

**Adopted by Voice Vote  
August 9, 2004**

**AMERICAN BAR ASSOCIATION**

**ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
TASK FORCE ON TREATMENT OF ENEMY COMBATANTS  
CRIMINAL JUSTICE SECTION  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
SECTION OF INTERNATIONAL LAW AND PRACTICE  
SECTION OF LITIGATION  
CENTER FOR HUMAN RIGHTS  
BEVERLY HILLS BAR ASSOCIATION  
BAR ASSOCIATION OF SAN FRANCISCO  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE  
SECTION OF BUSINESS LAW  
NEW YORK STATE BAR ASSOCIATION  
VIRGIN ISLANDS BAR ASSOCIATION  
NEW YORK COUNTY LAWYERS' ASSOCIATION**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 RESOLVED, That the American Bar Association condemns any use of torture or other  
2 cruel, inhuman or degrading treatment or punishment upon persons within the custody or  
3 under the physical control of the United States government (including its contractors) and  
4 any endorsement or authorization of such measures by government lawyers, officials and  
5 agents;  
6  
7 FURTHER RESOLVED, That the American Bar Association urges the United States  
8 government to comply fully with the Constitution and laws of the United States and  
9 treaties to which the United States is a party, including the Geneva Conventions of  
10 August 12, 1949, the International Covenant on Civil and Political Rights, the  
11 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or  
12 Punishment, and related customary international law, including Article 75 of the 1977  
13 Protocol I to the Geneva Conventions, to take all measures necessary to ensure that no  
14 person within the custody or under the physical control of the United States government  
15 is subjected to torture or other cruel, inhuman or degrading treatment or punishment;  
16

1 FURTHER RESOLVED, That the American Bar Association urges the United States  
2 government to: (a) comply fully with the four Geneva Conventions of August 12, 1949,  
3 including timely compliance with all provisions that require access to protected persons  
4 by the International Committee of the Red Cross; (b) observe the minimum protections of  
5 their common Article 3 and related customary international law; and (c) enforce such  
6 compliance through all applicable laws, including the War Crimes Act and the Uniform  
7 Code of Military Justice;

8  
9 FURTHER RESOLVED, That the American Bar Association urges the United States  
10 government to take all measures necessary to ensure that all foreign persons captured,  
11 detained, interned or otherwise held within the custody or under the physical control of  
12 the United States are treated in accordance with standards that the United States would  
13 consider lawful if employed with respect to an American captured by a foreign power;

14  
15 FURTHER RESOLVED, That the American Bar Association urges the United States  
16 government to take all measures necessary to ensure that no person within the custody or  
17 under the physical control of the United States is turned over to another government  
18 when the United States has substantial grounds to believe that such person will be in  
19 danger of being subjected to torture or other cruel, inhuman or degrading treatment or  
20 punishment;

21  
22 FURTHER RESOLVED, That the American Bar Association urges that 18 U.S.C.  
23 §§2340(1) and 2340A be amended to encompass torture wherever committed, and  
24 regardless of the underlying motive or purpose;

25  
26 FURTHER RESOLVED, That the American Bar Association urges the United States  
27 government to pursue vigorously (1) the investigation of violations of law, including the  
28 War Crimes Act and the Uniform Code of Military Justice, with respect to the  
29 mistreatment or rendition of persons within the custody or under the physical control of  
30 the United States government, and (2) appropriate proceedings against persons who may  
31 have committed, assisted, authorized, condoned, had command responsibility for, or  
32 otherwise participated in such violations;

33  
34 FURTHER RESOLVED, That the American Bar Association urges the President and  
35 Congress, in addition to pending congressional investigations, to establish an  
36 independent, bipartisan commission with subpoena power to prepare a full account of  
37 detention and interrogation practices carried out by the United States, to make public  
38 findings, and to provide recommendations designed to ensure that such practices adhere  
39 faithfully to the Constitution and laws of the United States and treaties to which the  
40 United States is a party, including the Geneva Conventions, the International Covenant  
41 on Civil and Political Rights, and the Convention against Torture and Other Cruel,  
42 Inhuman or Degrading Treatment or Punishment, and related customary international  
43 law, including Article 75 of the 1977 Protocol I to the Geneva Conventions;

44

1 FURTHER RESOLVED, That the American Bar Association urges the United States  
2 government to comply fully and in a timely manner with its reporting obligations as a  
3 State Party to the Convention Against Torture and Other Cruel, Inhuman or Degrading  
4 Treatment or Punishment;

5  
6 FURTHER RESOLVED, That the American Bar Association urges that, in establishing  
7 and executing national policy regarding the treatment of persons within the custody or  
8 under the physical control of the United States government, Congress and the Executive  
9 Branch should consider how United States practices may affect (a) the treatment of  
10 United States persons who may be captured and detained by other nations and (b) the  
11 credibility of objections by the United States to the use of torture or other cruel, inhuman  
12 or degrading treatment or punishment against United States persons.

## REPORT

### INTRODUCTION

The use of torture and cruel, inhuman or degrading treatment by United States personnel in the interrogation of prisoners captured in the Afghanistan and Iraq conflicts has brought shame on the nation and undermined our standing in the world. While the U.S. government has acknowledged, and is moving to punish, the acts at Abu Ghraib that have been documented on videotape, this does not address the substantial, fundamental concerns regarding U.S. interrogation policy and the treatment of detainees.

The U.S. government maintains that its policies comport with the requirements of law, and that the violations at Abu Ghraib represent isolated instances of individual misconduct. But there apparently has been a widespread pattern of abusive detention methods. Executive Branch memoranda were developed to justify interrogation procedures that are in conflict with long-held interpretations and understandings of the reach of treaties and laws governing treatment of detainees. Whether and to what extent the memoranda were relied upon by U.S. officials may be open to question, but it is clear that those legal interpretations do not represent sound policy, risk undercutting the government's ability to assert any high moral ground in its "war on terrorism", and put Americans at risk of being tortured or subjected to cruel, inhuman or degrading treatment by governments and others willing to cite U.S. actions as a pretext for their own misconduct.

The American public still has not been adequately informed of the extent to which prisoners have been abused, tortured, or rendered to foreign governments which are known to abuse and torture prisoners. There is public concern that the investigations under way to identify those accountable for prisoner abuse are moving slowly, and are too limited in scope. We do not yet know who is being detained, where they are, what are the conditions of their detention and interrogation, which agencies and personnel are exercising authority over them, who made the decisions regarding U.S. detention policy, and what, precisely, is the U.S. policy toward treatment of detainees.

It is incumbent upon this organization, which makes the rule of law its touchstone, to urge the U.S. government to stop the torture and abuse of detainees, investigate violations of law and prosecute those who committed, authorized or condoned those violations, and assure that detention and interrogation practices adhere faithfully to the Constitution, laws and treaties of the United States and related customary international law.

### BACKGROUND

In conducting military operations in Afghanistan and Iraq, and in undertaking other acts related to the "war on terrorism", the United States has detained large numbers of persons believed to be involved in activities in furtherance of terrorism or in opposition to U.S. military actions. There was great interest in obtaining information from these detainees regarding upcoming actions against U.S. forces and planned terrorist attacks. From the outset, questions were raised regarding the lengths to which United States personnel could go to extract

information from detainees<sup>1</sup>. High-level legal memoranda dating from early 2002<sup>2</sup> sketched out the legal positions which could be advanced to defend interrogation techniques which had not previously been considered legal or appropriate for use by U.S. personnel and were beyond standard military doctrine.<sup>3</sup>

Allegations of the use of interrogation techniques long considered to be torture or cruel, inhuman or degrading treatment began to surface in connection with interrogations of persons captured during the conflict in Afghanistan. The first public acknowledgement of these allegations came in December 2002, when the U.S. military announced that it had begun a criminal investigation into the death of a 22 year-old Afghan farmer and part-time taxi driver who had died of “blunt force injuries to lower extremities complicating coronary artery disease” while in U.S. custody at Bagram Air Force Base in Afghanistan.<sup>4</sup>

The American public has now learned that in December 2002, Secretary of Defense Rumsfeld approved a series of harsh questioning techniques for use in Guantanamo; novel techniques, including use of dogs to scare prisoners, were authorized in Iraq; and only after the Abu Ghraib scandal brought U.S. interrogation procedures into public view was there a substantial scaling back of the authorized techniques in Iraq.<sup>5</sup> In addition, while the Department of Defense (“DOD”) exercises control over thousands of detainees, the Central Intelligence Agency (“CIA”) is conducting a secret detention operation, including an extensive program in Afghanistan.<sup>6</sup> While the details of this operation are not being disclosed, Secretary of Defense Donald Rumsfeld has admitted to keeping the identity of a suspect secret, and hiding him from the International Committee of the Red Cross (“ICRC”), at the request of the CIA.<sup>7</sup> The ICRC has criticized the U.S. for not providing the ICRC with notification of, or access to, other persons in U.S. custody.<sup>8</sup>

<sup>1</sup> See, e.g., Dana Priest & Bradley Graham, *U.S. Struggled Over How Far to Push Tactics*, WASH. POST, June 24, 2004, at A01 (hereinafter “*U.S. Struggled*”).

<sup>2</sup> See Memorandum from John Yoo, Deputy Assistant Attorney General, to William J. Haynes, General Counsel, DOD (January 9, 2002)

<sup>3</sup> See Douglas Jehl, *Detainee Treatment; U.S. Rules on Prisoners Seen as a Back and Forth of Mixed Messages to G.I.'s*, N.Y. TIMES, June 22, 2004 at A1 (hereinafter, “*Detainee Treatment*”); *U.S. Struggled*, supra note 1.

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

<sup>5</sup> See, e.g., *U.S. Struggled*, supra note 1; Editorial, *Torture Policy*, WASH. POST, June 16, 2004, at A26; Julian Coman, *Interrogation abuses were ‘approved at highest levels’*, London Daily Telegraph, June 13, 2004 ([www.portal.telegraph.co.uk/core/Content/displayPrintable.jhtml?xml=/news/2004/06](http://www.portal.telegraph.co.uk/core/Content/displayPrintable.jhtml?xml=/news/2004/06)).

<sup>6</sup> See Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation; Long History of Tactics in Overseas Prisons in Coming to Light*, WASH. POST, May 11, 2004, at A01; Seymour M. Hersh, *Annals of National Security; The Gray Zone*, NEW YORKER, May 24, 2004 ([www.newyorker.com/printable/?fact/040524fa\\_fact](http://www.newyorker.com/printable/?fact/040524fa_fact)).

<sup>7</sup> See *U.S. Struggled*, supra note 1.

<sup>8</sup> See *U.S. Hiding Terror Suspects? Red Cross Wants Access to Detainees*, ASSOC. PRESS, June 13, 2004.

Allegations of abusive techniques reportedly being practiced by DOD and CIA personnel and U.S. government contractors at U.S. detention facilities in Iraq and Afghanistan include: forcing detainees to stand or kneel for hours in black hoods or spray-painted goggles, 24-hour bombardment with lights, “false-flag” operations meant to deceive a captive about his whereabouts, withholding painkillers from wounded detainees, confining detainees in tiny rooms, binding in painful positions, subjecting detainees to loud noises, and sleep deprivation.<sup>9</sup> In addition, the U.S. is reportedly “rendering” suspects to the custody of foreign intelligence services in countries where the practice of torture and cruel, inhuman or degrading treatment during interrogation is well-documented.<sup>10</sup>

The abusive treatment of detainees became consistent front-page news in April 2004, when videotapes circulated showing extensive torture and abusive treatment by United States personnel of detainees in the Abu Ghraib prison in Baghdad. These disclosures were followed by further charges of severe mistreatment by former detainees in Afghanistan, Iraq and the Guantanamo Naval Base. Military sources indicate that over 30 prisoners have died in U.S. custody<sup>11</sup> and military officials have acknowledged two prisoner deaths they consider to be homicides and are investigating another 12 deaths.<sup>12</sup> Prison guards charged that intelligence officers told them to “soften up” the Iraqi prisoners, with no explanation as to what that meant.<sup>13</sup> Over 100 cases of misconduct in Iraq and Afghanistan have now been reported.<sup>14</sup>

As the Department of Defense and the CIA were preparing and implementing their approach to interrogations, a series of memoranda were being prepared by various high-ranking legal officials in the Executive Branch which appear designed to provide a legal basis for going beyond established policies with regard to treatment of detainees. These memoranda set out a series of arguments for restrictive interpretation of the laws and treaties relevant to the subject, so as to greatly curb their effect. One example, in the August 1, 2002 memorandum from the Department of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President,

<sup>9</sup> See, e.g., Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; “Stress and Duress” Tactics used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01 (hereinafter “*U.S. Decries Abuse*”); Eric Lichtblau & Adam Liptak, *Questioning to Be Legal, Humane and Aggressive, The White House Says Now*, N.Y. TIMES, Mar. 4, 2003, at A13; Jess Bravin & Gary Fields, *How do U.S. Interrogators Make A Captured Terrorist Talk*, WALL ST. J., Mar 4, 2003, at B 1; Tania Branigan, *Ex-Prisoners Allege Rights Abuses By U.S. Military*, WASH. POST, Aug. 19, 2003, at A02.

<sup>10</sup> Captives have reportedly been “rendered” by the U.S. to Jordan, Egypt, Morocco, Saudi Arabia and Syria, in secret and without resort to legal process. See, e.g., Peter Finn, *Al Qaeda Recruiter Reportedly Tortured; Ex-Inmate in Syria Cites Others’ Accounts*, WASH. POST, Jan. 31, 2003, at A14; *U.S. Decries Abuse*, supra note 8; Rajiv Chandrasekaran & Peter Finn, *US. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A01.

<sup>11</sup> *New Probes Of Prison Deaths*, CBSNEWS.com, June 30, 2004.

<sup>12</sup> *14 prisoner deaths under investigation*, MSNBC ([www.msnbc.msn.com/id/4901264](http://www.msnbc.msn.com/id/4901264)), May 5, 2004.

<sup>13</sup> See *Detainee Treatment*, supra note 3.

<sup>14</sup> Editorial, *Remedies for Prisoner Abuse*, WASH. POST, June 7, 2004, at A18.

(recently rescinded by the Justice Department) concluded that for an act to constitute torture as defined in 18 U.S.C. §2340, “it must inflict pain that is difficult to endure”, “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”<sup>15</sup>

Beyond their strained interpretation of the law, the memoranda attempted to craft an overall insulation from liability by arguing that the President has the authority to ignore any law or treaty that he believes interferes with the President’s Article II power as Commander-in-Chief. In one such example, government lawyers argued that, for actions taken with respect to “the President’s inherent constitutional authority to manage a military campaign, 18 U.S.C. §2340A (the prohibition against torture) must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority.”<sup>16</sup>

These documents,<sup>17</sup> which were released publicly after they were widely leaked, purported to provide authority for an aggressive effort to extract information from detainees using means not previously sanctioned. We do not construe the giving of good faith legal advice to constitute endorsement or authorization of torture. Moreover, it is unclear to what extent these memoranda represented or formed the basis for official policy. However, what does seem clear is that the memoranda and the decisions of high U.S. officials at the very least contributed to a culture in which prisoner abuse became widespread.

The Administration has acknowledged that the conduct that was featured in the Abu Ghraib tapes violated the law, and pledged that those who committed the violations would be brought to justice. In addition, at least six investigations are under way with regard to the abuse of detainees.<sup>18</sup> It is important these investigations be thorough and timely, and that they be conducted by officers and agencies with the scope and authority to reach all those who should be held responsible.

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<sup>15</sup> Memorandum, at 1. It should be noted there are JAG officers who have expressed concerns regarding the approach of DOD and that outlined in these internal memoranda with regard to compliance with the Geneva Conventions and the methods used to interrogate detainees. See, e.g., Adam Liptak, *U.S. Barred Legal Review of Detentions, Lawyer Says*, N.Y. TIMES, May 19, 2004, at A14.

<sup>16</sup> *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 6 March 2003, at 21 (hereinafter *Working Group Report*).

<sup>17</sup> See A Guide to the Memos on Torture, [www.nytimes.com/ref/international/24MEMO-GUIDE.html](http://www.nytimes.com/ref/international/24MEMO-GUIDE.html) (posted June 26, 2004).

<sup>18</sup> See “*Detainee Treatment*”, supra note 3.

## LEGAL STANDARDS

### The Convention Against Torture

The United States' obligation to prohibit and prevent the torture and cruel, inhuman or degrading treatment of detainees in its custody is set forth in the Convention Against Torture And Other Cruel, Inhuman, or Degrading Treatment ("CAT"), to which the U.S. is a party.<sup>19</sup> Under CAT, there are no exceptional circumstances that warrant torture, and extradition or other rendering of a person to a country that would likely subject that person to torture is prohibited. The United Nations Committee Against Torture, created by CAT, monitors implementation of CAT, considers country reports and issues decisions.

When the U.S. ratified CAT in 1994, it did so subject to a reservation providing that the U.S. would prevent "cruel, inhuman or degrading treatment" insofar as such treatment is prohibited under the Fifth, Eighth, and/or Fourteenth Amendments.<sup>20</sup> Thus, the U.S. is obligated to prevent not only torture, but also conduct considered cruel, inhuman or degrading under international law if such conduct is also prohibited by the Fifth, Eighth and Fourteenth Amendments.

In interpreting U.S. obligations, we look to the U.N. Committee Against Torture's interpretations of CAT as well as U.S. case law decided in the immigration and asylum law context, under the Alien Tort Claims and Torture Victim Protection Acts and concerning the treatment of detainees and prisoners under the Fifth, Eighth or Fourteenth Amendments. Under these interpretations, measures such as severe sleep deprivation, the threat of torture, and forcing someone to sleep on the floor of a cell while handcuffed following interrogation constitutes torture<sup>21</sup> The U.N. Committee found that such measures as physical restraints in very painful conditions, being hooded, and using cold air to chill – all measures of which United States interrogators are accused of using – constitute cruel, inhuman or degrading treatment.<sup>22</sup>

The United States' attempt to comply with its obligation under CAT to criminalize torture is codified in 18 U.S.C. §2340A. Section 2340A criminalizes conduct by a U.S. national or a foreign national present in the U.S. who, acting under color of law, commits or attempts to commit torture outside the United States. The statute is exclusively criminal and may not be construed as creating any right enforceable in a civil proceeding. It is also narrower in scope than CAT. Section 2340A generally applies to acts committed by U.S. nationals overseas (everywhere *except* "all areas under the jurisdiction of the United States, including any of the places described in sections 5 and 7 of this title and §46501(2) of Title 49.") When the section

<sup>19</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, G.A. Res. 46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984) ("CAT").

<sup>20</sup> 136 Cong. Rec. S17486-01, 1990 WL 168442.

<sup>21</sup> Concluding Observations concerning Republic of Korea (1996), U.N. Doc. No. a/52/44, at para. 56; Concluding Observations concerning New Zealand (1993), U.N. Doc. No. A/48/44, at para. 148; *See* Inquirey under Article 20: Committee Against Torture, Findings concerning Peru (2001), U.N. Doc. No. A/56/44, at para. 35.

<sup>22</sup> Concluding Observations concerning Israel (1997), U.N. Doc. No. A/52/44, at para. 257.



was enacted the reach of the cross-referenced provisions, notably 18 U.S.C. §7, was uncertain.<sup>23</sup> However, §7 was broadened in the USA PATRIOT Act to clarify jurisdiction over crimes committed against U.S. citizens on U.S. property abroad by extending U.S. criminal jurisdiction over certain crimes committed at its foreign diplomatic, military and other facilities (which would encompass extraterritorial detention centers under U.S. jurisdiction) and by cross-reference excluded those places from the reach of §2340A.

Section 2340A defines torture to be any “act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain...” The Administration has interpreted this “specific intent” language to virtually eliminate its use against torturers: [E]ven if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.”<sup>24</sup> So long as the purpose is to get information, this interpretation suggests that any means may be used. This language clearly needs to be restricted to facilitate meaningful enforcement of CAT by the United States.

The U.S. did not enact a specific criminal statute outlawing torture within the United States, out of deference to federal-state relations and because it determined that existing federal and state criminal law was sufficient to cover any domestic act that would qualify as torture under CAT.<sup>25</sup>

The Uniform Code of Military Justice may be used to prosecute in courts-martial certain acts of ill-treatment carried out, whether in the United States or overseas, by American military personnel and possibly certain civilians, such as CIA agents, accompanying such personnel. The UCMJ is the most substantively extensive body of federal criminal law relating to interrogation of detainees by U.S. military personnel. The UCMJ prohibits such persons from subjecting detainees to torture and “cruelty and maltreatment” regardless of the applicability of the constitutional rights exception to CAT.<sup>26</sup> There is no civilian parallel to the provisions of the UCMJ. Recent events make a persuasive case that the inapplicability of state law to U.S. facilities abroad and the lack of other federal criminal law comparable to §2340A leaves a gap in anti-torture law that should be filled.

Unfortunately the U.S. has never enforced 18 U.S.C. § 2340A, and has thereby fallen far short of its obligations under international law and its professed ideals. It has failed to utilize the statute to prosecute either U.S. agents suspected of committing torture outside the jurisdiction of

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<sup>23</sup> Compare *U.S. v. Gatlin*, 216 F.3d 207 (2d Cir 2000) with *U.S. v. Corey*, 232 F.3d 1166 (9th Cir 2000). However, the question was substantially mooted for most purposes by the passage of the Military Extraterritorial Jurisdiction Act of 2000, PUB. L. 106-503, 112 STAT. 2488, which subjects persons accompanying the armed forces abroad to U.S. civilian criminal jurisdiction, even if outside the “special maritime and territorial jurisdiction.”

<sup>24</sup> *Working Group Report*, supra note 15, at 9.

<sup>25</sup> See U.S. Dept. of State, Initial Report of the United States of America to the U.N. Committee against Torture, U.N. Doc. CAT/C/28/Add.5 (1999), at para. 178.

<sup>26</sup> 10 U.S.C. §893.

the U.S. or foreign torturers living within the United States.<sup>27</sup> In addition, the United States is out of compliance with the requirement under Article 19 of CAT that it report to the United Nations Committee Against Torture every four years on measures taken to give effect to its undertakings under the Convention. The Second report was due in 1999, and the U.N. Committee has written to the United States asking for submission of the overdue report by October 1, 2004.

### The Geneva Conventions

Geneva Convention III Relative to the Treatment of Prisoners of War (“Geneva III”) flatly prohibits “any form of coercion” of POWs in interrogation – the most protective standard of treatment found in international law. Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (“Geneva IV”) protects “civilian” detainees who qualify as “protected persons” from “coercion.”<sup>28</sup>

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

The requirements of humane treatment embodied in Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I protect all detainees captured in situations of international or internal armed conflict, regardless of “legal” status.<sup>29</sup> Of course, all detainees -

<sup>27</sup> *Amnesty International Report Charges U.S. is “Safe Haven” for Torturers Fleeing Justice; Eight Years On, U.S. Has Failed to Prosecute Single Individual for Torture*, Amnesty International Press Release (2002) (available at <http://www.amnestyusa.org/news/2002/usa04102002.html>). *See also* William J. Aceves UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS (Amnesty International USA Publications 2002), at 50.

<sup>28</sup> *See* Section II(C) for a discussion of who qualifies as a “protected person” under Geneva IV.

<sup>29</sup> “Common Article 3” provides that detainees “shall in all circumstances be treated humanely” and prohibits the following acts “at any time and in any place whatsoever”: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;” and “outrages upon personal dignity, in particular humiliating or degrading treatment.” Common Article 3 also provides that the “wounded and sick shall be collected and cared for.”

Although neither the United States nor Afghanistan is a party to Additional Protocol I, it is generally acknowledged that relevant sections of Protocol I constitute either binding customary international law or good practice, in particular the minimum safeguards guaranteed by Article 75(2). *See* Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, reprinted in *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 415, 425-6 (1987).

Article 75 provides that “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions” “shall be treated humanely in all circumstances” and that

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

The Administration’s official position is that the Geneva Conventions apply to the War in Afghanistan<sup>30</sup> and the occupation of Iraq,<sup>31</sup> but do not apply to Al Qaeda detainees, and that neither the Taliban nor Al Qaeda detainees are entitled to prisoner of war (“POW”) status thereunder. Initially, the Administration’s position was that the Geneva Convention did not apply to the Taliban, but it relented, except with regard to withholding POW status.<sup>32</sup> The legal underpinning of this approach is found in the internal government documents dating from early 2002 cited above.<sup>33</sup> The stated purposes of this analysis were to preserve maximum flexibility with the least restraint by international law and to immunize government officials from prosecution under the War Crimes Act, which renders certain violations of the Geneva Conventions violations of U.S. criminal law.

The Administration has stated that it is treating Taliban and Al Qaeda detainees “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949,” and that the detainees “will not be subjected to physical or mental abuse or cruel treatment.”<sup>34</sup> However, the Administration has never explained how it determines what interrogation techniques are “appropriate” or “consistent with military necessity,” or how it squares that determination with U.S. obligations under human rights and customary international law.

Furthermore, the Administration’s approach raises serious issues regarding the application of the Geneva Conventions to the War on Terror, notably the minimal protections of

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each state Party “shall respect the person, honour, convictions and religious practices of all such persons.” Paragraph 2 of Article 75 prohibits, “at any time and in any place whatsoever, whether committed by civilian or military agents”: “violence to the life, health, or physical or mental well-being of persons, in particular ... torture of all kinds, whether physical or mental,” “corporal punishment,” and “mutilation”; “outrages upon personal dignity, in particular humiliating and degrading treatment . . . and any form of indecent assault”; and “threats to commit any of the foregoing acts.”

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

<sup>30</sup> *See, e.g.*, Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L L. 461, 476-77 (2002).

<sup>31</sup> S.C. Res. 1483, U.N. Doc S/Res/1483 (2003).

<sup>32</sup> *See White House Fact Sheet: Status of Detainees at Guantanamo* (February 7, 2002) (available at <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html>).

<sup>33</sup> *See, e.g.*, Michael Isikoff, “Double Standards? A Justice Department memo proposes that the United States hold others accountable for international laws on detainees—but that Washington did not have to follow them itself” *Newsweek*, May 22, 2004, available at <[www.msnbc.msn.com/id/5032094/site/newsweek/](http://www.msnbc.msn.com/id/5032094/site/newsweek/)>.

<sup>34</sup> *See White House Fact Sheet: Status of Detainees at Guantánamo* (Feb. 7, 2002) (available at <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html>).

Common Article 3 and the actual standards applied in the field. The internal Administration memoranda argue that Common Article 3 does not apply at all to Al Qaeda's activities in the Afghanistan conflict because, inasmuch as Al Qaeda operated cross-border and with support from persons in countries outside Afghanistan, that conflict is not an armed conflict of a non-international character within the meaning of Article 3. In fact, the Geneva Conventions are structured in terms of international armed conflicts (between State parties) and non-international (non-inter-State) conflict. There is no indication that there is any category of armed conflict that is not covered by the Geneva Conventions.<sup>35</sup> The Geneva Conventions apply to the totality of a conflict including the regular forces, irregulars (whether or not privileged combatants) and civilians.

With respect to interrogation in armed conflict, Common Article 3 requires humane treatment generally and specifically forbids "cruel treatment and torture" or "outrages upon personal dignity, in particular humiliating and degrading treatment." Such provisions were violated not only by the conduct photographed at Abu Ghraib, but also by practices reported to have been engaged in at other U.S. facilities in Iraq, and, if reports are accurate, also in Afghanistan.

The U.S. has acknowledged that its presence in Iraq is an "occupation" within the meaning of Geneva IV.<sup>36</sup> The U.S., as occupying power, is consequently subject to provisions for the benefit of "protected persons,"<sup>37</sup> including Article 31's prohibition of "physical or moral coercion to obtain information from them or third parties".<sup>38</sup> Should the occupation be considered terminated, in any armed conflict that may continue between remaining U.S. armed forces in Iraq and Iraqi resistance – a non-international (non-state) armed conflict – the minimal protections of Common Article 3 of the Geneva Conventions would apply.

It is clear that not only the abuses in Abu Ghraib but also certain practices contemplated by the "Interrogation Rules of Engagement"<sup>39</sup> – such as extended sleep deprivation and stressful positions – amount to "physical or moral coercion" and are, therefore, violations of Geneva IV.<sup>40</sup>

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<sup>35</sup> The authoritative ICRC Commentary refers to the application of the Conventions "to *all* cases of armed conflict, including internal ones" at 26 (*italics in original*). Whether a particular event is "armed conflict" is another question. There is no doubt that initial U.S. air and ground operations in Afghanistan and certainly the invasion of Iraq were armed conflict. In circumstances not constituting armed conflict, other legal standards apply, including CAT and the International Covenant on Civil and Political Rights ("ICCPR"), as more fully discussed in the Report.

<sup>36</sup> Security Council Resolution 1483, passed on May 22, 2003, constitutes a formal recognition by the UN of the occupation. *See* S.C. Res. 1483, U.N. Doc S/Res/1483 (2003). This resolution also notes the letter from the Permanent Representatives of the U.S. and U.K. to the President of the Security Council, which formally announced to the UN the creation of the Coalition Provisional Authority "to exercise powers of government temporarily." *See Letter, from the Permanent Representatives of the UK and the US to the UN addressed to the President of the Security Council*, U.N. Doc. S/2003/538 (May 8, 2003).

<sup>37</sup> On the Geneva Conventions and Geneva IV generally, *see* Part II of our Report.

<sup>38</sup> The ICRC Report also cites Articles 5, 27, 32 and 33 of Geneva IV. *See ICRC Report* at ¶8.

<sup>39</sup> In Senate hearings the Pentagon disclosed "Interrogation Rules of Engagement", which listed certain interrogation practices and specified a second group of practices that required approval of the Commanding General (Lt. Gen. Ricardo Sanchez). This second group included: "Isolation [solitary confinement] for longer than 30 days, Presence of Mil [Military] Working Dogs, Sleep Management (72 hrs max), Sensory Deprivation

U.S. military authorities maintain that interrogation of certain detainees possessing “high value intelligence” does not have to comply with certain restrictions of Geneva IV because of an exception provided in Article 5 of Geneva IV with respect to persons who threaten the security of a state so-called “security detainees”.<sup>41</sup> This view is based on a misinterpretation of the plain meaning and purpose of Article 5.

Article 5 provides for two categories of temporary exceptions to certain of its standards in the case of detainees who are definitely suspected of being threats to the security of a Party. The first paragraph of Article 5 provides that “where in the territory of a Party to the conflict,” that Party determines that an individual protected person is definitely suspected of, or engaged in, activities hostile to the security of the State, the Party can suspend that person’s rights and privileges under Geneva IV, where the exercise of such rights are prejudicial to the security of the State.<sup>42</sup> The plain language of this paragraph limits a Party’s ability to suspend certain protections of Geneva IV to situations where a party to the conflict determines that a protected person is posing a security risk in that party’s territory. Accordingly, this paragraph plainly has no application to protected persons detained by the U.S. in Iraq, because such detainees are not persons posing a security risk in the territory of the United States.<sup>43</sup>

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(72 hours max), Stress Positions (No longer than 45 min)”. A week following the disclosure of this document, General Sanchez announced that none of the practices in this second group, except for isolation, would now be permitted.

Such form of Rules of Engagement is understood to be one of at least four versions adopted at various times in the fall of 2003 for use in one or more Coalition facilities. It is cited here as illustrative of the approach taken to interrogation standards.

<sup>40</sup> A February 2004 report of the International Committee of the Red Cross (“ICRC”), only recently disclosed, describes abuses that are “part of the process” in the case of persons arrested in connection with suspected security offenses or deemed to have “intelligence value.” *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004 (“ICRC Report”) [www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf](http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf).

<sup>41</sup> For example, in a December 24, 2003 Letter from Brigadier General Janis L. Karpinski to the ICRC regarding ICRC’s visits to Camp Cropper and Abu Ghraib in October 2003, General Karpinski states: “[W]hile the armed conflict continues, and where ‘absolute military security so requires’ security internees will not obtain full GC protection as recognized in GCIV/5, although such protection will be afforded as soon as the security situation in Iraq allows it.” See also Douglas Jehl & Neil A. Lewis, *U.S. Disputed Protected Status of Iraq Inmates*, May 24, 2004.

<sup>42</sup> Specifically, Article 5 provides in part:

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

*See* Geneva IV, Art. 5 (emphasis added).

<sup>43</sup> Even in a case covered by paragraph I of Article 5, the detainee must be treated “with humanity.” See the definition of humane treatment in Common Article 3 of the Geneva Conventions quoted and discussed below, which would clearly exclude the abuses found at Abu Ghraib and probably a number of the practices

The second exception<sup>44</sup> applicable to occupation permits the Occupying Power, where absolute military necessity so requires, to temporarily deny “rights of communication” – but no other rights – for a person detained as a spy or saboteur or as a threat to the security of the Occupying Power. Therefore, during occupation, even detainees who pose a security risk to the Occupying Power have the same protection against coercion as any other detainee.

### Application of Geneva Conventions and the Anti-Torture Statute to Civilians

The War Crimes Act<sup>45</sup> criminalizes as a “war crime” the commission in the U.S. or abroad of a “grave breach” of the Geneva Conventions, violation of Common Article 3, and certain other international offenses, where the perpetrator or the victim is a member of the Armed Forces or a U.S. national. (With respect to the military, given the other recourse against active service members, the statute applies only to those who may have been discharged before prosecution and therefore were outside the jurisdiction of courts martial or who are being prosecuted jointly with civilians.)

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contemplated by the “Interrogation Rules of Engagement.” If the first paragraph’s broad right of derogation were interpreted to apply to occupied territory, it would make the second paragraph’s narrow derogation superfluous, contrary to principles of interpretation that seek to give meaning to all provisions.

<sup>44</sup> The second paragraph of Article 5 provides, in part:

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

<sup>45</sup> 18 U.S.C. § 2441 (2004) provides, in relevant part:

(a) Offense. Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances. The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States...

(c) Definition. As used in this section, the term “war crime” means any conduct -

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party...

... (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict...

*See* 18 U.S.C. § 2441. An internal Administration document referenced above argued against application of the Geneva Conventions specifically to develop a defense against application of the War Crimes Act, in case government officials were alleged to have committed grave breaches of the Geneva Conventions and other offenses thereunder.

The jurisdictional basis for enforcing the War Crimes Act against civilian contractors or others “accompanying” the Armed Forces outside the U.S. is likely to be the Military Extraterritorial Jurisdiction Act (“MEJA”).<sup>46</sup> Indeed, the Department of Justice has recently announced that it is asserting jurisdiction over, and is prosecuting, a civilian contractor in Iraq.<sup>47</sup> A significant issue under MEJA is whether a contractor was “employed” by the Armed Forces (expressly covered by the Act), was employed by a contractor serving the Armed Forces or was employed by the CIA. In the latter cases, the reach of MEJA would depend on whether the defendant was “accompanying” the Armed Forces, a factual matter to be determined on a case-by-case basis.

### Other International Legal Standards that Bind the United States

International law offers guidance in interpreting CAT. Some of these international legal standards are, without question, binding on the U.S., such as: the International Covenant on Civil and Political Rights (the “ICCPR”),<sup>48</sup> the law of *jus cogens* and customary international law. The Human Rights Committee established under the ICCPR has found prolonged solitary confinement, threatening a victim with torture, and repeated beatings to violate the Covenant’s prohibition against cruel, inhuman or degrading treatment or punishment.<sup>49</sup> Other sources, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>50</sup> also provide guidance.

Customary international law has long prohibited the state practice of torture, without reservation, in peace or in wartime.<sup>51</sup> In 1975, the United Nations General Assembly adopted by

<sup>46</sup> The Military Extraterritorial Jurisdiction Act provides, in relevant part:

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

(1) while employed by or accompanying the Armed Forces outside the United States; or

(2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

See 18 U.S.C. § 3261. Application to members of the Armed Forces is, however, limited to those no longer subject to the UCMJ (usually because of discharge) or accused of committing an offense with civilian defendants.

<sup>47</sup> David Kravets, *Patriot Act used to prosecute U.S. civilian*, CLEVE. PLAIN DEALER, June 19, 2004.

<sup>48</sup> G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316.

<sup>49</sup> See *Floyd Howell v. Jamaica*, Communication No. 798/1998 (20 January 1998), CCPR/C/79/D/798/1998; *Victor Alfredo Polay Campos*, Communication No. 577/1994 (6 November 1997), CCPR/C/61/D/577/1994; *Dave Marais, Jr. v. Madagascar*, Communication No. 49/1979 (19 April 1979), U.N. Doc. Supp. No. 40 (A/38/40) at 141 (1983); *Raul Sendic Antonaccio v. Uruguay*, Communication No. R.14/63 (28 November 1979), U.N. Doc. Supp. No. 40 (A/37/40) at 114 (1982). In ratifying the ICCPR, the U.S. Senate declared that the Articles 1 through 27 (which cover the subject at hand) are not self-executing.

<sup>50</sup> 213 U.N.T.S. 221.

<sup>51</sup> In order for a state’s practice to be recognized as customary international law, it must fulfill two conditions:

consensus the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Punishment.<sup>52</sup> The Torture Resolution together with CAT and the ICCPR – ratified by 133 and 151 States, respectively – embody the customary international law obligation to refrain from behavior which constitutes torture.<sup>53</sup> The prohibition of torture is, moreover, one of the few norms which has attained peremptory norm or *jus cogens* status, and is recognized as such by United States courts.<sup>54</sup> *Jus cogens* is defined as a peremptory norm “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>55</sup> While many international agreements expressly prohibit both torture and cruel, inhuman and degrading treatment,<sup>56</sup> it remains an open question as to whether *jus cogens* status extends to the prohibition

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

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

<sup>52</sup> GA Res. 3452 (XXX), U.N. GAOR, Supp. No. 34 at 91 (hereinafter the “Torture Resolution”).

<sup>53</sup> See *Report by the Special Rapporteur*, U.N. Economic and Social Council, E/CN.4/1986/15, at para. 3. The report details state practice and *opinio juris* with respect to national legislation prohibiting torture. See also HERMAN J. BURGERS & HANS SANELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* (Martinus Nijhoff Publishers/Kluwer Academic Publishers 1988), at 1-12. The widespread ratification of regional human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the African Charter on Human and Peoples’ Rights further reinforce the argument that torture is prohibited by customary international law.

<sup>54</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1986). See also *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 716 (9th Cir. 1992); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1006 (9th Cir. 2000); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 Supp. 2d 1322 (N.D. Ga. 2002); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 7 (D.D.C. 1998); *Doe v. Unocal*, 963 F. Supp. 880, 890 (C.D. Cal. 1997).

<sup>55</sup> Vienna Convention on the Law of Treaties, 1969, Art. 53, 1155 U.N.T.S. 331.

<sup>56</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., Art. 5, U.N. Doc. A/810 (1948) (“no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR, Supp. No. 34, U.N. Doc. A/10034 (1976), at Art. 3 (“Exceptional circumstances such as a state of war or a threat of war, internal political stability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman



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

## RECOMMENDATIONS

The above facts and law support the Recommendations, which address the following issues:

1. The United States must condemn the torture and abusive treatment of detainees within the custody or under the physical control of the U.S. government, including U.S. government contractors. Abuses at Abu Ghraib and elsewhere are strong evidence that in the war on terror this nation's detention policies have lost their moral compass. Rather than seek to excuse or minimize these failings, the U.S. must take responsibility for violations of treaties and international law, condemn those violations, investigate all plausible allegations of violations, and punish all those responsible, no matter how high ranking. It is vital to ensure that this disgraceful behavior does not happen again. Any individual who alleges that he or she has been subjected to torture must be provided with a meaningful opportunity to complain to, and to have his/her case promptly and impartially examined by, competent authorities. Steps must be taken to ensure that the complainant and witnesses are protected against ill-treatment and intimidation.

2. The U.S. government must ensure compliance with the Geneva Conventions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and related customary international law. In doing so, it should accept the time-honored interpretations of these instruments. They were designed to stop torture, not to stimulate an effort to narrow their scope beyond common sense meaning. The U.S. government should fully renounce the misguided interpretations found in its internal memoranda and clearly state a policy for treatment of detainees that would restore this nation's standing among the countries of the world.

3. The U.S. government must honor and implement fully the four Geneva Conventions. It must acknowledge the applicability of Common Article 3 to all armed conflicts. There are no "black holes" in the Conventions' scheme. Similarly, the Administration must acknowledge the very limited reach of the security exception of Article 5, and understand that the protections in the Convention are substantial, such that no POW's may be coerced in any way. The United States should adhere to Geneva III's requirement that any detainee whose POW status is in "doubt" is entitled to POW status — and, therefore, cannot be subjected to coercive treatment —

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or degrading treatment or punishment."); ICCPR, *supra* note 118, at Art. 7 ("no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); Additional Protocol I, *supra* note 20, at Art. 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II"), *reprinted in* 16 I.L.M. 1442 (1977), at Art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950), at Art. 3 (declaring that torture and inhuman or degrading treatment or punishment is prohibited); American Convention, *supra* note 128, at Art. 5 (providing that every person retain the right to be free from torture and ill-treatment); African Charter on Human and Peoples' Rights, *reprinted in* 21 I.L.M. 58 (1981), at Art. 5 (prohibiting torture and ill-treatment).

until a competent tribunal, which must be convened promptly, determines otherwise.<sup>57</sup>

4. The U.S. government should recognize its responsibility to treat detainees in accordance with standards it would consider legal if perpetrated against an American prisoner. Before adopting restrictive interpretations of binding prohibitions against torture or other cruel, inhuman or degrading treatment, it should consider how such interpretations would affect captured U.S. service members or others serving abroad were such interpretations to be adopted by our adversaries.

5. The United States must not render detainees to nations that it has reason to believe would subject them to torture or other cruel, inhuman or degrading treatment. Rendition not only violates all basic humanitarian standards, but violates treaty obligations which make clear that a nation cannot avoid its obligations by having other nations conduct unlawful interrogations in its stead.

6. 18 U.S.C. §2340 should be amended in two significant ways. First, the definition of torture in §2340(1) should be revised to apply to all acts of torture regardless of the underlying motive or purpose of the perpetrator. This change would prevent this or any future administration from again arguing that the required showing of “specific intent” means that a jailer or interrogator should not be found liable under the statute when his underlying motive or purpose was not to inflict severe physical or mental pain or suffering but only to extract information. That interpretation truly makes a mockery of all the United States purports to stand for regarding human rights. Second, consistent with its obligation under Article 4 of CAT to ensure that all acts of torture are offenses under its criminal law, the U.S. must expand the geographic reach of §2340 so that the prescriptions of CAT are applicable to torture and cruel, inhuman or degrading treatment wherever committed.

7. The U.S. government must investigate violations of law with regard to mistreatment of persons under its control and bring appropriate proceedings against those responsible.

8. The extent of the prisoner abuse scandal is so great, and its ramifications so broad and lasting, that an independent investigation is necessary to identify how these practices evolved and their extent, and to make recommendations to assure they will not recur. This investigation should not be confined to allegations of criminal behavior. Rather, it should extend to all actions, decisions and policy development regarding the interrogation of detainees in the post-September 11<sup>th</sup> “war on terrorism” that played even a small part in creating a culture that could allow such extensive abuse to happen.

9. The United States, as a State Party to the Convention Against Torture and Other Cruel, Unusual or Degrading Treatment or Punishment, must fulfill its requirement under Article 19 of the Convention to report to the United Nations Committee Against Torture every four years on measures taken to give effect to its undertakings under the Convention.

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<sup>57</sup> Geneva III, Art. 5.

<sup>58</sup> Geneva III, Art. 5.

<sup>59</sup> *Id.*, Art. 4.

10. The actions urged by these recommendations are necessary to protect American troops who may be detained by other nations that would be disinclined to honor their treaty commitments in light of the U.S. government's failure to honor its own. Furthermore, these actions are necessary to re-establish the nation's credibility in asserting the rights of people everywhere. The world's most powerful nation must exercise its power while demonstrating its respect for the rule of law.

## CONCLUSION

Al Qaeda and other terrorist organizations pose a real threat to the United States and other nations. That threat creates a tension between the need to obtain potentially life-saving information through interrogation and the legal standards banning torture and other cruel, inhuman or degrading treatment. But as a nation long pledged to the rule of law, we cannot resolve the tension by seeking to overcome that threat by violations of law. Condoning torture under any circumstances erodes one of the most basic principles of international law and human rights, places captured U.S. personnel at inordinate risk, and contradicts the basic values of a democratic state. Moreover, these violations feed terrorism by painting the United States as an arrogant nation above the law. The American Bar Association must go on record as supporting adherence to the rule of law as a fundamental principle, for when the rule of law suffers all who claim its benefits are less secure.

Respectfully submitted,

Bettina B. Plevan, President  
Association of the Bar of the City of New York

Neal R. Sonnett, Chair  
ABA Task Force on Treatment of Enemy Combatants

August 2004

**GENERAL INFORMATION FORM**

Submitting Entities: Association of the Bar of the City of New York  
Bettina B. Plevan, President

Task Force on Treatment of Enemy Combatants  
Neal R. Sonnett, Chair

**1. Summary of Recommendation(s).**

Through these Recommendations, the American Bar Association expresses its condemnation of any use of torture or other cruel, inhuman or degrading treatment or punishment upon persons within the custody or under the physical control of the United States government (including its contractors) and any approval or condoning of such measures by government lawyers, officials and agents.

The Recommendations urge the government to fully comply with the Constitution and laws of the United States and treaties to which the United States is a party, to ensure that no such person is subjected to such treatment or is turned over to another government when the United States has substantial grounds to believe that the person will be in danger of being subjected to such treatment.

The Recommendations also call for the amendment of 18 U.S.C. 2340 to encompass torture wherever committed, and whenever intentionally inflicted, without requiring proof of specific intent to torture, and urges the United States government to pursue vigorously the investigation of violations of law and bring appropriate proceedings against persons who may have committed, assisted, authorized, condoned, had command responsibility for, or otherwise participated in such violations.

The Recommendations call for an independent, bipartisan commission with subpoena power to prepare a full account of detention and interrogation practices carried out by the United States, to make public findings, and to provide recommendations designed to ensure that such practices adhere faithfully to the Constitution and laws of the United States and treaties to which the United States is a party.

Finally, the Recommendations urge that, in establishing and executing national policy regarding the treatment of persons within the custody or under the physical control of the United States government, Congress and the Executive Branch should consider how U.S. practices may affect the treatment of United States persons who may be captured and detained by other nations and the credibility of United States objection to such treatment against United States persons.

2. **Approval by Submitting Entity:**

This Recommendation and Report has been approved by the submitting entities, the Association of the Bar of the City of New York and the ABA Task Force on Treatment of Enemy Combatants. In addition, it has been approved by the governing bodies of the original cosponsors, the Criminal Justice Section, the Section of Individual Rights and Responsibilities, the Section of International Law and Practice, the Section of Litigation, the Center for Human Rights, the Beverly Hills Bar Association, and the Bar Association of San Francisco.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**

No similar Recommendations are known to have been previously submitted.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

The ABA has a long history of advocating respect for the rule of law and treaties to which the United States is a party, including the Geneva Conventions of August 12, 1949, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and related customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions,

This Recommendation would complement and extend those existing policies by urging that persons within the custody or under the physical control of the United States government (including its contractors) are not subjected to torture or other cruel, inhuman or degrading treatment or punishment, that such treatment is not approved or condoned by government lawyers, officials and agents, and that our nation fully respects and complies with its obligations under the Constitution, laws, and treaties of the United States.

5. **What urgency exists which requires action at this meeting of the House?**

Recent reports regarding the use of torture and cruel, inhuman or degrading treatment by United States personnel in the interrogation of prisoners captured in the Afghanistan and Iraq conflicts have brought international condemnation and undermined our standing in the world. United States interrogation policies and treatment of detainees present substantial, fundamental concerns that are currently being addressed by the Congress, and the American Bar Association should be heard on these critical issues.

6. **Status of Legislation.**

On May 6, 2004, House passed H. Res. 627, deploring the abuse of prisoners in the custody

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of the United States in Iraq and urging the Secretary of the Army to bring to swift justice any member of the Armed forces who has violated the Uniform Code of Military Justice.

On May 10, 2004, the Senate passed S. Res. 356, condemning the abuse of Iraq prisoners at Abu Ghraib prison, urging a full and complete investigation to ensure justice is served, and expressing support for all Americans serving nobly in Iraq.

On June 16, 2004, the United States Senate approved an amendment introduced by Senator Richard Durbin (D-IL) to S. 2400, the Defense Authorization bill for Fiscal Year 2005, which passed the Senate as amended on June 23, 2004. That amendment reaffirms the American commitment to refrain from engaging in torture or cruel, inhuman, or degrading treatment or punishment. It would require the Defense Secretary to issue guidelines to ensure compliance with this standard, provide these guidelines to Congress, and report to Congress any suspected violations of the prohibition on torture or cruel, inhuman or degrading treatment.

On June 23, 2004 Rep. Edward Markey (D-MA) introduced HR 4674, a bill to prohibit rendition of terrorism suspects to nations known to practice torture, which was referred to the House International Relations Committee.

On June 25, 2004, Rep. John Conyers (D-MI) introduced H. Res. 700, directing the Attorney General to transmit to the House of Representatives documents in his possession relating to the treatment of prisoners and detainees in Iraq, Afghanistan, and Guantanamo Bay. H. Res. 700 was scheduled for markup by the House Judiciary Committee on July 21, 2004.

On July 14, 2004, Rep. Duncan Hunter (D-CA) introduced H. Con. Res. 472, expressing the sense of Congress that the apprehension, detention, and interrogation of terrorists are fundamental elements in the successful prosecution of the Global War on Terrorism and the protection of the lives of United States citizens at home and abroad.

### **7. Cost to the Association.**

The adoption of the Recommendation would not result in any direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the Recommendations adopted and implemented by Congress and the Executive Branch. Such costs should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby on behalf of Association policies.

### **8. Disclosure of Interest. (If applicable)**

No known conflict of interest exists.

9. **Referrals.**

Concurrently with submission of this report to the ABA Policy Administration Office, it is being circulated to the following entities in addition to the listed sponsors:

Standing Committees/Task Forces:

Law and National Security

Sections, Divisions and Forums:

Administrative Law

Government and Public Sector Lawyers

Judicial Division

National Conference of Federal Trial Judges

Law Student Division

Litigation

Young Lawyers Division

Affiliated Organizations:

The American Judicature Society

The Federal Bar Association

The National Conference of Bar Presidents

Other Entities:

United States Department of Defense

United States Department of Justice

United States Department of State

10. **Contact Persons (Prior to the meeting).**

Alan Rothstein

The Association of the Bar of the City of New York

42 West 44th Street

New York, NY 10036

Phone: 212-382-6623

Fax: 212-398-6634

Email: [arothstein@abcny.org](mailto:arothstein@abcny.org)

Neal R. Sonnett, Chair

Task Force on Treatment of Enemy Combatants

Two South Biscayne Boulevard, Suite 2600

Miami, FL 33131-1804

Tel: 305-358-2000

Fax: 305-358-1233

Email: [nrs@sonnett.com](mailto:nrs@sonnett.com)

Mark D. Agrast, Immediate Past Chair  
Section of Individual Rights and Responsibilities  
805 Fifteenth Street, N.W., Suite 400  
Washington, D.C. 20005  
Tel: 202-682-1611  
Fax: 202-682-1867  
Email: [magrast@americanprogress.org](mailto:magrast@americanprogress.org)

Jerome J. Shestack, Chair  
Center for Human Rights  
Wolf Block Schorr & Solis-Cohen  
1650 Arch Street, 22nd Floor  
Philadelphia, PA 19103-2097  
Tel: 215-977-2290  
Fax: 215-977-2787  
Email: [jshestack@wolfblock.com](mailto:jshestack@wolfblock.com)

Stephen Saltzburg, Delegate  
Criminal Justice Section  
George Washington University School of Law  
2000 H Street, NW - Room 301  
Washington, DC 20052  
Tel: 202-994-7089  
Fax: 202-994-7143  
Email: [ssaltz@law.gwu.edu](mailto:ssaltz@law.gwu.edu)

C. Elisia Frazier, Delegate,  
Section of Individual Rights and Responsibilities  
1310 W. Lexington Avenue  
Fort Wayne, IN 46807  
Tel: 260-745-3044  
Fax: 260-455-5403  
Email: [cef1938@comcast.com](mailto:cef1938@comcast.com)

William M. Hannay III, Delegate  
Section of International Law and Practice  
Schiff Hardin & Waite  
233 S. Wacker Drive  
Chicago, IL 60606-6306  
Tel: 312-258-5617  
Fax: 312-258-5700  
Email: [whannay@schiffhardin.com](mailto:whannay@schiffhardin.com)



Albert J Krieger, Delegate  
National Association of Criminal Defense Lawyers  
1899 South Bayshore Drive  
Miami, FL 33133-3307  
Tel: 305-854-0050  
Fax: 305-285-1761  
Email: [ajkrieger@ajkriegerlaw.com](mailto:ajkrieger@ajkriegerlaw.com)

**11. Contact Persons (Who will present the report to the House)**

Bettina B. Plevan, President  
The Association of the Bar of the City of New York  
42 West 44th Street  
New York, NY 10036  
Tel: 212-382-6700 (ABCNY) or 212-969-2900 (Office)  
Fax: 212-768-8116  
Email: [bplevan@proskauer.com](mailto:bplevan@proskauer.com)

Neal R. Sonnett, Chair  
Task Force on Treatment of Enemy Combatants  
Two South Biscayne Boulevard, Suite 2600  
Miami, FL 33131-1804  
Tel: 305-358-2000  
Fax: 305-358-1233  
Email: [nrs@sonnett.com](mailto:nrs@sonnett.com)

Mark D. Agrast, Immediate Past Chair  
Section of Individual Rights and Responsibilities  
805 Fifteenth Street, N.W., Suite 400  
Washington, D.C. 20005  
Tel: 202-682-1611  
Fax: 202-682-1867  
Email: [magrast@americanprogress.org](mailto:magrast@americanprogress.org)

Jerome J. Shestack, Chair  
Center for Human Rights  
Wolf Block Schorr & Solis-Cohen  
1650 Arch Street, 22nd Floor  
Philadelphia, PA 19103-2097  
Tel: 215-977-2290  
Fax: 215-977-2787  
Email: [jshestack@wolfblock.com](mailto:jshestack@wolfblock.com)

Stephen Saltzburg, Delegate  
Criminal Justice Section  
George Washington University  
School of Law  
2000 H Street, NW - Room 301  
Washington, DC 20052  
Tel: 202-994-7089  
Fax: 202- 994-7143  
Email: [ssaltz@law.gwu.edu](mailto:ssaltz@law.gwu.edu)

C. Elisia Frazier, Delegate,  
Section of Individual Rights and Responsibilities  
1310 W. Lexington Avenue  
Fort Wayne, IN 46807  
Tel: 260-745-3044  
Fax: 260-455-5403  
Email: [cef1938@comcast.com](mailto:cef1938@comcast.com)

William M. Hannay III, Delegate  
Section of International Law and Practice  
Schiff Hardin & Waite  
233 S. Wacker Drive  
Chicago, IL 60606-6306  
Tel: 312-258-5617  
Fax: 312-258-5700  
Email: [whannay@schiffhardin.com](mailto:whannay@schiffhardin.com)

Albert J Krieger, Delegate  
National Association of Criminal Defense Lawyers  
1899 South Bayshore Drive  
Miami, FL 33133-3307  
Tel: 305-854-0050  
Fax: 305-285-1761  
Email: [ajkrieger@ajkriegerlaw.com](mailto:ajkrieger@ajkriegerlaw.com)