



**Convention against Torture
and Other Cruel, Inhuman
or Degrading Treatment
or Punishment**

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COMMITTEE AGAINST TORTURE

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION**

Second periodic reports of States parties due in 1999*

Addendum *** ******

UNITED STATES OF AMERICA

[6 May 2005]

* The Committee against Torture decided at its twenty-fourth session to request the second periodic report of the United States by 19 November 2001 (see A/55/44), para. 180 (f)).

** The initial report submitted by the Government of the United States of America is contained in document CAT/C/28/Add.5; for its consideration by the Committee, see documents CAT/C/SR.424, 427 and 431 and *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 44 (A/55/44)*, paras. 175-180.

*** The attachments to annex 1 and annexes 2 and 7 to the present report submitted by the Government of the United States of America may be consulted in the files of the secretariat.

**** In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

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I. INTRODUCTION

1. The Government of the United States of America welcomes the opportunity to report to the Committee Against Torture on measures giving effect to its undertakings under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), pursuant to Article 19 thereof and on other information that may be helpful to the Committee. The organization of this Second Periodic report follows the General guidelines regarding the form and contents of periodic reports to be submitted by states parties (CAT/C/14/Rev.1).
2. This report was prepared by the U.S. Department of State (“Department of State”) with extensive assistance from the U.S. Department of Justice (“Department of Justice”), the U.S. Department of Homeland Security (“Department of Homeland Security”), the U.S. Department of Defense (“Department of Defense”) and other relevant departments and agencies of the United States Government. Except where otherwise noted, the report covers the situation for the period after October 1999 and prior to March 1, 2005.
3. The United States submitted its Initial Report to the Committee Against Torture in October 1999 (CAT/C/28/Add.5), hereafter referred to as “Initial Report”. It made its oral presentation of that report to the Committee on May 10-15, 2000. Accordingly, the purpose of this Second Periodic Report is to provide an update of relevant information arising since the submission of the Initial Report.
4. Since the Initial Report, with the attacks against the United States of September 11, 2001, global terrorism has fundamentally altered our world. In fighting terrorism, the U.S. remains committed to respecting the rule of law, including the U.S. Constitution, federal statutes, and international treaty obligations, including the Torture Convention.
5. The President of the United States has made clear that the United States stands against and will not tolerate torture under any circumstances. On the United Nations International Day in Support of Victims of Torture, June 26, 2004, the President confirmed the continued importance of these protections and of U.S. obligations under the Torture Convention, stating:

...[T]he United States reaffirms its commitment to the worldwide elimination of torture To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. . . .

These times of increasing terror challenge the world. Terror organizations challenge our comfort and our principles. The United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere. *See* Annex 2.

6. The United States is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. Government.¹
7. All components of the United States Government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment.² The U.S. Government does not permit, tolerate, or condone torture, or other unlawful practices, by its personnel or employees under any circumstances. U.S. laws prohibiting such practices apply both when the employees are operating in the United States and in other parts of the world.
8. The legal and policy framework through which the United States gives effect to its Convention undertakings has not changed fundamentally since the Initial Report. Unless otherwise noted, the scope of the relevant protections afforded by the United States Constitution and comparable state constitutions, as well as the statutory and regulatory provisions governing the criminal justice system, detention conditions, and the relevant immigration laws and policies continue to apply. Furthermore, the U.S. federal court cases that have referenced the Torture Convention in some way since October, 1999, numbering well over 1000, illustrate the real impact of U.S. Convention undertakings on the U.S. legal system.³
9. By letter of May 21, 2004, the Committee requested “updated information concerning the situation in places of detention in Iraq, up to the time of the submission of the report.” In Annex 1, Part Two the United States provides a discussion and related materials relevant to its detention of individuals under the control of U.S. Armed Forces in Iraq captured during military operations. The United States provides similar information in Annex 1, Part One, with respect to detentions of individuals under the control of U.S. Armed Forces in Afghanistan and Guantanamo Bay, Cuba.
10. The United States is aware of allegations that detainees held in U.S. custody pursuant to the global war on terrorism have been subject to torture or other mistreatment. The President of the United States, as noted above, has clearly stated that torture is prohibited. When allegations of torture or other unlawful treatment arise, they are investigated and, if substantiated, prosecuted. These issues are addressed in detail in this report and its annexes with a view to conveying the seriousness of the commitment of the United States on these issues.

II. INFORMATION ON NEW MEASURES AND NEW DEVELOPMENTS RELATING TO THE IMPLEMENTATION OF THE CONVENTION

Article 1 (Definition)

11. The definition of torture accepted by the United States upon ratification of the Convention and reflected in the understanding issued in its instrument of ratification remains unchanged. The definition of torture is codified in U.S. law in several contexts.

12. As explained in the Initial Report, this definition is codified at Chapter 113B of Title 18 of the United States Code, which provides federal criminal jurisdiction over an extraterritorial act or attempted act of torture if (1) the alleged offender is a national of the United States or (2) if the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender. *See* 18 U.S.C. §§ 2340 and 2340A, as amended (the extraterritorial criminal torture statute), which is set forth in Annex 5. On October 26, 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. 107-56, Title VIII, § 811(g), amended § 2340A to add an explicit conspiracy provision with strengthened penalties to the substantive offense described in the extraterritorial criminal statute. This prohibition on torture and conspiracy to torture extends, *inter alia*, to U.S. employees and U.S. contractors of the United States anywhere in the world outside of the United States, provided that the conduct falls within the enumerated elements of the statute. At the time of the enactment of 18 U.S.C. §§ 2340, 2340A, 18 U.S.C. § 2 already punished those who aid, abet, counsel, command, induce, procure or cause the commission of an offense against the United States.

13. On December 30, 2004 the Department of Justice's Office of Legal Counsel (OLC), which provides legal advice to the Executive Branch, published a memorandum that addresses the legal standards applicable under the extraterritorial criminal torture statute. This memorandum is available at Annex 3 and at <http://www.usdoj.gov/olc/dagmemo.pdf>. Under the language Congress adopted in enacting the statute, in order to constitute "torture" under § 2340 -2340A, the conduct in question must have been "specifically intended to inflict severe physical or mental pain or suffering." The December 30, 2004 memorandum separately considers each of the principal components of that key phrase: (1) the meaning of "severe"; (2) the meaning of "severe physical pain or suffering"; (3) the meaning of "severe mental pain or suffering"; and (4) the meaning of "specifically intended." The memorandum supersedes an earlier memorandum of that same office in August 2002 on the same statute, discussing the definition of torture and the possible defenses to torture under U.S. law. The Department of Justice had previously withdrawn the August 2002 memorandum.

14. Torture is also defined in the immigration and extradition regulations that implement U.S. obligations under Article 3, as discussed below. *See* 8 Code of Federal Regulations (C.F.R.) § 208.18(a) and 22 C.F.R. § 95.1(b).

15. The term "torture" is also defined in the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, note, which, as discussed in greater detail in paragraph 82 below, permits victims of torture and extrajudicial killings to claim damages for such abuses.

Article 2 (Prohibition)

16. As indicated in the Initial Report, in the U.S. legal system, acts of torture are prohibited by law and contrary to U.S. policy, subject to prompt and impartial investigations, and punished by appropriate sanction. As noted above, the core legal framework through which the United States gives effect to its Convention undertakings to prevent acts of torture has not changed fundamentally since the Initial Report. As explained in the Initial Report, it is clear that any act of torture falling within the Torture Convention definition would in fact be criminally

prosecutable in every jurisdiction within the United States. Such acts may be prosecuted, for example, as assault, battery or mayhem in cases of physical injury; as homicide, murder or manslaughter, when a killing results; as kidnapping, false imprisonment or abduction where an unlawful detention is concerned; as rape, sodomy, or molestation; or as part of an attempt, or a conspiracy, an act of racketeering, or a criminal violation of an individual's civil rights.

17. Since the Initial Report, the jurisdiction to prosecute torture as well as other serious abuses short of torture that are committed outside the United States has been expanded. The extraterritorial jurisdiction to prosecute torture and other serious abuses is discussed in greater detail under Article 5.

18. Throughout this report, we refer to numerous specific actions that the United States is taking to combat various forms of serious abuse. Although the examples cited throughout the report do not necessarily involve acts of torture as defined under Article 1 of the Convention, as ratified by the United States, or cruel, inhuman or degrading treatment or punishment as defined under Article 16 of the Convention, as ratified by the United States, they are included to illustrate the commitment of the United States, or as the case may be, the sub-Federal level authorities in the United States, to prevent and prosecute serious abuses, whether or not they fall within these definitions of torture or cruel, inhuman or degrading treatment or punishment.⁴

19. The United States is fully aware of allegations that U.S. military or intelligence personnel have subjected detainees in various locations to torture. Allegations with respect to the military are discussed in more detail in Annex 1. The numerous statements by Executive Branch officials condemning the use of torture, made in response to allegations of abuse arising out of detentions in Afghanistan, Guantanamo Bay and Iraq, have emphasized that torture is prohibited as a matter of U.S. law. When allegations of abuses arise, they in all cases will be investigated and, if substantiated, prosecuted. As described in the Initial Report, the Congress of the United States has authorized a separate system of military justice for members of the United States armed forces. Members of the armed forces are subject to the Uniform Code of Military Justice, which, among other things, includes a specific offense of cruelty or maltreatment. *See* Annex 1. Annex 1 provides a description of the investigations into abuse allegations arising out of detentions of individuals under the control of U.S. Armed Forces in Afghanistan, Iraq and Guantanamo Bay, Cuba and actions to hold personnel of the U.S. armed forces accountable under the military justice system when they have been found to have committed unlawful acts. *See* Annex 1. Allegations regarding intelligence activities are currently under review by the Inspector General of the Central Intelligence Agency (CIA). That office has reported and will continue to report its findings to the Director of the Central Intelligence Agency and the Congressional Intelligence Oversight Committees and will continue to forward substantiated cases of abuse for investigation and prosecution to the Department of Justice.

20. **Federal criminal prosecutions of complaints about abuse.** Since the Initial Report, complaints about abuse including physical injury by individual law enforcement officers continue to be made and are investigated, and if the facts so warrant, officers are prosecuted by federal and state authorities. As described in the Initial Report, the Criminal Section of the Department of Justice's Civil Rights Division is charged with reviewing such complaints made to the Federal Government and ensuring the vigorous enforcement of the federal statutes that

make torture, or any willful use of excessive force, illegal. The Department of Justice is committed to investigating all incidents of willful use of excessive force by law enforcement officers and to prosecuting federal law violations should action by the local and state authorities fail to vindicate the federal interest. Between October 1, 1999 and January 1, 2005, 284 officers were convicted of violating federal civil rights statutes. Most of these law enforcement officers were charged with using excessive force.

21. Below are some significant examples of recent federal law enforcement prosecutions that occurred between October 1, 1999 and January 1, 2005:

- On September 7, 2004, a Texas police officer was convicted on federal civil rights charges under 18 U.S.C. § 242 for repeatedly assaulting a handcuffed man while the officer was acting under color of law during an arrest, and then attempting to cover up his actions. The police officer first kicked and choked the man, who was handcuffed to the side of a police car, then proceeded to stick his gun barrel into the victim's mouth, threatening to kill him. As of January 1, 2005, the defendant had not yet been sentenced;
- On July 14, 2004, an Oklahoma police officer was convicted and awaits sentencing for assaulting and fracturing the hip of a 67-year-old man he stopped for a traffic violation. The officer was prosecuted under 18 U.S.C. § 242 for the willful unreasonable seizure of the victim under the color of law;
- On May 19, 2004, a Louisiana detention officer was convicted and is awaiting sentencing for repeatedly throwing a handcuffed detainee against a wall resulting in significant lacerations to his face. The officer was prosecuted under 18 U.S.C. § 242 for the willful deprivation of the victim's liberty without due process under color of law;
- On March 25, 2004, the United States Court of Appeals for the Eleventh Circuit affirmed the conviction and sentence of a former deputy sheriff with the Jacksonville, Florida Sheriff's Department, who was charged and convicted for kidnapping, murdering, and stealing money from motorists, bank customers, and drug dealers whom he falsely arrested in 1998 and 1999. The deputy sheriff was sentenced to life in prison for, among other charges, the violation of 18 U.S.C. § 241 for conspiracy to deprive one of the victims of life and the others of liberty and property without due process under color of law;
- On September 24, 2003, a North Carolina police officer pleaded guilty to a felony civil rights charge for coercing women, whom he stopped or arrested, into having sex with him. He was sentenced to ten years in prison for willful deprivation of liberty without due process under color of law;
- On January 29, 2002, a North Carolina chief of police was convicted of using excessive force in seven separate incidents, involving six separate arrestees. The defendant was sentenced to 37 months in prison for willfully conducting unreasonable seizures under color of law in violations of 18 U.S.C. § 242;

- On May 27, 2001, the last of five male orderlies at a state-run care facility for developmentally disabled adults near Memphis, Tennessee was convicted for routinely beating residents. One of these beatings resulted in the death of a developmentally disabled patient who could not cry out for help because he was mute. The orderlies received sentences ranging from 60 to 180 months in prison under 18 U.S.C. § 242 for willful deprivation of the victim's liberty without due process under color of law;
- On February 7, 2001, six correctional officers with the Arkansas Department of Corrections beat and repeatedly shocked two naked and handcuffed victims with a hand-held stun gun and cattle prod. During a separate incident, three of the six defendants shocked and beat another handcuffed inmate. Ultimately, five officers entered guilty pleas while the sixth was convicted at trial. They were sentenced to terms of incarceration ranging from 24 to 78 months under 18 U.S.C. § 242 for imposing cruel and unusual punishment under color of law. Between March 3, 2001 and August 21, 2001, another three correctional officers with the Arkansas Department of Corrections pled guilty to assaulting an inmate while his hands were handcuffed behind his back. They were later sentenced to terms of incarceration ranging from 8 to 18 months in prison under 18 U.S.C. § 242 for imposing cruel and unusual punishment under color of law;
- On January 23, 2001, a Florida Department of Corrections officer with the Metro Dade Jail was convicted of assaulting a female inmate resulting in multiple contusions to her face, back, and neck. He was sentenced to 17 months in prison under 18 U.S.C. § 242 for imposing cruel and unusual punishment under color of law;
- On November 9, 2000, a correctional officer captain from a state of Florida jail pled guilty to having forcible sexual contact with a female inmate and was thereafter sentenced to 15 months in prison. He was prosecuted under 18 U.S.C. § 242 for willful deprivation of the victim's liberty without due process under color of law;
- On November 2, 2000, seven federal correctional officers from the U.S. Penitentiary in Florence, Colorado, were indicted for systematically beating inmates and making false statements to cover-up their illegal conduct. On June 24, 2003, the jury convicted the three ringleaders on conspiracy and substantive counts. They were sentenced to 30 and 41 months in prison for, among other charges, the violation of 18 U.S.C. § 241 for conspiring to impose cruel and unusual punishment under color of law;
- On March 23, 2000, a U.S. Bureau of Prisons correctional officer in Oklahoma City was convicted of engaging in various degrees of sexual misconduct with five female inmates. As a result, he was sentenced to 146 months in prison under 18 U.S.C. § 242 for imposing cruel and unusual punishment under color of law;
- On February 15, 2000, a Mississippi chief of police was convicted of striking an arrestee several times in the head with a baton while the victim was handcuffed in the back of a patrol car. He was sentenced to 13 months in prison under 18 U.S.C. § 242 for a willful unreasonable seizure under color of law;

- On December 13, 1999, New York City Police Officer, Justin Volpe, was sentenced to thirty years in prison under 18 U.S.C. § 242, for brutally sodomizing Abner Louima in a New York City police station, while acting under the color of law. Five other officers were convicted of obstructing justice during the investigation of the assault of Louima and a second arrestee and three of the officers were incarcerated for sentences ranging from three to five years. The convictions of two of these officers were, however, reversed by the United States Court of Appeals for the Second Circuit, which found their conduct did not violate federal obstruction of justice law.

22. **Criminal prosecutions of complaints of abuse at the state and local level.**

Additionally, prosecutions of abuse at the state and local level continue, some examples of which are cited below:

- In July 2004, a District of Columbia police officer was found guilty by a D.C. Superior Court jury of simple assault after shoving the barrel of his gun into the cheek of a man, following a confrontation at a gas station;
- On April 1, 2004, three Miami, Florida police officers were convicted on conspiracy charges after they took part in a scheme to plant guns near the bodies of two fleeing robbers shot to death by police. Sentences ranged from five to ten years;
- In 2002, a New York City, New York police officer was convicted of sodomy and reckless endangerment after forcing a 16-year old prostitute to engage in oral sex. The officer was sentenced to 7 years in prison;
- On November 1, 2000 the Appellate Court of Illinois upheld the decision by a municipal police board to dismiss a Chicago police officer for striking a detained suspect in the head and mouth.

23. **Federal criminal prosecutions of violations of procedural rights.** Complaints about failures to accord due process or “procedural rights” by individual law enforcement officers continue to be made to federal and state authorities. As described in the Initial Report, the Criminal Section of the Department of Justice’s Civil Rights Division is charged with reviewing such complaints made to the Federal Government and ensuring the vigorous enforcement of the applicable federal criminal civil rights statutes. The Department of Justice is committed to investigating all allegations of willful violations of constitutional rights and to prosecute federal law violations should action by the local and state authorities fail to vindicate the federal interest. For example, as of January 1, 2005, the Civil Rights Division is conducting two separate ongoing investigations in two different states involving allegations that local police officers used threats of force to coerce information or a confession from an arrestee.

24. **Civil Pattern or Practice Enforcement.** As discussed in the Initial Report, the Department of Justice’s Civil Rights Division may institute civil actions for equitable and declaratory relief pursuant to the Pattern or Practice of Police Misconduct provision of the Crime Bill of 1994, 42 U.S.C. § 14141 (Section 14141), which prohibits law enforcement

agencies from engaging in a pattern or practice of violating people's civil rights. Since October 1999, the Civil Rights Division has negotiated 16 settlements with law enforcement agencies. These settlements include two consent decrees regarding the Detroit, Michigan Police Department, and consent decrees covering Prince George's County, Maryland and Los Angeles, California police departments. Other recent settlements include those entered into with police departments in the District of Columbia; Cincinnati, Ohio; Buffalo, New York; Villa Rica, Georgia; and Cleveland, Ohio. As of January 1, 2005, there are currently 13 ongoing investigations of law enforcement agencies.

25. The resolution of the Division's investigation of the Detroit Michigan Police Department illustrates the impact of the Division's law enforcement misconduct program. On June 12, 2003, the Division filed a complaint alleging a pattern or practice of conduct by Detroit officers subjecting individuals to uses of excessive force, false arrests, illegal detentions and unconstitutional conditions of confinement. On the same date, the Division and the City of Detroit filed two proposed consent decrees and a Joint Motion to Appoint a Monitor. The consent decrees require reform in the following areas: use of force, arrest and witness detention practices, and holding cell conditions. Both consent decrees enhance the Police Department's policies, as well as require the supervision, accountability, and training necessary to implement and sustain the policies.

26. **CRIPA.** The Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 et seq., which permits the Attorney General to bring civil lawsuits against state institutions regarding the civil rights of their residents, including the conditions of their confinement and use of excessive force, is another statute pursuant to which the Department of Justice's Civil Rights Division continues to prevent unlawful use of force. By August 2004, the Civil Rights Division had initiated CRIPA actions regarding approximately 400 facilities, resulting in approximately 120 consent decrees and settlements governing conditions in about 240 facilities, since CRIPA was enacted in 1980. CRIPA enforcement has been a major priority of the Division. Since October 1999, the Division has opened 52 new investigations covering 66 facilities. The Division has also entered into 39 settlement agreements including seven consent decrees. As of January 1, 2005, there are currently 59 active investigations covering 69 facilities.

27. **Federal enforcement actions addressing prison conditions.** As stated above, the Civil Rights Division investigates conditions in state prisons and local jail facilities pursuant to CRIPA, and investigates conditions in state and local juvenile detention facilities pursuant to either CRIPA or Section 14141. These statutes allow the Department of Justice to bring legal actions for declaratory or equitable relief for a pattern or practice of unconstitutional conditions of confinement. Some examples of these investigations follow:

- On July 16, 2004, the Civil Rights Division reached an out-of-court agreement with the Wicomico County Detention Center in Salisbury, Maryland regarding systematic violations of prisoners' federally protected civil rights. The Division's three-year investigation revealed evidence that the Detention Center failed to provide required medical and mental health care, failed to provide adequate inmate safety, and failed to provide sufficiently sanitary living conditions. Under the terms of the agreement, the Detention Center will address and correct the deficiencies identified by the Division;

- On June 7, 2004, the Civil Rights Division filed a lawsuit challenging the conditions of confinement at the Terrell County Jail in Dawson, Georgia. The Division's complaint alleges that the jail routinely violates federally protected rights, including failing to protect inmate safety, and failing to provide required medical and mental health care.

28. The Division has also recently issued letters reporting its findings regarding conditions at the McPherson and Grimes Correctional Units in Newport, Arkansas, the Garfield County Jail and County Work Center in Enid, Oklahoma, the Patrick County Jail in Virginia, and the Santa Fe Adult Detention Center in New Mexico.

29. **Litigation of prison conditions in state courts.** Additionally, inmates have been successful in challenging prison conditions in state courts as violations of state and federal law. Some examples follow:

- On April 29, 2003, the Supreme Court of Montana held that the Montana State Prison system violated the Montana Constitutional rights of inmates housed in filthy, uninhabitable prison cells. Inmates were forced to inhabit cells that contained blood, feces, vomit and other types of debris. The Montana Supreme Court held that such living conditions were an "affront to the inviolable right of human dignity." *Walker v. State*, 68 P.3d 872, 885 (Mont. 2003);
- On October 5, 2000, the Supreme Court of Arkansas found that the established constitutional right against cruel and unusual punishment included a prison inmate's right to be reasonably protected from attacks by other prisoners. *Boyd v. Norris*, No. 00-536, 2000 Ark. LEXIS 458, at *2 (Ark. Oct. 5, 2000).

Article 3 (Non-refoulement)

30. The United States continues to recognize its obligation not to "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". The United States is aware of allegations that it has transferred individuals to third countries where they have been tortured. The United States does not transfer persons to countries where the United States believes it is "more likely than not" that they will be tortured.⁵ This policy applies to all components of the United States government. The United States obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred. If assurances were not considered sufficient when balanced against treatment concerns, the United States would not transfer the person to the control of that government unless the concerns were satisfactorily resolved. The procedures for evaluating torture concerns in the immigration removal and extradition context are described in greater detail below.

31. **Creation of the Department of Homeland Security (DHS).** Since the United States submitted the Initial Report and subsequent to the terrorist attacks of September 11, 2001, the United States Government restructured several agencies within the Executive Branch, creating the U.S. Department of Homeland Security (DHS). *See* Homeland Security Act of 2002,

Public Law 107-296, 116 Stat. 2310. As part of this restructuring, the Immigration and Naturalization Service (INS) was abolished and its functions were transferred from the U.S. Department of Justice to the new DHS. Pursuant to the Homeland Security Act, all authorities exercised by the Commissioner of the INS, on behalf of the Attorney General, were transferred to the Secretary of Homeland Security. The Executive Office for Immigration Review (EOIR), whose immigration judges preside over removal proceedings and adjudicate Torture Convention claims, remain within the Department of Justice. Immigration removal proceedings, and the adjudication of Torture Convention claims within those proceedings, remain unchanged since the Initial Report, but the functions described in that report as implemented by INS are now performed by DHS.⁶

32. **Observance of Article 3 obligations in the immigration removal context.** As discussed in the Initial Report, regulations implementing Article 3 of the Torture Convention permit aliens to raise Article 3 claims during the course of immigration removal proceedings. These regulations fully implement U.S. obligations under Article 3 and set forth a fair and rule-bound process for considering claims for protection. Individuals routinely assert Article 3 claims before immigration judges within the EOIR, whose decisions are subject to review by the Board of Immigration Appeals, and ultimately, to review in U.S. federal courts. In exceptional cases where an arriving alien is believed to be inadmissible on terrorism-related grounds, Congress has authorized alternate removal procedures in limited circumstances that do not require consideration or review by EOIR. *See* INA § 235(c). The implementing regulations provide that removal pursuant to section 235(c) of the Act shall not proceed “under circumstances that violate ... Article 3 of the Convention Against Torture.” *See* 8 C.F.R. 235.8(b)(4).

33. Article 3 protection is a more limited form of protection than that afforded to aliens granted asylum under the Immigration and Nationality Act (INA). This more limited form of protection is similar to withholding of removal, *see* INA § 241(b)(3), through which the United States implements its non-refoulement obligations under the Refugee Protocol. An alien granted protection under the Torture Convention may be removed to a third country where there are no substantial grounds for believing that the alien will be subjected to torture. Furthermore, the regulations contain special streamlined provisions for terminating Article 3 protection for an alien who is subject to criminal and security-related bars, when substantial grounds for believing the alien would be tortured if removed to a particular country no longer exist. Finally, in a very small number of appropriate cases, pursuant to 8 C.F.R. § 208.18(c), the U.S. may consider diplomatic assurances from the country of proposed removal that the alien will not be tortured if removed there. In such removal cases, the Secretary of Homeland Security (and in cases arising prior to the enactment of the Homeland Security Act, the Attorney General), in consultation with the Department of State, would carefully assess such assurances to determine whether they are sufficiently reliable so as to allow the individual’s removal consistent with Article 3 of the Torture Convention. The United States reserves the use of diplomatic assurances for a very small number of cases where it believes it can reasonably rely on such assurances that the individuals would not be tortured. Since the Initial Report, the United States has removed several individuals to their countries based on assurances that they would not be tortured. However, as is the case in the extradition context, the United States credits assurances and removes or extradites individuals only when it determines that it can remove or extradite a person consistent with its obligations under Article 3.

34. In practice, the record demonstrates that individuals seeking protection under Article 3 of the Torture Convention have asserted torture claims and in many cases have obtained protection under the regulations implementing the Convention. In the period from 1999, when the regulations implementing Article 3 of the Convention went into effect, through 2003, the available data indicates the following statistics regarding grants of protection by immigration judges based on the Torture Convention:⁷

| | Grants of Torture Convention protection by immigration judges |
|---------|--|
| FY 2000 | 519 |
| FY 2001 | 554 |
| FY 2002 | 546 |
| FY 2003 | 486 |
| FY 2004 | 532 |

35. However, these statistics do not convey the full extent to which U.S. law affords protection against return to individuals who “more likely than not” will be tortured upon their return. In light of the similarities between the harm feared by asylum and torture applicants, the same application form is used to request both forms of protection and most individuals who assert torture claims simultaneously assert asylum claims. In such cases, if an individual is eligible for asylum, the immigration judge may grant asylum and thus not reach the torture claim. Accordingly, the statistics on grants of torture protection cited above may reflect cases where individuals were deemed ineligible for a grant of asylum by virtue of the bars to such relief (e.g., individuals who committed serious crimes) under U.S. law and U.S. obligations under the 1967 Protocol relating to the Status of Refugees or because they failed to demonstrate that the persecution feared would be “on account” of one of the protected grounds specified in the definition of “refugee” set forth at § 101(a)(42) of the Immigration and Nationality Act. Therefore, for a more complete understanding of the extent to which protection against return is afforded to aliens, it is relevant to note the following available statistics on grants of asylum and withholding of removal:⁸

| | Grants of asylum by DHS (former INS) | Grants of asylum by an immigration judge | Grants of withholding of removal by an immigration judge |
|---------|---|---|--|
| FY 2000 | 16 556 | 8 903 | 3 244 |
| FY 2001 | 20 290 | 7 956 | 3 463 |
| FY 2002 | 18 880 | 8 663 | 3 544 |
| FY 2003 | 11 434 | 10 913 | 4 417 |
| FY 2004 | 10 278 | 10 825 | 4 723 |

36. As the United States implements Article 3, the contours of elements unique to Torture Convention claims, such as the meaning of “torture” and government “acquiescence,” are taking shape in the United States through the development of interpretive case law. Since the Initial Report, there have been a number of precedent-setting decisions relating to Article 3 protection

under the Torture Convention issued by the EOIR and by various federal district and circuit courts throughout the United States. Precedent administrative decisions by EOIR are available at http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html, and include:

- Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000) (Applicant for Torture Convention protection must establish that the torture feared would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity; therefore, protection does not extend to persons who fear private entities that a government is unable to control);
- Matter of G-A-, 23 I&N Dec. 366 (BIA 2002) (An Iranian Christian of Armenian descent demonstrated eligibility for Torture Convention protection by establishing that it is more likely than not that he will be tortured if deported to Iran based on a combination of factors, including his religion, his ethnicity, the duration of his residence in the United States, and his drug-related convictions in this country. The evidence of record demonstrated that Armenian Christians were subject to harsh and discriminatory treatment in Iran, that persons associated with narcotics trafficking, like G-A, faced particularly severe punishment, and that Iranians who had spent an extensive amount of time in the United States were perceived to be opponents of the Iranian Government or even pro-American spies. The combination of these traits, and the evidence of widespread use of torture in Iran, demonstrated that the respondent was likely to be subjected to torture if deported to Iran);
- Matter of J-E-, 23 I&N Dec. 291 (BIA 2002) (For an act to constitute “torture” it must satisfy each of the following five elements in the definition of torture set forth at 8 C.F.R. § 208.18(a): (1) the act must cause severe physical or mental pain or suffering; (2) the act must be intentionally inflicted; (3) the act must be inflicted for a proscribed purpose; (4) the act must be inflicted by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) the act cannot arise from lawful sanctions. Neither the indefinite detention of criminal deportees by Haitian authorities nor the substandard prison conditions in Haiti constitute torture within the meaning of 8 C.F.R. § 208.18(a) where there is no evidence that the authorities intentionally detain deportees or create and maintain conditions in order to inflict torture. Isolated instances of mistreatment that may rise to the level of torture as defined in the Torture Convention are insufficient to establish that it is more likely than not that the respondent will be tortured if returned to Haiti).

37. Relevant decisions by federal courts on Article 3 claims are issued daily and are too numerous to list in this report. Generally, precedent decisions are publicly available on the Internet. Attached in Annex 6 is a sampling of federal court decisions on Article 3 claims.

38. The United States remains committed to providing Article 3 protection to all aliens in its territory who require such protection, and recognizes that there are no categories of aliens who are excluded from protection under Article 3. As such, some aliens who are subject to criminal- or security-related grounds and are thus ineligible for other immigration benefits or protection

may be eligible for protection under Article 3. As described in paragraph 171 of the Initial Report, the United States provides a more limited form of protection - "deferral of removal" - to aliens otherwise subject to exclusion grounds. At the time the Initial Report was submitted, implementing regulations authorized continued detention of aliens granted deferral of removal. In 2001, the Supreme Court held in *Zadvydas v. Davis*, 533 U.S. 678 (2001), discussed also in paragraph 132, that existing statutory authority under INA § 241(a)(6) to detain aliens with final orders of removal is generally limited to such detention as necessary to achieve removal in the reasonably foreseeable future. While the *Zadvydas* decision limits the authority of the Department of Homeland Security to detain certain aliens granted deferral of removal, DHS remains committed to ensuring the proper balance between United States obligations under the Torture Convention and DHS's mission to improve the security of the United States.

39. **Observance of Article 3 obligations in the extradition context.** As described in the Initial Report, in U.S. practice, an extradition judge's decision whether to certify extraditability is not dependent upon consideration of any humanitarian claims, including claims under the Torture Convention. After the Secretary of State receives a certification of extraditability from a magistrate or judge, the Secretary of State must determine whether a fugitive who has been found extraditable should actually be extradited to a requesting State. In determining whether a fugitive should be extradited, the Secretary of State is authorized to consider *de novo* any and all issues properly raised before the extradition court, as well as any other considerations for or against surrender, including whether it is more likely than not that the fugitive would face torture in the requesting State.

40. Pursuant to Department of State regulations set forth in the Initial Report, whenever allegations relating to torture are raised by the fugitive or other interested parties, appropriate policy and legal offices within the Department of State review and analyze information relevant to a particular case. Information provided by the relevant regional bureau, country desk, or U.S. embassy also plays an important role in the evaluation of torture claims. Based on the analysis of relevant information, the Secretary of State may decide to surrender the fugitive to the requesting State, deny surrender of the fugitive, or condition the extradition on the requesting State's provision of assurances, deemed to be credible by the Secretary of State, related to torture or aspects of the requesting State's criminal justice system that protect against mistreatment, such as regular access to counsel. Whether such assurances are sought is determined on a case-by-case basis, fully bearing in mind U.S. obligations under Article 3 of the Torture Convention.

41. The Secretary of State will evaluate claims for protection under Article 3 of the Torture Convention after judicial extradition proceedings have been completed. This position is based on the longstanding "rule of non-inquiry," which leaves to the consideration of the Secretary of State questions regarding the treatment extraditees may receive following their surrender for extradition. In U.S. practice, the Secretary of State is uniquely well-suited to determine the risks that a fugitive would be subject to torture upon his return to a requesting state. In appropriate cases, it may be necessary for the Secretary of State to decide against surrender or to obtain assurances as necessary from the foreign government to persuade the Secretary of State that the United States would be acting in compliance with Article 3 of the Convention.

42. The issue of whether federal courts in the United States can consider an extradition fugitive's claims under the Torture Convention was litigated in *Cornejo-Barreto v. Seifert*. A panel of the United States Court of Appeals for the Ninth Circuit concluded that a fugitive facing extradition has a statutory right to judicial review of his claims under the Torture Convention, which attaches not during the extradition or habeas corpus proceedings, but after all the legal avenues are exhausted and the Secretary of State has signed the surrender warrant. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000). A different panel of the Ninth Circuit subsequently rejected this conclusion and, in agreement with the position of the Executive Branch, held that the Secretary of State's determination to extradite a fugitive is not subject to judicial review. *Cornejo-Barreto v. Seifert*, 379 F.3d 1075, 1089 (9th Cir. 2004). A majority of the Ninth Circuit judges voted to rehear the case *en banc*, but prior to the date of the rehearing, the Mexican government withdrew its extradition request pursuant to the dismissal of the Mexican state prosecution that served as the basis for the request. Upon motion of the government, the Ninth Circuit then dismissed the case as moot and vacated the second panel decision. *Cornejo-Barreto v. Seifert*, 839 F.3d 1307 (9th Cir. 2004). In *Mironescu v. Costner*, 345 F.Supp. 2d 538 (M.D.N.C. 2004) a district court recently held that a petitioner could not seek habeas review, asserting a CAT Article 3 claim, when the Secretary of State had not yet determined whether to extradite the petitioner, but concluded that it was inappropriate, given the stage of the proceedings, to decide whether the petitioner could seek habeas review after the Secretary has made a determination to extradite.

43. Since enactment of the Department of State regulations, torture claims have been raised in less than 1% of extradition cases and surrender warrants have been issued in all cases. In some of those cases, it was determined that the evidence submitted by the claimants provided no basis to conclude that it would be more likely than not that the claimants would be tortured. In several cases, assurances, which were deemed adequate, were received from the requesting country.

Article 4 (Torture as a criminal offense)

44. As discussed in the Initial Report and as restated in paragraph 16 above, within the United States, acts which would constitute torture under the Convention are punishable under state or federal law. This is also true of attempts to commit torture, conspiracies to commit torture and those who aid and abet the commission of an act of torture. Acts of torture committed outside the United States, as defined by the extraterritorial criminal torture statute, codified at 18 U.S.C. § 2340, in which the alleged offender is a national of the United States, or the alleged offender is present in the United States (irrespective of the nationality of the victim or alleged offender), are punishable under 18 U.S.C. § 2340A. The same prohibitions apply to persons who attempt to commit, conspire to commit, or aid and abet the commission of acts of torture within the definition contained in 18 U.S.C. § 2340.

Article 5 (Jurisdiction)

45. Since the submission of the Initial Report, two pieces of legislation, described below, were enacted that provide additional but distinct statutory bases for asserting jurisdiction over acts committed beyond the territory of the United States in addition to those discussed at

paragraph 185 of the Initial Report. In addition to the extraterritorial criminal torture statute, which establishes extra-territorial jurisdiction over certain offenses involving torture, the statutes discussed below extend criminal jurisdiction over an array of offenses, which may include torture, when committed within the “Special Maritime and Territorial Jurisdiction of the United States” (SMTJ). *See* 18 U.S.C. § 7. As discussed in the Initial Report, certain provisions of the federal criminal code apply to acts taking place outside United States geographical territory, but which fall within the SMTJ.

46. On November 22, 2000, the President signed into law the “Military Extraterritorial Jurisdiction Act (MEJA),” codified at 18. U.S.C. §§ 3261 et seq. This statute extends criminal jurisdiction over certain categories of individuals for conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the SMTJ. As reflected in House Report No. 106-778(I) which was adopted by the House Judiciary Committee when it considered the statute, the background and purpose of the statute was to amend federal law to extend the application of its criminal jurisdiction to persons, including civilians, both United States citizens and foreign nationals, who commit acts while employed by or otherwise accompanying the U.S. Armed Forces outside the United States. It also extends federal jurisdiction to active duty members of the Armed Forces who commit acts while outside the United States, with one or more other defendants, at least one of whom is not subject to the UCMJ. *See* 18 USC 3261(d)(2). It also extends federal jurisdiction to former members of the Armed Forces who commit such acts while they were members of the Armed Forces, but who are not tried for those crimes by military authorities and later cease to be subject to the Uniform Code of Military Justice. Because many federal crimes, such as sexual assault, arson, robbery, larceny, embezzlement, and fraud, did not have extraterritorial effect, there was a “jurisdictional gap” that in many cases allowed such crimes to go unpunished. Although host nations have jurisdiction to prosecute such acts committed within their territory, they frequently declined to exercise jurisdiction when an American was the victim or when the crime involved only property owned by Americans. Accordingly, the statute was designed to close this gap by establishing a new federal crime involving conduct that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the U.S. As of January 1, 2005, there have been two prosecutions under MEJA, neither involving torture.

47. An additional legislative development that extended U.S. criminal jurisdiction extraterritorially was enacted on October 26, 2001, when the USA PATRIOT Act amended § 7 of Title 18 of the United States Code, which defines the Special Maritime and Territorial Jurisdiction (SMTJ) of the United States. In pertinent part, a new paragraph 9 added to § 7 provides that, with respect to an offense that would otherwise apply within the SMTJ, committed by or against a national of the United States, premises of United States military or other United States Government missions or entities in foreign States are within the SMTJ. This paragraph, however, does not apply with respect to an offense committed by a person described in section 3261(a) of Title 18, United States Code, which codifies a provision of the Military Extraterritorial Jurisdiction Act described above.⁹

48. The MEJA and SMTJ statutes each provide separate bases for asserting U.S. jurisdiction over extraterritorial crimes. Each statute was designed to address a different problem: MEJA was designed primarily to address the jurisdictional gap over civilians employed by, or accompanying, the armed forces overseas other than in times of a declared war; the expanded SMTJ in 18 U.S.C. §7(9), contained in the USA PATRIOT Act, was enacted as part of a comprehensive program to deal with the Global War on Terrorism. While neither statute was specifically designed to address torture, both statutes in fact complement the separate jurisdictional reach of the extraterritorial criminal torture statute. This is because, depending on the status of the offender or the victim, or the location of the offense, the U.S. may be able to assert jurisdiction over other crimes, which are related to torture, but may not meet the statutory elements of 18 U.S.C. §§ 2340 and 2340A, i.e. murder. It became apparent in 2004, however, that there was an unintended legislative anomaly to the enactment of 18 U.S.C. §7(9).

49. By expanding the territory within the SMTJ to include premises of United States military or other United States Government missions or entities in foreign States, the SMTJ statute had the effect of narrowing the reach of the extraterritorial criminal torture statute. The statute, by definition, only applies “outside the United States.” The term “United States” was originally defined as including “all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title [Title 18 of the U.S. Code, § 7 of which defines the Special Maritime and Territorial Jurisdiction of the United States] and section 46501(2) of title 49.” Thus, when the USA PATRIOT Act expanded the SMTJ, the extraterritorial criminal torture statute no longer applied to areas included in the expanded SMTJ. This anomaly was corrected by § 1089 of the National Defense Authorization Act for Fiscal Year 2005 (NDAA05), which amended 18 U.S.C. §2340(3) to read as follows: “‘United States’ means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.” By narrowing the definition of the United States, and making that definition part of the extraterritorial criminal torture statute, the reach of that statute is expanded prospectively, and the anomaly presented by the expansion of the SMTJ is now avoided. It also became apparent in 2004, that the MEJA statute did not cover situations involving contractors, unless they were employed by the Department of Defense. In October 2004, §1088 of the NDAA05 amended MEJA so that it covered a much broader group of contractors. 18 U.S.C. §3267’s definition of the term “employed by the Armed Forces outside the United States” in MEJA was amended to include “employees, contractors and subcontractors” of “any other Federal agency or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”

50. **The extraterritorial criminal torture statute.** As discussed above in paragraph 12, the USA PATRIOT Act amended the extraterritorial criminal torture statute, codified at 18 U.S.C. §§ 2340, 2340A, to also provide extraterritorial jurisdiction over conspiracy to commit such offenses. As of January 1, 2005, the United States has considered applying the statute in several cases, but it has not initiated any prosecutions under this provision to date. In some cases, investigations are pending. As is necessarily true of any successful criminal prosecution, the available evidence must establish the various elements of the offense.

Accordingly, in order for the extraterritorial criminal torture statute to apply, the conduct must fall within the definition of torture, it must have been committed subsequent to the effective date of the statute (November 20, 1994), and it must have been committed “outside the United States.”

51. The extraterritorial criminal torture statute is available to prosecute U.S. and foreign nationals “acting under the color of law,” provided that the enumerated elements of the offense are met. As a result of initial investigations in some cases, although criminal charges have not been brought under the extraterritorial criminal statute, immigration charges have resulted. Also, as discussed above, U.S. employees and contractors may also be subject to other criminal statutes governing their conduct extraterritorially, which apply in a broader range of circumstances than those described in the extraterritorial criminal torture statute. For example, depending on the circumstances, U.S. employees and contractors may be subject to those criminal statutes defining crimes within the SMTJ, which as discussed above in paragraph 47, generally includes overseas facilities (except for certain persons, such as members of the armed forces and those employed by or accompanying them, who are subject to MEJA or the United States Code of Military Justice). Those statutes defining crimes within the SMTJ prohibit, for example, assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), manslaughter (18 U.S.C. § 1112), and murder (18 U.S.C. § 1111).

52. In the context of U.S. detention operations overseas, these criminal prohibitions may be available to prosecute abuses of detainees by particular members of the military (as noted, members of the military are also subject to the Uniform Code of Military Justice), intelligence and other non-military personnel. For example, on June 17, 2004, the Department of Justice announced that a contractor working for the Central Intelligence Agency had been indicted on charges stemming from the death of a prisoner in Afghanistan, Mr. Abdul Wali. The four-count indictment alleges that in June 2003 the contractor beat an Afghan prisoner who had surrendered voluntarily at the front of a U.S. detention facility near Asadabad in the northeast Kunar province of Afghanistan. The indictment includes two counts of assault causing serious injury and two counts of assault with a deadly weapon. Each count carries a maximum penalty of ten years in prison and a \$250,000 fine upon conviction. The indictment charges that the assaults occurred within the expanded SMTJ provided by 18 U.S.C. §7(9).

**Article 6 (Detention and preliminary inquiry in cases of extradition)
and Article 7 (Extradite or prosecute)**

53. As described in the Initial Report, federal law and bilateral extradition treaties provide the legal basis by which the United States can either extradite or prosecute individuals alleged to have committed offenses involving torture, as required by Article 7 of the Convention. Acts which would constitute or involve the offense of torture, as defined under the Convention, and as interpreted by the understandings expressed by the United States at the time of ratification, are crimes under state or federal law, and subject to prosecution by the appropriate authorities. The crime of torture also continues to fall within the scope of extradition treaties concluded by the United States since the time of its Initial Report.

Article 8 (Extraditable offenses)

54. Consistent with Article 8 of the Convention, any act of torture within the meaning of the Convention continues to be an extraditable offense under relevant United States law and extradition treaties with countries that are also party to the Convention. The crime of torture continues to fall within the scope of extradition treaties concluded by the United States since the time of its Initial Report.

55. Since the Initial Report, the United States has received a small number of requests for extradition involving individuals wanted for serious human rights abuses or war crimes. Since October 1999, the United States extradited Elizaphan Ntakirutimana to the International Criminal Tribunal for Rwanda, which had requested his extradition for genocide, complicity in genocide, and crimes against humanity.

Article 9 (Mutual legal assistance)

56. As discussed in the Initial Report, United States law permits both law enforcement authorities and the courts to request and to provide many forms of “mutual legal assistance” in criminal cases covered by the provisions of the Torture Convention.

Article 10 (Education and Information)

57. As described in the Initial Report, a variety of training programs exist at the federal, state and local level to educate law enforcement personnel, corrections officers and immigration officials in the proper treatment of persons in custody, including information related to the prohibition against torture and other abuses. Training programs for the U.S. Armed Forces, particularly regarding the prohibition of torture and other standards governing detentions by the U.S. Armed Forces in Afghanistan, Guantanamo Bay, and Iraq are described in greater detail in Annex 1.

58. The United States continues to attach considerable importance to the task of providing education and information regarding the prohibition against torture and other abuses to persons who may be involved in the custody, interrogation, and treatment of persons arrested, detained or imprisoned. In furtherance of this effort, and as was the case with the Initial Report, this report will be posted on the U.S. Department of State web site: <http://www.state.gov/g/drl>.

59. As part of a broader effort to educate and inform the public, on June 26, 2004 honoring the U.N. International Day in Support of Victims of Torture, President Bush reaffirmed the U.S. commitment to ending torture and stated that the U.S. “stands against and will not tolerate torture.” See Annex 2. In so doing, the President informed the public and the international community of U.S. programs aimed at combating torture and assisting victims of torture. President Bush issued a similar statement in honor of victims of torture on June 26, 2003, which can be found at <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html>, and the Department of State has also issued similar statements. Additionally, as allegations of abuses have surfaced with respect to detentions of foreign nationals by the U.S. Armed Forces

(see Annex 1), U.S. officials have repeatedly condemned the use of torture. At the same time, the U.S. Congress, advocacy groups, and the press have directed considerable attention to these issues.

Article 11 (Interrogation techniques)

60. As described in the Initial Report, police interrogation of criminal suspects is strictly regulated by court-made rules based on constitutional law. As a result, the methods and practices of interrogation of criminal suspects and their treatment while in custody are routinely subject to judicial review and revision.

61. Concerns have been raised about what detention and interrogation practices were authorized on the basis of the memorandum drafted by the Department of Justice's Office of Legal Counsel in August 2002 interpreting the extraterritorial criminal torture statute (discussed at paragraph 13). On June 22, 2004, upon the release of numerous government documents related to interrogation techniques and U.S. laws regarding torture, then White House Counsel Alberto Gonzales stated the following:

“The administration has made clear before and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws. [L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable.”¹⁰

62. Interrogation techniques employed by U.S. government personnel and contractors have been reviewed in light of the revised Department of Justice Office of Legal Counsel memorandum of December 30, 2004. See Annex 1.

Article 12 (Prompt and impartial investigation)

63. As noted in the Initial Report, as a matter of law, policy and practice, the competent authorities at all levels of Government and in all components of the U.S. government should proceed with a thorough, prompt and impartial investigation whenever they have reason to believe that an act of torture or other abuse has been committed within their jurisdiction. The discussion under Article 2 above demonstrates the commitment of the law enforcement mechanisms in the United States to investigate and rigorously prosecute such abuses in cases within their respective spheres of jurisdiction. Depending on the circumstances, and as noted in the discussion referred to above, this may include prosecutions of misconduct that may arise at the federal, state, county or local law enforcement levels.

Article 13 (Right to complain)

64. As indicated in the Initial Report, individuals who allege that they have been subject to torture or other forms of mistreatment have numerous opportunities to bring complaints and to have their cases promptly and impartially examined by competent authorities.

65. **Legislation on Victims' Rights.** On October 30, 2004, President Bush signed H.R. 5107, known as the Justice for All Act of 2004. [Pub. L. 108-405] Title I of that Act amends the Federal criminal code to grant victims specified rights, including: (1) the right to be protected from the accused, to be heard at any public proceeding involving release, plea, or sentencing, and to be treated with fairness and respect; (2) the right to timely notice of any public proceeding involving the crime or any release or escape of the accused and to proceedings free from unreasonable delay; (3) the right to confer with the Government attorney; and (4) the right to full and timely restitution. It also authorizes grants to help states implement and enforce their own victims' rights laws. Other provisions of the law relate to the expanded and improved use of DNA evidence in the criminal justice system.

66. **Victims' Assistance Programs.** The Office for Victims of Crime (OVC) within the U.S. Department of Justice administers programs authorized by the Victims of Crime Act of 1984, as amended, in addition to the Crime Victims Fund (the Fund), which is also authorized by the same statute. The Fund is composed of criminal fines and penalties, special assessments, and bond forfeitures collected from convicted federal perpetrators, as well as gifts and donations received from the general public. Money deposited in this fund is used to support a wide range of activities on behalf of crime victims, including victim compensation and assistance services, demonstration programs, training and technical assistance, program evaluation and replication, and programs to assist victims of terrorism and mass violence.

67. OVC administers two major formula grant programs: Victim Assistance and Victim Compensation. During the past decade, these two grant programs have greatly improved the accessibility and quality of services for federal and state crime victims nationwide.

68. **Victim Assistance.** Each year, all 50 states, the District of Columbia and various U.S. territories are awarded OVC funds to support community-based organizations that serve crime victims. Approximately 6,400 grants are made to domestic violence shelters, rape crisis centers, child abuse programs, and victim service units in law enforcement agencies, prosecutors' offices, hospitals, and social service agencies. These programs provide services including crisis intervention, counseling, emergency shelter, criminal justice advocacy and emergency transportation. States and territories are required to give priority to programs serving victims of domestic violence, sexual assault, and child abuse. Additional funds must be set aside for underserved victims, such as survivors of homicide victims and victims of drunk drivers.

69. **Victim Compensation.** All 50 states, the District of Columbia, Puerto Rico and Guam have established compensation programs for crime victims. These programs reimburse victims for crime-related expenses such as medical costs, mental health counseling, funeral and burial costs, and lost wages or loss of support. Compensation is paid only when other financial resources, such as private insurance and offender restitution, do not cover the loss. Some expenses are not covered by most compensation programs, including theft, damage, and property loss. Although each state compensation program is administered independently, most programs have similar eligibility requirements and offer comparable benefits.

70. Congress has twice re-authorized the Torture Victims Relief Act (TVRA) [P.L. 105-320], since its initial enactment in 1998. Most recently, the TVRA Reauthorization Act of 2003 [P.L. 108-179], which authorized further increases in funding, was signed by the President on December 15, 2003. The Act authorizes funding for the U.S. Department of Health and Human Services (HHS) to support treatment centers inside the U.S. and for programs for the treatment of victims of torture abroad. The Act also authorizes funding for the U.S. Agency for International Development (USAID) to support centers in foreign countries and programs for the treatment of victims of torture. Finally, as a result of the Act's authorizations of appropriations to the United Nations Voluntary Fund for Victims of Torture, the United States continues to lead the world in its support of the United Nations Voluntary Fund For Victims of Torture. Appropriations to the Fund, distributed through the Department of State, were:

| <i>Fiscal Year</i> | <i>Amount</i> |
|--------------------|---------------|
| 1999 | \$3 million |
| 2000 | \$5 million |
| 2001 | \$5 million |
| 2002 | \$5 million |
| 2003 | \$5 million |
| 2004 | \$5.5 million |

71. **Domestic Assistance to Victims of Torture.** Since the late-1990's the National Institute of Mental Health of the National Institutes of Health within the U.S. Department of Health and Human Services has funded research for survivors of torture and related trauma. HHS, in coordination with other Departments and Congress, has reached out to representatives from the human rights, refugee, and medical communities to discuss treatment for torture survivors.

72. The Office of Refugee Resettlement (ORR) within the Agency for Children and Families (ACF) of the U.S. Department of Health and Human Services (HHS) awards funds to assist survivors of torture. In fiscal year (FY) 2000, the first year of this program, Congress appropriated \$7.5 million for services and rehabilitation for survivors of torture. From FY 2001 through 2004, Congress has appropriated \$10 million each year to HHS, which has supported 25 torture treatment programs in fifteen states.

73. The activities funded by ORR include the following: training refugee resettlement staff, English language teachers, volunteers and community services staff to identify torture survivors and refer them to the services they need; orienting refugees to the help available from mental health services; and orienting mental health professionals to serve refugees effectively across language and cultural barriers.

74. ORR works with a network of non-profit organizations around the country whose mission is to serve the needs of torture survivors. The services needed by survivors of torture are a combination of medical care, spiritual healing, psychological help and other social and legal services. The Center for Victims of Torture (CVT) in Minneapolis, Minnesota provides technical assistance to these organizations. CVT has assisted centers in building data management systems to manage clients, aided in the development of fundraising, and trained

professionals in the particulars in treating members of this population. Other examples of projects funded under this program include: the Arab Community Center for Economic and Social Services in Dearborn, Michigan, which operates a career counseling and training center to assist survivors identify career options; Community Mental Health Services in Falls Church, Virginia, which has a transitional housing program to provide housing for survivors for up to six months; and Solace/Safe Horizon, which provides survivors with culturally and linguistically appropriate mental health services.

75. **Foreign Assistance to Victims of Torture.** In keeping with its legislative mandate under the Torture Victims Relief Act of 1998 and its subsequent reauthorizations, the U.S. Agency for International Development (USAID) works through the Victims of Torture Fund (VTF) to assist the treatment and rehabilitation of individuals who suffer from the physical and psychological effects of torture. According to the International Rehabilitation Council for Torture Victims (IRCT), rehabilitation aims to empower the torture victim to regain the capacity, confidence, and ability to resume as full a life as possible. In FY 2000, Congress appropriated \$7,500,000 to USAID for assistance to survivors of torture. For FY 2001 and 2002, Congress appropriated \$10,000,000 in each year. The appropriation levels for FY 2003 and 2004 were \$7,950,000 each year.

76. Toward this end, the Fund administers treatment programs based in 26 countries that span four regions (Latin America and the Caribbean, Africa, Asia and the Near East, and Europe and Eurasia). Currently, VTF is supporting treatment programs that attend to the medical, psychological, and social needs of torture survivors and their families. In addition to treatment services, some programs include advocacy, training, technical assistance, and research.

77. To complement the work that the Fund supports in the particular countries, the Fund also supports a global initiative through support for the Center for Victims of Torture (CVT) to strengthen the capacity of 15 treatment centers located in Africa, Asia, the Near East, Latin America, and Eastern Europe and to enhance their organizational and financial sustainability, clinical capacity and services, and advocacy campaigns.

78. Additionally, the Fund supports several regional initiatives. In Latin America and the Caribbean, the Fund supports the Inter-American Institute for Human Rights (IIHR) and the Center for Justice and International Law (CEJIL) and their collaborative work to provide psychological support for victims or relatives bringing claims of torture and cruel, inhuman, and degrading treatment before the Inter-American system of human rights. In Southern Africa, the Fund works through the Inter-African Network for Human Rights and Development (Afronet), a host organization for the Southern Africa Human Rights NGO Network (SAHRINGON), to strengthen the capacity of selected human rights nongovernmental organizations in the region to monitor, document, and advocate against torture and violence. In West Africa, the Fund supports the International Rescue Committee (IRC), the CVT, and Search for Common Ground (SFCG) in their program collaborating with national and sub-regional social organizations and employing a cross-border approach to facilitate the return and rehabilitation of refugees and to improve access to information.

Article 14 (Right of redress and/or compensation)

79. As described in the Initial Report, the legal system of the United States provides a variety of mechanisms through which persons subjected to torture or other abuse may seek redress, which are consistent with the obligations assumed by the United States upon ratification of the Convention.

80. **Civil actions in state and federal courts.** Individuals continue to file civil suits in state and federal courts seeking redress against officials for allegedly violating their rights, which may involve seeking monetary damages or equitable or declaratory relief. One of the most common methods by which prisoners seek redress against state and municipal officials is by means of a civil law suit for violations of fundamental rights pursuant to 42 U.S.C. § 1983. Some examples of such civil litigation follow:

- On February 20, 2003, the city of Oakland, CA agreed to a \$10.9 million settlement with dozens of plaintiffs in federal court who said they were victimized by four Oakland police officers, infamously known as the “Riders.” Allegations included excessive use of force, planting of evidence, and assault and battery. In addition to the monetary settlement, the Oakland Police Department was compelled to make systemic changes to bolster the accountability of the department;
- On September 26, 2002, the Court of Appeals of Arizona upheld the decision of a trial court jury that handed down a judgment against a local sheriff in an incident where an inmate in the county jail brutally attacked another inmate. The incident gave rise to a civil rights claim for damages under § 1983. The sheriff was found by the jury to have demonstrated deliberate indifference to inmate safety. The jury awarded, and the appellate court affirmed the award of compensatory and punitive damages;
- On April 5, 2002, a federal jury awarded a NY woman nearly \$1.7 million in punitive and compensatory damages in a § 1983 civil rights suit after being victimized by the excessive force of a NY police officer;
- In June 2001, the city of Asbury Park, NJ agreed to a \$5 million settlement with the family of a man who hung himself while in custody of the police. The police failed to notice the man committing suicide, despite video surveillance of his holding cell, until such a late point that he was left in a permanent vegetative state. The suit was settled just prior to June 11, 2001, the scheduled start date for the trial;
- In 2001, the District of Columbia spent over \$3 million to settle allegations of police and prison guard brutality. Nearly \$2 million was spent to settle 45 prisoner abuse cases that included inmate-on-inmate violence and beatings by prison guards. The remaining money was used to settle 48 allegations of police brutality and false arrest.

81. **Alien Tort Statute.** As discussed in the Initial Report, the Alien Tort Statute (ATS), which was enacted in 1789 and is currently codified at 28 U.S.C. § 1350, provides that “[the]

district courts shall have original jurisdiction in 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 United States Supreme Court recently had occasion to consider the ATS in *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004). While adopting a restrictive interpretation of the range of civil actions that could be brought under this statute consistent with the intent of the legislators who originally enacted it, the Court left open the possibility that federal courts may recognize as a matter of federal common law claims for damages based on alleged violations of the law of nations.

82. **Torture Victims Protection Act (TVPA).** As described in the Initial Report, the 1992 Torture Victims Protection Act allows both foreign nationals and United States citizens to claim damages against any individual who engages in torture or extrajudicial killing under “actual or apparent authority, or under color of law of any foreign nation.” It allows suits for redress for torture or extrajudicial killings perpetrated by officials of foreign governments. In July 2002, following a four week trial of a suit brought under the TVPA, a federal jury in the Southern District of Florida in West Palm Beach returned a verdict of \$54.6 million against two Salvadoran generals for their responsibility for the torture of three Salvadorans in the early 1980s. *Romagoza Arce v. Garcia*, No. 99-8364 CIV-Hurley (S.D. Fla. Feb 17, 2000). The U.S. Court of Appeals for the Eleventh Circuit subsequently reversed this decision on the grounds that the claims were time-barred by the statute of limitations. *Romagoza Arce v. Garcia*, No. 02-14427 (11th Cir. 2005).

83. **Treatment and rehabilitation.** As noted in the Initial Report, the United States continues to hold the view that in addition to monetary compensation, States should take steps to make available other forms of remedial benefits to victims of torture, including medical and psychiatric treatment as well as social and legal services. For examples of the U.S. commitment to such programs, see paragraphs 66-78.

84. The United States continues to be a haven for victims of persecution in foreign lands, including torture victims. Various private facilities exist in the United States for the treatment of individuals who suffered torture abroad. The CVT in Minneapolis, Minnesota, established in 1985, is the nation's pre-eminent comprehensive torture treatment center. Other facilities exist in the following locations: Hotevilla, Arizona; Phoenix, Arizona; Los Angeles, California; San Diego, California; San Francisco, California; San Jose, California; Denver, Colorado; Clearwater, Florida; Chicago, Illinois; Baltimore, Maryland; Dearborn, Michigan; Lincoln, Nebraska; New York, New York; Columbus, Ohio; Portland, Oregon; Philadelphia, Pennsylvania; and Falls Church, Virginia.

Article 15 (Coerced statements)

85. United States law continues to provide strict rules regarding the exclusion of coerced statements and the inadmissibility of illegally obtained evidence in criminal trials.

86. Also, some states have taken steps recently to further protect the rights of the accused. In 2003, Illinois passed a crime law that requires police to videotape or audiotape questioning of suspects in homicide cases for the entirety of the interview. The reform measure joins Illinois with Alaska and Minnesota as the leading states to require such tapings.

Article 16 (Other cruel, inhuman or degrading treatment or punishment)

87. As the President of the United States explained on the United Nations International Day in Support of Victims of Torture, in addition to its commitment to investigating and prosecuting all acts of torture, the United States will “undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction.” *See* Annex 2.

88. In the United States a robust legal and policy framework operates to give effect to U.S. obligations under Article 16 of the Torture Convention. Article 16 requires that States parties act to “prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” The particular undertakings of Article 16 are those specified in Articles 10-13, “with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.” As we did in the Initial Report, we note the reservation to Article 16 included by the United States in its instrument of ratification: “That the United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” As described in the Initial Report, federal and state law provide extensive protections against conduct that may amount to cruel, inhuman or degrading treatment or punishment.

89. The Initial Report addressed a number of specific issues of concern where law enforcement authorities acted in a manner inconsistent with the legal framework described above. Many of the shortcomings described in the Initial Report continue to arise in particular instances. At the same time, however, U.S. law continues to provide effective mechanisms at the federal and state level to address such abuses and to prevent their recurrence.

90. As we noted earlier in paragraph 18, although the examples cited below in the discussion under Article 16, like other examples cited throughout the report, do not necessarily involve acts of torture as defined under Article 1 of the Convention, as ratified by the United States, or cruel, inhuman or degrading treatment or punishment as defined under Article 16 of the Convention, as ratified by the United States, they are included to illustrate the commitment of the United States, or as the case may be, the sub-Federal level authorities in the United States, to prevent and prosecute serious abuses, whether or not they fall within these definitions of torture or cruel, inhuman or degrading treatment or punishment.

91. **Police brutality.** Efforts continue to be made to punish and prevent police brutality. Indeed, the discussion in paragraph 21 above that includes an illustrative list of prosecutions of law enforcement officers who employed unlawful force illustrates both the continuing problems that arise in this area as well as the resolve of the United States to take action to both punish the perpetrators of such abuses and to prevent their recurrence. As discussed in the Initial Report, and as evidenced by the discussion above, certain excessive use of force by law enforcement

officers violates the United States Constitution and federal law, as well as the law of the state where the incident occurs. United States law, at both the federal and state level, continues to provide victims of such abuses several methods for seeking compensation and rehabilitation as well as grounds for punishing those who have used excessive force.

92. **Conditions of Confinement.** U.S. law enforcement authorities continue to work to improve conditions of confinement in detention facilities within the United States. In fact, the discussion in paragraph 27 above provides an illustration of such problems, as well as the mechanisms employed by the Civil Rights Division of the Department of Justice to challenge conditions of confinement in various prisons and other remedies available under federal and state law. United States law, at both the federal and state level, continues to provide inmates themselves with several methods to challenge conditions of confinement. Indeed, it is common practice in prisons and jails throughout the United States for inmates to challenge conditions of confinement in federal and state courts as evidenced by the numerous district and appellate court decisions handed down every year in federal reporters (collections of federal case decisions), and as further exemplified by the discussion under paragraph 27 above. Additionally, various non-governmental organizations continue to employ advocacy and litigation to draw attention to sub-standard conditions in the nation's prisons. For example, as a result of a class-action lawsuit over conditions for prisoners in a county jail in Washington State filed by the ACLU's National Prison Project in February 2002, a U.S. District Court approved a settlement agreement in January 2004 to improve conditions for inmates in the jail.

93. As indicated in the Initial Report, the United States Constitution, along with federal and state laws, establishes standards of care to which all inmates are entitled. The Federal Bureau of Prisons (BOP) meets its constitutional and statutory mandates by confining inmates in prisons and community-based facilities that are safe, humane, and appropriately secure, and that provide opportunities and programs to help inmates develop the personal and work-related skills they will need to maintain a crime-free lifestyle after release.

94. The BOP strives to ensure that all inmates in its custody are treated fairly and with dignity. The agency does not tolerate abuse of inmates, and takes all allegations of staff misconduct and the mistreatment of inmates very seriously. Every allegation is investigated vigorously and thoroughly. If warranted, offending staff are referred for prosecution.

95. **Supermaximum security prisons.** For certain violent inmates, supermaximum security ("supermax") facilities may be necessary, for among other reasons, to protect the safety of the community at large and of other members of the prison population. As discussed in the preceding paragraphs, U.S. law requires that prisons throughout the United States satisfy U.S. constitutional requirements. When they fail to do so, a variety of remedies are available, as described under Article 2 above. For example, in March 2003, the ACLU and others settled a lawsuit brought against Wisconsin's Department of Corrections regarding conditions at its supermax prison in Boscobel, Wisconsin. The settlement agreement included a ban on seriously mentally ill prisoners being housed in the facility; a modest improvement to exercise provision and rehabilitation programs; and a reduction in the use of restraints and electro-shock control devices.

96. **Sexual abuse of prisoners.** Law enforcement authorities in the United States continue to prevent and punish acts of sexual abuse committed against prisoners. Illustrative of the problem of sexual abuse in correctional facilities are the facts animating *United States v. Arizona* and *United States v. Michigan*, both filed in 1997 and dismissed in 1999 and 2000, respectively, subject to a settlement whereby state prisons agreed to make significant changes in conditions of confinement for female inmates. In these cases, brought pursuant to CRIPA, described above, the Department of Justice's Civil Rights Division sought to remedy a pattern or practice of sexual misconduct against female inmates by male staff, including sexual contact and unconstitutional invasions of privacy.

97. Enhancing the protections already in place under U.S. law, the Prison Rape Elimination Act of 2003 (PREA) [Pub. L. 108-79] was enacted by Congress to address the problem of sexual assault of persons in the custody of U.S. correctional agencies. The Act applies to all public and private institutions that house adult or juvenile offenders and is also relevant to community-based agencies. On September 4, 2003, President George W. Bush signed PREA into law. The purpose of the Act is to: (a) establish a zero-tolerance standard for the incidence of rape in prisons in the United States; (b) make the prevention of prison rape a top priority in each prison system; (c) develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape; (d) increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities; (e) standardize the definitions used for collecting data on the incidence of prison rape; (f) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape; (g) protect the Eighth Amendment rights of federal, state, and local prisoners; (h) increase the efficiency and effectiveness of federal expenditures through grant programs such as those dealing with health care, mental health care, disease prevention, crime prevention, investigation, and prosecution, prison construction, maintenance, and operation, race relations, poverty, unemployment, and homelessness; and (i) reduce the costs that prison rape imposes on interstate commerce.

98. Additionally, the Director of the Bureau of Prisons has repeatedly affirmed, both to BOP staff and the public, the agency's zero tolerance standard for sexual abuse of inmates. The agency is committed to developing systemic approaches to prevent and control sexual abuse in prisons. As part of this initiative, in 1997 the BOP issued a policy on sexual abuse and sexual assault prevention and intervention programs. Program Statement 5324.04, Sexual Abuse/Assault Prevention Programs, updated December 31, 1997, addresses (1) prevention of sexual assaults on inmates, (2) the safety and treatment needs of inmates who have been sexually assaulted, and (3) discipline and prosecution of those who sexually assault inmates. The policy requires that all staff receive training annually to recognize the physical, behavioral, and emotional signs of sexual assault, understand the identification and referral process when a sexual assault occurs, and have a basic understanding of sexual assault prevention and response techniques.

99. BOP staff receive training annually on this topic. BOP staff members know that inmates must report inappropriate conduct by staff and that inmates will be safeguarded against any reprisals by staff or inmates. BOP staff members also know that if they become aware of sexual activity occurring between staff and inmates, they must report such conduct or be subject to

disciplinary action. In addition, all federal inmates receive a pamphlet about sexual abuse; and, during orientation to the institution, inmates are taught that it is illegal for a staff member to have sexual contact with an inmate, how they should report such contact, and what process they will go through once a report is made.

100. The BOP takes seriously all allegations of sexual misconduct and refers such matters to appropriate investigative agencies. Allegations of mistreatment of prisoners are ordinarily investigated by the Department of Justice's Civil Rights Division or the Office of Inspector General. Some examples follow:

- On November 25, 2003, the Division reported its findings of its investigation of the McPherson Correctional facility in Newport, Arkansas. The Division found that serious problems existed at the McPherson facility with regard to sexual misconduct. The Division noted lapses in supervision of staff and inmates, privacy violations, and substandard investigations;
- On March 6, 2003, the Division reported its findings regarding the Santa Fe County Adult Detention Center in which the Division recommended that the Detention Center make more concerted efforts to guide and train staff, avoid leaving female inmates isolated and vulnerable, and improve the system of reporting and investigating allegations of sexual misconduct.

101. Examples of prosecutions of law enforcement officers for abusing female detainees and inmates by the U.S. Department of Justice's Civil Rights Division include the following examples:

- On September 24, 2003, a North Carolina state police officer pleaded guilty to a felony civil rights charge for coercing women, whom he stopped or arrested, into having sex with him. He was sentenced to ten years in prison;
- On November 9, 2000, a correctional officer captain from a jail in Florida pled guilty to having forcible sexual contact with a female inmate and was sentenced to 15 months in prison;
- On March 23, 2000 a U.S. Bureau of Prisons correctional officer in Oklahoma City was convicted of engaging in various degrees of sexual misconduct with five female inmates. He was sentenced to 146 months in prison;
- January 23, 2001 a Florida Department of Corrections officer with the Metro Dade Jail was convicted of assaulting a female inmate resulting in multiple contusions to her face, back and neck. He was sentenced to 17 months in prison.

102. **Restraint devices.** The use of restraint and electro-shock devices continues to form the basis of allegations of abuse by law enforcement officers. Advocacy groups have directed considerable attention to publicizing such allegations and taking legal action to remedy alleged abuses. According to a 2002 Amnesty International report, between 2000 and 2002, at least

four inmates died in the United States after being subdued in a restraint chair. In February 2001, the American Civil Liberty Union's National Prison Project and the Connecticut branch of the ACLU filed a lawsuit against the Connecticut Department of Corrections alleging that Connecticut prisoners held in a Virginia state prison, Wallens Ridge State Prison, were being subjected to cruel and unusual punishment in violation of the U.S. Constitution, by being placed in mechanical restraints for prolonged periods for minor offenses.

103. At the federal level, whether inmates are in the custody of the Federal Bureau of Prisons, or the U.S. Marshals Service (USMS), the use of restraint devices, including electro-shock devices, is permissible, subject to imposition in a manner consistent with the applicable policies and procedures. As described in greater detail below, such devices are sparingly used, if at all, and only as a last resort.

104. In federal prisons, the BOP's Program Statement 5566.05, Use of Force and Application of Restraints on Inmates, updated December 31, 1996, applies. It outlines specific procedures and protocols for the use of force and restraints. The BOP authorizes staff to use force only as a last alternative after all other reasonable efforts to resolve a situation have failed. Staff are authorized to use only the amount of force necessary to gain control of the inmate; to protect and ensure the safety of inmates, staff, and others; to prevent serious property damage; to enforce institution regulations; to prevent a crime or to apprehend someone who is believed to have committed a crime; and to ensure the security and good order of the institution. Staff may immediately use force if it is determined through sound correctional judgment that an inmate's behavior constitutes an immediate, serious threat to the safety of another individual, or to the security of the institution and its property. Staff may use force in an immediate (rather than calculated) fashion if it is determined through sound correctional judgment that an inmate's behavior constitutes an immediate, serious threat to the safety of another individual, or to the security of the institution and its property.

105. Staff are authorized to apply physical restraints to gain control of an inmate who appears to be dangerous because the inmate is assaulting another individual, destroying government property, attempting suicide, inflicting injury upon himself or herself, or displaying signs of imminent violence. Four-point restraints can be used when the warden has determined that this method is the only means available to maintain control of an inmate. The BOP uses soft four-point restraints unless soft restraints have been previously proven ineffective on the inmate. The BOP's use of restraint chairs is intended only for short-term use, such as transporting an inmate on or off of an airplane. The BOP policy outlines procedures that call for the guidance of health care personnel in the application of restraints and for qualified staff to regularly check the restraints and the inmate's medical condition.

106. The BOP routinely removes inmates from secure institutions, typically for medical treatment, inmate transfers, and court appearances. The safety of citizens and staff, as well as the security of inmates, is paramount during these moves. Some of these escorted trips involve high-risk inmates who require full physical restraints. To increase security and reduce the risk to the community in these instances, "stun belts" have been adopted for agency use, but only for Maximum custody inmates who require greater security than can be afforded through conventional restraints. To date the BOP has not activated the stun belt on an inmate.

107. The stun belt is a defensive device. Only trained, qualified staff members at the supervisory level are authorized to apply and activate a stun belt during an escorted trip. When activated, it produces a medically tested, less than lethal electrical charge of 50,000 volts, which temporarily immobilizes the inmate without causing permanent injury, allowing staff to regain immediate control of the situation. The stun belt has been determined to be essentially harmless to individuals in good health. The BOP medical staff have reviewed the stun belt and concluded the technology is medically safe for use on the great majority of the BOP's inmate population. The exceptions are: 1) pregnant female inmates, 2) inmates with heart disease, 3) inmates with multiple sclerosis, 4) inmates with muscular dystrophy, and 5) inmates who are epileptic. As part of pre-escort screening, inmates identified as having these conditions are prohibited from wearing the belt.

108. When federal pretrial detainees are remanded to the custody of the U.S. Marshals Service, USMS policies and procedures regarding restraints apply. However, the USMS does not operate any facilities that house pretrial detainees. Rather, the USMS contracts with state, local, and private jails throughout the United States to house and care for federal pretrial detainees. Although the daily safekeeping and care of federal pretrial detainees is the responsibility of these jails, the jails must nonetheless undergo regular USMS inspections under the standards promulgated by the U.S. Department of Justice and the American Correctional Association.

109. Stun belts are also used for courtroom security purposes to control potentially violent defendants. The stun belt is placed underneath the clothing of the individual, on the individual's waist, and is activated by remote control.

110. The USMS has distributed approximately 200 stun belts to district offices across the country, principally for use on high-risk federal prisoners in courtrooms. The use of stun belts is strictly regulated pursuant to USMS policy and procedures, including application and activation guidelines and reporting procedures. Any deputy who is authorized to employ the device must successfully complete a four-hour basic certification program, including a written and practical examination, ensuring that he/she is competent in the proper use of the belt. Stun belts are placed on federal prisoners in court only with the court's approval and are not utilized where a prisoner's medical condition would pose a danger with its application. In fact, the actual practice of the USMS reveals that stun belts have been sparingly activated. The USMS reports that there have been two instances in which USMS staff have intentionally activated the device. In both instances they were deployed in courtroom settings and the detainee suffered no injuries in either case. In addition, current FAA regulations have not approved the use of stun belts on board aircraft.

111. The USMS believes that, although resort to activation of stun belts is infrequent in U.S. courts, stun belts are a proper, safe, legal and effective part of the USMS overall courtroom security program. In instances in which USMS personnel must physically control a prisoner, this device, if activated, would allow USMS personnel to restrain the prisoner in a manner that presents less of a physical danger to U.S. personnel and others requiring protection from the accused. Alternatively, USMS personnel must either choose to strike a violent defendant with an expandable baton or with a hand/foot technique. Chemical/pepper spray is another option.

However, the use of such spray in the courtroom poses substantial difficulties in the cross contamination of other parties such as the judge and jurors, as well as a higher probability of physical injury to the prisoner and the USMS personnel. Finally, the United States Court of Appeals for the Ninth Circuit recently upheld the constitutionality of placing a stun belt on a defendant for security purposes in the courtroom. *Hawkins v. Comparet*, 251 F.3d 1230, 1240-42 (9th Cir. 2001). In that decision, the court recognized the effectiveness of the stun belt to ensure courtroom security without prejudicing a defendant's right to a fair trial. *See also United States v. Joseph*, 333 F.3d 587, 590-591 (5th Cir. 2003), cert. denied, 124 S.Ct. 446 (2003).

112. At the state level, while the use of electro-shock devices continues in many state courts and prisons, some state courts have taken steps to curtail the application of such devices. In 2001, the Supreme Court of Indiana banned the use of stun belts on defendants in court. *Wrinkles v. State*, 749 N.E. 2d 1179, 1194 (Ind. 2001).

113. More recently, other states have also limited the use of stun belts. In 2002, the California Supreme Court ruled that the use of a stun belt requires a showing, on the record, of a manifest need for such restraints, supported by evidence of "violence or a threat of violence or other nonconforming conduct" by the defendant. *People v. Mar*, 52 P.3d 95, 104-5 (Cal. 2002). Illinois courts have begun taking steps to limit the use of stun belts during state trials. In 2004, the Appellate Court ruled that the use of stun belts must be held to the same stringent requirements as those for other physical restraints, and that failure to do so constituted a violation of the defendant's due process rights. *People v. Martinez*, 808 N.E.2d 1089 (Ill.App.Ct. 2004).

114. **Detention of juveniles.** The Department of Justice continues to make it a priority to investigate and remedy unlawful conditions in juvenile justice facilities across America. Between October 1, 1999 and January 1, 2005, the Civil Rights Division authorized 16 investigations covering 26 juvenile justice facilities, issued eight findings letters - letters detailing patterns or practices of civil rights violations and minimum remedial measures to remedy the violations - regarding conditions in 17 juvenile justice facilities, and entered 11 settlement agreements involving 26 facilities. In fiscal year 2004, the Civil Rights Division authorized five investigations of five facilities; issued three findings letters regarding conditions at six facilities; filed one lawsuit involving two facilities; and entered three consent decrees or agreements regarding four facilities.

115. The Civil Rights Division's investigations of juvenile facilities have revealed that, in various locations throughout the country, there are facilities that contravene the constitutional and/or statutory rights of the resident inmates. In December 2003, the Division sued Mississippi over the conditions of confinement at the Oakley Training School in Raymond, Mississippi and the Columbia Training School in Columbia, Mississippi. The Division's investigation found evidence of numerous abusive practices, including hogtying, pole-shackling, and placing suicidal students for extended periods of time into a "dark room," naked, with only a hole in the floor for a toilet. Children who became ill during strenuous physical exercise were made to eat their vomit. As of January 1, 2005, the Civil Rights Division remains in litigation with the State of Mississippi.

116. Although practice varies within prisons at the state level, in federal prisons, juveniles are not regularly held in prison with the regular prison population. Federal law prohibits juvenile offenders held in custody of federal authorities from being placed in correctional institutions or detention facilities in which they could have regular contact with adult offenders. *See* 18 U.S.C. § 5039.

117. **Care and Placement of Unaccompanied Alien Children.** In March 2003, § 462 of the Homeland Security Act of 2002 transferred functions under U.S. immigration laws regarding the care and placement of unaccompanied alien children (UACs) from the Commissioner of the Immigration and Naturalization Service to the Office of Refugee Resettlement (ORR) within the Administration for Children and Families (ACF) at the Department of Health and Human Services.

118. Responsibilities of ORR under the law include: making and implementing placement determinations and policies, identifying sufficient qualified placements to house UACs, ensuring that the interests of the child are considered in decisions related to the care and custody of UACs, reuniting UAC with guardians and/or sponsors, overseeing the infrastructure and personnel of UAC facilities, conducting investigations and inspections of facilities housing UACs, collecting and comparing statistical information on UACs, and compiling lists of qualified entities to provide legal representation for UACs.

119. The UAC Program has accomplished a great deal since its inception within ORR. The program has made great strides in improving overall services within facilities, including enhanced clinical and mental health services. The program has also been faced with a dramatic increase in the number of apprehended juveniles due to increased Department of Homeland Security border initiatives. As a result, the program has added over 300 shelter/foster care beds to accommodate the influx, marking a significant achievement for this program. This was accomplished without reliance on secure detention facilities. In fact, since March 2003 the program has dramatically reduced its reliance on secure detention by ensuring that only those with a severe criminal background are placed in a secure juvenile facility. Children are never mixed with an adult population, since the current facilities under contract are licensed to serve only juvenile populations. Currently, less than 2 percent of the total UAC population is in a secure environment. Finally, all facilities are required to ensure an appropriate level of care in terms of education, counseling, recreation and mental health services.

120. **Abuse of the institutionalized.** Between October 1 1999 and January 1, 2005, pursuant to CRIPA, described above in paragraph 26, the Civil Rights Division authorized 5 investigations covering 8 facilities housing persons with mental illness, 6 investigations covering 6 facilities housing persons with developmental disabilities, and 10 investigations covering 10 nursing homes. During that period, the Civil Rights Division entered into four settlement agreements concerning three facilities housing persons with mental illness, 10 settlement agreements concerning 17 facilities housing persons with developmental disabilities, and 3 settlements concerning 3 nursing homes. During that period, pursuant to CRIPA, the Civil Rights Division issued findings letters regarding conditions in 7 facilities for persons with mental illness, 5 facilities for persons with developmental disabilities, and 11 nursing homes. Some examples of these investigations follow:

- On January 12, 2004, the U.S. Department of Justice's Civil Rights Division and the State of Louisiana filed a complaint and consent decree in *United States v. Louisiana* (M.D. La.) regarding the Hammond and Pinecrest Developmental Centers. The action resolved an investigation into allegations of a pattern or practice of violations at the two facilities. Pinecrest and Hammond are the two largest state-owned and operated residential facilities in Louisiana serving persons with developmental disabilities. Staff at one of the facilities have been arrested for abuse such as kicking a resident, dragging him to his room, placing a blanket over his head, and hitting him. At the other facility, staff had left residents alone for long periods of time and when the residents were eventually found, they were found in appalling and unclean conditions. The Department of Justice's Civil Rights Division and the State of Louisiana entered into a consent decree in which the State agreed to remedy the alleged constitutional deficiencies;
- On February 17, 2004, the Civil Rights Division filed a complaint and a consent decree in *United States v. Breathitt County, Kentucky* (E.D. Ky.) regarding Nim Henson Geriatric Center, a case concerning unconstitutional conditions at the county nursing home, including the use of inappropriate medications for an elderly population, unnecessary medical interventions such as feeding tubes, and residents with untreated bed sores. For example, during the Division's investigation, the Division found that in many instances, residents' medical records contained no clinical justification for their medications, and frequently certain medications appeared to be prescribed inappropriately. Often, powerful psychotropic medications were administered to patients based solely on nurses' observations that they were "agitated," and a high number of Nim Henson residents displayed symptoms consistent with many of the harmful side effects of harmful medication use, particularly muscular rigidity, swallowing difficulties, restricted speech and movement, and mental confusion. The consent decree contains remedial measures addressing these and all of the Division's other findings of unconstitutional conditions at Nim Henson;
- In October 2001, the Civil Rights Division obtained the first court-ordered comprehensive community service plan for persons with developmental disabilities after President Bush signed the New Freedom Initiative (a domestic initiative to help Americans with disabilities by increasing access to assistive technologies, expanding educational opportunities, increasing the ability of Americans with disabilities to integrate into the workforce, and promoting increased access into daily community life). In 1997, the Division investigated all six of the residential facilities for persons with developmental disabilities operated by the Commonwealth of Puerto Rico. The Division found dire conditions at the institutions such as no running water, broken toilets, showers and sinks, as well as medication and food shortages. Many residents were found in filthy conditions and suffered serious injuries such as black eyes, deep cuts to the head, bruises, and significant weight loss. The Division responded quickly, filing suit and securing a series of agreements to remedy deficient conditions. The Division reached agreement on a comprehensive community-based

service plan whereby the Commonwealth would create a community system to serve the residents with developmental disabilities in the most integrated setting. As a result, the Commonwealth closed its deficient institutions and created a good community system. Virtually all of the residents who had been institutionalized in dire conditions now live in clean, safe homes staffed by caring and involved staff. The Division has conducted several monitoring tours of community placements and programs. Most recently, the Commonwealth committed to increasing its mental health care for former residents of institutions now living in the community.

121. **Prisoners on chain gangs.** Chain gangs are employed by a minority of states, where their use has sparked controversy. However, the use of chain gangs is not *per se* unconstitutional.
122. The Bureau of Prisons does not employ chain gangs. While only a minority of states and some local jurisdictions employ chain gang work crews, one county in Arizona has attracted particular attention for its approach. Maricopa County, Arizona operates four chain gangs, two for adult males, one for females, and one for juveniles. Common duty for chain gang members is to bury indigent members of the community. In the past, federal authorities have in some instances taken measures to regulate state authorities who have employed chain gangs.
123. Some states have stopped using chain gangs for a variety of reasons, including safety concerns for inmates. Although Alabama was the first state to resurrect the practice in 1995, it ended its chain gangs only two years later. Inmate safety was a significant factor behind Alabama's decision after a guard shot an inmate who attacked a fellow prisoner while they were chained together and the victim could not escape. Also, in 2002, the Alabama Supreme Court ruled that prison guards could be held liable for injuries suffered by a prisoner while on a chain gang.
124. One of the issues involved in the investigations by the Civil Rights Division of the Department of Justice into two Alabama prisons involved use of the "hitching post." The Department of Justice concluded that Alabama's systematic use of the hitching post constituted improper corporal punishment. Later, in *Hope v. Pelzer*, 536 U.S. 730 (2002), the Supreme Court agreed with the petitioner and the United States (which participated as a "friend of the court") that the use of the "hitching post" was, under the alleged circumstances, an unconstitutional practice. In that case, a hitching post referred to a metal bar located outdoors to which inmates were attached by means of mechanical restraints. The Court held that it is unconstitutional for prison officials to, with deliberate indifference to the health or safety of inmates, expose inmates to the "unnecessary and wanton infliction of pain." *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (internal quotation marks omitted).
125. **Adult aliens in immigration custody.** The Department of Homeland Security continues to address allegations that arise about the treatment of aliens held in immigration detention. Within the Department of Homeland Security, the Bureau of Immigration and Customs Enforcement (ICE), Office of Detention and Removal Operations (DRO) detains approximately 19,000 aliens in Service Processing Centers, Contract Detention Facilities and

local facilities through Inter-governmental Service Agreements (IGSA). ICE regularly meets at both the national and local levels with various non-governmental organizations (NGOs) (such as the American Immigration Lawyers Association, the American Bar Association, Catholic Charities, Las Americas) to address such allegations. A national NGO working group meets in Washington, D.C. at ICE Headquarters. ICE also regularly meets with consular officials to address allegations of mistreatment.

126. In a particularly noteworthy development since the Initial Report, in November 2000, the former Immigration and Naturalization Service (INS) promulgated the National Detention Standards (NDS). These 36 standards were the result of negotiations between the American Bar Association, the Department of Justice, the INS and other organizations involved in pro bono representation and advocacy for immigration detainees. The NDS provides policy and procedures for detention operations. Previously, policies governing detention operations were not consolidated in one location, but were instead sent to field officers via periodic memoranda containing guidance and policy statements. As a result, local differences among INS detention offices were possible.

127. The NDS are comprehensive, encompassing areas from legal access to religious and medical services, marriage requests to recreation. The four legal access standards concern visitation, access to legal materials, telephone access, and group presentations on legal rights. In July 2003, the 37th standard was introduced for Staff-Detainee Communication, which is discussed further at paragraph 137. Effective March 2003, the Office of Detention and Removal Operations became a division of ICE within the Department of Homeland Security. Effective September 2004, the Detainee Transfer standard was added. The 38 NDS can be accessed by the public and other interested parties via the Internet at <http://www.ice.gov/graphics/dro/opsmanual/index.htm>.

128. ICE is committed to ensuring that the conditions of confinement for aliens detained pursuant to ICE authority meet or exceed the National Detention Standards. These standards are based on current ICE detention policies, Bureau of Prisons' Program Statements and the widely accepted American Correctional Association Standards for Adult Local Detention Facilities, but are tailored to serve the unique needs of ICE detainees. All ICE facilities are required to comply with such standards. Additionally, wherever possible, ICE works with private contract facilities and state, local and federal government agencies which are holding aliens under Intergovernmental Service Agreements to ensure that non-ICE facilities comply with ICE's detention standards.

129. On January 24, 2002, DRO completed and implemented the Detention Management Control Program (DMCP) to operational components at all levels. The DMCP replaced the outdated INS Jail Inspection Program. The purpose of the DMCP is to prescribe policies, standards, and procedures for ICE detention operations and to ensure detention facilities are operated in a safe, secure and humane condition for both detainees and staff. The DMCP consists of a series of events designed to ensure that reviews/inspections of detention facilities are conducted in a uniform manner.

130. All Service Processing Centers, Contract Detention Facilities, and Intergovernmental Service Agreements are reviewed annually using procedures and guidance as outlined in DMCP. During FY 2003, a cumulative total of 8 Special Assessments were conducted as a result of reported significant incidents, reported deficiencies, at-risk detention reviews or significant media event. Some examples follow:

- A special assessment was prompted at a facility in Oklahoma following an escape. Health, welfare and safety issues were identified during the assessment. Corrective actions taken by ICE included the removal of all ICE detainees from the facility and the termination of the agreement;
- Following an escape of a detainee, a special assessment was conducted at a facility used in Washington. The population was ordered reduced due to health, welfare and safety issues. Monthly site visits were instituted until the facility became compliant with the contract and applicable standards. The contractor removed the Warden and Assistant Warden;
- After allegations of assault on a detainee by staff at a parish jail in Louisiana, a special assessment was conducted. The officer was arrested and prosecuted by the Parish District Attorney, other staff were terminated, and disciplinary action initiated. No further action by ICE was required.

131. ICE concluded capacity studies for its Service Processing Centers (SPCs) in 2003. These studies were conducted by an independent agency. They determined the proper population levels at each facility based on operational, design, and emergency capacity parameters. Pursuant to completion of these studies, ICE issued policy directives mandating facility compliance with assessed appropriate population levels.

132. Another noteworthy development since the Initial Report affecting the rights of aliens is the U.S. Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), which established, as a matter of statutory interpretation, certain limitations upon the government's ability to detain aliens. In *Zadvydas*, discussed above at paragraph 38, the Supreme Court construed INA § 241(a)(6), 8 U.S.C. § 1231(a)(6), the statute authorizing immigration detention of aliens after the issuance of a final order of removal, to require that an alien who "has effected entry into the United States" and been ordered removed may only be detained for a period reasonably necessary to remove the alien. The Court held that detention for six months after a final removal order is entered is presumptively reasonable. After six months, however, detention may not be reasonable absent evidence that removal is likely to occur in the reasonably foreseeable future or evidence that "special circumstances," such as a national security threat or an alien's dangerousness, may warrant continued detention. District and appellate courts have also held that where the alien has created the delay in removal, the alien's continued detention does not violate the statute. In light of this ruling, the regulations governing detentions of aliens were revised. Specifically, 8 C.F.R. § 241.4 was revised in November 2001 to provide post-order custody review procedures for inadmissible and deportable criminal and other aliens in detention whose prompt removal is delayed or impracticable because their own governments

have not agreed to their return. To implement the standards established in *Zadvydas*, an additional provision was promulgated. Section 241.13 of Title 8 of the C.F.R. establishes procedures to determine whether there is a significant likelihood that an alien who has effected an entry into the U.S. will be removed in the reasonably foreseeable future.

133. Finally, in January 2005 in *Clark v. Martinez*, 125 S.Ct. 716 (2005), the Supreme Court of the United States held that the construction of 8 U.S.C. § 1231(a)(6), which the Court announced in *Zadvydas* (discussed above), applies to aliens “ordered removed who are inadmissible under § 1182” of Title 8 of the United States Code, which sets forth the general classes of aliens ineligible to receive visas and ineligible for admission to the United States. Thus, the Court held that such aliens may be detained only as long as “reasonably necessary” to remove them from the United States and that the six-month presumptive detention period prescribed in *Zadvydas* applies to such aliens. Accordingly, the Court concluded that the detention of Sergio Suarez Martinez and Daniel Benitez, both Mariel Cubans who have been ordered removed and who are inadmissible under § 1182, was subject to the limitations articulated in *Zadvydas*.¹¹

134. **Immigration detentions connected with September 11 investigations.** In response to the attacks against the United States on September 11, 2001, the United States initiated an investigation to identify any accomplices to the terrorists who committed the September 11 attacks and to prevent a future attack. Department of Justice officials from numerous components, including employees of the Federal Bureau of Investigation (FBI), the former Immigration and Naturalization Service, the United States Marshals Service, the Bureau of Prisons, the Criminal Division, and many United States Attorney’s Offices, along with officials at the state level, worked tirelessly to do everything within their legal authority to protect against another terrorist attack. As a result of the Federal Bureau of Investigation’s (FBI) investigation, known as “PENTTBOM” (Pentagon Twin Towers Bombing), 762 aliens were detained on immigration charges after the attacks.

135. During the course of these detentions and in their aftermath, individual detainees, their families and human rights and immigrant rights groups asserted a broad range of allegations of abuses resulting from the investigations and detentions. These assertions included that individuals did not receive prompt notice of the charges on which they were being held, that they were deprived of procedural protections, that the immigration proceedings were closed to the public, and in some cases, that detainees were physically abused. Several lawsuits have been filed. At least one has been settled, while others are still pending.

136. On June 2, 2003, the U.S. Department of Justice Office of the Inspector General (OIG) issued a report entitled “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks.” The report is available at <http://www.usdoj.gov/oig/special/0306/full.pdf>. The OIG undertook this investigation pursuant to its responsibilities under the Inspector General Act and pursuant to its responsibilities under the USA PATRIOT Act, section 1001 of which requires the OIG to designate an official to review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice. The report described

DOJ's response to the attacks, including the PENTTBOM investigation. The OIG's report focused on the 762 aliens who were detained on immigration charges after the attacks. The report examined all aspects of the detainees' treatment, from the serving of the charging document to the policies governing the conditions of the detainees' confinement during their detention. Some of the detainees were held in Bureau of Prisons facilities, while others were held at INS detention centers or in state or local facilities under contract with INS. The report described the manner in which the BOP classified the detainees - initially putting them under its witness security group - and the problems this created for those who attempted to communicate with them. The report made 21 recommendations to address the issues identified in the DOJ OIG review. The recommendations covered a broad range of issues, including, *inter alia*, the adoption of clearer and more objective criteria to govern arrests, the development of more effective means of coordination and communication between the various law enforcement agencies involved in such investigations, and the need for new standards governing conditions of detention.

137. Both the Department of Justice and the Department of Homeland Security have responded to the various recommendations identified by the Department of Justice's OIG. The respective responses of the agencies, as well as the analyses of such reports by the Department of Justice's OIG, are available at: www.usdoj.gov/oig/special/0306/analysis.htm and <http://www.usdoj.gov/oig/special/0401/index.htm>. As evidenced by their responses to the OIG's report, in some cases the respective Departments adopted new policies, such as the adoption by the Department of Homeland Security's Immigration and Custom Enforcement (ICE) of a new detention standard on Staff-Detainee Communication. The central goal of this new standard is to ensure that ICE personnel monitor detention conditions and promptly address concerns that arise. The standard also includes specific timeframes during which officers must respond to certain enumerated detainee requests.

138. On December 18, 2003, DOJ's Office of Inspector General issued a supplemental report entitled "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center (MDC) in Brooklyn, New York." This report is available at <http://www.usdoj.gov/oig/special/0312/final.pdf>. The report described the investigation conducted by the OIG concerning allegations that staff members of the Federal Bureau of Prisons' Metropolitan Detention Center in Brooklyn, New York physically and verbally abused aliens who were detained in connection with the terrorist attacks of September 11, 2001. It supplemented Chapter 7 of the June 2003 OIG report described above, in which the OIG found evidence that the conditions of detention at the MDC were excessively restrictive and unduly harsh. According to the OIG, those allegations included inadequate access to counsel, sporadic and mistaken information to detainees' families and attorneys about where they were being detained, lockdown for at least 23 hours a day, cells remaining illuminated 24 hours a day, detainees placed in heavy restraints whenever they were moved outside their cells, limited access to recreation, and inadequate notice to detainees about the process for filing complaints about their treatment. In its June 2003 report, the OIG also noted that there was evidence that some MDC correctional officers physically and verbally abused some September 11 detainees, particularly during the months immediately following the September 11 attacks. The

December 2003 supplemental report contained the results of the OIG's completed investigation into the allegations of abuse at the MDC. It recommended that the BOP consider taking disciplinary action against ten current BOP employees, counseling two current MDC employees, and informing employers of four former staff members about the OIG's findings against them. The Bureau of Prisons is continuing its investigation of the allegations of staff misconduct based on the OIG's report and recommendation and will consider appropriate action based on the results of that investigation.

139. Separate from the OIG's investigation into the MDC, allegations of abuse at the MDC were also investigated by the Bureau of Prisons' Office of Internal Affairs, the Department of Justice's Civil Rights Division and the United States Attorney's Office for the Eastern District of New York. Following a very thorough review, the Civil Rights Division and United States Attorney's Offices determined that there was no criminal conduct at the MDC facility. However, even if a matter is declined criminally at the Department of Justice, the OIG can continue that investigation to determine if there was misconduct that should result in disciplinary or other administrative action. In this case, the OIG did pursue the investigation as an administrative matter after prosecution was declined, and as noted above, the BOP Office of Internal Affairs is continuing its investigation into this matter.

140. **Capital punishment.** The issue of capital punishment remains a matter of active discussion within the United States. As was true when the United States submitted its Initial Report, a majority of the people in a majority of the states, and of the country as a whole, have chosen through their democratically elected representatives to provide the possibility of capital punishment for the most serious of crimes. Capital punishment is permitted by 38 states and by the Federal Government, whereas 12 states and the District of Columbia prohibit its use.

141. As has been explained elsewhere in this report and as discussed in detail in the Initial Report, the reservation to Article 16 contained in the U.S. instrument of ratification limits U.S. obligations under Article 16 of the Convention to the prohibitions against "cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Moreover, the United States understanding, also included in the U.S. instrument of ratification, states that "The United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty."

142. Accordingly, as stated in the Initial Report, the United States considers the issue of capital punishment to be outside the scope of its reporting obligations under the Torture Convention. Nevertheless, in an annex to the Initial Report, the United States provided for the information of the Committee a summary of some aspects of the issue. As a matter of courtesy to the Committee, the United States provides updated information on this issue in Annex 7.

III. ADDITIONAL INFORMATION REQUESTED BY THE COMMITTEE

143. By letter of May 21, 2004, the Committee requested “updated information concerning the situation in places of detention in Iraq, up to the time of the submission of the report.” This and other relevant information regarding U.S. military operations is provided in Annex 1 for the Committee’s review.

IV. OBSERVATIONS ON THE COMMITTEE’S CONCLUSIONS AND RECOMMENDATIONS

144. The United States has carefully considered the Committee’s Conclusions and Recommendations. Observations of the United States on those conclusions and recommendations appear below.

The Committee expressed concern over “The failure of the State Party to enact a federal crime of torture in terms consistent with Article 1 of the Convention.”

145. As was discussed in considerable detail in the Initial Report, every act of torture within the meaning of the Convention, as ratified by the United States, is illegal under existing federal and/or state law, and any individual who commits such an act is subject to penal sanctions as specified in criminal statutes at either the state or federal level. While the specific legal nomenclature and definitions vary from jurisdiction to jurisdiction, it is clear that any act of torture falling within the Convention would in fact be criminally prosecutable in every jurisdiction within the United States. The United States appreciates many merits in the suggestion advanced by the Committee. However, as the United States substantively has fulfilled the requirements of the Convention in this respect and for the reasons it determined to apply at the time it became party to the Convention, the United States has decided to retain the current statutory regime within the United States on this point.

The Committee expressed concern over “The reservation lodged to Article 16, in violation of the Convention, the effect of which is to limit the application of the Convention.”

146. The Committee’s use of the phrase “in violation of the Convention” is confusing as a matter of international treaty law. By their nature, reservations alter the scope of treaty obligations assumed by State Parties. Accordingly, reservations that are not prohibited by a treaty or by the applicable international law rules relating to reservations are not violations of that treaty. As the Torture Convention does not prohibit the making of a reservation and as the reservation in question is not incompatible with the object and purpose of the Convention, there is nothing in the U.S. reservation that would be unlawful or otherwise constitute a violation of the Convention.

147. The decision by the United States to condition its ratification upon a reservation to Article 16 (construing its obligations under Article 16 to prevent “cruel, inhuman or degrading treatment or punishment” only insofar as the term means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the

U.S. Constitution) was made after careful deliberation. Indeed, the existence of this reservation was a critical element in the decision by the United States to become a State Party to the Convention. The rationale set forth in the Initial Report, in particular the vague and ambiguous nature of the term “degrading treatment,” remains equally valid at this time.

The Committee expressed concern over “The number of cases of police ill-treatment of civilians, and ill-treatment in prisons (including instances of inter-prisoner violence). Much of this ill-treatment by police and prison guards seems to be based upon discrimination.”

148. Please see discussion under under Article 2 and Article 16 above. In a country of some 280 million people with a prison population of over 2 million people it is perhaps unavoidable, albeit unfortunate, that there are cases of abuse. Continuing U.S. efforts to deal with these problems and punish perpetrators of such acts are set out throughout this report. The United States fully agrees that the rights of detainees should be protected, in particular against unlawful discrimination.

The Committee expressed concern over “Alleged cases of sexual assault upon female detainees and prisoners by law enforcement officers and prison personnel. Female detainees and prisoners are also very often held in humiliating and degrading circumstances.”

149. Please see discussion under Article 16 above.

The Committee expressed concern over “The use of electro-shock devices and restraint chairs as methods of constraint, which may violate the provisions of Article 16 of the Convention.”

150. Please see discussion under Article 16 above.

The Committee expressed concern over “The excessively harsh regime of the ‘supermaximum’ prisons.”

151. Please see discussion under Article 16 above.

The Committee expressed concern over “The use of ‘chain gangs’, particularly in public.”

152. Please see discussion under Article 16 above.

The Committee expressed concern over “The legal action by prisoners seeking redress, which has been significantly restricted by the requirement of physical injury as a condition for bringing a successful action under the Prison Litigation Reform Act.”

153. The Prison Litigation Reform Act of 1996 (PLRA), which was enacted as part of Pub. L. 104-134, contains several provisions designed to curtail frivolous lawsuits by prison inmates. One such provision is the requirement that no action shall be brought with respect to

prison conditions under federal law by a prisoner until such administrative remedies as are available are exhausted. Another is the provision that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury. Courts of appeals have held that the physical injury requirement does not prevent a prisoner from obtaining injunctive or declaratory relief. *E.g., Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002). Moreover, the “physical injury” requirement has been challenged in U.S. courts and its constitutionality has been upheld. Since their enactment in 1996, the statutory amendments provided by the PLRA have achieved their fundamental purpose of restricting frivolous lawsuits by inmates that were disrupting the efficient operation of the federal judicial system.

The Committee expressed concern over “The holding of minors (juveniles) with adults in the regular prison population.”

154. Please see discussion under Article 16.

Recommendations

“enact a federal crime of torture in terms consistent with Article 1 of the Convention and withdraw its reservations, interpretations and understandings relating to the Convention.”

155. As described above, the United States respectfully disagrees with the Committee regarding the necessity and advisability of enacting a new federal crime of torture when existing U.S. law already provides that every act of torture within the meaning of the Torture Convention, as ratified by the United States, is prohibited by criminal law under existing federal and/or state law.

156. The United States respectfully reminds the Committee that the United States reached its conclusion that it would be necessary to condition U.S. ratification of the Convention on certain reservations, understandings and declarations as a result of a serious and careful review of U.S. law. The Initial Report sets forth the rationale for each of those reservations, understandings and declarations. While the United States has considered its existing reservations, understandings, and declarations in light of the Committee’s recommendation, there have been no developments in the interim that have caused the United States to revise its view of the continuing validity and necessity of the conditions set forth in its instrument of ratification.

“take such steps as are necessary to ensure that those who violate the Convention are investigated, prosecuted and punished, especially those who are motivated by discriminatory purposes or sexual gratification.”

157. Much of this report has described actions taken within the United States that are consistent with this recommendation. The United States Government is aware of continuing allegations of specific types of abuse and ill-treatment in particular cases. The United States believes that, overall, the country’s law enforcement agencies and correctional institutions set and maintain high standards of conduct for their officers and treatment for persons in their custody. The United States believes that there is a deterrent effect on prospective individual

conduct due to the successful federal and state criminal prosecutions of law enforcement officers who are responsible for abuse. It also realizes that such conduct has not been eradicated and that its efforts in this regard must continue.

158. The discussion under Article 2 above provides accounts of examples of the Department of Justice's efforts to prosecute law enforcement officers for misconduct, as exemplified by the 284 convictions of law enforcement officers for violating federal civil rights statutes between October 1, 1999 and January 1, 2005. When sufficient evidence of a violation of an individual's constitutional rights is established, such cases are prosecuted by the Federal Government and substantial sentences are adjudged. Please refer also to the discussion under Article 16 above regarding police brutality and the action taken to remedy such abuses. In addition to federal law enforcement efforts, local and state prosecutions are also brought.

159. Recognizing that female offenders have different social, psychological, educational, family, and health care needs than male offenders, the Bureau of Prisons continues to design and implement special programs for women offenders. However, the BOP treats all inmates, male and female, in a firm, fair, and consistent manner, with a primary focus being the maintenance of the inmates' dignity and humanity. Prospective employees undergo a rigorous pre-employment screening and background check to ensure the highest standards of integrity. Once employed, staff receive initial training and refresher training at least annually throughout their careers regarding the importance of proper treatment of inmates, and appropriate boundaries between staff and inmates.

160. Despite these measures, there have been unfortunate instances where staff have violated these standards of trust. Federal law expressly criminalizes sexual activity between correctional workers and inmates in federal prisons. Every allegation is investigated thoroughly. In cases where an allegation of inappropriate conduct by a staff member towards an inmate is substantiated, offending staff are referred for prosecution, to eradicate this deplorable behavior. Examples of prosecutions of such conduct are provided in the discussion under Article 16 above.

“Abolish electro-shock stun belts and restraint chairs as methods of restraining those in custody; their use almost invariably leads to breaches of Article 16 of the Convention.”

161. The policies regarding the use of restraint chairs adopted by the Department of Justice reflect an awareness that the use of restraint chairs and stun belts, while lawful, should nevertheless be carefully circumscribed. The Bureau of Prisons' use of restraint chairs is intended only for short-term use, such as transporting an inmate on or off of an airplane. In the course of several investigations, the Civil Rights Division of the Department of Justice has investigated the use of the restraint chair in non-federal jails and prisons. The Civil Rights Division has recommended that such devices should only be used to keep an inmate from hurting himself or others, when less restrictive means of controlling the inmate have failed. The use of such devices should be carefully controlled and the inmate should be monitored at least every 15 minutes, vital signs should be checked and opportunities for movement, eating, and toileting should be provided. Restraints should be removed as soon as the inmate is no longer a threat to himself or others.

162. In the course of its investigations of adult correctional facilities, juvenile correctional facilities and law enforcement agencies pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA) and the Pattern or Practice of Police Misconduct provision of the Crime Bill of 1994, described above, the Civil Rights Division has recommended limitations on the use of electro-shock weapons in both law enforcement agencies and corrections facilities, as well as increased training for officers using such weapons. However, the *per se* use of such restraints does not violate constitutional standards. Used appropriately, stun belts, stun guns, certain types of choke holds, and pepper spray can be effective tools for law enforcement under certain conditions where use of force is warranted due to the actions of a suspect whom the police are justifiably attempting to detain or arrest and in the correctional setting. In particular, these devices sometimes can be used as effective alternatives where more serious or deadly force would otherwise be justified. In the corrections setting, medical screening is required to determine if use of stun devices and pepper spray is contraindicated.

“Consider declaring in favor of Article 22 of the Convention.”

163. At the time it undertook its domestic procedures to become a State Party to the Convention, the United States Executive and Legislative Branches gave substantial thought to the question of whether to avail the United States of the procedure set forth in Article 22. Since receiving the Committee’s recommendation, the United States has further considered whether to make a declaration recognizing the competence of the Committee to consider communications made by or on behalf of individuals claiming to be victims of a violation of the Convention by the United States. While noting that at any time it could decide to reconsider the issue, the United States continues to decline to make such a declaration. As has been discussed at considerable length throughout this report, the United States legal system affords numerous opportunities for individuals to complain of abuse, and to seek remedies for such alleged violations. Accordingly, the United States will continue to direct its resources to addressing and dealing with violations of the Convention pursuant to the operation of its own domestic legal system.

“Ensure that minors (juveniles) are not held in prison with the regular prison population.”

164. As stated under Article 16 above, in federal prisons, juveniles are not regularly held in prison with the regular prison population. Federal law prohibits juvenile offenders held in custody of federal authorities from being placed in correctional institutions or detention facilities in which they could have regular contact with adult offenders. *See* 18 U.S.C. § 5039. When a juvenile must be temporarily detained in an adult facility, it is for a minimal period of time and “sight and sound” separation from the adult offenders is ensured within the institution. The Bureau of Prisons has less than 300 juvenile offenders in its custody, and all such offenders are housed in contract facilities. All juvenile offenders in BOP custody are required to receive 50 hours per week of quality programming (e.g., GED, drug treatment, sex offender treatment, violent offender treatment).

165. The United States appreciates this opportunity to update its Initial Report on the operation of the Convention within the United States and looks forward to further work with the Committee Against Torture on these important issues.

V. ANNEXES

Annex 1

PART ONE

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

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

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

At the same time, the commitment of the United States to treat detainees humanely is clear and well documented.¹² A discussion of allegations of mistreatment of detainees appears in Part One, III.B and Part Two, III.B.

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

Summary of unlawful belligerent acts committed by al-Qaida

Although the events of September 11, 2001 indisputably brought conflict to U.S. soil, al-Qaida had engaged in acts of war against the United States long before that date. The reality is that for almost a decade before September 11, 2001, al-Qaida and its affiliates waged a war against the United States, although it did not show the depth of its goals until the morning of September 11, 2001.

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

In 1999, an al-Qaida member attempted to carry out a bombing plot at the Los Angeles International Airport during the Millennium Celebrations. U.S. law enforcement foiled this attack, arresting Ahmed Ressay at Port Angeles at the U.S./Canadian border. The United States now knows that in October 2000, al-Qaida directed the attack on a U.S. naval warship, the USS Cole, while docked in the port of Aden, Yemen.¹³ This attack killed 17 U.S. sailors and injured 39.

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

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

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

On September 11, 2001, the Organization of American States (OAS) General Assembly immediately “condemned in the strongest terms, the terrorist acts visited upon the cities of New York and Washington, D.C.” and expressed “full solidarity” with the government and people of the United States. Immediately thereafter, the foreign ministers of the States Parties to the 1947 Inter-American Treaty of Reciprocal Assistance (the Rio Treaty) declared, “these terrorist attacks against the United States of America are attacks against all American states.” The ministers passed a resolution agreeing to “use all legally available measures to pursue, capture, extradite, and punish” anyone in their territories believed to be involved in terrorist activities. (At <<http://www.oas.org/Assembly2001/assembly/gaassembly2000/GAterrorism.htm>> (visited February 28, 2005)).

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

The seriousness of the threat al-Qaida and its supporters posed to the security of the United States compelled it to act in self-defense. On October 7, 2001, President Bush invoked the United States’ inherent right of self-defense and, as Commander in Chief of the Armed Forces of the United States, ordered U.S. Armed Forces to initiate action against terrorists and the Taliban regime harboring them in Afghanistan. The U.S. Armed Forces “initiated actions

designed to prevent and deter further attacks on the United States .. [including] measures against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.” Letter from John Negroponte, U.S. Permanent Representative to the U.N., to Richard Ryan, President of the U.N. Security Council, U.N. Doc. No. S/2001/946 (Oct. 7, 2001), 40 I.L.M. 1281 (2001). (At <http://www.un.int/usa/s-2001-946.htm>) (visited March 1, 2005)). The attacks commenced when United States and coalition forces launched “strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan . . . designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime.” (At <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>) (visited March 1, 2005)).

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

Al-Qaida continues to wage armed conflict against the United States and its allies. On December 22, 2001, an al-Qaida associate, Richard Reid, attempted to destroy a U.S. airliner using explosives concealed in his shoe, a plot that the airline passengers foiled. In April 2002, al-Qaida firebombed a synagogue in Djerba, Tunisia, killing at least 20 people and injuring dozens. In June 2002, al-Qaida detonated a bomb outside the U.S. Consulate in Karachi, Pakistan, killing 11 persons and injuring 51. On October 6, 2002, al-Qaida was most likely responsible for a suicide attack against the French oil tanker, the MV Limburg, off the coast of Yemen, killing one and injuring four. On October 8, 2002, al-Qaida gunmen attacked U.S. Marines on Failaka Island in Kuwait, killing one U.S. Marine and wounding another. On November 28, 2002, in Mombasa, Kenya, al-Qaida detonated a car bomb in front of the Paradise Hotel, killing 15 persons and wounding 40 others. That same day, terrorists launched two anti-aircraft missiles at a civilian aircraft, and narrowly missed downing a Boeing 757 taking off from Mombasa en route to Israel. Al-Qaida claimed responsibility for the attacks.

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

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

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

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

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

A. Brief overview of the detainee populations held by the U.S. Armed Forces at Guantanamo Bay and in Afghanistan

During the course of the war in Afghanistan, the U.S. Armed Forces and allied forces have captured or procured the surrender of thousands of individuals fighting as part of the al-Qaida and Taliban effort. The law of war has long recognized the right to detain combatants until the cessation of hostilities.¹⁴ Detaining enemy combatants prevents them from returning to the battlefield and engaging in further armed attacks against innocent civilians and U.S. forces. Further, detention serves as a deterrent against future attacks by denying the enemy the fighters needed to conduct war. Interrogations during detention enable the United States to gather important intelligence to prevent future attacks during ongoing hostilities.

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

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

Detainees in Afghanistan and Guantanamo include many senior al-Qaida and Taliban operatives and leaders, in addition to rank-and-file jihadists who took up arms against the United States. The individuals currently held by the United States were at one time actively committing belligerent terrorist acts as part of al-Qaida, the Taliban or their affiliates and

supporters who engaged in hostilities against the United States and its allies. Generally, the enemy combatants held at Guantanamo Bay comprise enemy combatants who are part of al-Qaida, the Taliban, or affiliated forces, or their supporters, whether captured committing acts of belligerency themselves or directly supporting hostilities in aid of such enemy forces. Examples of enemy combatants held in U.S. custody include:

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

Representative examples of specific Guantanamo detainees include:

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

B. Status of detainees at Guantanamo Bay and in Afghanistan

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

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

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

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

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

After the President's decision, the United States concluded that those who are part of al-Qaida, the Taliban or their affiliates and supporters, or support such forces are enemy combatants whom we may detain for the duration of hostilities; these unprivileged combatants do not enjoy the privileges of POWs (*i.e.*, privileged combatants) under the Third Geneva Convention.¹⁵ International law, including the Geneva Conventions, has long recognized a nation's authority to detain unlawful enemy combatants without benefit of POW status.¹⁶ *See, e.g.*, INGRID DETTER, *THE LAW OF WAR* 148 (2000) ("Unlawful combatants ... though they are a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status."); *see also United States v. Lindh*, 212 F. Supp. 2d. 541, 558 (E.D. Va. 2002) (confirming the Executive branch view that "the Taliban falls far short when measured against the four GPW criteria for determining entitlement to lawful combatant immunity.")

Because there is no doubt under international law as to the status of al-Qaida, the Taliban, their affiliates and supporters, there is no need or requirement to review individually whether each enemy combatant detained at Guantanamo is entitled to POW status. For example, Article 5 of the Third Geneva Convention requires a tribunal in certain cases to determine whether a belligerent (or combatant) is entitled to POW status under the Convention only when

there is doubt under any of the categories enumerated in Article 4.¹⁷ The United States concluded that Article 5 tribunals were unnecessary because there is no doubt as to the status of these individuals.

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

C. Combatant status review tribunals (CSRTs) for detainees at Guantanamo Bay

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

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

- Tribunals are composed of three neutral commissioned officers, plus a non-voting officer who serves as a recorder;
- Decisions are by a preponderance of the evidence by a majority of the voting members who are sworn to execute their duties impartially;

- The detainee has the right to (a) call reasonably available witnesses, (b) question witnesses called by the tribunal, (c) testify or otherwise address the tribunal, (d) not be compelled to testify, and (e) attend the open portions of the proceedings;
- An interpreter is provided to the detainee, if necessary; and
- The Tribunal creates a written report of its decision that the Staff Judge Advocate reviews for legal sufficiency. See CSRT Implementation Memorandum, July 29, 2004 (at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>) (visited March 1, 2005)).

Unlike an Article 5 tribunal, the CSRT guarantees the detainee *additional* rights, such as the right to a personal representative to assist in reviewing information and preparing the detainee's case, presenting information, and questioning witnesses at the CSRT. The rules entitle the detainee to receive an unclassified summary of the evidence in advance of the hearing in the detainee's native language, and to introduce relevant documentary evidence. See CSRT Order g(1); Implementation Memorandum Encl. (1) F(8), H (5); CSRT Order g(10); Implementation Memorandum Encl. (1) F (6). In addition, the rules require the Recorder to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee should not be designated as an enemy combatant." See Implementation Memorandum Encl. (2), B(1). The detainee's Personal Representative also has access to the government files and can search for and provide relevant evidence that would support the detainee's position.

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

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

D. Assessing detainees for release/transfer

1. Guantanamo Bay

The detention of each Guantanamo detainee is reviewed annually by an Administrative Review Board (ARB), established by an order on May 11, 2004 (*Review Procedure Announced for Guantanamo Detainees*, Department of Defense Press Release, May 18, 2004)

(at <http://www.defenselink.mil/releases/2004/nr20040518-0806.html>) (visited February 28, 2005)) and supplemented by an implementing directive on September 14, 2004. See *Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (at <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>) (visited February 28, 2005)).

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

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

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

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

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

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

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

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

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

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

2. Afghanistan

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

E. Transfers or releases to third countries

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

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

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

F. Military commissions to try detainees held at Guantanamo Bay

In 2001, the President authorized military commissions to try those detainees charged with war crimes. See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, November 13, 2001 (at <<http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html>> (visited February 28, 2005)). The Geneva Conventions recognize military fora as legitimate and appropriate to try those persons who engage in belligerent acts in contravention of the law of war. The United States has used military commissions throughout its history. During the Civil War, Union Commanders conducted more than 2,000 military commissions. Following the Civil War, the United States used military commissions to try eight conspirators (all U.S. citizens and civilians) in President Lincoln's assassination. During World War II, President Roosevelt used military commissions to prosecute eight Nazi saboteurs for spying (including at least one U.S. citizen). A military commission tried Japanese General Yamashita for war crimes committed while defending the Philippine Islands. In addition to the international war crimes tribunals, the Allied Powers, such as England, France, and the United States, tried hundreds of lesser-known persons by military commissions in Germany and the Pacific theater after World War II.

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

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

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

G. Access to U.S. courts

In 2003, petitions for writ of habeas corpus were filed in U.S. courts on behalf of some of the detainees at Guantanamo seeking review of their detention. On June 28, 2004, the United States Supreme Court, the highest judicial body in the United States, issued two decisions

pertinent to many enemy combatants. One of the decisions directly pertained to enemy combatants detained at Guantanamo Bay, and the other pertained to a citizen enemy combatant held in the United States. See *Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004); see also *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004) (involving a decision on which U.S. Federal court has jurisdiction over habeas action). In *Rasul v. Bush*, the Supreme Court decided only the question of jurisdiction. The Court ruled that the U.S. District Court for the District of Columbia had jurisdiction to consider habeas challenges to the legality of the detention of foreign nationals at Guantanamo. 124 S.Ct. at 2698. The Court held that aliens apprehended abroad and detained at Guantanamo Bay, Cuba, as enemy combatants, “no less than citizens,” could invoke the habeas jurisdiction of a district court. *Id.* at 2696. The Supreme Court left it to the lower courts to decide “[w]hether and what further proceedings may become necessary after [the United States Government parties] make their response to the merits of petitioners’ claims.” *Id.* at 2699. In *Hamdi v. Rumsfeld*, the Supreme Court held that the United States is entitled to detain enemy combatants, even American citizens, until the end of hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms. The Court recognized the detention of such individuals is such a fundamental and accepted incident of war that it is part of the “necessary and appropriate” force that Congress authorized the President to use against nations, organizations, or persons associated with the September 11 terrorist attacks. 124 S.Ct. at 2639-42 (plurality op.); *id.*, at 2679 (Thomas J., dissenting).

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

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

The various habeas corpus petitions seek the detainees’ release, claiming that the detentions violate the Fifth, Sixth, Eighth and Fourteenth Amendments, and the War Powers and Article I Suspension clauses of the Constitution. Some of the petitions have also alleged claims

under the Administrative Procedure Act, the Alien Tort Statute, Army Regulation 190-8, customary international law, and international treaties including the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Geneva Conventions of 1949.

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

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

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

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

III. DETAINEES - TREATMENT

A. Description of conditions of detention at Department of Defense facilities

1. Guantanamo Bay

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

Detainees receive:

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

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

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

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

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

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

In addition, legal counsel representing the detainees in habeas corpus cases have visited detainees at Guantanamo since late August 2004. As of late April 2005, counsel in nineteen cases had personally met with the 74 detainees they represent, and counsel in seventeen of those cases have made repeat visits to Guantanamo. To date, every request by American counsel of record in the habeas cases to visit detainees at Guantanamo has been granted, after that counsel has received the requisite security clearance and agreed to the terms of the protective order issued by the Federal court. The Government does not monitor these meetings (or the written correspondence between counsel and detainees), which occur in a confidential manner. The Government also allows foreign and domestic media to visit the facilities.

2. Afghanistan

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

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

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

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

B. Allegations of mistreatment of persons detained by the Department of Defense

1. Introduction

The United States is well aware of the concerns about the mistreatment of persons detained by the Department of Defense in Afghanistan and at Guantanamo Bay, Cuba. Indeed, the United States has taken and continues to take all allegations of abuse very seriously.

Specifically, in response to specific complaints of abuse in Afghanistan and at Guantanamo Bay, Cuba, the Department of Defense has ordered a number of studies that focused, inter alia, on detainee operations and interrogation methods to determine if there was merit to the complaints of mistreatment.

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

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

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

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

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

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

...

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

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

Subsequent to the release of the December 2004 DOJ memo interpreting the Federal Torture Statute, the Deputy Secretary of Defense ordered a "top-down" review within the Department to ensure that the policies, procedures, directives, regulations, and actions of the department comply fully with the requirements of the new Justice Department Memorandum.¹⁸ The Office of Detainee Affairs in the Office of the Under Secretary of Defense for Policy coordinates this process of review.

2. Reports of abuses, summary of abuse investigations and actions to hold persons accountable - Guantanamo Bay

As described above in the introductory section, there have been multiple reports resulting from investigations concerning the treatment of detainees at Guantanamo Bay. For example, the Naval Inspector General reviewed the intelligence and detainee operations at Guantanamo Bay to ensure compliance with DoD orders and policies. The review, conducted in May 2004, concluded that the Secretary of Defense's directions with respect to humane treatment of detainees and interrogation techniques were fully implemented. The Naval Inspector General documented eight minor infractions involving contact with detainees as stated below (two additional incidents occurred after this investigation was completed). In each of those cases, the chain of command took swift and effective action. Administrative actions ranging from admonishment to reduction in grade.¹⁹

In a subsequent report, the Naval Inspector General engaged in a comprehensive review of DoD detention operations and detainee interrogation operations covering not only Guantanamo, but Iraq and Afghanistan. This report expanded upon his earlier finding with

respect to interrogation operations at Guantanamo, noting that while “there have been over 24,000 interrogation sessions since the beginning of interrogation operations, there are only three cases of closed, substantiated interrogation-related abuse, all consisting of minor assaults in which MI interrogators, exceeded the bounds of approved interrogation policy.” Church Report, Executive Summary, at 14, released March 10, 2005 (using data as of September 30, 2004) (at <www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (visited March 23, 2005)). He highlighted that “[w]e found no link between approved interrogation techniques and detainee abuse.” *Id.*, at 13.

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

Therefore, although there have been allegations of serious abuse of detainees at Guantanamo Bay, the United States has not found evidence substantiating such claims. Instead, it has identified 10 substantiated incidents²⁰ of misconduct at Guantanamo:

- A female interrogator inappropriately touched a detainee on April 17, 2003 by running her fingers through the detainee’s hair, and made sexually suggestive comments and body movements, including sitting on the detainee’s lap, during an interrogation. The female interrogator received a written admonishment and additional training;
- On April 22, 2003, an interrogator assaulted a detainee by directing military policemen repeatedly to bring the detainee from a standing to a prone position and back. A review of medical records indicated superficial bruising to the detainee’s knees. The interrogator received a letter of reprimand;
- A female interrogator, at an unknown date, in response to being spit upon by a detainee, assaulted the detainee by wiping red dye from a red magic marker on the detainee’s shirt and telling the detainee that the red stain was blood. The interrogator received a verbal reprimand for her behavior;
- In October 2002, an interrogator used duct tape to tape shut the mouth of a detainee who was being extremely disruptive during an interrogation. The tape did not harm the detainee and the interrogator received a verbal reprimand for his behavior;
- A military policeman (MP) assaulted a detainee on September 17, 2002, by attempting to spray him with a hose after the detainee had thrown an unidentified, foul-smelling liquid on the MP. The MP received non-judicial punishment that included seven days restriction and reduction in grade from Specialist (E-4) to Private First Class (E-3);

- On March 23, 2003, after a detainee threw unidentified liquid on an MP, the MP sprayed the detainee with pepper spray. The MP declined non-judicial punishment,²¹ and he was subsequently tried by special court-martial where he was acquitted of all charges;
- On April 10, 2003, after a detainee had struck an MP in the face (causing the MP to lose a tooth) and bitten another MP, the MP struck the detainee with a handheld radio. This MP was given non-judicial punishment, received 45 days extra-duty, and was reduced in grade from Specialist (E-4) to Private First Class (E-3);
- On January 4, 2004, an MP platoon leader received an initial allegation that one of his guards had thrown cleaning fluid on a detainee and later made inappropriate comments to the detainee. The platoon leader, however, did not properly investigate the allegation or report it to his chain of command. The initial allegation against the guard ultimately turned out to be substantiated. The MP was given non-judicial punishment and received forfeiture of pay of \$150 per month for two months and reduction in grade from Private (E-2) to Private (E-1). The platoon leader was issued a reprimand for dereliction of duty;
- On February 10, 2004, an MP inappropriately joked with a detainee, and dared the detainee to throw a cup of water on him. After the detainee did so, the MP threw a cup of water on the detainee. The MP was removed from further duty because of these inappropriate actions;
- On February 15, 2004, a barber intentionally gave two detainees unusual haircuts, including an “inverse Mohawk,” in an effort to frustrate the detainees’ request for similar haircuts as a sign of unity. The barber and his company commander were both counseled because of this incident.

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

3. Reports of abuses, summary of abuse investigations and actions to hold persons accountable - Afghanistan

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

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

- The investigations into the death of two detainees (Mr. Mullah Habibullah and Mr. Dilawar) at the Bagram detention facility on December 4 and 10, 2002 identified 28 military members who may have committed offenses punishable under the UCMJ.

Investigations determined that the detainees had been beaten by several military members. Commanders are considering the full range of administrative and disciplinary measures, including trial by court-martial. As of this writing, charges have been preferred against two military members;

- The Naval Criminal Investigation Service (NCIS) opened an investigation in May 2004 involving allegations of an Afghan police officer who claimed he was abused while under coalition control in Gardez and Bagram. This investigation remains open.

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

- *Major General Ryder's report*

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

- *Army IG Assessment*

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

- *Jacoby Review*

In May 2004, Lieutenant General Barno, Commander, Combined Forces Command-Afghanistan, initiated an inspection of detainee operations in his area of responsibility in Afghanistan. The inspection was conducted by

Brigadier General Jacoby during the period May 19 through June 26, 2004. The primary purpose of this inspection was to ascertain the standard of treatment provided to persons detained by U.S. forces throughout the detention process from capture to release or detention. The Jacoby report did not disclose new allegations of abuse or misconduct. The consistent and overarching observation that flowed from the inspection was that forces assigned to the command understood the concept of humane treatment and were providing humane treatment to detainees consistent with the principles of the Geneva Conventions.

- *Church Report*

On May 25, 2004, the Secretary of Defense directed the Naval Inspector General at that time, Vice Admiral Albert T. Church, III, to conduct a comprehensive review of DoD Detention Operations and Detainee Interrogation Techniques in Guantanamo Bay, Cuba, Iraq, and Afghanistan. The Executive Summary of the Report was released on March 10, 2005, and relied upon data available as of September 30, 2004. Vice Admiral Church found that “the vast majority of detainees held” under DoD control “have been treated humanely, and that the overwhelming majority of U.S. personnel have served honorably.” Executive Summary at 21. He found that “without exception, that the DoD officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely which is fundamentally inconsistent with the notion that such officials or commanders ever accepted that detainee abuse would be permissible.” *Id.*, at 3. Although noting a number of “missed opportunities in the policy development process,” for example, that “no specific guidance on interrogation techniques was provided to the commanders responsible for Afghanistan and Iraq...,” he concluded that “authorized interrogation techniques have not been a causal factor in detainee abuse.” *Id.*, at 13, 21. He could not identify a single overarching reason for abuse but addressed the stressful combat situation, particularly at the point of capture, commenting that “a breakdown of good order and discipline in some units could account for some incidents of abuse.” *Id.*, at 16. Although he candidly pointed out: “[d]issemination of interrogation policy in Iraq and Afghanistan was generally poor and interrogators fell back on their training and experience, often relying on a broad interpretation of Army Field Manual F.M. 34-52,” he continued, “[w]hile these problems of policy dissemination and compliance were certainly cause for concern, we found that they did not lead to the employment of illegal or abusive interrogation techniques.” *Id.*, at 10. He found that interrogators knew that abusive behavior was prohibited. *Id.*, at 10, 15. The Executive Summary of this Report is available online (at www.defenselink.mil/news/Mar2005/d20050310exe.pdf (visited March 23, 2005)).

- *Naval Inspector General Report*

On January 13, 2005, the Deputy Secretary of Defense directed the Naval Inspector General, Vice Admiral Route, to review documents related to detainees recently released under the Freedom of Information Act, including those released by the Federal Bureau of Investigation, and to conduct an inquiry into any credible

allegations contained in those documents with respect to Afghanistan and Iraq. The Naval Inspector General will take any additional actions with respect to these documents, as he deems appropriate. The report is expected to be finalized soon.

IV. TRAINING OF U.S. ARMED FORCES

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

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

PART TWO

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

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

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

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

MNF-I and Iraqi forces remain actively engaged in combating these hostile forces across Iraq. An essential tool in the effort to contain and end the violence is the ability of MNF-I to capture and detain hostile forces. UN Security Council Resolution 1546 authorizes MNF-I to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters to the President of the Security Council from Dr. Ayad Allawi and Secretary of State Colin Powell. The letter from Secretary Powell noted the MNF-I's readiness to undertake those tasks necessary to counter the security threats posed by forces seeking to influence Iraq's future through violence, including the internment of individuals "where this is necessary for imperative reasons of security...." (At <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement> (visited March 5, 2005)). In addition, because hostilities are ongoing, MNF-I may continue to detain enemy prisoners of war ("EPWs"). MNF-I may also continue to detain civilian internees who were detained prior to June 28, 2004, as long as their detention remains necessary for imperative reasons of security. Finally, in accordance with UN Security Council Resolution 1546 and the authorities contained in Coalition Provisional Authority Memorandum No. 3 (Revised) (at http://cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf

(visited March 1, 2005)), which continues in effect under the Transitional Administrative Law (TAL), MNF-I may apprehend individuals who are suspected of having committed criminal acts and who are not considered security internees. MNF-I may retain such criminal detainees in its facilities at the request of appropriate Iraqi authorities.

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

A. Brief overview of the detainee population held by MNF-I

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

B. Status review of detainees

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

With regard to individuals detained on suspicion of having committed criminal acts, those individuals must be handed over to Iraqi authorities as soon as reasonably practicable, but may be held by MNF-I at the request of appropriate Iraqi authorities based on security or detention facility capacity considerations. If MNF-I retains custody at the request of appropriate Iraqi authorities, CPA Memorandum No. 3 (Revised) establishes a series of procedural protections for the detainee, including the right to remain silent, to consult with an attorney within 72 hours, to be promptly informed in writing of charges, to be brought before a judicial officer within 90 days, and to be visited by the ICRC. (At http://cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf (visited March 1, 2005)).

C. Decisions on continued detention or release of detainees

The Combined Review and Release Board (CRRB) was created to provide detainees a method by which to have their detention status reviewed. The CRRB first met on August 21, 2004. It consists of nine members: three MNF-I officers, and two members each from the Iraqi Ministry of Justice, Ministry of Interior, and Ministry of Human Rights.

The CRRB meets and reviews detention cases several times per week and reviews approximately 100 detainee files at each meeting. Consistent with the Geneva Conventions, the case of each detainee who remains in MNF-I custody is reviewed at least once every six months. The CRRB reviews the status of each detainee and recommends one of three options: release, conditional release, or continued detention. A detainee may file an appeal of internment to the CRRB for its consideration.

III. DETAINEES - TREATMENT

A. Description of conditions of detention in U.S. Department of Defense facilities

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

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

B. Allegations of mistreatment of persons detained by the Department of Defense

1. Legal framework

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

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

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

General Protection Policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

- (1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.
- (2) All persons taken into custody by U.S. forces will be provided with the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) until some other legal status is determined by competent authority.
- (3) The punishment of EPW, CI, and RP known to have, or suspected of having committed serious offenses will be administered [in accordance with] due process of law and under legally constituted authority per the GPW, [the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War], the Uniform Code of Military Justice and the Manual for Courts Martial.
- (4) The inhumane treatment of EPW, CI, and RP is prohibited and is not justified under the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

DoD Directive 5100.77 further requires that all possible, suspected, or alleged violations of the law of war committed by United States persons be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action. December 9, 1998, (at <http://www.dtic.mil/whs/directives/corres/pdf2/d510077p.pdf>) (visited February 28, 2005)). For instance, U.S. forces are subject to the Uniform Code of Military Justice (UCMJ), which provides that those who commit acts of abuse, whether or not during an armed conflict, are criminally liable for their actions. Article 93 of the UCMJ provides: "Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct." A member of the U.S. forces suspected of mistreating or abusing persons in U.S. detention is subject to prosecution under this and other applicable UCMJ articles.²²

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

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

2. Reports of abuses and summary of abuse investigations

Allegations of detainee abuse at the Abu Ghraib prison in Iraq became known with incidents documented in photographs and reported in the media throughout the world. These photographs, which depict acts of abuse and mistreatment of detainees by certain members of the U.S. Armed Forces in Iraq, were abhorrent to the people of the United States and others around the world. These incidents, which to date could implicate 54 military personnel, involved blatant violations of the UCMJ and the law of war. The United States deeply regrets these abuses. Indeed, on May 6, 2004, the President of the United States said that he “was sorry for the humiliation suffered by the Iraqi prisoners and the humiliation suffered by their families” and that “the wrongdoers will be brought to justice....” Remarks by President Bush and His Majesty King Abdullah II of the Hashemite Kingdom of Jordan (at <http://www.whitehouse.gov/news/releases/2004/05/20040506-9.html>) (visited March 1, 2005)).

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

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

The United States has ordered a number of studies and reports subsequent to allegations of mistreatment in Iraq, particularly at Abu Ghraib. Again, as described in Part One of this Report, it is impossible to characterize and summarize fully these reports, but it can be stated that

although these investigations identified problems and made recommendations, none found a governmental policy directing, encouraging, or condoning the abuses that occurred. What follows is a brief summary of each of the investigative reports:

- *Miller Report*

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

- *Ryder Report*

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

- *Taguba Report*

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

- *The Army Inspector General Report*

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

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

This was completed on August 13, 2004. This report covered Military Intelligence (MI) and DoD contractor interrogation policies in Iraq. This report revealed that 27 military personnel or civilians appeared to have abused Iraqi prisoners due to criminal activity or confusing interrogation rules. Twenty-three military intelligence personnel and four civilian contractors were alleged to be involved in abuse. Eight others, including six military officers and two civilians, were alleged to have learned of the abuse and to have failed to report the abuse to authorities. This report found 44 cases of abuse. In an interview after the report's release, General Kern told reporters, "We found that the pictures you have seen, as revolting as they are, were not the result of any doctrine, training or policy failures, but violations of the law and misconduct." (At <http://www.defenselink.mil/transcripts/2004/tr20040825-1224.html>)

(visited April 5, 2005)). The report found that the abuses were carried out by a small group of “morally corrupt” soldiers and civilians and caused by a lack of discipline by leaders and soldiers of the brigade and a “failure or lack of leadership by multiple echelons” within a unit within the U.S. military forces in Iraq. *See* Report at 2. This report was publicly released and can be found online (at <<http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>> (visited February 28, 2005)).

- *Schlessinger Report*

This Report was completed in August 2004. The Secretary of Defense named a panel of four distinguished former public officials, including two former Secretaries of Defense, to evaluate the areas under review in the ongoing investigations and to determine if there was a need for additional areas of investigation. The Report found that “[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities.” *See* Report at 5. It stated that “the most egregious instances of detainee abuse were caused by the aberrant behavior of a limited number of soldiers and the predilections of the non-commissioned officers on the night shift of Tier 1 at Abu Ghraib,” although noting that “commanding officers and their staffs at various levels failed in their duties and that such failure contributed directly or indirectly to detainee abuse.” *See* Report at p. 43. This report was publicly released and can be found online (at <<http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>> (visited February 28, 2005)).

- *Formica Report*

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

- *Church Report*

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

- *Naval Inspector General Report*

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

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

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

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

The Department of Defense has improved its detention operations in Iraq and elsewhere, improvements have been made based upon the lessons learned, and in part because of the broad investigations and focused inquiries into specific allegations. These comprehensive reports, reforms, investigations and prosecutions make clear the commitment of the Department of Defense to do everything possible to ensure that detainee abuse such as occurred at Abu Ghraib never happens again.

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

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

3. Summary of actions to hold persons accountable

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

Some criminal investigations have been completed and others continue with respect to abuse of detainees in Iraq. Although it would be inappropriate to comment on the specifics of on-going investigations, as of March 1, 2005, 190 incidents of abuse have been substantiated.

Some are minor, while others are not: penalties have ranged from administrative to criminal sanctions, including 30 courts-martial, 46 non-judicial punishments, 15 reprimands, and 15 administrative actions, separations, or other administrative relief. A number of actions are pending.

Some examples of service members convicted at a court-martial²³ for acts related to detainee maltreatment include:

- (1) A Staff Sergeant, charged with numerous offenses related to maltreatment of detainees at the Abu Ghraib Detention Facility, pled guilty on October 21, 2004, at a General Court-Martial to conspiracy, maltreatment of detainees, simple battery, and indecent acts. The Military Judge sentenced him to 10 years confinement, total forfeitures of pay and allowances, reduction from Staff Sergeant (a non-commissioned officer rank) to the lowest enlisted grade (enlisted grade of Private), and discharge from the U.S. Army with a dishonorable discharge. Because of a plea agreement, the Staff Sergeant will ultimately be confined for eight years, if he cooperates with future prosecutions per the plea arrangement.
- (2) A Sergeant, charged with numerous offenses related to maltreatment of detainees at the Abu-Ghraib Detention Facility, pled guilty on February 4, 2005, to battery, dereliction of duty, and false official statement. A court-martial panel sentenced him to confinement for 6 months, reduction to the lowest enlisted grade, and discharge from the U.S. Army with a bad conduct discharge.
- (3) A Specialist charged with conspiracy to maltreat subordinates, dereliction of duty, and maltreatment of detainees at the Abu Ghraib Detention Facility, pled guilty to all charges at a Special Court-Martial on May 19, 2004. The Military Judge sentenced him to confinement for a period of 12 months, reduction in rank to the lowest enlisted grade, and a discharge from the U.S. Army with a bad conduct discharge.
- (4) A Specialist, charged with numerous offenses related to maltreatment of detainees at the Abu Ghraib Detention Facility, was convicted on January 7, 2005, by a 10-member panel of five counts, including assault, maltreatment, and conspiracy. He was sentenced to 10 years confinement, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge from the U.S. Army.
- (5) A Specialist, charged with participating in and directing the abuse of two Iraqi detainees by handcuffing the detainees together naked at the Abu Ghraib Detention Facility, was tried at a Special Court-Martial on September 11, 2004, and convicted of conspiracy to maltreat detainees and the maltreatment of the detainees. The Specialist was sentenced to confinement for eight months, a reduction to the lowest enlisted grade, and a bad conduct discharge from the U.S. Army.

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

C. Remedies for victims of abuse

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

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

IV. TRAINING OF U.S. ARMED FORCES

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

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

V. LESSONS LEARNED AND POLICY REFORMS

It is clear that certain individual service members committed serious abuses during U.S. detention operations in Iraq. Apart from proceedings to hold accountable the perpetrators of abuse, the U.S. Armed Forces have been studying the larger question of how to ensure that these types of abuses will not occur in the future. The nine detainee reports released to date have

made more than 300 recommendations for short and long-term changes to improve detainee handling, accountability, investigation, supervision, and coordination. Further investigations remain in progress. The Office of the Secretary of Defense, the Military Departments, the Combatant Commands, and the Joint Staff have each taken concrete steps to implement many of these changes and will continue to do so.

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

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

Other steps that the Department of Defense has taken include:

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

Notes

¹ See, e.g., President's Statement on the United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003) ("Torture anywhere is an affront to human dignity everywhere."); *see also* *Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100-20, at ii (1988) ("Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice still prevalent in the world today.").

² Unless specified otherwise in this report, whenever the terms "torture" and "cruel, inhuman or degrading treatment or punishment" are employed in this report, they are understood to mean those terms as they are defined by the United States in its reservations and understandings. *See* Annex 3.

³ The vast majority of these cases involve aliens in removal proceedings where regulations permit aliens to challenge their removal to countries under Article 3 of the Torture Convention.

⁴ See in particular the examples cited in the discussion following Article 2 and Article 16.

⁵ This policy has been articulated by the President of the United States and various United States governmental personnel. *See* www.whitehouse.gov/news/releases/2005/03/20050316-3.html (visited March 19, 2005); *see also* Declaration of Pierre-Richard Prosper at Annex 1, Tab 2; *see also* Declaration of Matthew C. Waxman at Annex 1, Tab 1; *see also* Letter from General Counsel of the Department of Defense William G. Haynes II to Senator Patrick Leahy of June 25, 2003.

⁶ Shortly after its creation, the Department of Homeland Security reaffirmed its commitment to fulfilling U.S. obligations under Article 3 of the Torture Convention. *See* Immigration Relief under the Convention Against Torture for Serious Criminals and Human Rights Violators; Hearing Before the House Subcomm. on Immigration, Border Security, and Claims of the House Comm. on the Judiciary, 108th Cong., 1st Sess. 45, Serial No. 34, at 11 (July 11, 2003) (prepared statement of C. Stewart Verdery, Asst. Secretary for Policy and Planning, Border and Transportation Security Directorate, U.S. Dept. of Homeland Security). *See* http://commdocs.house.gov/committees/judiciary/hju88220.000/hju88220_0.HTM#19 (visited May 3, 2005) ("The Department of Homeland Security is committed to ensuring the proper balance between our convention obligations and our mission to make our communities safe. . . [W]e will fulfill the President's declaration that ... the United States is committed to the worldwide elimination of torture, and we are leading this fight by example.")

⁷ The data were compiled by the EOIR and represent only decisions taken by the Immigration Courts.

⁸ The data on grants of asylum by DHS (former INS) were compiled by U.S. Citizenship and Immigration Services (USCIS) of the U.S. Department of Homeland Security and reflect decisions on applications, including those filed by principal applicants on behalf of themselves

and family members. Accordingly, these statistics do not reflect the number of actual individuals who are granted asylum by DHS. The data on grants of asylum and withholding of removal by immigration judges were compiled by EOIR and reflect the actual numbers of individuals who were granted asylum or withholding of removal, as EOIR evaluates each individual claim separately. The data compiled by EOIR represent decisions taken by Immigration Courts; accordingly, they do not include decisions on cases appealed to the Board of Immigration Appeals. As a result, the data do not necessarily represent the final disposition on these cases.

⁹ The carve out from the expanded definition of the SMTJ provided by 18 U.S.C. §7(9) for those as defined by MEJA, was the result of a legislative compromise to avoid the applicability of the complex MEJA provisions relating to initial appearances and removals to the United States. The SMTJ and MEJA statutes each provide a separate basis for asserting U.S. jurisdiction, and the legislative intent was to keep these jurisdictional bases separate and distinct, not to co-mingle them.

¹⁰ Press Briefing by White House Counsel Judge Alberto Gonzales, DoD General Counsel William Haynes, Department of Defense Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander, June 22, 2004, at <<http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>> (visited February 28, 2005).

¹¹ It should be that in its decision, the Supreme Court noted in *dicta*, “The Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it.” *Clark v. Martinez*, 125 S.Ct. 716, 727 (2005).

¹² See Annex 3. See also President’s Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003).

¹³ This was the first time that we knew that al-Qaida attacked U.S. military forces directly. There are other instances of violence, however, such as the June 1996 attack on Khobar Towers killing 19 U.S. service members, which bin Ladin called a “praiseworthy act of terrorism.”

¹⁴ As the Supreme Court recently made clear in *Hamdi*, the United States may detain enemy combatants, including U.S. citizens who are enemy combatants, for the duration of hostilities. The Court held that Congress has authorized such detentions. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639-42 (2003). Notably, hostilities in Afghanistan have not yet ended.

¹⁵ See, e.g., Secretary Rumsfeld’s statement that the detainees “are not POWs” and instead are “unlawful combatants.” Gerry J. Gilmore, *Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba*, American Forces Press Service, Jan. 27, 2002. (At <http://www.defenselink.mil/news/Jan2002/n01272002_200201271.html> (visited April 11, 2002)).

¹⁶ The U.S. Supreme Court, citing numerous authoritative international sources, has held that unlawful combatants “are subject to capture and detention, [as well as] trial and punishment by military tribunals for acts which render their belligerency unlawful.” *See Ex parte Quirin*, 317 U.S. 1, 31 (1942) (citing GREAT BRITAIN, WAR OFFICE, MANUAL OF MILITARY, ch. xiv, §§ 445-451; REGOLAMENTO DI SERVIZIO IN GUERRA, § 133, 3 LEGGI E DECRETI DEL REGNO D’ITALIA (1896) 3184; 7 MOORE, DIGEST OF INTERNATIONAL LAW, § 1109; 2 HYDE, INTERNATIONAL LAW, §§ 654, 652; 2 HALLECK, INTERNATIONAL LAW (4th Ed. 1908) § 4; 2 OPPENHEIM, INTERNATIONAL LAW, § 254; HALL, INTERNATIONAL LAW, §§ 127, 135; BATY & MORGAN, WAR, ITS CONDUCT AND LEGAL RESULTS (1915) 172; BLUNTSCHI, DROIT INTERNATIONAL, §§ 570 bis).

¹⁷ Article 5 states:

“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the *protection* of the present Convention *until* such time as their status has been determined by a competent tribunal.” [emphasis added]. Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, Signed at Geneva on Aug. 12, 1949; entered into force on Oct. 21, 1950 (entered into force for the United States, Feb. 2, 1956).

¹⁸ Department of Defense Memorandum (Jan. 27, 2005).

¹⁹ *See* 10 U.S.C. § 815. The intent of nonjudicial punishment (colloquially referred to as an “Article 15” or “Captain’s Mast”) is to provide the commander with enough latitude to resolve a disciplinary problem appropriately in order to maintain “good order and discipline” within the unit. Nonjudicial punishment is designed for minor offenses. It allows a commander to correct, educate, and reform offenders while simultaneously preserving the service member’s record of service from unnecessary stigma and furthering military efficiency. A service member is provided appropriate due process rights when considered for nonjudicial punishment. The service member has the right to consult with counsel, the right to remain silent, turn down the nonjudicial punishment and, in turn, possibly face trial by court-martial (unless attached to or embarked upon a vessel), request an open hearing, a spokesperson to speak on the service member’s behalf at the hearing, examine all available evidence, present evidence and call witnesses, and, if nonjudicial punishment is imposed, the right to appeal.

²⁰ There has also been an investigation in response to a request by the Australian Government following claims of mistreatment of two Australian detainees at Guantanamo. Although not initially substantiated, the Naval Criminal Investigative Service is conducting an independent investigation into these allegations of abuse.

²¹ *See* description, *id.*

²² A member, or former member, of the U.S. Armed Forces, who is either a national of the United States, or later present in the United States, who, while outside the United States, commits acts that meet the definition of torture under the relevant statute (18 U.S.C. §2340) is subject to federal prosecution under 18 U.S.C. §2340A, if not previously prosecuted for the same offense under the UCMJ.

A member of the U.S. Armed Forces who, while outside the United States, commits a crime that would constitute a felony if committed within the Special Maritime Territory Jurisdiction (SMTJ), and does so with one or more other defendants, at least one of whom is not subject to the UCMJ, is subject to federal prosecution. Similarly, a former member of the U.S. Armed Forces, who has ceased to be subject to the UCMJ, but who was subject to the UCMJ at the time that he was outside the territory of the United States and committed a crime that would be a felony if committed within the SMTJ, is subject to federal criminal prosecution.

²³ U.S. Armed Forces are subject to the Uniform Code of Military Justice (UCMJ), which provides that those who commit acts of abuse, whether or not during an armed conflict, may be held criminally liable for their actions. Article 93 of the UCMJ provides: “Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.” A member of the U.S. Armed Forces who is suspected of mistreating or abusing persons in U.S. detention is subject to prosecution under this and other applicable UCMJ articles.

Other charges that may apply will depend on the circumstances of the abuse. For example, U.S. Armed Forces may be charged with assault, Article 128, UCMJ, or if the abuse results in the death of a detainee, Article 118, Murder, or Article 119, Manslaughter, or Article 134, Negligent Homicide. For allegations of abuse involving theft of money or other possessions from a detainee, U.S. Armed Forces may be charged with Article 121, Larceny. For allegations of sexual assault, U.S. Armed Forces may be charged with Article 120, Rape, Article 125, Sodomy, or Article 134, Indecent Assault.

List of materials available for consultation in the files of the secretariat

Attachments to Annex I

TAB 1: Declarations on Transfers of Detainees from Guantanamo Bay

(Declarations of Matthew C. Waxman and Pierre-Richard Prosper)

Annex 2 - President's Statement on the United Nations International Day in Support of Victims of Torture

Annex 3 - December 30, 2004 Memorandum Opinion of the Acting Assistant Attorney General of the Office of Legal Counsel, United States Department of Justice, to the Deputy Attorney General on the Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A, December 30, 2004. (Also available at <http://www.usdoj.gov/olc/dagmemo.pdf>)

Annex 4 - U.S. Reservations, Understandings, and Declarations Upon Ratification

Annex 5 - Relevant Constitutional, Legislative, and Regulatory Provisions

Annex 6 - Sample of U.S. Federal Court Decisions Related to Article 3 of the Torture Convention

Annex 7 - Capital Punishment
