unusual punishment” in Article 55 (emphasis added). *See* Articles of War 41, Manual for Courts-Martial, U.S. Army, 1929 at 212, and 1949 at 284. The legislative history of Article 55 provides no rationale why the word “and” was changed to “or.” *United States v. White*, 54 M.J. 469, 2001 CAAF LEXIS 497 (C.A.A.F. 2001).

unusual punishment,⁷⁵ several military courts have found that Article 55 provides greater protections than those given under the Eighth Amendment.⁷⁶ It is notable that Article 55 applies at least the equivalent of the protection afforded by the Eighth Amendment even if the victim is not otherwise entitled to constitutional rights (*e.g.*, a non-citizen apprehended and detained outside the U.S. and arguably not entitled to such rights).⁷⁷

Moreover, the UCMJ effectively provides a basis for the prosecution of military personnel in courts-martial for the offense of torture in violation of 18 U.S.C. § 2340.

Article 134 of the UCMJ (10 U.S.C. § 934) provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the UCMJ: Clause 1 offenses involving disorders and neglect to the prejudice of good order and discipline; Clause 2 offenses involving conduct of a nature to bring discredit upon the armed forces; and Clause 3 offenses entailing non-capital crimes or offenses that violate Federal law.

⁷⁵ See *United States v. Kinsch*, 54 M.J. 641, 2000 CCA LEXIS 237 (A.C.C.A. 2000). See also Section I(C)(3)(b) of this Report for a fuller discussion of the Eighth Amendment prohibition of cruel and unusual treatment and punishment.

⁷⁶ See *United States v. Wappler*, 2 C.M.A. 393, 9 C.M.R. 23, 1953 CMA LEXIS 897 (C.M.A. 1953); *White*, 54 M.J. at 473; *United States v. Avila*, 53 M.J. 99, 2000 CAAF LEXIS 569 (C.A.A.F. 2000).

⁷⁷ Compare the federal criminal civil rights statutes, 18 U.S.C. §§ 241 and 242, and the civil statute 42 U.S.C. § 1983, all of which apply only where the victim is entitled to constitutional rights.

In order to successfully charge an individual under Clauses 1 and 2 of this Article, the government must show: (i) that the accused did or failed to do certain acts; and (ii) that, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.⁷⁸ Under Clause 1, the acts must be directly prejudicial to good order and discipline, rather than remotely so. Under Clause 2, discredit is interpreted to mean "injure the reputation of," and encompasses conduct that brings the service "into disrepute or which tends to lower it in public esteem."⁷⁹ With respect to Clause 3 offenses, as a general rule, any offense created by Federal statute may be prosecuted as an Article 134 offense. *United States v. Perkins*, 47 C.M.R. 259 (Ct. of Mil. Rev. 1973).⁸⁰

Thus, a service member whose conduct is alleged to violate 18 U.S.C. § 2340, the federal enactment of CAT, could be prosecuted under Article 134 of the UCMJ, as a Clause 3 violation. Moreover, multiple counts alleging Article 134 violations also could be brought in such a situation, as such conduct could be construed as prejudicial to good order and discipline and/or of a nature to bring discredit upon the armed forces. *Perkins*, 47 C.M.R. at 263-264.

⁷⁸ Manual for Courts-Martial, United States, (1995 edition) (the "Manual"), Paragraph 60.b (1-2). The Manual is issued by the President as a regulation under the authority granted by Congress under Article 3 of the UCMJ.

⁷⁹ Manual, Paragraph 60.c (3).

⁸⁰ According to the Manual, however, the doctrine of preemption "prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny type offense, either under Article 121 or, because of preemption, under Article 134." Manual, Paragraph 60.c (5)(a). In effect, Article 134 may not be employed to salvage a charge where the charge could not be sustained under the substantive offense provisions of the UCMJ or Federal statute. Accordingly, conduct which violated Article 55 discussed above or any other substantive provision of the UCMJ could not be charged under Article 134. These remain alternative, not cumulative provisions.

Finally, criminal charges for torture or CID conduct could be brought under a variety of other provisions⁸¹ including “cruelty.”⁸² The last of these offenses is generally intended to be applied to mistreatment of U.S. service members by their superiors, but by its terms it is not so limited and has been applied to intentional mistreatment of detainees.⁸³ And in instances where specific orders are in place regarding the treatment of detainees, as is recommended in this Report, failure to obey such orders is punishable under 10 U.S.C. § 892. A number of service members in Iraq are or have been investigated or tried for assaulting detainees,

⁸¹ For example, murder (10 U.S.C. § 918), manslaughter (10 U.S.C. § 919), dereliction of duty (10 U.S.C. § 892).

For purposes of this Report, we assume that U.S. military interrogations of detainees are conducted for intelligence gathering purposes and not with an investigatory intent to elicit incriminating responses in anticipation of criminal prosecution. However, should the focus of the interrogation shift from an intelligence to a law enforcement nature, Miranda warnings under Article 31 of the UCMJ (10 U.S.C. § 831) would be required. The failure to give such warnings is a criminal offense under Article 98 of the UCMJ (10 U.S.C. § 898).

⁸² See Article 93 of the UCMJ (10 U.S.C. § 893). Two Marines face charges for assault, cruelty and dereliction of duty involving the treatment and death of an Iraqi prisoner. See Associated Press Newswires, *Two Marines Face Trial After Iraqi Dies*, Apr. 14, 2004; Tony Perry, *Iraqi Prisoner Died After Marine Grabbed His Throat, Officials Say*, L.A. TIMES, Oct. 22, 2003, at B06. It is not believed that the incident involved interrogation, but it is notable that such alleged offenses involved Marine infantry reservists who had not been trained in the treatment of prisoners (apart from one with relevant peacetime background) and are reported to have been given only a brief orientation before being assigned to this duty. As advocated elsewhere in this Report, proper training of U.S. military and intelligence personnel is essential to achieve compliance with the U.S.’s obligations under CAT.

⁸³ Article 93 prohibits a person subject to the jurisdiction of the UCMJ from committing acts of “cruelty toward, or oppression or maltreatment of, any person subject to his orders.” The phrase “any person subject to his orders” in Article 93 is defined as: “not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the...[UCMJ] or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.” Manual for Courts-Martial, United States, (1995 edition), Part IV, P 17c(1).

under the assault provision of the UCMJ (Article 128), and in at least one case the alleged assault occurred in the context of an interrogation.⁸⁴

The UCMJ is thus the substantively most extensive body of federal criminal law relating to the interrogation of detainees by U.S. military personnel and, in time of war, its reach could possibly extend to civilians such as CIA agents accompanying such personnel. It prohibits such persons from subjecting detainees to torture and “cruel or unusual punishment” within or without the United States and regardless of the applicability of constitutional rights.

Summary

CAT’s prohibition against torture is absolute. By ratifying CAT, the United States has accepted that the prohibition of torture is non-derogable. Moreover, by implementing prohibitions against torture in immigration, extradition, criminal and civil tort law contexts, the U.S. has given CAT’s prohibition against torture the force of U.S. law. Furthermore, by stipulating that CAT’s prohibition on CID treatment or punishment means the cruel and unusual treatment or punishment prohibited by the U.S. Constitution, the U.S. has made relevant the case law providing that detainees cannot be subjected to interrogation techniques: that force them to answer law enforcement questions by “fear of hurt, torture or exhaustion,” *Adamson v. California, supra*; that are “brutal and offensive to human dignity,” *Rochin v. California, supra*; that fall below the “evolving standards of decency that mark the progress of a maturing society,”

⁸⁴ An officer in Iraq was charged under Article 28 (10 U.S.C. § 928) for firing his pistol near an Iraqi detainee’s head in the course of an interrogation in order to elicit details about a planned ambush or assassination. Thomas E. Ricks, *Army Accuses Officer In Iraq Of Firing Pistol Near Prisoner*, WASH. POST, Oct. 30, 2003, at A14. The officer faced a possible court-martial and up to eight years imprisonment. Following a UCMJ Article 32 hearing (which is akin to a grand jury or preliminary hearing), the division’s commanding general ordered that the officer be fined and allowed to retire. *See U.S. Officer Fined for Harsh Interrogation Tactics* (Dec. 13, 2003) (available at <http://www.cnn.com/2003/US/12/12/sprj.nirq.west.ruling>).

Trop v. Dulles, supra; or which deliberately inflict force or pain (in the context of restoring prison order or safety), *Hudson v. McMillian, supra*. However, U.S. enforcement of CAT in our domestic criminal law – particularly with respect to acts of torture or CID treatment by U.S. civilians or by U.S. officials in extra-territorial areas under U.S. jurisdiction – has been incomplete. We urge the U.S. to fill in the gaps in preventing and punishing torture and CID treatment left by 18 U.S.C. § 2340A and to fully utilize the UCMJ to fulfill its obligations under CAT.

THE GENEVA CONVENTIONS

The four Geneva Conventions of 1949 are the core of the international law of armed conflict applicable to the treatment of detainees, albeit not the complete body of applicable law. The applicability of the Geneva Conventions to persons captured by the United States in connection with the War In Afghanistan and the ongoing conflict in Afghanistan, however, is highly controversial. The most hotly contested issue is whether those Al Qaeda and Taliban detainees who were captured before the creation of the Karzai government are entitled to POW status under Geneva Convention III Relative to the Treatment of Prisoners of War (“Geneva III”). This issue is of particular significance because Geneva III flatly prohibits “any form of coercion” of POWs in interrogation – the most protective standard of treatment found in international law. Likewise, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (“Geneva IV”) protects “civilian” detainees who qualify as “protected persons” from “coercion.”⁸⁵ We also should note that the issues regarding Geneva III and Geneva IV are affected by whether the person was detained either before or after the Karzai

⁸⁵ See Section II(C) for a discussion of who qualifies as a “protected person” under Geneva IV.

government was established. Before the Karzai government, the U.S. was engaged in an international armed conflict with Afghanistan, which was governed by the Taliban (albeit the U.S. did not recognize that government). After the establishment of the Karzai government, the conflict in Afghanistan became an internal one – as the U.S. and other international organizations were present in Afghanistan with the consent of the Karzai government to assist in maintaining order. Geneva III and Geneva IV apply only in situations of international armed conflict and, therefore, ceased to apply once the Afghan conflict became an internal one. *See* Geneva IV, Art. 6.

In this section, we will examine the Administration’s position that Al Qaeda and Taliban detainees are not POWs under Geneva III and some critiques of the Administration’s position. We submit that, regardless of whether a detainee enjoys status as a POW or civilian protected person under the Geneva Conventions, the Conventions nevertheless are relevant to the interrogation of detainees in the following respects:

First, the requirements of humane treatment embodied in Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I protect all detainees captured in situations of international or internal armed conflict, regardless of “legal” status.⁸⁶ Of course, all

⁸⁶ “Common Article 3” provides that detainees “shall in all circumstances be treated humanely” and prohibits the following acts “at any time and in any place whatsoever”: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;” and “outrages upon personal dignity, in particular humiliating or degrading treatment.” Common Article 3 also provides that the “wounded and sick shall be collected and cared for.”

Although neither the United States nor Afghanistan is a party to Additional Protocol I, it is generally acknowledged that relevant sections of Protocol I constitute either binding customary international law or good practice, in particular the minimum safeguards guaranteed by Article 75(2). *See* Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, reprinted in *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on*

detainees – including those captured outside of Afghan territory or in connection with the “War on Terror” – are entitled to the protection provided by human rights law, including CAT, the ICCPR and customary international law.

Second, notwithstanding its position on the POW status of Taliban and Al Qaeda detainees, the Administration has undertaken that it will treat all detainees in a manner consistent with the principles of Geneva III. Accordingly, the interrogation techniques reportedly being used on detainees at Bagram and other U.S. detention facilities should be considered in light of the text and spirit of the Geneva Conventions.

Third, if there is doubt as to whether a detainee meets Geneva III criteria for POW status, that detainee is entitled to interim POW status until a “competent tribunal” determines his or her legal status. Because the U.S. government has not convened “competent tribunals” to

Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U. J. INT’L L. & POL’Y 415, 425-6 (1987).

Article 75 provides that “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions” “shall be treated humanely in all circumstances” and that each state Party “shall respect the person, honour, convictions and religious practices of all such persons.” Paragraph 2 of Article 75 prohibits, “at any time and in any place whatsoever, whether committed by civilian or military agents”: “violence to the life, health, or physical or mental well-being of persons, in particular . . . torture of all kinds, whether physical or mental,” “corporal punishment,” and “mutilation”; “outrages upon personal dignity, in particular humiliating and degrading treatment . . . and any form of indecent assault”; and “threats to commit any of the foregoing acts.”

The U.S. rejection of Additional Protocol I was explained in a presidential note to the Senate in the following terms: “Protocol I . . . would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations. . . .” *See* 1977 U.S.T. LEXIS 465.

determine the status of any detainees, all detainees for whom POW status is in doubt are entitled to interim POW status.⁸⁷

Finally, even accepting the interpretation that the Third and Fourth Geneva Conventions contain gaps leaving certain detainees captured in the War in Afghanistan (*i.e.*, citizens of co-belligerents and neutrals) without POW or “protected person” civilian status, the Geneva Conventions are supplemented by human rights law and customary international legal norms which have the force of law in the United States. For example, even where a detainee may not be entitled to a hearing under Geneva III, he is entitled to a hearing to determine the justification for his detention under Article 9 of the ICCPR. Many detainees may not be combatants at all and may be simply innocent bystanders mistakenly detained or wrongfully turned over to the U.S. military by the Northern Alliance.⁸⁸ They deserve prompt hearings in which they are given an opportunity to establish their non-combatant status.

⁸⁷ See Geneva III, Art. 5; see also U.S. Dept. of Army, Field Manual 27-10, “Law of Land Warfare”, Art. 71 (1956); U.S. Dept. of Army, REGULATION 190-8 Military Police, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” § 1-5 (a)(2) (1997).

⁸⁸ See, *e.g.*, Dep’t of Defense, Secretary Rumsfeld Media Availability en route to Camp X-Ray (Jan. 27, 2002) (*available at* http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html) (“Sometimes when you capture a big, large group there will be someone who just happened to be in there that didn’t belong in there.”) (remarks of Respondent, Secretary of Defense Donald H. Rumsfeld); Carlotta Gall, *Freed Afghan, 15, Recalls a Year at Guantánamo*, N.Y. TIMES, Feb. 11, 2004, at A03 (quoting released teenager claiming to have been captured by non-U.S. forces and handed over to the Americans while looking for a job); Jan McGirk, *Pakistani Writes of His U.S. Ordeal*, BOSTON GLOBE, Nov. 17, 2002, at A30 (“Pakistan intelligence sources said Northern Alliance commanders could receive \$5000 for each Taliban prisoner and \$20,000 for a[n] [al] Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.”).

Application of the Geneva Conventions to the Afghan Conflict Generally

Both the U.S. and Afghanistan are parties to the Geneva Conventions. Article 2 common to all four Conventions provides that the Conventions “apply to all cases of declared war or of any other armed conflict” between two or more parties to the Conventions so long as a state of war is recognized by a party to the conflict. The Conventions also apply to all cases of partial or total occupation of the territory of a signatory, even if the occupation meets with no armed resistance. *See* Geneva Conventions, Art. 2. Signatories to the Conventions are bound by its terms regardless of whether an additional party to the conflict is a signatory. *Id.* The Administration’s position is that the Geneva Conventions apply to the War in Afghanistan.⁸⁹

Geneva III

Relevant Legal Standards

Under Geneva III, combatants are entitled to POW status if they are members of the armed forces (other than medical personnel and chaplains). The specific requirements for combatant/POW status are set forth in Article 4 of Geneva III⁹⁰ and Articles 43 and 44 of Additional Protocol I.⁹¹

⁸⁹ *See, e.g.,* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L L. 461, 476-77 (2002).

⁹⁰ Article 4-A of Geneva III provides, in part:

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:

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.

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

If there is any doubt as to whether captured persons meet Article 4's criteria for POW status, such persons are entitled to interim POW status until a "competent tribunal" determines their legal status.⁹²

volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) 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.

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

⁹¹ Article 43 of Additional Protocol I provides: "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."

⁹² See Geneva III, Art. 5; see also, U.S. Dept. of Army, Field Manual 27-10, "Law of Land Warfare", Art. 71 (1956); U.S. Dept. of Army, REGULATION 190-8 Military Police, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees," § 1-5 (a)(2) (1997). Under U.S. military regulations, a "competent tribunal" pursuant to Article 5 of Geneva III consists of three commissioned officers. The regulations also require that persons whose status is to be determined be advised of their rights; be permitted to attend all open sessions, call witnesses and question witnesses called by the tribunal; be permitted (but not compelled) to testify or otherwise address the tribunal; and be provided with an interpreter. The regulations provide for the tribunal's determination of a detainee's status in closed session by a majority vote and require a preponderance of the evidence to support the tribunal's finding. See Erin Chlopak, *Dealing with the Detainees at Guantánamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions*, HUM RTS. BR. (Spring 2002), at 6, 8.

Geneva III mandates that POWs be treated humanely at all times. This includes freedom from physical and mental torture, acts of violence, intimidation and insult, and exposure to public humiliation.⁹³ Pursuant to Article 14, POWs also “are entitled in all circumstances to respect for their persons and their honour . . . [and] shall retain the full civil capacity which they enjoyed at the time of their capture.”

With respect to interrogation, in particular, Article 17 of Geneva III provides:

“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

It should be noted that the “competent tribunal” outlined in ARMY REG. 190-8, § 1-6 is a quick, administrative process that is highly dependent upon the availability of witnesses during ongoing combat and support operations. Unsworn statements may be presented as evidence, and a record of the proceedings is developed. Although the tribunal may or may not include military lawyers such as members of the Staff Judge Advocate General (“JAG”), JAG lawyers will subsequently review the record. The record may also be the basis for any further proceedings for war crimes or for any other penalty.

Fundamentally, the tribunal determines only status and does not adjudicate liability. Tribunals are required under Geneva III only when status of the detainee is in doubt. When, for example, ten thousand uniformed members of a regular enemy infantry division surrender as a body, there is no need for a tribunal. When, however, non-uniformed, but possibly military, personnel mix with refugees, that is a classic situation for such tribunals.

⁹³ Specifically, Article 13 of Geneva III provides:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.” Under Article 17, POWs are only obligated to provide their name, rank, date of birth, and army, personal or serial identification number or equivalent information. Geneva III does not, however, prohibit non-coercive interrogation of POWs. POWs may be interrogated, but they are not obliged to respond to such interrogation, nor may they be threatened, coerced into responding or punished for failing to respond. The Geneva Conventions also do not “preclude classic plea bargaining” – *i.e.*, the offer of leniency or other incentives in return for cooperation.⁹⁴

Thus, to the extent detainees from the War in Afghanistan are considered POWs or to the extent their POW status is in “doubt” pending the determination of status by a competent tribunal, interrogation tactics which rise to the level of “coercion” are prohibited by Geneva III.

The United States’ Position

In sharp contrast with past conflicts (such as Vietnam and Korea) in which it was U.S. policy to presume that military prisoners were entitled to POW status regardless of the possible nonqualification of their forces under Geneva III, from the very outset of the War in Afghanistan, United States officials labeled captured Al Qaeda and Taliban prisoners “unlawful combatants,” and stated that the Geneva Conventions were, therefore, entirely inapplicable to their treatment.⁹⁵ The United States reasoned that Al Qaeda was not entitled to the protections of the Geneva Conventions because: (1) Geneva III could not apply to members of a nonstate organization, such as Al Qaeda, (2) the conflict was not an internal conflict such that Al Qaeda

⁹⁴ Manooher Mofidi and Amy E. Eckert, “*Unlawful Combatants*” or “*Prisoners of War*”: *The Law and Politics of Labels*, 36 CORNELL INT’L L.J. 59, 89 (2003).

⁹⁵ Murphy, *supra* note 89, at 476-77.

members could benefit from the protection of Common Article 3, and (3) in any event, Al Qaeda members failed to meet the requirements set forth in Article 4(A)(2) of Geneva III.⁹⁶ The United States argued further that, since Afghanistan was not a functioning state during the conflict and the Taliban was not recognized as a legitimate government, Geneva III could not apply to the Taliban.⁹⁷

After vigorous criticism was leveled against these arguments, Secretary of State Colin Powell requested that the Administration reconsider its position.⁹⁸ On February 7, 2002, in response to Powell's comments, the Administration partially reversed its initial position. Although the Administration continues to argue that the Geneva Conventions are inapplicable to Al Qaeda captives, President Bush announced that Geneva III was applicable to the Taliban because both the U.S. and Afghanistan were signatories to the Convention and the parties had been involved in an armed conflict. However, President Bush further argued that because the Taliban had violated the laws of war and associated closely with Al Qaeda, "[u]nder the terms of the Geneva Convention ... the Taliban detainees do not qualify as POWs."⁹⁹ The decision in

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Powell asked that the Administration recognize that the Geneva Conventions apply to the conflict between the U.S. and Taliban regime and that the Administration convene a "competent tribunal" to determine the status of the prisoners pursuant to Article 5 of Geneva III. See Katharine Q. Seelye, *A Nation Challenged: The Prisoners; Powell Asks Bush to Review Stand on War Captives*, N.Y. TIMES, Jan. 27, 2002, at A01; William Safire, Editorial, *Colin Powell Dissents*, N.Y. TIMES, Jan. 28, 2002, at A15.

⁹⁹ See *supra* note 18.

U.S. Secretary of Defense Donald Rumsfeld, responding to a request for clarification, referred to Article 4(a)(2) of Geneva III to explain why the Taliban could not qualify for POW status: "The Taliban [like Al Qaeda] also did not wear uniforms, they did not have insignia, they did not carry their weapons openly, and they were tied tightly at the waist to Al

United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002), which specifically addresses the issue of whether the Taliban are entitled to POW status under Geneva III, sheds further light on the U.S. position.¹⁰⁰

Critiques of the United States' Position

International humanitarian and human rights organizations and legal bodies,

including the International Committee of the Red Cross ("ICRC"),¹⁰¹ the Inter-American Court

Qaeda. They behaved like them, they worked with them, they functioned with them, they cooperated with respect to communications, they cooperated with respect to supplies and ammunition." Secretary of Defense Donald H. Rumsfeld, Remarks on Ferry from Air Terminal to Main Base, Guantánamo Bay, Cuba (Jan. 27, 2002) (transcript available at http://www.defenselink.mil/transcripts/2002/t01282002_t0127sd2.html).

¹⁰⁰ Applying the four-part test from Article 4(a)(2) of Geneva III to the determination, the *Lindh* court found that the Taliban had an insufficient internal system of military command or discipline, that the "Taliban typically wore no distinctive sign that could be recognized by opposing combatants," and that the "Taliban regularly targeted civilian populations in clear contravention of the laws and customs of war." *Lindh*, 212 F. Supp. 2d at 558. Implicitly the *Lindh* Court held that the four conditions listed in Geneva III, Article 4(a)(2) also apply to "regular armed forces." *Id.* at 557. In concluding that the Taliban were not regular armed forces, the *Lindh* court stated "[i]t would indeed be absurd for members of a so-called 'regular armed force' to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war. Simply put, the label 'regular armed force' cannot be used to mask unlawful combatant status." *Id.*, at n.35.

See also Int'l Comm. of the Red Cross, *Commentaries to Article 4(a)(1) Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949*, ICRC Database on Int'l Humanitarian Law (available at <http://www.icrc.org./ihl.nsf/b466ed681ddfcfd241256739003e6368/3ca76fa4dae5b32ec12563ed00425040?OpenDocument>) ("It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians."). *See also, generally*, INGRID DETTER, *THE LAW OF WAR* (Cambridge Univ. Press, 2nd ed., 2000), at 136; Christopher Greenwood, *International Law and the War Against Terrorism*, 78 *INTERNATIONAL AFFAIRS* 301, 316 (2002); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 *AM. J. INT'L L.* 328, 335 (2002).

¹⁰¹ ICRC, *Geneva Convention on Prisoners of War* (Feb. 9, 2002) (available at [http://www.icrc.org/Web/Eng/siteeng\(\).nsf/iwpList454/26D99836025EA80Dc1256B6600610C90](http://www.icrc.org/Web/Eng/siteeng().nsf/iwpList454/26D99836025EA80Dc1256B6600610C90)) ("International Humanitarian Law foresees that the members of armed forces as well

of Human Rights,¹⁰² Amnesty International,¹⁰³ the International Commission of Jurists,¹⁰⁴ the Secretary General of the United Nations,¹⁰⁵ the United Nations High Commissioner for Human Rights,¹⁰⁶ as well as certain U.S. and foreign international law scholars¹⁰⁷ have criticized the U.S. position on several grounds.

as militias associated to them which are captured by the adversary in an international armed conflict are protected by the Third Geneva Convention. There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status.”)

¹⁰² IACHR, DECISION ON REQUEST FOR PRECAUTIONARY MEASURES (DETAINEES AT GUANTÁNAMO BAY, CUBA), 41 I.L.M. 532, 533 (2002) (“It is . . . well-known that doubt exists as to the legal status of the detainees.”)

¹⁰³ Amnesty International, *Memorandum to the U.S. Government on the rights of people in U.S. custody in Afghanistan and Guantánamo Bay* (available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510532002ENGLISH/\\$File/AMR510532.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510532002ENGLISH/$File/AMR510532.pdf)) (The United States’ “selective approach to the Geneva Conventions threatens to undermine the effectiveness of international humanitarian law protections for any U.S. or other combatants captured in the future.”)

¹⁰⁴ ICJ, *Rule of Law Must be Respected in Relation to Detainees in Guantánamo Bay* (Jan. 17, 2002) (available at http://www.icj.org./ews.php?id_article=2612&lang=eng) (“The United States has refused [POW] status to Taliban fighters even though, as members of the armed forces, they are entitled to it.”)

¹⁰⁵ Kofi Annan, Press Encounter outside No. 10 Downing Street, London, (Feb. 25, 2002) (unofficial transcript available at <http://www.un.org/aps/sg/offthecuff.asp?nid=103>) (“The Red Cross has indicated that anyone who was arrested in the battlefield, or picked up in the battlefield, is a prisoner of war and they do not make a difference between the Al Qaeda and the Taliban. And under the convention, where there is a disagreement, normally you have an independent tribunal to resolve this.”).

¹⁰⁶ Mary Robinson, Statement of the High Commissioner for Human Rights on Detention of Taliban and Al Qaeda Prisoners at U.S. Base in Guantánamo Bay, Cuba (Jan. 16, 2002) (available at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/C537C6D4657C7928C1256B43003E7D0B?opendocument>) (“All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949.”)

**Article 5 Presumes POW Status Until the Determination of Status by
a Competent Tribunal**

Critics of the Administration position argue that non-civilian detainees from the War in Afghanistan either clearly qualify as POWs or their POW status is in “doubt.” Geneva III mandates that a detainee whose status is in “doubt” must be treated as a POW until his status is decided otherwise by a competent tribunal under Article 5. Indeed, Article 5’s presumption that captured combatants are entitled to POW status until their status is determined by a competent tribunal is one that has been consistently honored by the U.S. since World War II.¹⁰⁸ Moreover, like Article 5, customary international law also includes the principle that a competent tribunal must resolve any doubt about the status of a captured combatant.¹⁰⁹ We agree with critics of the

¹⁰⁷ See, generally, George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891 (2002); Harold Hongju Koh, *Agora: Military Commissions –The Case Against Military Commissions*, 96 AM. J. INT’L L. 337 (2002); Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the War on Terror*, 44 HARV. INT’L L.J. 301 (2003); Manooher Mofidi and Amy E. Eckert, “Unlawful Combatants” or “Prisoners of War”: *The Law and Politics of Labels*, 36 CORNELL INT’L L.J. 59 (2003); Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513 (2003).

¹⁰⁸ See JENNIFER ELSEA, TREATMENT OF “BATTLEFIELD DETAINEES” IN THE WAR ON TERRORISM, CONG. RESEARCH SERV., RL31367, at 30 (2002) (*available at* <http://fpc.state.gov/documents/organization/9655.pdf>) (stating that the United States “has in the past interpreted [Article 5] as requiring an individualized assessment of status before privileges can be denied”). See also THE JUDGE ADVOCATE GENERAL’S SCHOOL, OPERATIONAL LAW HANDBOOK 22 (William O’Brien ed., 2003) (instructing judge advocates to “advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of [Geneva III], at least until their status may be determined”).

¹⁰⁹ Michael J. Matheson, while serving as Deputy Legal Advisor of the U.S. State Department, stated:

We [the United States] do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for

Administration position that all combatants whose claim to POW status is “in doubt” must be treated as POWs until such doubt has been resolved by a “competent tribunal.” Accordingly, since no tribunals have been convened for detainees from the War in Afghanistan, all such detainees must be considered POWs under Geneva III.

**The Taliban Detainees Were “Regular Armed Forces” and,
Therefore, Are Encompassed by Article 4(A) of Geneva III**
Critics of the Administration’s position that Taliban fighters are not entitled to

POW status because they do not satisfy the requirements of Article 4(a)(2) of Geneva III¹¹⁰ assert that Taliban captured in the War in Afghanistan are entitled to POW status either under: Article 4(a)(1) because they are “[m]embers of the armed forces” of Afghanistan; or Article 4(a)(3) as they are “[m]embers of regular armed forces who profess allegiance to a government of an authority not recognized by the Detaining Power.”¹¹¹

Policy Arguments Favoring Broad Grant of POW Status to Non-Civilian Detainees from the War in Afghanistan
Several policy arguments favor granting POW status liberally even assuming that

Geneva III does not apply to Taliban or Al Qaeda detainees captured in the War in Afghanistan.

an offense arising out of the hostilities, he should have the right to assert his entitlement before a judicial tribunal and to have that question adjudicated.

Matheson, *supra* note 86.

¹¹⁰ Some have argued that the Taliban did comply with the requirements for Article 4(a)(2). *See, e.g.*, ROBERT GOLDMAN AND BRIAN TITTEMORE, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN RIGHTS LAW (The Am. Soc. Of Int’l Law Task Force on Terrorism, Task Force Paper) (*available at* <http://asil.org/taskforce/goldman.pdf>.)

¹¹¹ Not only did the Taliban profess such an allegiance, but they were the strongest military partner in the Alliance, effectively controlling Afghanistan. *See* “Taliban Reach Zenith?,” 85 National Defense 10 (Oct. 1, 2000).

First, depriving Taliban and Al Qaeda of POW status because they do not obey the laws of war sets a dangerous precedent, inviting other state parties to claim that another party is not obeying the rules of war and that they are, therefore, free from the obligations of Geneva III. International humanitarian law applies regardless of whether or not the other party to the conflict respects such laws.¹¹² Reciprocity arrangements are generally rejected in international humanitarian law as they can so easily be abused at the expense of civilians or persons rendered “hors de combat.”¹¹³

Second, it is in the U.S.’s self-interest to ensure that the Geneva Conventions – a regime of vital importance to the safety of our own armed forces – are interpreted as broadly as possible. Otherwise, an opposing state party could use the argument that the U.S. has violated the laws of war to deny captured U.S. soldiers POW status. In fact, North Korea and Vietnam have already used this argument as a basis to deny captured U.S. prisoners POW protections

¹¹² Article 1 of Geneva III states “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” *See also* Military and Paramilitary Activities (*Nicar. v. U.S.*), 1986 I.C.J. REP. 14, 14 (June 27) (holding that Geneva III applies in all circumstances regardless of the actions of the other party to the conflict). *See also, generally*, Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 248-249 (2000).

¹¹³ As the ICRC Commentaries on Article 1 state: “it is not merely an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations ‘vis-à-vis’ itself and at the same time ‘vis-à-vis’ the others. The motive of the Convention is so essential for the maintenance of civilization that the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from all parties.” ICRC *Commentaries to Article 1, Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949*, ICRC Database on Int’l Humanitarian Law (available at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/49cfe5505d5912dlc12563ed00424cdd?Open Document>). *See also* Geneva III, Art. 13.

under the Geneva Conventions.¹¹⁴ Indeed, it was reportedly these very examples that prompted Colin Powell, out of concern for the safety of U.S. forces, to request that President Bush reconsider the Administration's initial position.¹¹⁵

We accordingly urge liberal extension of POW treatment where that would encourage reciprocal treatment of U.S. service personnel and advance more generally foreign policy and national security interests. We further believe that, even to the extent that POW status is denied to detainees, such detainees must be afforded the protections of international criminal law, as well as international human rights and humanitarian law.

Geneva IV

Geneva IV applies in international armed conflicts to the same extent as Geneva III. It covers "protected persons" defined as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." *See* Geneva IV, Article 4.¹¹⁶

¹¹⁴ George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 895-96 (2002) (noting that North Korea and North Vietnam denied POW status to all American prisoners on the basis of the allegation that they were all war criminals).

¹¹⁵ Colin Powell apparently made remarks to this effect in a memo leaked to the press on January 27, 2002. *See* Editorial, *Bush's Call on Captives*, THE BOSTON GLOBE, Jan. 29, 2002, at A10.

¹¹⁶ Legal commentators have argued that persons who have directly participated in the War in Afghanistan and who do not qualify as POWs under Geneva III (*i.e.*, detainees considered to be "unlawful combatants" by the U.S.) should automatically be considered "protected persons" under Geneva IV, unless other exceptions apply. *See, e.g.*, Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513, 1518 -19 (2003) ("There is no gap between the two conventions"). Recent decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) have held that, "if an individual is not entitled to the protections of the Third Convention as a

The fact that a person may have unlawfully participated in a conflict is not relevant to Geneva IV protections, apart from a significant national security exemption. The term “protected persons” includes persons detained as spies or saboteurs as well as other persons suspected of engaging in activities hostile to the security of the detaining power. Specifically, Article 5 provides:

Where in the territory of a Party to the conflict, the *latter* is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State

....

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

As drafted, (*i.e.*, the use of the words “the latter”), it would appear that the national security derogation is available only to the State on whose territory the conflict is occurring (*i.e.*, in the War in Afghanistan, only to the Northern Alliance), and there is no authority whether or not an allied State, such as the United States, can benefit from such exemption.

In an exception of great importance in Afghanistan, given the number of third country participants in the conflict, “protected persons” does not include “[n]ationals of a State which is not bound by the Convention,” “[n]ationals of a neutral State who find themselves in

prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of [Geneva IV].” See *The Prosecutor v. Delalic*, IT-96-21-T, at para. 271 (1998); see also *Prosecutor v. Tadic*, IT-94-I-A, 38 I.L.M. 158 (1999).

the territory of a belligerent State” and “nationals of a co-belligerent State ... while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.” *See* Geneva IV, Article 4. For example, a Pakistani picked up on the battlefield in Afghanistan would fall within the exceptions to “protected person” status under Geneva IV.

However, in no event would such provision permit the State to commit “grave breaches” as defined in Article 147, which includes torture or inhuman treatment and willfully causing great suffering or serious injury to body or health, upon a “protected person”. *See* Geneva IV, Art. 146. Furthermore, to the extent that any physical or moral coercion (otherwise prohibited by Article 31 of Geneva IV) might fall below the level of “grave breach” and thus be derogable, the ICRC commentary to the national security derogations contained in Article 5 of Geneva IV, involving persons engaged in activities hostile to the security of the state notes that:

widespread application of the Article may eventually lead to the existence of a category of civilian internees who do not receive the normal treatment laid down by the Convention but are detained under conditions which are almost impossible to check. It must be emphasized most strongly, therefore, that Article 5 can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will follow. This article should never be applied as a result of mere suspicion.

Like POWs under Geneva III, “protected persons” under Geneva IV cannot be subjected to coercive interrogation tactics. Specifically, Article 31 of Geneva IV provides that “[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.” Article 32 further provides that “any measure of such a character as to the cause the physical suffering or extermination of protected persons” is prohibited and that “[t]his prohibition applies not only to murder, torture, corporal punishments, 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.”

By its terms, Geneva IV ceases to apply “on the general close of military operations” in the case of an international conflict. *See* Geneva IV, Art. 6. Whether military operations have reached a “general close” after the establishment of the Karzai government in June 2002 and whether the change in character of the conflict from an international one to a multi-national conflict within a single State against non-State opponents terminated application of Geneva IV are issues open to controversy.¹¹⁷ Thus, the ability of some civilians captured in Afghanistan to claim “protected person” status under Geneva IV today is subject to additional debate. However, regardless of the characterization of the current conflict, torture and inhumane treatment of civilian detainees from the War in Afghanistan or the ongoing conflict in Afghanistan, whether or not they qualify as “protected persons” under Geneva IV, is not permitted. All such persons are still entitled to the protections of international human rights law and to humane treatment under Common Article 3 and Article 75 of Additional Protocol I.

Summary

None of the detainees from the War in Afghanistan or the ongoing conflict in Afghanistan fall outside of international humanitarian law. An individual detained during the armed conflict in Afghanistan – whether considered an international or internal armed conflict – is either protected by Geneva III as a POW, by Geneva IV as a civilian “protected person,” or, at the very minimum, by Common Article 3 and Article 75 of Additional Protocol I. Of course, all

¹¹⁷ Such determination does not negate application of Common Article 3 to an “armed conflict not of an international character” or certain other provisions of international humanitarian law and the law of armed conflict.

detainees – regardless of where or when they were captured – are entitled to the protection of human rights law (including CAT and the ICCPR) and customary international law.

Detainees protected as POWs or civilians under Geneva III or Geneva IV cannot be subjected to coercion of any kind. In addition, those detainees whose POW status is in doubt are entitled to interim POW status until a competent tribunal determines otherwise. At least some Afghan detainees are entitled to such tribunals, and the U.S. is long overdue in providing any process whatsoever to detainees, many of whom may simply be innocent non-combatants, wrongfully detained. We, therefore, urge the U.S. to establish proper screening procedures for all detainees.

OTHER INTERNATIONAL LEGAL STANDARDS

The legal standards set forth in the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man, and customary international law also apply to the treatment of detainees held by the United States.

The International Covenant on Civil and Political Rights¹¹⁸

Relevant Legal Standards

Like CAT, the ICCPR expressly prohibits both torture and CID. Specifically, Article 7 of the ICCPR provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹¹⁹ However, the ICCPR goes further than CAT in its non-

¹¹⁸ The ICCPR, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 was adopted in 1966 and came into force in 1976. It was ratified by the United States in 1992, subject to a number of reservations, understandings and declarations. *See* 138 CONG. REC. S4781-01 (1992).

¹¹⁹ Congressional ratification of the ICCPR with respect to the prohibition against cruel, inhuman or degrading treatment is subject to a reservation mirroring that taken by the U.S.

derogability provision, expressly stating that neither torture nor CID treatment can be justified by exceptional circumstances such as war, internal political stability or other public emergencies. (See ICCPR, Art. 4). Article 10 also provides that: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

The Human Rights Committee, established under Article 28, adjudicates complaints filed by individuals or states parties alleging violations of the ICCPR. The Committee has found the following conduct to violate Article 7’s prohibition against cruel, inhuman or degrading treatment or punishment: threatening a victim with torture, prolonged solitary confinement and incommunicado detention, and repeated beatings.¹²⁰ Moreover, the Human Rights Committee has specifically criticized interrogation procedures such as handcuffing, hooding, shaking and sleep deprivation as violations of Article 7 in any circumstances.¹²¹

Although the ICCPR does not expressly prohibit states parties from “rendering” individuals to countries where they are likely to be mistreated, the Human Rights Committee has explained that, under Article 7, states parties “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country

under CAT: “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....” *Id.*

¹²⁰ See *Floyd Howell v. Jamaica*, Communication No. 798/1998 (20 January 1998), CCPR/C/79/D/798/1998; *Víctor Alfredo Polay Campos*, Communication No. 577/1994 (6 November 1997), CCPR/C/61/D/577/1994; *Dave Marais, Jr. v. Madagascar*, Communication No. 49/1979 (19 April 1979), U.N. Doc. Supp. No. 40 (A/38/40) at 141 (1983); *Raul Sendic Antonaccio v. Uruguay*, Communication No. R.14/63 (28 November 1979), U.N. Doc. Supp. No. 40 (A/37/40) at 114 (1982).

¹²¹ See Concluding Observations of the Human Rights Committee (Israel), CCPR/C/79/Add.93 (1998).

by way of their extradition, expulsion or refoulement.”¹²² Accordingly, the Human Rights Committee has stated that “[i]f a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”¹²³

Enforcement

U.S. Courts

In ratifying the ICCPR, the U.S. Senate declared that Articles 1 through 27 are not self-executing. Thus, while the Supreme Court has not squarely decided the issue, the majority of federal appeals courts have held that the ICCPR provides no privately enforceable rights and is not binding on federal courts.¹²⁴ The Second and Ninth circuit courts, however, have cited the

¹²² See General Comment 20, U.N. GAOR Hum. Rts. Comm., 47th Sess., Supp. No. 40, para. 9, U.N. Doc. A/47/40 (1992).

¹²³ *Kindler v. Canada*, Communication No. 470/1991, Human Rights Committee, U.N. Doc. CCPR/C/48/D/470/1990 (1993).

¹²⁴ See, e.g., *Poindexter v. Nash*, 333 F.3d 372, 379 (2d Cir. 2003); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *Wesson v. U.S. Penitentiary Beaumont, TX*, 305 F.3d 343, 348 (5th Cir. 2002); *United States v. Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir. 2002); *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002); *United States v. Warden, FMC Rochester*, 286 F.3d 1059, 1063 (8th Cir. 2002); *Dutton v. Warden, FCI Estill*, 2002 WL 255520, at *1 (4th Cir. 2002); *Lal v. Roe*, 2002 WL 31356505, at *1 (9th Cir. 2002); *Beazley v. Johnson*, 242 F.3d 248, 267 (5th Cir. 2001); *Kenan v. U.S.P. Lompac*, 2001 WL 1003213, at *1 n.1 (9th Cir. 2001); *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994); see also *Beshli v. Dept. of Homeland Security*, 2003 WL 21693668, at *10 (E.D. Pa. July 22, 2003); *Macharia v. United States*, 238 F. Supp. 2d 13, 29-30 (D.D.C. July 30, 2002); *Reaves v. Warden, U.S.P.*, 2002 WL 535398, at *9 (M.D. Pa. Mar. 22, 2002); *Jama v. United States Immigration and Naturalization Service*, 22 F. Supp. 2d 353, 364-65 (D.N.J. 1998).

ICCPR as evidence that customary international law prohibits arbitrary arrest, prolonged detention and torture.¹²⁵

The Human Rights Committee

The Human Rights Committee is empowered to: (i) receive state party reports and comment on those reports (*see* ICCPR, Art. 40(4)); (ii) rule on complaints filed by a state party that another state party is not fulfilling its obligations under the ICCPR (*see* ICCPR, Art. 41);¹²⁶ and (iii) rule on complaints filed by individuals “who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies.”¹²⁷

Organization of American States’ Instruments

Relevant Legal Standards

The U.S. is a member of the Organization of American States (the “OAS”).

Article XXV of The American Declaration of the Rights and Duties of Man (the “American Declaration”), which was adopted by the Ninth International Conference of the OAS in 1948, provides:

¹²⁵ *See Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (recognizing that an international prohibition exists against “prolonged and arbitrary detention” and citing, among other sources to ICCPR, Art. 9); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-84 (9th Cir. 1998) (same); *United States v. Romano*, 706 F.2d 370, 375 n.1 (2d Cir. 1983) (citing to ICCPR for articulation of rights of a person charged with a criminal offense); *Filartiga v. Peña-Irala*, 630 F.2d 876, 883-84 (2d Cir. 1980) (citing ICCPR as one example that international law universally rejects torture).

¹²⁶ In ratifying the ICCPR, the U.S. Senate declared that “The United States . . . accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.” *See supra* note 118.

¹²⁷ *See* Optional Protocol to the International Covenant on Civil and Political Rights, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

On June 1, 1997, the U.S. signed, but has not yet ratified, the American Convention On Human Rights (1969) (the “American Convention”).¹²⁸ Article 5 of the American Convention, which sets forth Rights to Humane Treatment, provides:

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.

Moreover, pursuant to Article 27(2) of the American Convention, the Rights to Humane Treatment may not be suspended “[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party.”

With respect to the treatment of detainees, the Inter-American Commission on Human Rights (the “Inter-American Commission”) – which represents all member countries of the OAS and was established under Chapter VII of the American Convention – has determined that, “when the State holds a person in detention and under its exclusive control, it becomes the guarantor of that person’s safety and rights.”¹²⁹ In this regard, the Commission has found the following practices to be violations of Article 5 of the American Convention: threats to summon family members and pressure them to “talk”; threats to kill detainees; blindfolding detainees and forcing them to run around; “prolonged isolation and deprivation of communication”; solitary

¹²⁸ 1144 U.N.T.S. 123, *reprinted in* 9 I.L.M. 101 (1969).

¹²⁹ *See Manrique v. Peru*, Report No. 56/98, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 983 (1998).

confinement; confining detainees in small cells with other prisoners; keeping detainees in cells that are damp and/or without adequate ventilation; keeping detainees in cells without beds; forcing detainees to sleep on the floor or on newspaper; depriving detainees of necessary hygiene facilities; beatings with rifles; and kicks in various parts of the body, especially in the stomach.¹³⁰

The Inter-American Court of Human Rights (the “Inter-American Court”) – established pursuant to Chapter VIII of the American Convention – has held that, “in order to establish if torture has been inflicted and its scope, all the circumstances of the case should be taken into consideration, such as the nature and context of the respective aggressions, how they were inflicted, during what period of time, the physical and mental effects and, in some case, the sex, age and state of health of the victims.”¹³¹ “The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.”¹³²

The Inter-American Court has found the following practices to violate Article 5 of the American Convention and/or Article 2 of the Inter-American Convention To Prevent and

¹³⁰ See, e.g., *Request for Advisory Opinion OC-16, by the State of Mexico, of December 10, 1997*, OEA/Ser.L/V/III.39, Doc. 5, at para. 23(d) (1998); *Manrique v. Peru*, Report No. 56/98, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 983, at paras. 87-88 (1998); *Congo v. Ecuador*, Report No. 63/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 475, at paras. 55-59 (1998); *Lucio Parada Cea, et al. v. El Salvador*, Report No. 1/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 531, at para. 70 (1998).

¹³¹ *Villagran Morales et al. Case (the “Street Children” Case), Judgment of November 19, 1999*, Inter-Am. Ct. H.R. (Ser. C) No. 63, at para. 74 (1999).

¹³² *Loayza-Tamayo Case, Judgment of September 17, 1997*, Inter-Am. Ct. H.R. (Ser. C) No. 33, at para. 57 (1997).

Punish Torture:¹³³ forcing detainees to stand blindfolded with their hands cuffed behind their backs; forcing detainees to listen to the cries of others being beaten; threatening detainees with physical torture; restriction of visiting rights; incommunicado detention; incarceration in solitary confinement and/or in a small cell with no ventilation or natural light; prohibiting detainees from engaging in physical exercise or intellectual efforts; deprivation of necessary hygiene facilities; deficient medical treatment; and throwing detainees to the ground.¹³⁴ “[A]ccording to international standards for protection, torture can be inflicted not only via physical violence, but also through acts that produce severe physical, psychological or moral suffering in the victim.”¹³⁵ The Inter-American Court also has held that: “Prolonged isolation and being held incommunicado constitute, in themselves, forms of cruel and inhuman treatment, harmful to the mental and moral integrity of the person and to the right of all detainees of respect for the inherent dignity of the human being.”¹³⁶

¹³³ The U.S. is not a signatory to the Inter-American Convention To Prevent and Punish Torture, O.A.S. Treaty Series No. 67. Article 2 of this Convention defines torture as “any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”

¹³⁴ See, e.g., *Cantoral Benavides Case, Judgment of August 18, 2000*, Inter-Am. Ct. H.R. (Ser. C) No. 69, at paras. 43(a), 63(e) – (k), 104, 106 (2000); *Loayza-Tamayo Case, Judgment of September 17, 1997*, Inter-Am. Ct. H.R. (Ser. C) No. 33, at para. 58 (1997); *Castillo-Paez Case, Judgment of November 3, 1997*, Inter-Am. Ct. H.R. (Ser. C) No. 34, at para. 66 (1997); *Suarez-Rosero Case, Judgment of November 12, 1997*, Inter-Am. Ct. H.R. (Ser. C) No. 35, at para. 91 (1997).

¹³⁵ *Cantoral Benavides Case, Judgment of August 18, 2000*, Inter-Am. Ct. H.R. (Ser. C) No. 69, at para. 100.

¹³⁶ See *Fairen-Garbi and Solis Corrales Case, Judgment of March 15, 1989*, Inter-Am. Ct. H.R. (Ser. C) No. 6, at para 149 (1989); *Godinez-Cruz Case, Judgment of January 20, 1989*, Inter-

Moreover, the Inter-American Court has warned that the fact that a State is confronted with terrorism does not, in itself, warrant the use of force:

Any use of force that is not strictly necessary, given the behavior of the person detained, constitutes an affront to human dignity . . . in violation of Article 5 of the American Convention. The need to conduct investigations and the undeniable difficulties inherent to combating terrorism are not grounds for placing restrictions on the protection of the physical integrity of the person.¹³⁷

In a case brought before the Inter-American Commission by detainees alleging violations of the United States' obligations under the American Declaration by U.S. armed forces in Grenada in 1983, *Coard, et al. v. United States*, the Inter-American Commission expressly extended the protections of human rights and humanitarian norms to extraterritorial conduct by U.S. military forces and criticized the U.S. for delay in providing procedure to detainees.¹³⁸ Acknowledging the need to balance between public security and individual rights, the Inter-

Am. Ct. H.R. (Ser. C) No. 5, at para. 164 (1989); *Velazquez-Rodriguez Case, Judgment of July 29, 1988*, Inter-Am. Ct. H.R. (Ser. C) No. 4, at para. 156 (1988). In the *Suarez-Rosero* case, the Inter-American Court explained that incommunicado detention is “an exceptional measure” which can cause the detainee to suffer extreme psychological and moral injury. “[I]solation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prisons.” *Suarez-Rosero Case, Judgment of November 12, 1997*, Inter-Am. Ct. H.R. (Ser. C) No. 35, at para. 90 (1997).

¹³⁷ See *Castillo-Petruzzi Case, Judgment of May 30, 1999*, Inter-Am. Ct. H.R. (Ser. C) No. 52, at para. 197 (1999).

¹³⁸ *Coard, et al. v. United States*, Inter-Am. C.H.R. Report No. 109/99 (Sept. 29, 1999) (“*Coard*”). The *Coard* petitioners alleged that U.S. forces arrested them during the period in which it consolidated control over Grenada; that they were held incommunicado for many days; and that months passed before they were taken to a magistrate, or allowed to consult with counsel. “During this period petitioners were threatened, interrogated, beaten, deprived of sleep and food and constantly harassed.” *Coard*, at para. 17. The petitioners alleged that their whereabouts were kept secret, and that requests by lawyers and others to meet with them were rejected. They also alleged that U.S. forces subjected them to threats and physical abuse – including threatening to hand the detainees over to Caribbean authorities and allowing Caribbean authorities to “soften” the detainees. *Coard*, at paras. 18-19.

American Commission in *Coard* held that: “What is required when an armed force detains civilians is the establishment of a procedure to ensure that the legality of the detention can be reviewed without delay and is subject to supervisory control. . . . [C]ontrol over a detention [cannot] rest[] exclusively with the agents charged with carrying it out.” *Coard*, at paras. 58-59.

Enforcement

The Inter-American Commission has competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to the American Convention.¹³⁹

“The main function of the Commission” is “to promote respect for and defense of human rights.”¹⁴⁰ Any person may lodge a petition with the Commission complaining of violation of the American Convention by a State Party, so long as effective domestic remedies available to the petitioner have been exhausted.¹⁴¹

On March 12, 2002, in response to a petition challenging detentions at Guantánamo Bay coordinated by the Center for Constitutional Rights,¹⁴² the Inter-American Commission adopted precautionary measures addressed to the United States concerning the

¹³⁹ See *supra* note 128, Art. 33.

¹⁴⁰ *Id.*, Art. 41. The Commission has also been willing to apply other relevant legal standards, including the Geneva Conventions.

¹⁴¹ *Id.*, Arts. 44 and 46. The Inter-American Court also has competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to the American Convention. *Id.*, Art. 33. Only States Parties and the Commission have the right to submit a case to the Inter-American Court, however, and only after the case has been considered by the Inter-American Commission. *Id.*, Art. 61.

¹⁴² A federal habeas corpus petition on behalf of named detainees at Guantánamo which was filed in parallel was dismissed for lack of jurisdiction because “the military base at Guantánamo Bay, Cuba is outside the sovereign territory of the United States.” *Rasul v. Bush*, 215 F. Supp. 2d 55, 72 (D.D.C. 2002), *cert. granted*, 2003 WL 22070599 (U.S. Nov. 10, 2003).

Guantánamo detainees.¹⁴³ Specifically, the Commission asked the U.S. “to take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal.”¹⁴⁴ In so doing, the Inter-American Commission explained:

[W]here persons find themselves within the authority and control of a state and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law. In short, no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights.¹⁴⁵

With regard to the Guantánamo Bay detainees in particular, the Inter-American Commission observed that: “[T]he information available suggests that the detainees remain entirely at the unfettered discretion of the United States government. Absent clarification of the legal status of the detainees, the Commission considers that the rights and protections to which they may be entitled under international or domestic law cannot be said to be the subject of

¹⁴³ See Rules of Procedure of the Inter-American Commission on Human Rights, Art. 25(1): “In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.”).

¹⁴⁴ *Ref. Detainees in Guantánamo Bay, Cuba Request for Precautionary Measures*, Inter-Am. C.H.R., Mar. 13, 2002, *reprinted in* 41 I.L.M. 532, 532. The Commission has ruled that OAS member states are subject to an international legal obligation to comply with a request for precautionary measures. See *Fifth Report on the Situation of Human Rights in Guatemala*, Inter-Am. C.H.R. OEA/Ser.L/V/II.111, Doc. 21 rev. (2001), at paras. 71-72 (2001); *Case 12.243*, Inter-Am. C.H.R. OEA/Ser.L/V/II.111, Doc. 21 rev. 1255 (2000), at para. 117.

¹⁴⁵ 41 I.L.M. at 533.

effective legal protection by the State.”¹⁴⁶ The Inter-American Commission further noted that, regardless of the legal status of the Guantánamo Bay detainees, their legal protections “may in no case fall below the minimal standards of non-derogable rights.”¹⁴⁷ Thereafter, the Commission issued a renewed request to the U.S. government for precautionary measures, stating that new factual allegations regarding torture or other ill-treatment of detainees “raise questions concerning the extent to which the United States’ policies and practices in detaining and interrogating persons in connection with its anti-terrorist initiatives clearly and absolutely prohibit treatment that may amount to torture or may otherwise be cruel, inhuman or degrading as defined under international norms.”¹⁴⁸

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*, at 534. The Inter-American Commission invited the U.S. to provide information concerning compliance with these precautionary measures. In response, the United States argued that: (i) the Commission did not have jurisdiction to apply international humanitarian law, particularly the Geneva Conventions, as well as customary international humanitarian law; (ii) the Commission lacks authority to request precautionary measures with respect to States which are not party to the American Convention; and (iii) in any event, precautionary measures are neither necessary nor appropriate because the detainees are not entitled to prisoner of war status, do not meet Geneva Convention criteria for lawful combatants and are, instead, enemy combatants. *See Response of the United States To Request For Precautionary Measures – Detainees in Guantánamo Bay, Cuba, reprinted in* 41 I.L.M. 1015, 1028-1030 (2002). The U.S. stated, however, that it “is providing the detainees with protections consistent with international humanitarian law.” *Id.* at 1031. The U.S. also asserted that it had no obligation to convene a tribunal to determine the detainees’ status, and that the detainees had no right to counsel or to have access to courts. *Id.* at 1034. The U.S. Response did not address interrogation techniques. However, on December 2, 2003, the Pentagon announced that U.S. citizen and Taliban soldier Yaser Esam Hamdi would be given access to a lawyer, “as a matter of discretion and military policy,” but that the decision “should not be treated as a precedent” and was “subject to appropriate security restrictions.” *See* Associated Press Newswires, *Pentagon OKs Lawyer For Terror Suspect*, Dec. 3, 2003; Jerry Markon and Dan Eggen, *U.S. Allows Lawyer For Citizen Held as “Enemy Combatant”*, WASH. POST, Dec. 3, 2003, at A01.

¹⁴⁸ *Ref. Detainees in Guantánamo Bay, Cuba Request for Precautionary Measures*, Inter-Am C.H.R., July 23, 2003, at 5.

Customary International Law and *Jus Cogens*

Relevant Legal Standards

Customary international law has long prohibited the state practice of torture, without reservation, in peace or in wartime.¹⁴⁹ On December 9, 1975, the United Nations General Assembly adopted by consensus the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Punishment.¹⁵⁰ The Torture Resolution together with CAT and the ICCPR – ratified by 133 and 151 States, respectively – embody the customary international law obligation to refrain from behavior which constitutes torture.¹⁵¹ In addition, in 1985 the United Nations Special Rapporteur on Torture, Pieter

¹⁴⁹ In order for a state's practice to be recognized as customary international law, it must fulfill two conditions:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, *i.e.*, the existence of a subjective element, is implicit in the very notion of the *opinion juris sive necessitas*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

North Sea Continental Shelf (*F.R.G. v. Den.*), 1969 I.C.J. 3, 44. *See also* Military and Paramilitary Activities (*Nicar v. U.S.*), 1986 I.C.J. 14, 14; R. JENNINGS & A. WATTS, OPPENHEIM'S INTERNATIONAL LAW, (9th ed. 1996); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (cited with approval in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983)); *U.S. v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2002).

¹⁵⁰ GA Res. 3452 (XXX), U.N. GAOR, Supp. No. 34 at 91 (hereinafter the "Torture Resolution").

¹⁵¹ *See Report by the Special Rapporteur*, U.N. Economic and Social Council, E/CN.4/1986/15, at para. 3. The report details state practice and *opinio juris* with respect to national legislation prohibiting torture. *See also* HERMAN J. BURGERS & HANS SANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (Martinus Nijhoff Publishers/Kluwer Academic Publishers 1988), at 1-12. The widespread ratification of regional human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the

Koojimans, noted the widespread existing domestic legislation in many countries, including the United States, expressly or by implication prohibiting torture as well as cruel, inhuman and degrading punishment.¹⁵²

The prohibition of torture is, moreover, one of the few norms which has attained peremptory norm or *jus cogens* status, and is recognized as such by United States courts.¹⁵³ *Jus cogens* is defined as a peremptory 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.”¹⁵⁴ While many international agreements expressly prohibit both torture and cruel, inhuman and degrading treatment,¹⁵⁵ it remains an open question as to whether *jus cogens* status

American Convention on Human Rights and the African Charter on Human and Peoples’ Rights further reinforce the argument that torture is prohibited by customary international law.

¹⁵² *Report by the Special Rapporteur, id.*, at paras. 72, 82.

¹⁵³ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1986). See also *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 716 (9th Cir. 1992); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1006 (9th Cir. 2000); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 Supp. 2d 1322 (N.D. Ga. 2002); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 7 (D.D.C. 1998); *Doe v. Unocal*, 963 F. Supp. 880, 890 (C.D. Cal. 1997).

¹⁵⁴ Vienna Convention on the Law of Treaties, 1969, Art. 53, 1155 U.N.T.S. 331.

¹⁵⁵ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., Art. 5, U.N. Doc. A/810 (1948) (“no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); 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, 30 U.N. GAOR, Supp. No. 34, U.N. Doc. A/10034 (1976), at Art. 3 (“Exceptional circumstances such as a state of war or a threat of war, internal political stability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”); ICCPR, *supra* note 118, at Art. 7 (“no one shall be subjected to torture or to cruel, inhuman or degrading treatment or

extends to the prohibition against cruel, inhuman or degrading treatment. What is clear, however, is that cruel, inhuman and degrading treatment or punishment is prohibited by customary international law.

U.S. ratification of the ICCPR and CAT are clear pronouncements that we condemn the practice of torture and CID treatment and that we consider ourselves legally bound to prohibit such conduct. Indeed, in 1999, the United States issued a report to the U.N.

Committee Against Torture categorically affirming that:

Every act constituting torture under the Convention constitutes a criminal offense under the law of the United States. No official of the Government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as justification for torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstance (for example, during a “state of public emergency”) or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension.¹⁵⁶

punishment”); Additional Protocol I, *supra* note 20, at Art. 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (“Additional Protocol II”), *reprinted in* 16 I.L.M. 1442 (1977), at Art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950), at Art. 3 (declaring that torture and inhuman or degrading treatment or punishment is prohibited); American Convention, *supra* note 128, at Art. 5 (providing that every person retain the right to be free from torture and ill-treatment); African Charter on Human and Peoples’ Rights, *reprinted in* 21 I.L.M. 58 (1981), at Art. 5 (prohibiting torture and ill-treatment).

¹⁵⁶ Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, United States of America, U.N. Doc. CAT/C/28/Add.5 (2000) (“U.S. Report Under CAT”), at para. 6.

Furthermore, the United States has enacted the Torture Victim Protection Act,¹⁵⁷ has imposed civil liability for acts of torture regardless of where such acts take place,¹⁵⁸ and has enacted the Torture Victims Relief Act, providing for monetary assistance for torture victims.¹⁵⁹ As previously discussed, not only does the U.S. Constitution prohibit cruel and unusual punishment or treatment by state officials (including under the military justice system), but almost all of the U.S. State constitutions have similar prohibitions.¹⁶⁰ Finally, a number of federal judicial proceedings have recognized that the right to be free from torture as well as cruel, inhuman or degrading treatment or punishment is a norm of customary international law.¹⁶¹

In the State Department Country Reports On Human Rights Practices, for example, the United States has expressly characterized the following types of conduct – some of which are allegedly occurring at U.S. detention centers – as “torture” or “other abuse”: tying detainees in painful positions; forcing detainees to stand for long periods of time; incommunicado detention; depriving detainees of sleep; dousing naked detainees with cold water; denial of access to medical attention; interrogation techniques designed to intimidate or disorient; subjecting a detainee to loud music; forcing a detainee to squat or to assume “stressful, uncomfortable or painful” positions for “prolonged periods of time”; long periods of

¹⁵⁷ 28 U.S.C. § 1350.

¹⁵⁸ *Id.*

¹⁵⁹ 22 U.S.C. § 2152.

¹⁶⁰ See Part I of this Report; U.S. Report Under CAT, at paras. 50, 301 - 348.

¹⁶¹ See *Abebe-Jira v. Negero*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Najarro de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994).

imprisonment in darkened rooms; verbal threats; and instilling detainees with the false belief that they are to be killed.¹⁶² The following types of conduct have been defined as cruel, inhuman or degrading treatment: stripping; confinement in severely overcrowded cells; beating; imprisonment in small containers; and threats against family members of detainees.¹⁶³

Enforcement

As the Second Circuit stated in *Filartiga v. Peña-Irala*, 630 F.2d 876 (1980), the United States is bound by customary international law. Thus, in cases where jurisdictional hurdles have been met, the bans on torture, arbitrary detention, and at least some aspects of cruel, inhuman and degrading treatment have been enforced by U.S. courts as violations of customary international law.¹⁶⁴

SHOULD EXCEPTIONS BE MADE FOR THE “WAR ON TERROR”?: THE EXPERIENCE OF OTHER JURISDICTIONS

Notwithstanding the clear legal prohibitions against the use of torture and cruel, inhuman or degrading treatment in U.S. and international law, we considered whether, in a post-September 11 world, the threat posed by terrorists to the United States could ever justify the use of prohibited interrogation practices. We sought to answer the question of whether there are any

¹⁶² See U.S. Dept. of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices – 2002* (for Brazil, Burma, China, Egypt, Israel and the occupied territories, Jordan, Kenya, Democratic People’s Republic of Korea, Laos, Pakistan, Saudi Arabia, Togo, Turkey and Zimbabwe) (Mar. 31, 2003).

¹⁶³ *Id.* (for Cameroon, Mongolia, Nigeria and Rwanda).

¹⁶⁴ See, e.g., *Filartiga v. Peña-Irala*, 639 F.2d 876 (2d Cir. 1980) (allowing a torture claim to be prosecuted under the Alien Tort Claims Act, 28 U.S.C. § 1350); see also *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541-43 (N.D. Cal. 1987) (recognizing torture and arbitrary detention as violations of customary international law, but finding that universal consensus regarding right to be free from cruel, inhuman and degrading treatment had not yet been established).

circumstances in which torture and CID treatment in the interrogation of detainees should be permitted.

For additional guidance in answering these questions, we looked to the experiences of Northern Ireland and Israel, other places where the struggle between fighting terrorism and upholding the rule of law has been waged. Both the European Court of Human Rights and the Israeli Supreme Court have confronted the contradictory demands of national security and human rights against the backdrop of terrorism. The legal debate that infuses these courts' seminal decisions on the use of torture and CID treatment in the interrogation of terrorist suspects offers guidance to the United States in interpreting CAT. These courts have ruled that there are no exceptions to the prohibition against torture and CID treatment. Their rulings express the conviction that the torture and CID treatment of detainees – even when those detainees are suspected terrorists – cannot be justified.

Legal Challenges to Interrogation Practices in Northern Ireland and Israel

The Republic of Ireland v. The United Kingdom

The European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”) came into force in 1953.¹⁶⁵ Article 3 of the European Convention provides: “No one shall be subject to torture or to inhuman or degrading treatment or punishment.” The judicial body primarily charged with interpreting and enforcing the European Convention is the European Court of Human Rights (the “ECHR”). The ECHR has, in several decisions, applied the European Convention’s prohibition against torture and inhuman or degrading treatment to cases involving interrogation of suspected terrorists who pose a threat to national security.

¹⁶⁵ 213 U.N.T.S. 221.

The most important of these decisions is *The Republic of Ireland*.¹⁶⁶ *The Republic of Ireland* case was decided in a legal and political environment conditioned by several years of terrorism in Northern Ireland perpetrated by members of the Irish Republican Army (IRA) and Loyalist groups. By March 1975, over 1,100 people had been killed, over 11,500 injured and £140 million worth of property destroyed.¹⁶⁷ To combat a campaign of violence being carried out by the IRA, in 1971, the Northern Ireland Government introduced regulations providing authorities with extrajudicial powers, including arrest for interrogation purposes and internment.¹⁶⁸

The Republic of Ireland Decision is a landmark legal discussion of whether specific interrogation practices committed by British security forces against IRA detainees constituted torture or inhuman or degrading treatment. The impetus for the ECHR's decision was the Republic of Ireland's application before the European Commission of Human Rights alleging, among other things, that various interrogation practices – including specific practices referred to as the “five techniques” – amounted to torture and inhuman or degrading treatment, in contravention of Article 3 of the European Convention.¹⁶⁹ The “five techniques” – described by the ECHR as methods of “disorientation” or “sensory deprivation” – include a number of practices allegedly being used today by U.S. interrogators:

- Wall-standing: Forcing a detainee to remain spread-eagled against a wall with his fingers placed high above his head against the wall, his legs spread apart and his feet positioned such that he must stand on his toes with the weight of his body resting on his fingers;

¹⁶⁶ *The Republic of Ireland v. The United Kingdom*, (1979-80) 2 E.H.R.R. 25.

¹⁶⁷ *Id.*, at 30-31.

¹⁶⁸ *Id.*, at 36.

¹⁶⁹ *Id.*, at 25.

- Hooding: Keeping a dark bag over a detainee’s head at all times, except during interrogation;
- Subjection to noise: Holding a detainee in a room where there is a continuous loud and hissing noise;
- Deprivation of sleep; and
- Deprivation of food and drink.¹⁷⁰

The European Commission of Human Rights unanimously found that the “five techniques” constituted torture, and that other challenged interrogation practices amounted to inhuman and degrading treatment.¹⁷¹ Although the British Government subsequently discontinued the “five techniques” and did not contest the underlying allegations of the case or the Commission’s findings in connection therewith, the Republic of Ireland nevertheless referred the case to the ECHR.¹⁷² The ECHR took the opportunity to rule upon the legality of the “five techniques,” citing to the European Court’s responsibility “to elucidate, safeguard and develop the rules instituted by the Convention.”¹⁷³

In *The Republic of Ireland* decision, the ECHR explained that ill-treatment “had to attain a minimum level of severity to fall within Article 3, the assessment of which was necessarily relative, depending on all the circumstances, including the duration of the treatment, its physical or mental effects and, sometimes, the sex, age or state of health of the victim.”¹⁷⁴ The ECHR pointed out that, while the term “torture” attached “a special stigma to deliberate inhuman treatment causing very serious and cruel suffering,” the distinction between torture and

¹⁷⁰ *Id.*, at 59.

¹⁷¹ *Id.*, at 25.

¹⁷² *Id.*, at 25.

¹⁷³ *Id.*, at 75-76.

¹⁷⁴ *Id.*, at 26.

inhuman or degrading treatment “derived principally from a difference in the intensity of the suffering inflicted.”¹⁷⁵ The ECHR held that since the “five techniques” “were applied in combination, with premeditation and for hours at a time, causing at least intense physical and mental suffering and acute psychiatric disturbances, they amount to inhuman treatment.”¹⁷⁶ The ECHR further held that since the “five techniques” aroused “in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, they were also degrading.”¹⁷⁷ The ECHR concluded that the “five techniques” violated Article 3’s prohibition against inhuman or degrading treatment, but that they did not amount to torture.¹⁷⁸

¹⁷⁵ *Id.*, at 26.

¹⁷⁶ *Id.*, at 26.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*, at 79-80. In separate annexed opinions, Judges Zekia, O’Donoghue and Evrigenis disagreed with the majority’s ruling that the five practices did not amount to torture.

In the years since the *Republic of Ireland* decision, neither time nor the ever-expanding threat of terrorism has diminished the ECHR’s commitment to maintaining an absolute prohibition against torture and inhuman or degrading treatment. In *Chahal v. United Kingdom*, Case No. 70/1995/576/662 (Nov. 15, 1996), for example, the ECHR rejected Great Britain’s argument that national security considerations justified the deportation of an Indian citizen to India on grounds that he was active in extremist Sikh organizations in England and was suspected of planning terrorist and other violent acts in the country. Chahal argued that, if deported, he would be tortured in India. In ruling that Chahal’s deportation by the United Kingdom would constitute a violation of Article 3 of the Convention, the ECHR stated:

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 modern times 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. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no

*Israeli Supreme Court Judgment Concerning The Legality
Of The General Security Service's Interrogation Methods*
As the Israeli Supreme Court notes at the outset of its *Judgment Concerning The*

Legality Of The General Security Service's Interrogation Methods,¹⁷⁹ the State of Israel “has been engaged in an unceasing struggle for both its very existence and security, from the day of its founding”:

Terrorist organizations have established as their goal Israel's annihilation. Terrorist acts and the general disruption of order are their means of choice. In employing such methods, these groups do not distinguish between civilian and military targets. They carry out terrorist attacks in which scores are murdered in public areas, public transportation, city squares and centers, theaters and coffee shops. They do not distinguish between men, women and children. They act of cruelty and without mercy.¹⁸⁰

In 1987, the Landau Commission of Inquiry into the Methods of Investigation of the GSS Regarding Hostile Terrorist Acts (the “Landau Commission”) was established to investigate the interrogation practices of the main body responsible for fighting terrorism in Israel, the General Security Service (the “GSS”), and to reach legal conclusions concerning them. The resulting Landau Report,¹⁸¹ concluded: “The effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate

provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

Id., at 79. *See also Aksoy v. Turkey*, Case No. 100/1995/606/694 (Dec. 15, 1996), para. 62 (ruling that Turkish security forces' treatment of a detainee suspected of membership and activity on behalf of the PKK, a Kurdish militant organization operating against the Turkish government, constituted torture).

¹⁷⁹ *Judgment Concerning The Legality Of The General Security Service's Interrogation Methods*, 38 I.L.M. 1471 (Sept. 9, 1999) (the “GSS Interrogation Methods Decision”).

¹⁸⁰ *Id.*, at 1472.

¹⁸¹ Excerpts printed in 23 Isr. L. Rev. 146 (1989).

will not to disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does not reveal information.”¹⁸² The Landau Report explained that: “The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided.”¹⁸³ The Landau Commission recommended, however, that GSS interrogators should be guided by clear rules “to prevent the use of inordinate physical pressure arbitrarily administered,” and formulated a code of guidelines (set forth in a secret part of the Landau Report) which defined, “on the basis of past experience, and with as much precision as possible, the boundaries of what is permitted to the interrogator and mainly what is prohibited to him.”¹⁸⁴ The Landau Commission asserted that the latitude it afforded GSS interrogators to use “a moderate measure of physical pressure” did not conflict with the standards set forth in international human rights conventions – such as the UDHR, the ICCPR and the European Convention – which prohibited torture and cruel, inhuman or degrading treatment or punishment.¹⁸⁵

In 1999, in the *GSS Interrogation Methods Decision*, the Israeli Supreme Court took up the legality of certain interrogation practices employed by the GSS. The Israeli Supreme Court acknowledged that the Landau Commission had approved the use of “a moderate degree of physical pressure,” and that the Landau Commission’s recommendations had been accepted by

¹⁸² *Id.*, at 184.

¹⁸³ *Id.*

¹⁸⁴ *Id.*, at 185.

¹⁸⁵ *Id.*, at 186.

the Israeli Government.¹⁸⁶ The interrogation methods considered by the Israeli Supreme Court in the *GSS Interrogation Methods Decision* were:

- Shaking: Forcefully shaking a detainee’s upper torso back and forth, repeatedly, and in a manner which causes the neck and head to dangle and vacillate rapidly.
- The “shabach” position: Forcing a detainee who has his hands tied behind his back to sit on a small and low chair whose seat is tilted forward and towards the ground, where one hand is placed inside the gap between the chair’s seat and back support, the detainee’s head is covered by an opaque sack falling down to his shoulders, and powerfully loud music is played in the room.
- The “frog crouch”: Forcing a detainee to crouch on the tips of his/her toes for five minute intervals.
- Excessive tightening of handcuffs: Using particularly small cuffs, ill-fitted in relation to the suspect’s arm or leg size.
- Sleep deprivation: A detainee is deprived of sleep as a result of being tied in the “shabach” position, being subjected to powerfully loud music or intense non-stop interrogations.¹⁸⁷

In examining the legality of these GSS interrogation methods, the Israeli Supreme Court acknowledged that, taken individually, some of the components of the “shabach” position have “legitimate” goals: for example, hooding prevents communication between suspects, the playing of powerfully loud music prevents the passing of information between suspects, the tying of the suspect’s hands to a chair protects investigators, and the deprivation of sleep can be

¹⁸⁶ *GSS Interrogation Methods Decision*, 38 I.L.M. at 1477.

¹⁸⁷ *Id.*, at 1474 -76. The Israeli Government argued that such interrogation methods did not need to be outlawed because, before resorting to physical pressure against detainees, GSS interrogators are instructed to “probe the severity of the danger that the interrogation is intending to prevent; consider the urgency of uncovering the information presumably possessed by the suspect in question; and seek an alternative means of preventing the danger.” *Id.*, at 1475. The Israeli Government also argued that directives respecting interrogation provide that in cases where shaking – considered the harshest interrogation method of those examined in the *GSS Interrogation Methods Decision* – is to be used, “the investigator must first provide an evaluation of the suspect’s health and ensure that no harm comes to him.” *Id.*, at 1475.

necessitated by an interrogation.¹⁸⁸ According to the Israeli Supreme Court, however, there is a necessary balancing process between a government's duty to ensure that human rights are protected and its duty to fight terrorism. The results of that balance, the Israeli Supreme Court stated, are the rules for a "reasonable interrogation" – defined as an interrogation which is: (1) "necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever"; and (2) "likely to cause discomfort."¹⁸⁹ "In the end result," the Court noted, "the legality of an investigation is deduced from the propriety of its purpose and from its methods."¹⁹⁰

Turning to the specific interrogation methods before it, the Court concluded that shaking, the "frog crouch," the "shabach" position, cuffing causing pain, hooding, the consecutive playing of powerfully loud music and the intentional deprivation of sleep for a prolonged period of time are all prohibited interrogation methods.¹⁹¹ "All these methods do not fall within the sphere of a 'fair' interrogation. They are not reasonable. They impinge upon the suspect's dignity, his bodily integrity and his basic rights in an excessive manner (or beyond what is necessary). They are not to be deemed as included within the general power to conduct interrogations."¹⁹² The Israeli Supreme Court explained that restrictions applicable to police investigations are equally applicable to GSS investigations, and that there are no grounds to

¹⁸⁸ *Id.*, at 1480 - 81.

¹⁸⁹ *Id.*, at 1482.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*, at 1482-84.

¹⁹² *Id.*, at 1483.

permit GSS interrogators to engage in conduct which would be prohibited in a regular police interrogation.¹⁹³

In so ruling, the Israeli Supreme Court considered the “ticking time bomb” scenario often confronted by GSS interrogators:

A given suspect is arrested by the GSS. He holds information respecting the location of a bomb that was set and will imminently explode. There is no way to defuse the bomb without this information. If the information is obtained, however, the bomb may be defused. If the bomb is not defused, scores will be killed and maimed. Is a GSS investigator authorized to employ physical means in order to elicit information regarding the location of the bomb in such instances?¹⁹⁴

The Israeli Supreme Court stated that it was prepared to presume that if a GSS investigator – who applied physical interrogation methods for the purpose of saving human life – is criminally indicted, the “necessity” defense recognized under Israeli Penal Law would be open to him in the appropriate circumstances.¹⁹⁵ The Israeli Supreme Court also acknowledged that the legislature could enact laws permitting the interrogation methods that its decision struck down.¹⁹⁶ However, the Israeli Supreme Court refused to imply from the existence of the “necessity” defense, as the State argued for it to do, “an advance legal authorization endowing the investigator with the capacity to use physical interrogation methods.”¹⁹⁷

¹⁹³ *Id.*, at 1485.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*, at 1486.

¹⁹⁶ *Id.*, at 1487.

¹⁹⁷ *Id.*, at 1486.

The Legal and Moral Implications of the “Ticking Bomb” Scenario

As the *Republic of Ireland* and *GSS Interrogation Methods Decision* demonstrate,

in the face of a terrorist threat there is an inherent tension between obtaining potentially life-saving intelligence information through abusive interrogation of detainees and upholding human rights:

In crystallizing the interrogation rules, two values or interests clash. On the one hand, lies the desire to uncover the truth, thereby fulfilling the public interest in exposing crime and preventing it. On the other hand, is the wish to protect the dignity and liberty of the individual being interrogated.¹⁹⁸

International and human rights law is clear: torture and cruel, inhuman or degrading treatment of detainees is prohibited. Those who would, nevertheless, support the use of moderate physical force, sensory deprivation or disorientation techniques in the interrogation of terrorist suspects argue that resort to such methods is, at times, the only way to prevent the death of innocent persons and is, therefore, justified in such cases as the “lesser of two evils.” Proponents of this view would argue that the legitimacy of an act can be measured by whether its utility exceeds its harm. On this point, the Landau Commission took the following position:

To put it bluntly, the alternative is: are we to accept the offense of assault entailed in slapping a suspect’s face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident.

Everything depends on weighing the two evils against each other.¹⁹⁹

In the case of detainees being held by the U.S. in connection with the “War on Terror,” however, the “ticking bomb” scenario is further complicated. Any utilitarian

¹⁹⁸ *Id.*, at 1481.

¹⁹⁹ *See* 23 *Isr. L. Rev.*, at 174.

justification for subjecting these detainees to interrogation practices prohibited by CAT must necessarily be premised on the certainty (or, at least, the substantiated suspicion) that these individuals do, in fact, possess vital intelligence information. But, here, there is no such certainty. Instead, hundreds of detainees at Guantánamo Bay, Bagram Air Force Base and other U.S. detention facilities have been detained for months without any type of hearing or legal challenge permitted to their detention.

Our answer to the question of whether torture of detainees should ever be permitted in a post-September 11 world is that there are no such circumstances. We condemn the use of torture in interrogation of detainees, without exception. By its terms, CAT permits no derogation of the prohibition against torture – stating that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture.”²⁰⁰ As the Israeli Supreme Court has explained, “A democratic, freedom-loving society does not accept that investigators use any means for the purpose of uncovering the truth. ‘The interrogations practices of the police in a given regime are indicative of a regime’s very character.’”²⁰¹

We recognize that some legal scholars and ethicists may well argue that circumstances exist (as in the “ticking bomb” scenario) in which torture and CID treatment in the interrogation of detainees should be permitted. However, we stress that torture of detainees – which is prohibited under international and U.S. law – is never permissible, and should be fully investigated and prosecuted in all cases.

* * *

²⁰⁰ CAT, Art. 2.

²⁰¹ *GSS Interrogation Methods Decision*, 38 I.L.M. at 1481 (internal citations omitted).

In summary, the Association makes the following recommendations:

First, we urge the United States to amend 18 U.S.C. § 2340 to encompass the actions of military and intelligence personnel at U.S. facilities overseas, to fully utilize the UCMJ to protect all detainees from abuse and to independently investigate human rights compliance in countries to which we are “rendering” detainees.

Second, U.S. military and intelligence personnel involved in interrogation of terrorist suspects should be educated regarding the prohibition against torture and CID, and should receive training to comply with those rules.

Third, the U.S. should adhere to its commitments under the Geneva Conventions, extend POW treatment to regular force combatants as a matter of policy, and promptly establish proper screening procedures and hearings for all detainees.

Finally, the Association notes that particularly in these times of terrorism and violence, it is important to protect the rule of law and the standards of decency to which our nation and the community of nations are committed. As the Israeli Supreme Court has stated:

This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand.²⁰²

* * *

²⁰² *Id.*, at 1488.

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The views expressed herein are solely those of the Association and the participating Committees.

The Committee on International Human Rights and Military Affairs and Justice would like to thank the following persons for their assistance in the preparation of the report: John Cerone (Executive Director, War Crimes Research Office, Washington College of Law, American University); Ken Hurwitz (Human Rights First); Professor Marco Sassòli (University of Geneva, professor of international law); Brigitte Oederlin and Gabor Rona (International Committee of the Red Cross); Paul, Weiss, Rifkind, Wharton & Garrison LLP (“Paul Weiss”) associates Katarina Lawergren and Marc Miller and former Paul Weiss associate Matias Milet; and New York University School of Law students Ari Bassin, Amber A. Baylor, Angelina Fisher, Tzung-lin Fu, David R. Hoffman, Jane Stratton and Stephanie S. Welch; and New York Law School student Holly Higgins. This report could not have been completed without the indefatigable efforts of Paul Weiss associate Liza Velazquez in helping edit the many drafts of the Report and

consolidating the many views and comments of the Committees and Subcommittee into a coherent whole.

Appendix A

December 26, 2002

President George W. Bush

The White House

1600 Pennsylvania Avenue, NW

Washington, DC 20500

Dear President Bush:

Human Rights Watch is deeply concerned by allegations of torture and other mistreatment of suspected al-Qaeda detainees described in the Washington Post ("U.S. Decries Abuse but Defends Interrogations") on December 26. The allegations, if true, would place the United States in violation of some of the most fundamental prohibitions of international human rights law. Any U.S. government official who is directly involved or complicit in the torture or mistreatment of detainees, including any official who knowingly acquiesces in the commission of such acts, would be subject to prosecution worldwide.

Human Rights Watch urges you to take immediate steps to clarify that the use of torture is not U.S. policy, investigate the Washington Post's allegations, adopt all necessary measures to end any ongoing violations of international law, stop the rendition of detainees to countries where they are likely to be tortured, and prosecute those implicated in such abuse.

I. Prohibitions Against Torture

The Washington Post reports that persons held in the CIA interrogation centers at Bagram air base in Afghanistan are subject to "stress and duress" techniques, including "standing or kneeling for hours" and being "held in awkward, painful positions." The Post notes that the detention facilities at Bagram and elsewhere, such as at Diego Garcia, are not monitored by the International Committee of the Red Cross, which has monitored the U.S. treatment of detainees at Guantánamo Bay, Cuba.

The absolute prohibition against torture is a fundamental and well-established precept of customary and conventional international law. Torture is never permissible against anyone, whether in times of peace or of war.

The prohibition against torture is firmly established under international human rights law. It is prohibited by various treaties to which the United States is a party, including the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the United States ratified in 1994. Article 7 of the ICCPR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The right to be protected from torture is non-derogable, meaning that it applies at all times, including during public emergencies or wartime.

International humanitarian law (the laws of war), which applies during armed conflict, prohibits the torture or other mistreatment of captured combatants and others in captivity, regardless of their legal status. Regarding prisoners of war, article 17 of the Third Geneva Convention of 1949 states: "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." Detained civilians are similarly protected by article 32 of the Fourth Geneva Convention. The United States has been a party to the 1949 Geneva Conventions since 1955.

The United States does not recognize captured al-Qaeda members as being protected by the 1949 Geneva Conventions, although Bush administration officials have insisted that detainees will be treated humanely and in a manner consistent with Geneva principles. However, at minimum, all detainees in wartime, regardless of their legal status, are protected by customary international humanitarian law. Article 75 ("Fundamental Guarantees") of the First Additional Protocol to the Geneva Conventions, which is recognized as restating customary international law, provides that "torture of all kinds, whether physical or mental" against "persons who are in the power of a

Party to the conflict and who do not benefit from more favorable treatment under the [Geneva] Conventions," shall "remain prohibited at any time and in any place whatsoever, whether committed by civilian or military agents." "[C]ruel treatment and torture" of detainees is also prohibited under common article 3 to the 1949 Geneva Conventions, which is considered indicative of customary international law.

II. Possible U.S. Complicity in Torture

It is a violation of international law not only to use torture directly, but also to be complicit in torture committed by other governments. The Post reports being told by U.S. officials that "[t]housands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners." The Convention against Torture provides in article 4 that all acts of torture, including "an act by any person which constitutes complicity or participation in torture," is an offense "punishable by appropriate penalties which take into account their grave nature."

The Post article describes the rendition of captured al-Qaeda suspects from U.S. custody to other countries where they are tortured or otherwise mistreated. This might also be a violation of the Convention against Torture, which in article 3 states: "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.... 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."

The U.S. Department of State annual report on human rights practices has frequently criticized torture in countries where detainees may have been sent. These include Uzbekistan, Pakistan, Egypt, Jordan and Morocco. The United States thus could not plausibly claim that it was unaware of the problem of torture in these countries.

III. International Prosecutions for Torture and Command Responsibility

Direct involvement or complicity in torture, as well as the failure to prevent torture, may subject U.S. officials to prosecution under international law.

The willful torture or inhuman treatment of prisoners-of-war or other detainees, including "willfully causing great suffering or serious injury to body or health," are "grave breaches" of the 1949 Geneva Conventions, commonly known as war crimes. Grave breaches are subject to universal jurisdiction, meaning that they can be prosecuted in any national criminal court and as well as any international tribunal with appropriate jurisdiction.

The Convention against Torture obligates States Parties to prosecute persons within their jurisdiction who are implicated or complicit in acts of torture. This obligation includes the prosecution of persons within their territory who committed acts of torture elsewhere and have not be extradited under procedures provided in the convention.

Should senior U.S. officials become aware of acts of torture by their subordinates and fail to take immediate and effective steps to end such practices, they too could be found criminally liable under international law. The responsibility of superior officers for atrocities by their subordinates is commonly known as command responsibility. Although the concept originated in military law, it now is increasingly accepted to include the responsibility of civil authorities for abuses committed by persons under their direct authority. The doctrine of command responsibility has been upheld in recent decisions by the international criminal tribunals for the former Yugoslavia and for Rwanda.

There are two forms of command responsibility: direct responsibility for orders that are unlawful and imputed responsibility, when a superior knows or should have known of crimes committed by a subordinate acting on his own initiative and fails to prevent or punish them. All states are obliged to bring such people to justice.

The allegations made by the Washington Post are extraordinarily serious. They have put the United States on notice that acts of torture may be taking place with U.S. participation or complicity. That creates a heightened duty

to respond preventively. As an immediate step, we urge that you issue a presidential statement clarifying that it is contrary to U.S. policy to use or facilitate torture. The Post's allegations should be investigated and the findings made public. Should there be evidence of U.S. civilian or military officials being directly involved or complicit in torture, or in the rendition of persons to places where they are likely to be tortured, you should take immediate steps to prevent the commission of such acts and to prosecute the individuals who have ordered, organized, condoned, or carried them out. The United States also has a duty to refrain from sending persons to other countries with a history of torture without explicit and verifiable guarantees that no torture or mistreatment will occur.

Thank you for your attention to these concerns.

Sincerely,

Kenneth Roth

Executive Director

Cc: Colin Powell, Secretary of State

Donald Rumsfeld, Secretary of Defense

Condoleezza Rice, National Security Advisor

January 31, 2003

The Honorable George W. Bush
The White House
Washington, DC 20301-1010

Dear President Bush:

We are writing to you on a matter of great concern. As you are no doubt aware, on December 26th the Washington Post reported that your Administration has used, tacitly condoned or facilitated torture by third countries in the interrogation of prisoners. These reports are so flagrantly at odds with your many statements about the importance of human rights that we trust that you are equally disturbed by it.

You have repeatedly declared that the United States “will always stand firm for the non-negotiable demands of human dignity.” Surely there is no more basic and less negotiable requirement of human dignity than the right to be free of torture or cruel, inhuman or degrading treatment. As you know, under the Torture Convention “no exceptional circumstances whatsoever” may be invoked to justify torture and no party may return 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.” Likewise, under the Covenant on Civil and Political Rights, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

As you declared in your State of the Union address, these solemn commitments of the United States are non-negotiable; in legal terms, there can be no derogation from them. You may also know that it was your father’s Administration that sought and received overwhelming Senate support for the United States to ratify these two treaties.

The Administration’s response to the outrageous statements made by numerous unnamed officials to the Post’s reporters concerning United States use or tolerance of torture and cruel, inhuman and degrading treatment has thus far been wholly inadequate. Whatever the truth of the Post’s allegations, without a more authoritative response to this high-profile story the world will conclude that the United States is not practicing what it preaches. America’s authority as a champion of human rights will be seriously damaged.

What is clearly needed in this instance are unequivocal statements by you and your Cabinet officers that torture in any form or manner will not be tolerated by this Administration, that any US official found to have used or condoned torture will be held accountable, and that the United States would neither seek nor rely upon intelligence obtained through torture in a third country. These statements need to be accompanied by clear written guidance applicable to everyone engaged in the interrogation and rendition of prisoners strictly prohibiting the use or tolerance of torture or cruel, inhuman or

degrading treatment of prisoners and mandating full compliance with the Geneva conventions requirements for the treatment of prisoners.

We urge you in the strongest terms to take this opportunity to demonstrate that torture and cruel, inhuman and degrading treatment is, in fact as well as word, non-negotiable.

Sincerely,

William Schulz
Amnesty International USA

Kenneth Roth
Human Rights Watch

Gay McDougall
International Human Rights Law Group

Louise Kantrow
International League for Human Rights

Michael Posner
Lawyers Committee for Human Rights

Robin Phillips
Minnesota Advocates for Human Rights

Len Rubenstein
Physicians for Human Rights

Todd Howland
RFK Memorial Center for Human Rights

NATIONAL CONSORTIUM OF
TORTURE TREATMENT PROGRAMS

74-09 37th AVE. ROOM 412, JACKSON HEIGHTS, NEW YORK, U.S.A.
TEL: 718-899-1233, EXT. 101; FAX: 718-457-6071

February 5, 2003

President George Bush
Fax 202- 456-2461

Dear President Bush:

The National Consortium of Torture Treatment Programs consists of 33 programs throughout the United States that provide medical and mental health care, as well as legal and social services, to survivors of politically motivated torture. I am writing on behalf of our membership to request a dialogue with the Administration regarding recent allegations published in the *Washington Post* that certain U.S. practices, including “stress and duress tactics” and “rendering” of detainees to foreign intelligence services, may amount to or result in torture.

Members of the Consortium commend your strong denunciation of torture in Iraq during this week’s State of the Union address. As health professionals caring for torture victims, we have witnessed first-hand the devastating impact torture has on the health and well-being of its victims. Every day we see the aftereffects of the abuses you described during your address. We see the scars from shackles, the marks from cigarette burns inflicted during interrogation, the wounds and broken bones from severe beatings, and the disfiguration from acid or flames. We listen to stories of shame and humiliation, of haunting nightmares and memories that will not go away, and of lives shattered by extreme cruelty.

The individuals we care for are among the estimated 500,000 torture survivors now living in the United States. Iraq is only one of 100 countries represented in our client populations last year. Sadly, torture is perpetrated or condoned in nations across the world.

The United States has stated its commitment to end torture in our world, and we commend the Department of State for its continuing efforts in this regard. This nation has also demonstrated its commitment to healing torture survivors who live in this country and abroad through passage of the Torture Victims Relief Act in 1998 and subsequent appropriations to the U.S. Office of Refugee Resettlement, the U.S. Agency for International Development, and the United Nations Voluntary Fund for Victims of Torture.

In order to maintain our country's commitment to end torture and support healing, we are deeply concerned by the allegations published in the *Washington Post*. The National Consortium of Torture Treatment Programs takes no position on the credibility of these allegations. We urge the United States government to fully investigate the allegations of torture of detainees, and to place on the public record our nation's policies and practices with respect to torture.

We request a meeting to discuss a response to the *Washington Post* allegations. We suggest that participants might include Anthony Banbury, William Haynes, William Taft, IV, and Lorne Craner. I hope a member of your staff will contact my office to schedule such a meeting.

Mr. President, torture undermines the fabric of society through fear and terror. As the U.S. Congress articulated in its resolution of June 20, 2001, "When one individual is tortured, the scars inflicted by such horrific treatment are not only found in the victim but in the global system, as the use of torture undermines, debilitates, and erodes the very essence of that system." We urge you to authorize an investigation of the allegations published in the *Washington Post*, to communicate the results of that investigation to the American people, and to ensure that the United States does not and will not participate in torture.

Respectfully,

Ernest Duff
President
National Consortium of Torture Treatment Programs

cc: Anthony Banbury, Acting Senior Director for Democracy, Human Rights and International Operations, National Security Council, Fax (202) 456-9140
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William Taft, IV, Legal Advisor, Department of State, Fax (202)647-1037

PATRICK LEAHY
VERMONT

COMMITTEES:
AGRICULTURE, NUTRITION, AND
FORESTRY
APPROPRIATIONS
JUDICIARY

United States Senate

WASHINGTON, DC 20510-4502

June 2, 2004

The Honorable Condoleezza Rice
National Security Adviser
The White House
Washington, DC 20500

Dear Dr. Rice:

Over the past several months, unnamed Administration officials have suggested in several press accounts that detainees held by the United States in the war on terrorism have been subjected to "stress and duress" interrogation techniques, including beatings, lengthy sleep and food deprivation, and being shackled in painful positions for extended periods of time. Our understanding is that these statements pertain in particular to interrogations conducted by the Central Intelligence Agency in Afghanistan and other locations outside the United States. Officials have also stated that detainees have been transferred for interrogation to governments that routinely torture prisoners.

These assertions have been reported extensively in the international media in ways that could undermine the credibility of American efforts to combat torture and promote the rule of law, particularly in the Islamic world.

I appreciate President Bush's statement, during his recent meeting with U.N. High Commissioner for Human Rights Sergio De Mello, that the United States does not, as a matter of policy, practice torture. I also commend the Administration for its willingness to meet with and respond to the concerns of leading human rights organizations about reports of mistreatment of detainees. At the same time, I believe the Administration's response thus far, including in a recent letter to Human Rights Watch from Department of Defense General Counsel William Haynes, while helpful, leaves important questions unanswered.

The Administration understandably does not wish to catalogue the interrogation techniques used by U.S. personnel in fighting international terrorism. But it should affirm with clarity that America upholds in practice the laws that prohibit the specific forms of mistreatment reported in recent months. The need for a clear and thorough response from the Administration is all the greater because reports of mistreatment initially arose not from outside complaints, but from statements made by administration officials themselves.

With that in mind, I would appreciate your answers to the following questions:

First, Mr. Haynes' letter states that when questioning enemy combatants, U.S. personnel are required to follow "applicable laws prohibiting torture." What are those laws? Given that the United States has ratified the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), is this Convention one of those laws, and does it bind U.S. personnel both inside and outside the United States?

Second, does the Administration accept that the United States has a specific obligation under the CAT not to engage in cruel, inhuman and degrading treatment?

Third, when the United States ratified the CAT, it entered a reservation regarding its prohibition on cruel, inhuman and degrading treatment, stating that it interprets this term to mean "the cruel, unusual and inhumane treatment or punishment prohibited by the 5th, 8th, and/or 14th amendments to the Constitution." Are all U.S. interrogations of enemy combatants conducted in a manner consistent with this reservation?

Fourth, in its annual Country Reports on Human Rights Practices, the State Department has repeatedly condemned many of the same "stress and duress" interrogation techniques that U.S. personnel are alleged to have used in Afghanistan. Can you confirm that the United States is not employing the specific methods of interrogation that the State Department has condemned in countries such as Egypt, Iran, Eritrea, Libya, Jordan and Burma?

Fifth, the Defense Department acknowledged in March that it was investigating the deaths from blunt force injury of two detainees who were held at Bagram air base in Afghanistan. What is the status of that investigation and when do you expect it to be completed? Has the Defense Department or the CIA investigated any other allegations of torture or mistreatment of detainees, and if so, with what result? What steps would be taken if any U.S. personnel were found to have engaged in unlawful conduct?

Finally, Mr. Haynes' letter offers a welcome clarification that when detainees are transferred to other countries, "U.S. government instructions are to seek and obtain appropriate assurances that such enemy combatants are not tortured." How does the Administration follow up to determine if these pledges of humane treatment are honored in practice, particularly when the governments in question are known to practice torture?

I believe these questions can be answered without revealing sensitive information or in any way undermining the fight against international terrorism. Defeating terrorism is a national security priority, and no one questions the imperative of subjecting captured terrorists to thorough and aggressive interrogations consistent with the law.

The challenge is to carry on this fight while upholding the values and laws that distinguish us from the enemy we are fighting. As President Bush has said, America is not merely struggling to defeat a terrible evil, but to uphold "the permanent rights and the hopes of mankind." I hope you agree that clarity on this fundamental question of human rights and human dignity is vital to that larger struggle.

Thank you for your assistance.

Sincerely,



PATRICK LEAHY
United States Senator

Condi- I want to make
sure we are on the
right moral plain if an
American is being held
abroad.



THE ASSOCIATION OF THE BAR
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June 4, 2003

Scott W. Muller
General Counsel
Central Intelligence Agency
1 George Bush Center
Washington, D.C. 20505

Dear Mr. Muller:

We are writing on behalf of the Committees on International Human Rights and Military Affairs & Justice of the Association of the Bar of the City of New York. Founded in 1870, the Association is an independent non-governmental organization with a membership of more than 22,000 lawyers, judges, law professors and government officials, principally from New York City but also from throughout the United States and from 40 other countries. The Committee on International Human Rights investigates and reports on human rights conditions around the world. The Committee on Military Affairs & Justice engages in matters of policy and law relating to the United States Armed Forces. The two committees are investigating reports about the treatment of detainees subject to CIA interrogation at locations outside of the United States, including the centers at Bagram air base in Afghanistan and on the island of Diego Garcia and at Guantanamo.

Over the past six months, several newspapers (the Washington Post, The New York Times and the Wall Street Journal) have reported allegations of abusive treatment by U.S. interrogators of people detained at Bagram. As described in these reports, some of the abusive treatment would qualify under international law as torture or cruel, inhuman and degrading treatment. In addition, the reports state that in some instances, people suspected of having links to terrorism have been apprehended by U.S. officials outside of the United States and rendered to countries where they can be subject to interrogation tactics -- including torture -- that are illegal in the United States.

Mr. William J. Haynes II, General Counsel of the Defense Department, recently wrote -- in response to a letter from the Executive Director of Human Rights Watch to President Bush raising these issues -- that "[w]hen questioning enemy combatants, U.S. personnel are required to

follow [United States] policy and applicable laws prohibiting torture." In addition, Mr. Haynes confirmed that in the event of a transfer of "detained enemy combatants to other countries for continued detention on [the U.S. Government's] behalf, U.S. Government instructions are to seek and obtain appropriate assurances that such enemy combatants are not tortured."

Our Committees would like an opportunity to review the Directorate of Operations instructions and any other relevant materials giving guidance to interrogators, so that we may assess the clarity and specificity of the instructions given to U.S. interrogators and other U.S. personnel responsible for handling detainees. It is essential that U.S. personnel understand precisely those actions which are permissible and those which are prohibited by law. Our Committees, therefore, would appreciate it if your office could send us copies of the Directorate of Operations instructions and any other relevant material providing guidance to interrogators.

We are requesting only unclassified materials or classified materials redacted to remove classified information. After we have had an opportunity to review the materials, we would like to arrange a meeting with you to discuss these issues further.

We look forward to hearing from you.

Respectfully,



MILES P. FISCHER, CHAIR
COMMITTEE ON MILITARY AFFAIRS & JUSTICE



SCOTT HORTON, CHAIR
COMMITTEE ON INTERNATIONAL HUMAN RIGHTS

PATRICK LEAHY
VERMONT

COMMITTEES:
AGRICULTURE, NUTRITION, AND
FORESTRY
APPROPRIATIONS
JUDICIARY

United States Senate

WASHINGTON, DC 20510-4502

September 9, 2003

Mr. William J. Haynes, II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Dear Mr. Haynes:

Thank you for your June 25, 2003, letter concerning U.S. policy with regard to the treatment of detainees held by the United States.

I very much appreciate your clear statement that it is the policy of the United States to comply with all of its legal obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). I also welcome your statement that it is United States policy to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with our government's obligation, under Article 16 of the CAT, "to prevent other acts of cruel, inhuman, or degrading treatment or punishment" as prohibited under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

This statement of policy rules out the use of many of the "stress and duress" interrogation techniques that have been alleged in press reports over the last several months, including beatings, lengthy sleep and food deprivation, and shackling detainees in painful positions for extended periods of time. It should also go a long way towards answering concerns that have been expressed by our friends overseas about the treatment of detainees in U.S. custody. It should strengthen our nation's ability to lead by example in the protection of human rights around the world, and our ability to protect Americans, including our service members, should they be detained abroad.

At the same time, the ultimate credibility of this policy will depend on its implementation by U.S. personnel around the world. In that spirit, I would appreciate it if you could clarify how the administration's policy to comply with the CAT is communicated to those personnel directly involved in detention and interrogation? As you note in your letter, the U.S. obligation under Article 16 of the CAT is to "undertake . . . to prevent" cruel, inhuman or degrading treatment or punishment. What is the administration doing to prevent violations? Have any recent directives, regulations or general orders been issued to implement the policy your June 25 letter describes? If so, I would appreciate receiving a copy.

I understand that interrogations conducted by the U.S. military are governed at least in part by Field Manual 34-52, which prohibits "the use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind." This field manual rightly stresses that "the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear." Are there further guidelines that in any way add to, define, or limit the prohibitions contained in this field manual? What mechanisms exist for ensuring compliance with these guidelines?

Most important, I hope you can assure me that interrogators working for other agencies, including the CIA, operate from the same guidelines as the Department of Defense. If CIA or other interrogation guidelines in use by any person working for or on behalf of the U.S. government differ, could you clarify how, and why?

I am pleased that before handing over detainees for interrogation to third countries, the United States obtains specific assurances that they will not be tortured. I remain concerned, however, that mere assurances from countries that are known to practice torture systematically are not sufficient. While you state that the United States would follow up on any credible information that such detainees have been mistreated, how would such information emerge if no outsiders have access to these detainees? Has the administration considered seeking assurances that an organization such as the International Committee for the Red Cross have access to detainees after they have been turned over? If not, I urge you to do so.

Finally, has the administration followed up on specific allegations reported in the press that such detainees may have been tortured, including claims regarding a German citizen sent to Syria in 2001, and statements by former CIA official Vincent Cannistrano concerning an al-Qaeda detainee sent from Guantanamo to Egypt (see enclosed articles)?

Thank you again for your response to my last letter.

With best regards,


PATRICK LEAHY
United States Senator

I appreciate your concern.



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

April 2, 2003

Mr. Kenneth Roth
Executive Director
Human Rights Watch
350 Fifth Avenue, 34th Floor
New York, NY 10118

Dear Mr. Roth:

This is in response to your December 26, 2002, letter to the President and other letters to senior administration officials regarding detention and questioning of enemy combatants captured in the war against terrorists of global reach after the terrorist attacks on the United States of September 11, 2001.

The United States questions enemy combatants to elicit information they may possess that could help the coalition win the war and forestall further terrorist attacks upon the citizens of the United States and other countries. As the President reaffirmed recently to the United Nations High Commissioner for Human Rights, United States policy condemns and prohibits torture. When questioning enemy combatants, U.S. personnel are required to follow this policy and applicable laws prohibiting torture.

If the war on terrorists of global reach requires transfer of detained enemy combatants to other countries for continued detention on our behalf, U.S. Government instructions are to seek and obtain appropriate assurances that such enemy combatants are not tortured.

U.S. Government personnel are instructed to report allegations of mistreatment of or injuries to detained enemy combatants, and to investigate any such reports. Consistent with these instructions, U.S. Government officials investigate any known reports of mistreatment or injuries to detainees.

The United States does not condone torture. We are committed to protecting human rights as well as protecting the people of the United States and other countries against terrorists of global reach.

Sincerely,

A handwritten signature in black ink, appearing to read "W. L. Haynes II".

William L. Haynes II



Jun-28-03 02:52pm

From-Assoc.Bar of NYC

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CENTRAL INTELLIGENCE AGENCY
Washington, D.C. 20505

General Counsel

23 June 2003

Miles P. Fischer, Esquire
Scott Horton, Esquire
Association of the Bar
of the City of New York
42 West 44th Street
New York, New York 10036-6690

Dear Messrs, Fischer and Horton:

Thank you for your letter of 4 June regarding the treatment of enemy combatants detained in the wake of the terrorist attacks on the United States of 11 September 2001.

As you know, the Director of Central Intelligence is required by law to protect intelligence sources and methods, 50 U.S.C. §403-3(c)(6), and the Central Intelligence Agency (CIA) does not comment on operational activities or practices. I can assure you, however, that in its various activities around the world the CIA remains subject to the requirements of US law. Pursuant to Executive Order 12333, any allegations of unlawful behavior are reported by the CIA to the Department of Justice, and may be investigated both by that Department and by the Agency's own Presidentially appointed, Senate confirmed Inspector General. The Agency also provides the Congressional intelligence oversight committees with briefings and materials about its various activities, as provided by 50 U.S.C. §§413a, 413b(b).

I appreciate the concerns raised in your letter as well as the thoughtfulness of your questions. While I acknowledge that this response does not provide you with all the information you have requested, I want you to know that I share your committees' interest in ensuring that US personnel understand their obligations under US law and comply with them.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott W. Muller".

Scott W. Muller

JUN-25-2003 21:28

DOD GENERAL COUNSEL

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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

June 25, 2003

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

I am writing in response to your June 2, 2003, letter to Dr. Rice raising a number of legal questions regarding the treatment of detainees held by the United States in the wake of the September 11, 2001, attacks on the United States and in this Nation's war on terrorists of global reach. We appreciate and fully share your concern for ensuring that in the conduct of this war against a ruthless and unprincipled foe, the United States does not compromise its commitment to human rights in accordance with the law.

In response to your specific inquiries, we can assure you that it is the policy of the United States to comply with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture. Its obligations include conducting interrogations in a manner that is consistent with the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT") as ratified by the United States in 1994. And it includes compliance with the Federal anti-torture statute, 18 U.S.C. §§ 2340-2340A, which Congress enacted to fulfill U.S. obligations under the CAT. The United States does not permit, tolerate or condone any such torture by its employees under any circumstances.

Under Article 16 of the CAT, the United States also has an obligation to "undertake . . . to prevent other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture." As you noted, because the terms in Article 16 are not defined, the United States ratified the CAT with a reservation to this provision. This reservation supplies an important definition for the term "cruel, inhuman, or degrading treatment or punishment." Specifically, this reservation provides that "the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only in so far 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." United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with this commitment.



06/25/2003 09:29PM

JUN-25-2003 21:28

DOD GENERAL COUNSEL

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P.03

As your letter stated, it would not be appropriate to catalogue the interrogation techniques used by U.S. personnel in fighting international terrorism, and thus we cannot comment on specific cases or practices. We can assure you, however, that credible allegations of illegal conduct by U.S. personnel will be investigated and, as appropriate, reported to proper authorities. In this connection, the Department of Defense investigation into the deaths at Bagram, Afghanistan, is still in progress. Should any investigation indicate that illegal conduct has occurred, the appropriate authorities would have a duty to take action to ensure that any individuals responsible are held accountable in accordance with the law.

With respect to Article 3 of the CAT, the United States does not "expel, return ('refouler') or extradite" individuals to other countries where the U.S. believes it is "more likely than not" that they will be tortured. Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. We can assure you that the United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored.

In closing, I want to express my appreciation for your thoughtful questions. We are committed to protecting the people of this Nation as well as to upholding its fundamental values under the law.

Sincerely,



William J. Haynes II