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U.S. Meeting with U.N. Committee Against Torture

Opening Remarks

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Legal Adviser, U.S. Department of State

May 5, 2006

LDIA

Mr. Chairman, Distinguished Members of the Committee,
Members of Civil Society and Other Observers,

My name is John Bellinger. I am the Legal Adviser of the Department of State, and I serve as head of the United States delegation to the Committee Against Torture.

The United States recognizes the importance of our international legal obligations and the key role this Committee plays in the treaty-monitoring process. The United States greatly appreciates this opportunity to meet with the Committee and to explain the measures we have taken to give effect to the obligations we have undertaken as a State Party to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Secretary of State Rice has emphasized that the United States takes its international obligations seriously. This is reflected in the great lengths to which we have gone to provide you with an extensive report and thorough answers to the many questions you have posed. Our delegation is composed of senior-level officials involved in implementing the Convention. This further demonstrates our commitment not only to fulfilling our obligations under the Convention, but also to engaging in what we expect will be a productive dialogue with you.

At the outset I want to reiterate the United States Government's absolute commitment to upholding our national and international obligations to eradicate torture and to prevent cruel, inhuman, or degrading treatment or punishment worldwide. The President of the United States has made clear that "[t]orture anywhere is an affront to human dignity everywhere" and that "freedom from torture is an inalienable human right." Beyond the protections in our Constitution that Mr. Lowenkron mentioned, United States criminal laws prohibit torture. There are no exceptions to this prohibition. Within the United States, our 50 states and the federal government prohibit conduct that would constitute torture under their civil

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and criminal laws. Our Congress has also passed laws that provide for severe federal sanctions, both civil and criminal, against those who engage in torture outside the territory of the United States.

And our laws have gone further. Our focus on eradicating torture and punishing its perpetrators would be incomplete without a parallel effort to help its victims recover from abuses. The United States has comprehensive legislation that enables citizens and non-citizens of the United States who are victims of torture to bring claims for damages against foreign government officials in U.S. federal courts. Congress has also established and funded programs that assist victims of torture, domestically and overseas. The United States has contributed far more than any other country in the world to the United Nations Voluntary Fund for Victims of Torture. For the years 2000 through 2005, U.S. contributions to the Fund totaled more than 32 million dollars, which is approximately 70% of the total contributions during that period.

And late last year, our Congress enacted, and the President signed into law, the Detainee Treatment Act of 2005. The Act included a provision that codified in law our already-existing policy against the use of cruel, inhuman or degrading treatment as that term is defined under the obligations the United States assumed under the Convention. The law provides that no person "in the custody or under the physical control of the United States Government, regardless of nationality or physical location" shall be subjected to cruel, unusual, and inhumane treatment or punishment prohibited by certain provisions of the U.S. Constitution. The enactment of the Detainee Treatment Act highlights our nation's commitment to upholding the values of freedom and humanity on which it was founded.

We know that you will have many questions about actions the U.S. Government has taken in response to the terrorist attacks upon our country on September 11. We welcome this dialogue and we are committed to addressing your questions as fully as possible. As we attempt to answer your questions, I would like to ask the Committee to bear in mind a few considerations.

First, some of the matters that are addressed by your questions are the subject of ongoing litigation, and I hope you will understand that our ability to comment in detail on such matters is necessarily constrained.

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Second, like other governments, we are not in a position to comment publicly on alleged intelligence activities.

Third, our Second Periodic report and the written answers to your questions contain extensive information about U.S. detainee operations in Guantanamo Bay, Cuba, and in Afghanistan and Iraq. It is the view of the United States that these detention operations are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations.

As a general matter, countries negotiating the Convention were principally focused on dealing with rights to be afforded to people through the operation of ordinary domestic legal processes and were not attempting to craft rules that would govern armed conflict.

At the conclusion of the negotiation of the Convention, the United States made clear "that the convention . . . was never intended to apply to armed conflicts. . . ." The United States emphasized that having the Convention apply to armed conflicts "would result in an overlap of the different treaties which would undermine the objective of eradicating torture."¹ No country objected to this understanding.

In any case, regardless of the legal analysis, torture is clearly and categorically prohibited under both human rights treaties and the law of armed conflict. The obligation to prevent cruel, inhuman, or degrading treatment or punishment is in Article 16 of the Convention and in similar provisions in the law of armed conflict.

While the United States maintains its view that the law of armed conflict is the *lex specialis* governing the detainee operations that we will discuss, we are pleased to provide extensive information about these operations in a sincere spirit of cooperation with the Committee.

In closing I would like to make two final comments.

First, while I am acutely aware of the innumerable allegations that have appeared in the press and in other fora about various U.S. actions, I would ask you not to believe every allegation that you have heard. Allegations about U.S. military or intelligence activities have become so hyperbolic as to

¹ U.N. Doc. E/CN.4/1984, March 9, 1984.

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be absurd. Critics will now accept virtually any speculation and rumor and circulate them as fact. The U.S. Government has attempted to address as many of these allegations as quickly and as fully as possible. And yet, as much as we would like to deny the numerous inaccurate charges made against our government, because many of the accusations relate to alleged intelligence activities, we have found that we cannot comment upon them except in a general way.

Second, even as we recognize matters of concern to the Committee, we ask that the Committee keep a sense of proportion and perspective. While it is important to deal with problems in a straightforward manner, it does a disservice to the quality of our dialogue, to the treaty monitoring process, to the United States, and, ultimately, to the cause of combating torture around the world to focus exclusively on the allegations and relatively few actual cases of abuse and wrongdoing that have occurred in the context of the U.S. armed conflict with al Qaeda. I do not mean to belittle or shift attention away from these cases in any way. We welcome your questions. But we suggest that this Committee should not lose sight of the fact that these incidents are not systemic. We also suggest that the Committee devote adequate time in these discussions to examining the treatment or conditions that apply domestically with respect to a country of more than 290 million people. The United States is committed to rule of law and has a well-functioning legal system to ensure criminal and civil accountability.

We will now begin to answer the questions you have posed to us. In light of time constraints on this oral presentation, it will be impossible for us to reply in detail to every aspect of your wide-ranging questions. In many cases, we will refer you to the more detailed responses we have provided in writing.

Thank you very much.

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ANNEX 1

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PART ONE

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

AND

PART TWO

**INDIVIDUALS UNDER THE CONTROL OF U.S. ARMED
FORCES IN IRAQ CAPTURED DURING MILITARY
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(Declarations of Matthew C. Waxman and Pierre-Richard Prosper)

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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.¹ 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, Osama bin Laden 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

¹ 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).

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August 7, 1998, al-Qaida attacked two U.S. Embassies in Kenya and Tanzania, killing over 200 people and injuring approximately 5,000.

In 1999, an al-Qaida member attempted to carry out a bombing plot at the Los Angeles International Airport during the Millennium Celebrations. U.S. law enforcement foiled this attack, arresting Ahmed Ressam at Port Angeles at the U.S./Canadian border. The United States now knows that in October 2000, al-Qaida directed the attack on a U.S. naval warship, the USS Cole, while docked in the port of Aden, Yemen.² 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 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"

² 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 Laden called a "praiseworthy act of terrorism."

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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, 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,

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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

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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.³ 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 (see <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 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:

³ 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.

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- 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 and 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 Laden; 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 Laden;
- 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

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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.⁴ International law, including the Geneva Conventions, has long recognized a nation's authority to detain unlawful enemy combatants without benefit of POW status.⁵ *See, e.g.*, INGRID DETTER, *THE LAW OF WAR* 148 (2000)

⁴ *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)).

⁵ 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*

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("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 4.⁶ 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) (DoD 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

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).

⁶ 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).

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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)

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¶¶ 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

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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 by majority vote makes a written assessment 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 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](http://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

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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 Department of Defense 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

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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 DoD 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

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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

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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

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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*, 2005 WL 195356 (D.D.C.) (Jan. 31, 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.

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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, with amputees 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 a Koran and other prayer accessories. Traditional

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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 Department of Defense 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 DoD 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 DoD 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

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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 Department of Defense 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 Department of Defense 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,

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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.⁷ The Office of Detainee Affairs in the Office of the Under Secretary of Defense for Policy coordinates this process of review.

⁷ Department of Defense Memorandum (Jan. 27, 2005).

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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/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.⁸

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.

⁸ 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.

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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 incidents⁹ 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,¹⁰ 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

⁹ 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.

¹⁰ See description, *id.*

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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 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 Department of Defense 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.

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

As described in the Introduction to this Section, there have been multiple important substantive reports/investigations into alleged detainee abuse in Department of Defense 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 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

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concept of humane treatment and are 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 Department of Defense 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 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 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.

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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.

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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 successfully transitioning 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

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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

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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

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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. Department of Defense 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).

Department of Defense 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

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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.¹¹

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 Americans 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).

¹¹ 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.

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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.

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- *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 of failing 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 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 at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> <(visited February 28, 2005)>).

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- *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 Department of Defense 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.

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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-martial¹² for acts related to detainee maltreatment include:

¹² 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.

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(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 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.

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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.

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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 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.

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- Ensuring widespread publication of the findings of reports and investigations by publishing unclassified information on the Department of Defense website <http://www.defenselink.mil>. The Department has established an entire sub-site on detainee operations.

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LD53B

May 1, 2006

Dear Mr. Bellinger:

I promised during our recent Advisory Committee meeting to send you a fuller list of questions that might be useful with respect to your prospective oral presentation before the Committee on Torture. Knowing how well L lawyers prepare, I suspect that none of the questions/issues below will come as a surprise but I am forwarding them in case they might prove useful. (These are, of course, simply for your use and I certainly do not expect answers.)

At the outset, allow me to commend your office for the May 6, 2005 U.S. Report to the COT that you sent to us. It was the first time that I read it closely and it is a substantial achievement in terms of depth of analysis and respect for international law. Indeed, its sheer level of detail, particularly with respect to U.S. statutory law and caselaw, inspires some of the questions below, simply because at least on my reading, the U.S.'s answers with respect to these points appear more ambiguous:

- (1) Given press allegations of secret CIA flights involving "ghost detainees," it seems particularly important to be clearer with respect to whether the USG views any or all of its obligations under the Torture Convention, and underlying customary law, to apply to its actions abroad, including actions by the CIA in Europe, or by US agents in Guantanamo, Afghanistan, and Iraq. While the U.S. Torture Report includes a blanket affirmation that the U.S. does not engage in torture anywhere and does not claim a "wartime" exception to this ban (see para. 6, p. 4), elsewhere the Report affirms only that certain detainees only have the right to be treated "humanely" (p. 47).
- (2) Which U.S. laws criminalize or otherwise penalize the activities of all of our agents who act abroad, including the CIA, should they be involved in the arrest and subsequent rendering of individuals to places where they are likely to be tortured? (The relevant paragraphs of the report (paras. 44, 49, 52) appear to suggest that the rendering of "ghost detainees" abroad may not be penalized under U.S. laws or that U.S. laws criminalize only the actions of those supporting the mission of the Department of Defense.)
- (3) If even the decision to extradite made on US territory is not subject to judicial review (para. 42), does this mean that there is no opportunity for meaningful judicial scrutiny of decisions to render individuals to countries abroad (whether or not this occurs with respect to individuals in or out of the United States)? Assuming this to be the case, is it against the clearly enunciated policy of the USG not to render or transfer individuals to countries that our own State Department Human Rights reports brand as regular practitioners of torture?
- (4) Given our reservation with respect to article 16 of the Torture Convention (discussed at para. 88), is it the U.S. position that the protection against cruel, inhuman or degrading treatment does not apply abroad since our own constitutional protections do not so extend? (And is this the meaning to be attributed to the President Bush's signing statement for the McCain bill?) If so, it

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is our position that US agents are free to treat detainees "cruelly" or in an "inhumane" fashion and can render individuals to countries where such treatment is to be expected? [With respect to the U.S. reservation to article 16, I am sure that you are aware that it raises the reciprocity problem noted by Professor Franck in the course of our meeting. As I understand it, we have raised objections (as in the ICCPR) with respect to similarly "self-judging" reservations made by Islamic states (in which human rights norms are made subject to Sharia law as determined by their religious courts from time to time) on the grounds that such self-judging reservations gut the obligation to "respect and to ensure" human rights treaties and are therefore inconsistent with these treaties' object and purpose. As you know, the Human Rights Committee has agreed with this and I would assume that the propriety of the U.S. reservation to article 16 will continue to be questioned on comparable grounds.]

- (5) You can expect close questioning on whether the U.S. permits coerced statements to be used as evidence (cf. article 15 of the Torture Convention) in any and all of its military commissions.
- (6) Does the U.S. still affirm that Geneva law continues to apply to Iraq despite the formal end of occupation pursuant to Security Council resolutions? If so, what is the U.S.'s position on the continued application of article 49 of Geneva IV (barring the transfer or deportation of protected persons from occupied territory including for purposes of facilitating interrogation)? [Committee members may be aware that the US has not renounced the legal analysis contained in the Mar. 19, 2004 draft memorandum by then Assistant Attorney General Jack Goldsmith, even though this memo has been widely disseminated and is included in Greenberg and Dratel's The Torture Papers. There may therefore be understandable confusion about whether the US has ever transferred individuals from inside Iraq since its invasion, pursuant to that memo's (surely overbroad?) claims that transfers of any aliens or even Iraqis to facilitate interrogation is legal so long as "temporary."]
- (7) It is, of course, to be expected that the US will be closely questioned as to which interrogation techniques it now sees as permissible despite the treaty and customary prohibitions on torture and cruel, inhuman treatment. [This is especially likely given Attorney General Gonzales's refusal to rule out such egregious techniques as water-boarding.] To the extent the US military or other services is now working on a new list of permissible interrogation techniques, to what extent has the US taken into account the detailed reports issued by, for example, the UN Special Rapporteur on Torture with respect to such techniques?
- (8) At p. 52, the US report continues to affirm that since there is "no doubt" that members of the Taliban and Al Qaida are not entitled to the protections of Geneva, article 5 status tribunals are not required. Keep in mind that this assertion is especially likely to be questioned with respect to individuals that come into US custody far from any battlefield and as a result of the say so of unknown agents responding to bounty payments. Is the US claiming that it can hold anyone from any nationality without reasonably prompt scrutiny of the status of such individuals? This claim is all the more likely to be questioned since in the absence of article 5 tribunals, the US appears to be claiming a right to indefinite

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and prolonged arbitrary detention – which in itself appears to be a jus cogens violation even under the US's relatively conservative US Restatement of Foreign Relations. This is an instance where the US assertion that neither Geneva nor human rights law applies appears to result in a legal blackhole that is fundamentally repugnant to the rule of law.

- (9) Questions are likely to be expected even by the COT which is not expert on such matters with respect to US claims that it has the right to use specially designed military commissions (whose procedures fall short of those applied to US military) to try detainees of "war crimes." Apart from predictable questions as to the fairness (and stability of) the procedural and evidentiary rules applied by such commissions, questions are likely to be raised about whether the crimes that we are charging (e.g., waging war against the US military or engaging in a conspiracy towards that end) are truly "war crimes" as understood by international humanitarian law.

Hope that at least some of the above prove useful to you and/or Bob Harris.

Finally, I want to express my deep thanks to you for including me in your Advisory Committee. I deeply appreciate the frankness and openness with which you have conducted these meetings, including with respect to sensitive topics such as the subject of this letter. For me, being a member of the Advisory Committee these many years has made the remoteness of the Ivory Tower a little more bearable and has only enhanced my historic respect for L, including my former colleagues (and their much younger colleagues, some of whom have been my students). Since I recognize that you will be re-constituting your committee and I may not be included in its new membership, I thought I would take the opportunity to express my sincere appreciation.

Of course, whether or not I am a member of your new Advisory Committee, I hope that we can collaborate on matters of mutual interest during my Presidency of the ASIL.

Sincerely yours,

Jose E. Alvarez

Schou, Nina E

From: Steven Hill [redacted]
 Sent: Saturday, April 29, 2006 9:59 AM
 To: Bob Harris; Nina Schou
 Cc: Steven Hill; Bob Harris; Nina Schou; Julianna Bentes
 Subject: Script thus far

RELEASED IN PART

B6

B6

Attachments: CAT_script.doc



CAT_script.doc
 (183 KB)

Bob,

I've gotten about halfway through the script (up to question 28) and have managed to cut about 10 pages so far, which is crucial since Julianna and I discovered yesterday that it takes between 1:15 to 1:30 to read one double-spaced page. We are currently down to 66 pages, and assuming the same rate of cutting for the second half of the document as I did in the first half, that should give us about 55 pages in the end. This would work out to 70-80 minutes for the whole thing, still a touch too long. We may have to cut more radically and/or identify certain answers that could be combined. Some of the stuff on DHS procedures might be a good candidate but let me think about it.

We also need to bear in mind that there are at least two questions whether the Army Field Manual comes up and where additional material might be required.

I have to go help a friend move today and won't be able to turn to this again until late this afternoon. I'm sending it to you now in case you or Nina want to work on it further during the day.

Call if you have any questions or want to touch base -- [redacted]

B6

Nina, if you get a chance, take a look at how I restructured the forced disappearances question: it seemed a bit hard to understand before.

Steve

B6

LD14

Schou, Nina E

From: Gorove, Katherine M
Sent: Monday, May 02, 2005 9:33 AM
To: Harris, Robert K; Schou, Nina E
Subject: FW: CAT Annex

Attachments: Legal-#10876-v1-CAT_Annex_april_29_almost_final.DOC

-----Original Message-----

From: Gorove, Katherine M
Sent: Friday, April 29, 2005 8:07 PM
To: [REDACTED]
Subject: CAT Annex

B6

Here it is; after hours of technical problems, I think it's finished. But, I think we need to check on consistencies between its cover sheet and other annexes. Also, Nina, you need to indent your footnotes in main report. Also, I wonder if each annex shouldn't have a header in it; will the main report have a header, just so every page, says 2nd periodic report of United States to U.N. C.A.T. Committee and then annexes also say their annex number. I think it'd be easier for the world & not that hard to do. Nina, I can't locate Prosper and Waxman. My e-mail keeps crashing. Can you try to pull up on Monday morning.



Legal-#10876-v1-C
AT_Annex_apr...

Enjoy!

Schou, Nina E

From: Hill, Steven R
Sent: Thursday, March 23, 2006 12:06 PM
To: Hill, Steven R; Christopher N. Camponovo [redacted] igor.timofeyev@dhs.gov; Andrew.Steinberg@dhs.gov; Brian.Kelliher1@dhs.gov; daniel.brown@dhs.gov; molly.groom@dhs.gov; nader.baroukh@dhs.gov; roger.sagerman@dhs.gov; ron.rosenberg@dhs.gov; Ronald.whitney@dhs.gov; Thomas.Monheim@usdoj.gov; omar.vargas@usdoj.gov; rena.comisac@usdoj.gov; laurence.rothenberg@usdoj.gov; matthew.friedrich2@usdoj.gov
Cc: Harris, Robert K; Brancato, Gilda M; Schou, Nina E; [redacted] Bentes, Julianna W; Grummon, Caroline E.; Haines, Avril D; Hodgkinson, Sandra L; Johnson, Thomas A; Lagon, Mark P; Noyes, Julieta V (DRL)
Subject: RE: Draft Consolidated CAT Replies for Interagency Review
Attachments: LEGAL-#23552-v1-CAT_agency_questions_by_page.DOC

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Attached is list of questions posed to each agency. These questions appear throughout the text circulated yesterday, but having them all in one place might prove useful in your review.



LEGAL-#23552-v1-
 CAT_agency_que...

From: Hill, Steven R
Sent: Wednesday, March 22, 2006 5:52 PM
To: 'Christopher_N_Camponovo' [redacted] 'igor.timofeyev@dhs.gov'; 'Andrew.Steinberg@dhs.gov'; 'Brian.Kelliher1@dhs.gov'; 'daniel.brown@dhs.gov'; 'molly.groom@dhs.gov'; 'nader.baroukh@dhs.gov'; 'roger.sagerman@dhs.gov'; 'ron.rosenberg@dhs.gov'; 'Ronald.whitney@dhs.gov'; 'Thomas.Monheim@usdoj.gov'; 'omar.vargas@usdoj.gov'; 'rena.comisac@usdoj.gov'; 'laurence.rothenberg@usdoj.gov'; 'matthew.friedrich2@usdoj.gov'
Cc: Harris, Robert K; Brancato, Gilda M; Schou, Nina E; [redacted] Bentes, Julianna W; Grummon, Caroline E.; Haines, Avril D; Hodgkinson, Sandra L; Johnson, Thomas A; Lagon, Mark P; Noyes, Julieta V (DRL)
Subject: Draft Consolidated CAT Replies for Interagency Review

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B6

Dear Interagency CAT Team:

On behalf of Bob Harris and my State colleagues, I'd like to thank you for your excellent contributions to our effort to assemble a USG response to the Committee's "List of Issues."

We have integrated the DHS, DOD, and DOJ contributions into the attached draft document along with our suggested edits to those contributions (indicated in the "tracked changes" format) and additional questions relating to them. Note that in some places, we moved detailed information (such as statistical data) into annexes.

While this is not a request for final clearance on the document, we are trying to get the document as close to final as possible and would therefore greatly appreciate your review of the entire document as well as, of course, answers to the specific questions addressed to your agency.

Please provide your input by COB next Tuesday, March 28.

If you have any questions or comments, please let us know.

Thanks,

Steve

UNITED STATES DEPARTMENT OF STATE
 REVIEW AUTHORITY: JOHN S BLODGETT
 DATE/CASE ID: 18 AUG 2009 200706444

<< File: CAT Reply Interagency March 22.doc >>

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Steven Hill
U.S. Department of State
Office of the Legal Adviser
Human Rights and Refugees
(202) 647-4065 (tel)
(202) 736-7028 (fax)
hillsr@state.gov

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B6 LD28

Schou, Nina E

From: Nina Schou [redacted]
Sent: Thursday, March 23, 2006 3:34 PM
To: schoune@state.gov
Subject: Fwd: FW: Draft Consolidated CAT Replies for Interagency Review
Attachments: pat768833926

B6

"Hill, Steven R" <HillsR@state.gov> wrote:

From: "Hill, Steven R" <HillsR@state.gov>
To: Robert Harris <[redacted]> Nina Schou <[redacted]>
CC: "Steven Hill" <[redacted]>
Subject: FW: Draft Consolidated CAT Replies for Interagency Review
Date: Wed, 22 Mar 2006 17:50:32 -0500

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B6

The beast has gone out to the interagency and around the building as well. Hope you're having fun, Bob.

From: Hill, Steven R
Sent: Wednesday, March 22, 2006 5:52 PM
To: [redacted]
'igor.timofeyev@dhs.gov'; 'Andrew.Steinberg@dhs.gov'; 'Brian.Kelliher1@dhs.gov'; 'daniel.brown@dhs.gov'; 'molly.groom@dhs.gov';
'nader.baroukh@dhs.gov'; 'roger.sagerman@dhs.gov'; 'ron.rosenberg@dhs.gov'; 'Ronald.whitney@dhs.gov';
'Thomas.Monheim@usdoj.gov'; 'omar.vargas@usdoj.gov'; 'rena.comisac@usdoj.gov'; 'laurence.rothenberg@usdoj.gov';
'matthew.friedrich2@usdoj.gov'
Cc: Harris, Robert K; Brancato, Gilda M; Schou, Nina E; [redacted] Bentes, Julianna W; Grummon, Caroline E; Haines, Avril D; [redacted] Johnson, Thomas A; Lagon, Mark P; Noyes, Julieta V (DRL)
Subject: Draft Consolidated CAT Replies for Interagency Review

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Please provide your input by COB next Tuesday, March 28.

If you have any questions or comments, please let us know.

Thanks,

Steve
<<CAT Reply Interagency March 22.doc>>

Steven Hill
U.S. Department of State
Office of the Legal Adviser

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: FRANK H PEREZ
DATE/CASE ID: 12 AUG 2009 200706444

11/26/2008

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hillsr@state.gov

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LD35

Schou, Nina E

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B6

From: Steven Hill
Sent: Friday, April 21, 2006 3:59 AM
To: Bob Harris; Bob Harris
Cc: Nina Schou; Nina Schou; Steven Hill; Julianna Bentes; Julianna W Bentes
Subject: CAT

B6, B5

Attachments: CAT 4-21 4 AM (clean with jbb changes marked).doc; CAT 4-21 4 AM (markup).doc; dagmemo-1.pdf



CAT 4-21 4 AM (clean with jbb ...
CAT 4-21 4 AM (markup).doc (1 ...
dagmemo-1.pdf (1,018 KB)

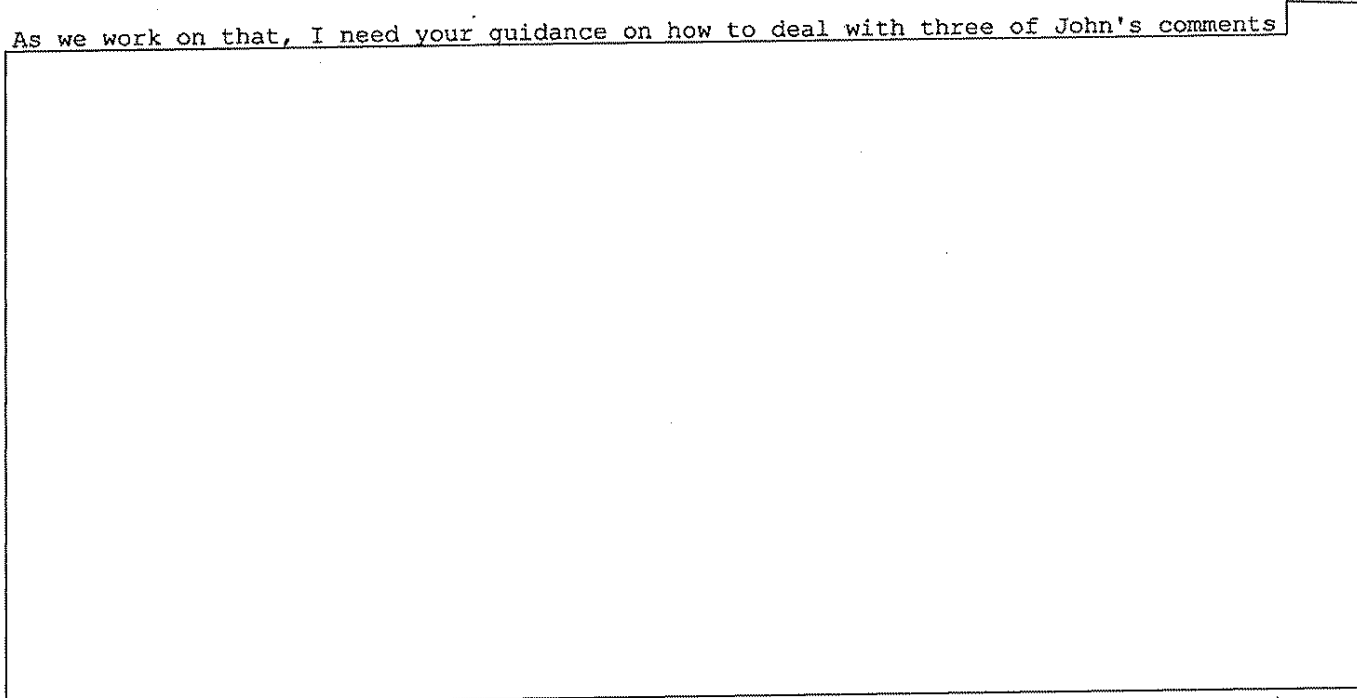
Bob,

The attached documents integrate what I was able to do with John's comments. The most up-to-date is the rather unwieldy document with all the tracked changes. The other document is clean except for the text I added in response to John's comments.

I will work tomorrow -- with Julianna if she's feeling better -- on accepting all changes in the track changes-filled beast (we had done a quick "accept all" for the clean document that went to JBB, but this hasty action may have resulted in losing some things that should actually go in) and then proofing it with a view toward getting something clean ready for interagency circulation in the afternoon.

As we work on that, I need your guidance on how to deal with three of John's comments

B5



You'll also note that I added a request to DOD to provide a breakdown of cause of death information.

I'll forward this to L/PM as well tomorrow morning.

Steve

Schou, Nina E

From: Harris, Robert K
 Sent: Thursday, May 11, 2006 1:21 PM
 To: Laurence.Rothenberg@usdoj.gov; [redacted] Julianna Bentes; L/HRR:Julianna Bentes (Business Fax); L/HRR:NinaSchou/home [redacted] L/HRR:RobertHarris/home (HarrisRK2@state.gov); L/HRR:SteveHill/home [redacted]; Kovar, Jeffrey D Camponovo, Christopher N.; Kovar, Jeffrey D(Geneva); Barton, Paula J; DOJ:Brent.McIntosh@usdoj.gov; Kelliher, Brian; Padmanabhan, Vijay M; Legal-L-HRR
 Subject: FW:
 Attachments: LEGAL-#25346-v1-CAT_Follow-Up.DOC

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LEGAL-#25346-v1-CAT_Follow-Up....

Larry,

Here are State's suggested edits to the DOJ follow-up questions. We need to get the final out of here today around 4. It probably makes sense for you to be the keeper of the pen at this point and send me what you have heard from DOD by 4. I'll send the text Jeff Kovar at our Mission. The Committee staff confirmed that they have to receive our submission by tomorrow morning Geneva time for it to be of use.

Bryan and Cully,

We still need to see the first draft of the DOD Qs and As.

Bob

-----Original Message-----

From: Padmanabhan, Vijay M
 Sent: Thursday, May 11, 2006 1:01 PM
 To: Dorosin, Joshua L; Harris, Robert K
 Cc: ''; Schou, Nina E; Bentes, Julianna W
 Subject: RE:

[redacted]

B5

-----Original Message-----

From: Dorosin, Joshua L
 Sent: Thursday, May 11, 2006 9:45 AM
 To: Padmanabhan, Vijay M
 Cc: Schou, Nina E; Bentes, Julianna W; Harris, Robert K
 Subject: FW:

Vijay -

Could you review for L/PM. Bob needs comments ASAP; especially need views on the judicial review questions.

Thanks. Josh

-----Original Message-----

From: Robert Harris [mailto:[redacted]]
 Sent: Thursday, May 11, 2006 8:02 AM

B6

UNITED STATES DEPARTMENT OF STATE
 REVIEW AUTHORITY: FRANK H PEREZ
 DATE/CASE ID: 12 AUG 2009 200706444

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To: harrisrk2@state.gov
Cc: [redacted] schoune@state.gov; BentesJW@state.gov; dorosinjl@state.gov
Subject:

B6

I tried to send this message a few minutes ago, but it doesn't appear I was successful.

Attached are follow-up questions to the Committee Against Torture, drafted by DOJ and edited by Nina. We need to get them back for DOJ to review this morning. Would L/PM be willing to quickly look at the Q and A on habeas access for GTMO detainees. Thanks.

Bob