

TORTURE BY THE UNITED STATES

The Status of Compliance by the U.S. Government with the International Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

Submitted to the United Nation's Committee Against Torture
in conjunction with the expected filing by the U.S. Government
in January, 2005 of their report on compliance with CAT standards
by

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of the United Nations

I. EXECUTIVE SUMMARY

The issue of torture, and the question of whether the U.S. Government has been improperly and unlawfully engaged in a pattern and practice of torture in connection with the “war against terrorism,” have received a great deal of public and international attention in recent months. Each week reveals new evidence of a variety of different forms of abuse and torture that the U.S. Government appears to have used to keep alleged terrorists in custody, and to obtain information from them about their activities, including:

- the widely publicized torture of detainees in Abu Ghraib Prison in Iraq, the site of so many horrendous torture abuses during the regime of Saddam Hussein, as well as at U.S. detention facilities in Guantanamo Bay, Cuba and Afghanistan;
- the policy of “rendition to torture,” that is sending suspected terrorists to other countries such as Egypt, Syria and Saudi Arabia, where they are interrogated using harsh techniques not permitted in the U.S.;
- the practice of indefinite detention and allegations of “ghost detainees,” whose status and location have never been accounted for; and,
- executions of detainees during torture.

In addition to the above practices, just this past week new revelations were the basis for a front page story in the *Washington Post* ("Long-Term Plan Sought for Terror Suspects," January 5, 2005) indicating that the Government is formulating plans for "permanent . . . potentially lifetime detentions" of suspected terrorists in specially built prisons in foreign nations, without criminal prosecutions or convictions ever taking place.

These are just some of the growing number of indicators that the U.S. Government has been using torture on a systemic and widespread basis as part of an official policy and practice aimed at combating terrorism.

This report, highlighting some of the major findings that have been made regarding these practices, has been prepared in conjunction with the U.S. Government's expected issuance in January of 2005 of an official submission to the Committee Against Torture of the United Nations reporting on U.S. compliance with the standards set out in the Convention Against Torture. This is the second report by the U.S. Government to the CAT Committee along these lines. The first was submitted in October of 1998. Concurrently with the submission of that first U.S. report to the CAT Committee, our organization, on behalf of an informal working group of U.S. based civil rights and social justice organizations that we organized and chaired, with funding support from the Ford Foundation, issued a "shadow report," analyzing on a comprehensive basis a wide range of issues indicating non-compliance with CAT requirements, including prison conditions, the imposition of the death penalty and the improper return of survivors of persecution and torture to countries where they faced further abuse. Copies of that report, and related "shadow reports" on U.S. compliance under the International Covenant on Civil and Political Rights (1995) and under the Convention on the Elimination of Racial Discrimination (2000) are available on request from our group.

Given the importance, immediacy and unusual nature of the information on torture abuses connected with the "war against terrorism" that have been emerging in recent months, our group has decided to focus its current submission to the CAT Committee, in conjunction with the U.S. Government's January 2005 compliance report, on the special concerns raised by the indefinite detention and abuse of suspected terrorists, and the improper use of torture to combat terrorism on a systemic basis.

It is important to note four things in this regard. First, the pattern and practice of torture that has been uncovered is not limited to those captured on fields of battle in Afghanistan and Iraq. A number of U.S. residents, and some U.S. citizens, have been similarly treated. We are not dealing here only with the treatment of foreigners captured on a battlefield in the midst of an armed conflict, who are deemed to have committed war crimes or crimes against humanity. These violations of the Torture Convention cover a wide range of practices, and

impact a large number of individuals, going well beyond those the Government has designated as “unlawful enemy combatants.”

Second, the alleged torture abuses are associated with a wide and ever increasing range of violations of international human rights standards, not simply the use of torture for interrogation purposes. They include “rendition to torture,” the improper use of the designation of “unlawful enemy combatant” to justify arbitrary, indefinite detention and the prosecution of suspected terrorists through the use of unlawfully constituted military courts, and the unlawful execution of detainees during questioning. The recently revealed plan of detaining suspected terrorists in special foreign prisons on a permanent basis is just the latest in the long and increasing list of unlawful activities violating the anti-torture prohibitions of CAT that the U.S. Government is engaging in under the justification of fighting a “war against terrorism.”

Third, and perhaps most important, the U.S. Government’s claim that the abuses that have taken place are the isolated, aberrant actions of a few individuals acting on their own volition who have been, or are in the process of being, prosecuted for their crimes, must be rejected. The nature and scope of the abuses that are taking place, and the written and oral justifications for actions of this type that have been issued by the U.S. Government at the highest levels (some of which have since been repudiated), suggest that the use of torture to combat terrorism unfortunately has become part of official policy, or if not formally authorized that it has at least has been approved and acquiesced in as a matter of military necessity. Some of the most recent revelations concerning abuse of detainees in the Guantanamo Bay facility suggest that those committing the violations believed they had been ordered or approved at the highest levels of government based on legal memoranda issued by the U.S. Department of Justice and the Defense Department, and approved by the Office of the Counsel to the President, suggesting that certain forms of abuse were justified to obtain information, and that the legality of these practices could not be questioned since they were taking place pursuant to “military necessity,” and could be excused by the President pursuant to his war powers.

The U.S. Government has claimed that these legal memoranda suggesting the use of certain forms of “harsh” interrogation practices, do not amount to authorization of torture, and were only discussion papers not official orders. But the fact remains that these memoranda, numerous statements by high level government officials asserting that any actions to combat terrorism are justified on the grounds of military necessity, and the very scope of the torture abuses that have been taking place, all suggest a pattern and practice of abuse that can not be explained away as isolated, unauthorized actions by a few demented soldiers and officials who are being appropriately punished. Until those higher-level officials who set the torture practices in motion, or who turned a blind eye to their use, are themselves investigated and prosecuted, then the responsibility of the U.S. Government under the Torture Convention, and under

our own domestic laws implementing CAT, will not have been properly and adequately carried out.

Fourth, the recent actions to repudiate these torture abuses are not adequate. This past June, the U.S. Supreme Court found (in the case of *Rasul v. Bush*) that the indefinite detention in Guantanamo Bay, Cuba of suspected terrorist prisoners from the armed conflicts in Afghanistan and Iraq violated the requirements of both international and domestic law, and that determinations of their status as prisoners had to be made by a competent judicial tribunal as the Geneva Conventions require in order for detainees to be held without prosecution. Instead of fully complying with this ruling, the Government sought new ways to evade it, by convening what were called combatant status review tribunals to determine the detainees' prisoner of war or "unlawful enemy combatant" status. Unfortunately these "tribunals" compounded the problem instead of curing it because they were not the independent judicial bodies required under the Geneva Conventions and U.S. military law, but rather military panels subject to the President's directives.

Later in the year, federal court judges issued two additional rulings casting doubt on the legality of the special military courts convened to prosecute terrorist detainees (*Hamdan v. Rumsfeld*), and the practice of "rendition to torture" (in the case of *Ahmed Abu Ali v. Ashcroft*, involving a 23-year old U.S. citizen detained by Saudi Arabia for 18 months at the request of the U.S.). These were positive indicators that U.S. courts were rejecting some aspects of the government's torture policies. But these judicial rulings reached only a small portion of the Government's overall policies, and did not result in their elimination. Ahmed Abu Ali still has not been returned to the U.S., and other renditions to torture continue unaffected. The indefinite detentions and military trials of suspected terrorists continue on a widespread basis, and based on the January 2, 2005 *Washington Post* story (attached) may well be expanding further to produce "permanent ... lifelong detention" of terror suspects. Moreover, the practice of secret detentions has not been addressed.

Similarly, the announcement on December 30, 2004 that the U.S. Department of Justice had repudiated past efforts to "redefine" torture to permit certain forms of highly abusive practices falling short of causing permanent and extreme physical damage or imminent death, certainly was a positive development. But it did not alter the underlying widespread and systemic use of indefinite detention and torture as key elements of the "war against terrorism." Nor did it adequately provide for the investigation and prosecution of those officials at the highest levels of government who set in place or facilitated the improper and unlawful acts of torture that have now been acknowledged.

For many years the U.S. Government has been among the most forceful advocates pointing out the major human rights abuses of other governments, especially where acts of torture were concerned, and working hard to prevent

these types of abuses from occurring. Even today the U.S. is playing a major role in pointing out the emerging pattern and policy of genocide in Sudan, and seeking to prevent abuses there and in many other countries where persecution and violations of fundamental international human rights standards are taking place. For our government to remain credible in these efforts, and to continue to play a major role in promoting and protecting human rights worldwide, the U.S. must use special care not to fall prey to the same types of actions, and the same justifications, that torturers, dictators and persecutors in so many other nations have used in the past, and which until now we have properly rejected.

Under the Convention Against Torture and U.S. legislation implementing CAT, torture is absolutely prohibited under any and all circumstances. There is no acceptable reason justifying or immunizing the use of torture. Nevertheless, the U.S. Government appears to be taking the position that the use of torture, or abusive interrogation practices that they prefer to characterize as something short of torture, may be justified as a means of combating the special and extreme threats that terrorism presents. Every dictator and repressive regime throughout history has sought to make similar claims justifying their use of torture and other major human rights abuses based on national security or military concerns. It is urgent that U.S. efforts to justify or immunize its use of torture as a means for combating terrorism be firmly rejected by the CAT Committee and by the international community as a whole. As Justice Scalia cautioned in one of the terrorist detainee cases (*Hamdi v. Rumsfeld*) decided just this past summer by the United States Supreme Court, it is in times of greatest duress, when the threats and dangers that we face are most immediate and substantial, that we must be most careful and vigilant about protecting and preserving our civil liberties and human rights, because that is when our core values and the rule of law are most likely to be eroded on a permanent basis.

It is with this insightful reminder from Justice Scalia in mind that we focus this second non-governmental report on U.S. compliance under the Convention Against Torture on the special and limited set of issues relating to torture abuses being committed in the name of the war against terrorism. It is our hope that the U.S. Government, and the members of the United Nations Committee Against Torture, will place equal emphasis on this special area of concern emerging from the genuine and understandable fears generated by the terrorist attacks of September 11, 2001. If we can not find a better way to combat and prevent terrorism than to embrace the tactics of torture that we for so long have properly condemned when carried out by others, then, as Justice Scalia noted, we will have turned our backs on many of the core values that we have been fighting so hard to maintain, including the rule of law and a commitment to prevent and prohibit torture under any and all circumstances.

This brief report highlights the problems and concerns raised by:

- the harsh physical and psychological abuse of detainees for purposes of interrogation;
- indefinite long-term detention without charge of those suspected of being connected with terrorist activities and groups;
- the use of “secret” detention facilities, and failure to report and make public information about individual detainees and their status and treatment;
- arbitrary and unlawful execution of detainees as a result of the infliction of torture; and,
- the practice of “rendition to torture”

II. RECOMMENDED ACTION

ACTION STEPS THAT MUST BE TAKEN BY THE UNITED STATES GOVERNMENT:

Based on the demonstrated pattern and practice of torture and the involvement of the U.S. Government in authorizing, encouraging and/or condoning these violations of the Convention Against Torture, the following specific steps, at a minimum, now need to be taken by the U.S. Government to properly address these abuses, prevent their reoccurrence, and provide for suitable punishment of those who have engaged in acts of torture:

- Specific orders and instructions should be issued by the President and the Department of Defense making clear that previously issued legal memoranda from the Department of Justice’s Office of Legal Counsel and the Department of Defense, which suggested that “moderate abuse” of suspected terrorist detainees for interrogation purposes that did not produce the most serious, permanent bodily harm were justified in the name of military necessity to combat terrorism, are repudiated and inoperable, and do not represent the policy of the United States with regard to the absolute prohibition against torture. The December 30, 2004 memorandum by the Department of Justice repudiating torture is a good first step in this direction;

- The policy and practice of “rendition to torture,” that is, encouraging other nations to carry out “harsh” interrogations of suspected terrorist detainees on behalf of or at the request of the U.S. should immediately cease, and all individuals still being detained on that basis immediately charged and prosecuted for specific crimes;

- All individuals and officials who are responsible for carrying out, encouraging or condoning torture abuses, including those at the highest levels of

government who were aware of the abuses taking place but did not act to prevent them, and those who provided a legal justification that encouraged torture to take place, should be subjected to criminal investigation and prosecution under Public Law 103-236, section 506 (18 U.S.Code Chapter 113B, section 2340, copy attached) making torture committed “outside the United States” a crime subject to up to 20 years imprisonment. We do not condone or support the application of the death penalty, which is authorized by section 2340 if loss of life results from torture.

- The policy of arbitrary, indefinite detention of those suspected of terrorist ties should be ended, and all those being detained on this basis in Abu Ghraib Prison in Iraq, in Guantanamo Bay, Cuba or elsewhere should either be charged with criminal offenses, war crimes or crimes against humanity and appropriately prosecuted and punished, or released;

- All “secret detentions,” wherever they are taking place, should be immediately ended, and information on all detainees should immediately be made public, with “secret” detention facilities closed, or opened to international inspection by the International Committee for the Red Cross (ICRC); and,

- The U.S. Department of Defense should immediately declassify and make public all allegations of abuse filed by detainees that might involve violations of the Convention Against Torture.

ACTIONS RECOMMENDED FOR THE COMMITTEE AGAINST TORTURE OF THE U.N.:

The United Nations Committee Against Torture (the independent monitoring agency for the Convention Against Torture) and the United Nations Special Rapporteur on Torture, are encouraged to take the following actions to help assure that the remedial steps to be taken by the U.S. as outlined above actually take place:

- The hearing to be convened by the CAT Committee to review U.S. compliance under CAT and to review the U.S. Government’s CAT report, tentatively scheduled for November, 2005 should take place in New York City rather than Geneva, Switzerland, so that the U.S. based non-governmental groups and others with access to information about the torture abuses that have been taking place can observe and participate in these sessions;

- The set of questions to be presented to the U.S. Government by the CAT Committee in March of 2005 in anticipation of the compliance hearing scheduled for November should request the submission of the following specific information:

1. the numbers, names, place of capture and place of confinement of all those individuals previously detained, or presently being detained, as suspected terrorists or supporters of terrorism in connection with the war against terrorism;
2. the numbers, names and affiliations of all those who have been investigated, prosecuted or convicted for abusing detainees, along with information about the offenses they have been charged with or convicted of having committed, the nature and length of any sentences or other penalties that have been imposed;
3. copies of all documents and reports that have been prepared or issued regarding the infliction of torture at Abu Ghraib Prison, Guantanamo Bay, Cuba or any other facilities where suspected terrorist detainees are being or have been held, including any and all allegations of torture or abuse that have been made by detainees; and,
4. flight logs or other information regarding the operations of the Gulfstream jet aircraft operated by Premiere Jet Transport Service or any other entity that has been used to transport individuals to other nations for interrogation purposes.

- Demand that the U.S. Government immediately cease and desist the policy and practice of rendition to torture, as well as all actions involving the interrogation and treatment of detainees that involve, encourage or condone physical or psychological abuse falling within the definition of torture as applied under CAT and its implementing legislation; and,

- Request that the U.S. Government promptly initiate criminal investigation (and prosecution where the investigation indicates it is warranted) pursuant to Public Law 103-236 (18 U.S. Code Chapter 113B, section 2340) against all higher-level officials who may be implicated in ordering, encouraging or condoning torture, including those responsible for the preparation and circulation of legal memoranda seeking to establish a legal justification for the use of torture in support of anti-terrorism efforts based on the theory of military necessity or Presidential prerogatives.

III. INTRODUCTION

The International Convention Against Torture (CAT) is a treaty obligation fully binding on the United States. It was ratified by the U.S. in 1994, and implementing statutes incorporating its requirements into domestic law were adopted by Congress in 1994 (applying criminal sanctions for violations) and in 1998 (prohibiting the return of anyone to a situation of torture in another country). As such, it is considered a fully “executed” treaty whose standards are fully recognized and enforceable under U.S. law.

Under both the treaty and statutory provisions, the U.S. has undertaken to prohibit and criminally prosecute any acts of torture taking place “in any territory under its jurisdiction,” (Article 2(1) of CAT), including areas in foreign countries that for any reason can be considered under the authority and control of our government. Acts of torture are defined as any act causing “severe pain or suffering, whether physical or mental,” that is intentionally inflicted “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” (Article 1(1) of CAT). The reason that an act of torture is committed is irrelevant to its status as a prohibited, unlawful and criminal action. In fact, CAT specifically indicates that “No exceptional circumstances whatsoever, whether a state of war or a threat of war or . . . other public emergency, may be invoked as a justification” or excuse for torture. (Article 2(2) of CAT). In other words, the CAT prohibition against torture is absolute and cannot be rationalized, excused or carried out for any reason, or under any circumstances, no matter how grave the threat or compelling the justification.

Despite these clear-cut prohibitions, and in direct violation of the provision of CAT that indicates that even war or the threat of war or other public emergency can not justify or immunize torture, numerous acts of torture have been authorized and have taken place in connection with policies and practices carried out in furtherance of the “war against terrorism.” In particular, through legal memoranda prepared at the highest levels of the U.S. Government, official sanction has been given to carrying out torture for the purpose of detaining and obtaining information from suspected terrorists that presumably might prevent future or imminent acts of terrorism from taking place. Among the specific acts of torture and violations of CAT that have taken place in conjunction with the war on terrorism are the following:

- severe physical and psychological abuse of detainees in Abu Ghraib prison in Iraq, and in other detention and interrogation facilities in that country, Afghanistan, and Guantanamo Bay, Cuba;
- “rendition to torture” to other countries for purposes of interrogation of more than an estimated 200 individuals suspected of terrorist ties, including at

least one known U.S. citizen, Ahmed Abu Ali, who has been detained in Saudi Arabia for over 17 months at the request of the U.S. government, and one Canadian citizen, Maher Arar, who was sent to Syria by the U.S. for over a year after being detained by U.S. authorities while in transit to his home country of Canada;

- indefinite, arbitrary detention, without a lawful determination of status other than the President's designation of their being "unlawful enemy combatants," of more than 600 detainees in the Guantanamo Bay, Cuba military base;

- execution by torture and other unlawful, extra-judicial means of upwards of 37 detainees being held for interrogation purposes;

- use of unlawfully constituted military tribunals to prosecute suspected terrorists and to keep them detained and subject to interrogation for prolonged periods; and,

- maintenance of an undetermined number of "ghost" detainees in secret facilities without charges being filed against them, and without their whereabouts or status being reported to any recognized authorities.

U.S. officials at the highest levels have been involved in authorizing or condoning these acts and policies of torture, but have not been subjected to official investigation or prosecution, although in some cases lower level individuals involved in carrying out specific acts of torture have been subjected to criminal proceedings through courts-martial, and several of these individuals have been convicted.

IV. TORTURE OF DETAINEES IN U.S. CUSTODY

The International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) establishes an absolute prohibition against torture that may not be compromised or justified under any circumstances or for any reason. (Article 2). A state of war, public emergency, or superior orders are not defenses to torture under the Convention, which defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" through government action or acquiescence regardless of the reason that the abuse was inflicted. (Articles 1, 2) CAT also prohibits "cruel, inhuman or degrading treatment or punishment which do not amount to torture."

The torture abuses at Abu Ghraib prison in Iraq that came into public view last year were not isolated acts, nor were the public revelations news to many high level officials in the U.S. government. Allegations of similar abuses by detainees at other detention facilities and a stream of recently released

corroborating evidence expose a pattern of abuse at U.S. detention and interrogation facilities in Iraq, Afghanistan, and Guantanamo Bay, Cuba. The evidence suggests that the U.S. government not only was aware of the use of torture at its detention facilities, but that it created policies that suggested and encouraged it. Legal memoranda produced by government lawyers at the Justice and Defense Departments and that were approved by White House legal counsel Alberto Gonzalez, that sought to redefine CAT's basic protections, agency documents indicating that high-level government officials approved the use of harsh interrogation tactics, and reports from a variety of sources, including the International Committee of the Red Cross and the FBI that detail first-hand observations of torture and inhumane treatment in U.S. detention facilities, lead to one unmistakable conclusion: the United States' war on terror includes a policy that authorizes and encourages the use of torture as a basic element of the war against terrorism on a systemic basis.

The United States' clear violation of the Convention Against Torture should not be obscured by the prosecution and punishment of individual soldiers and lower level officers. Far more is needed by the United States government to comply with its obligations under the Convention, beginning with the adoption of a government-wide repudiation of the policies that resulted in the torture of detainees in U.S. custody, and a full investigation and prosecution of all those responsible for authorizing and carrying out such acts.

A. THE USE OF TORTURE DURING INTERROGATION

Evidence indicating that the United States has a systemic and officially sanctioned policy of condoning, justifying, and encouraging the use of torture is being divulged on a daily basis. Recent reports and documentary evidence suggest that torture has occurred systemically at U.S. detention facilities in Iraq, Afghanistan, and Guantanamo Bay, Cuba.

1. Evidence of Torture

A growing body of well-documented evidence indicates that individuals detained by the United States in Iraq, Afghanistan, and Guantanamo Bay, Cuba have been subjected to torture in violation of Article 1 of the Convention Against Torture on a systemic basis. The abuses reported by many constitute intentionally inflicted severe physical pain and suffering carried out for purposes of obtaining information and imposing punishment. At Abu Ghraib prison and elsewhere in Iraq, techniques of abuse that were used in a systemic way to obtain information from detainees include: hooding; placing detainees in stress positions for extended periods of time; stripping detainees naked; holding them in darkness; forcing them to wear women's underwear; sleep, food, and water deprivation; prolonged exposure to sun; physical and sexual assaults; forced arrangement of detainees in sexually explicit positions for photographing; simulation of electronic torture; threat of execution; and other forms of torture and

humiliating and degrading treatment.¹ Several detainees are reported to have died as a result of these practices.²

As early as May 2003, high level government officials received reports of these abuses from the International Committee of the Red Cross.³ Also during 2003, the press, human rights groups, and even a small unit of interrogators at Abu Ghraib brought abuses to the attention of higher-level officials.⁴ Nothing was done to stop or prevent the abuse from occurring until one year later, when shocking pictures of abuse at Abu Ghraib were disseminated around the world. As recently as May of 2004, the Red Cross reported that outstanding issues of abuse had not been remedied in Iraq and called for further relief.⁵

Recently released FBI memos show that U.S. forces in Iraq were responsible for forms of abuse and violations of international law not previously acknowledged by the government or covered by the published photographs from Abu Ghraib. One memo dated June 24 of this year addressed to Robert S. Mueller III, the FBI Director, and other Bureau officials noted “serious physical abuses of civilian detainees” in Iraq including “strangulation, beatings, placement of lit cigarettes into the detainees’ ear openings, and unauthorized interrogations.”⁶ In addition, U.S. soldiers committed several threatened or “mock executions” of teenage and adult Iraqi detainees.⁷ New information also confirms that the abuses in Iraq were not confined to isolated incidents at Abu Ghraib prison. For example, in February 2004, 10 U.S. soldiers were charged with abusing 44 prisoners while escorting the Iraqis to a detention center in Umm

¹ “Report of the International Committee of the Red Cross 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; Maj. Gen. Antonio M. Taguba, “Article 15-6 Investigation of the 800th Military Police Brigade” (“Taguba Report”), March 3, 2004.

² Steven Lee Myers and Eric Schmitt, “Abuse Inquiries Seen as Leaving Significant Gaps,” *New York Times*, June 6, 2004; David Johnston and Neil A. Lewis, “U.S. Examines Role of CIA and Employees in Iraq Deaths,” *New York Times*, May 6, 2004.

³ Neil A. Lewis, “Red Cross Found Abuses at Abu Ghraib Last Year,” *New York Times*, May 11, 2004.

⁴ “Chronology,” *Washington Post*, June 2004; Warren Hoge, “U.N. Rights Chief Says Prison Abuse May Be War Crime,” *New York Times*, June 5, 2004; Andrea Elliot, “Unit Says It Gave Earlier Warning of Abuse in Iraq,” *New York Times*, June 14, 2004; Human Rights Watch, “Timeline of Detainee Abuse Allegations and Responses,” May 2004.

⁵ “ICRC Still Concerned on Iraq Jail,” *BBC News Online*, May 19, 2004.

⁶ Neil A. Lewis & David Johnston, “New F.B.I. Files Describe Abuse of Iraq Inmates,” *New York Times*, Dec. 21, 2004.

⁷ R. Jeffrey Smith and Dan Eggen, “New Papers Suggest Detainee Abuse was Widespread,” *The Washington Post*, A01, Dec. 22, 2004. The documents report that a U.S. soldier without any training in interrogation forced two Iraqi men to their knees, forced bullets into their mouths, ordered them to close their eyes, and threatened to shoot them unless they responded to questions. *Id.* A fellow soldier then took the bullets and pretended to load them into a gun. The offending soldier was not judicially punished for his violations of the Geneva Convention or his use of torture. In another incident, an army sergeant in Iraq performed “a mock execution of an Iraqi teenager” in front of the child’s father and brother. In a separate incident, a lieutenant ordered a suspected Iraqi looter to kneel, pointed a 9mm pistol at his head and pulled away at the last minute. The extent of investigation and punishment that followed those incidents is unclear. *Id.*

Qasr.⁸ Moreover, abuses were not limited to regular soldiers at Abu Ghraib, they extended to elite forces. Special Operations forces' utilization of harsh interrogation techniques and mistreatment of detainees, prompted the C.I.A. to bar its employees from taking part in military-run interrogations in which prisoners were subjected to rough treatment and duress.⁹

The story is similar in Afghanistan. Detainees in U.S. custody at Bagram Airbase and elsewhere have been subjected to shackling, beatings, sleep deprivation, deliberate exposure to intense cold, humiliating and degrading treatment, and indefinite detention at military prisons in Gardez, Khost, Ghazni and Jalalabad, Afghanistan.¹⁰ The Army's Criminal Investigation Command is investigating the deaths of several Afghans who have died under suspicious circumstances in U.S. custody, including the beating and torture of 19-year-old Jamal Naseer, who died while in the custody of U.S. Special Forces at the Gardez prison.¹¹ Naseer's brother, also a detainee, claims that U.S. forces tortured his brother and other members of his Afghan unit with "karate, cables, wooden bats, and electrical shocks."¹² In spite of the Army's investigation into numerous unexplained deaths of Afghans in U.S. custody, there has been no publicly released accounting or policy change related to the procedures or policies that allowed abuses and executions by U.S. soldiers to take place in Afghanistan. Army Brig. Gen. Charles H. Jacoby Jr. completed a broad investigation on *current* detainee treatment in Afghanistan last July, finding, according to *The Washington Post*, that rules given to interrogators were inadequate and that there were shortcomings in the enforcement of prison standards.¹³ The report, which is still classified, did not examine past incidents or claims of abuse in Afghanistan including the deaths of prisoners in U.S. custody.¹⁴

While the scope of abuse at Guantanamo Bay, Cuba is still emerging, first hand accounts by FBI agents recorded in internal government memos, a report registering observations of torture from the Red Cross, and accounts by military officials and interrogators provided to the media, have incrementally brought into focus a clearer picture of the U.S. government's treatment of Guantanamo prisoners in violation of the Convention. These independent accounts of torture corroborate many of the details of abuse alleged by current and former Guantanamo detainees in public statements and court filings. The picture of abuse that emerges from Guantanamo suggests that detainees were subjected to severe pain and suffering aimed at extracting intelligence information through acts similar to those perpetrated against detainees in Iraq and Afghanistan. Detainees say they were beaten and kicked before and during interrogation,

⁸ Neil A. Lewis, "New Data Hints at Poor Review of Abuse Cases," *New York Times*, Dec. 22, 2004.

⁹ Douglas Jehl, "C.I.A. Order on Detainees Shows Its Role Was Curbed," *New York Times*, Dec. 14, 2002.

¹⁰ R. Jeffrey Smith, "Army Reprimand Reported in Slaying," *The Washington Post*, Dec. 14, 2004.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ "U.S. Says It Has 6 Open Afghan Abuse Cases," *Associated Press*, Dec. 15, 2004.

sometimes while they were hooded and shackled; were tormented with extreme temperatures; subjected to prolonged, repeated rectal exams; shackled in painful stress positions for extended periods of time; stripped naked while military police photographed them; threatened with sexual abuse; forcibly injected with unknown drugs; and subjected to prolonged isolation.¹⁵

Reports by the FBI and Red Cross largely corroborate those accounts of torture and other cruel, inhuman or degrading treatment or punishment. In July of 2004, the International Committee of the Red Cross issued a confidential report to the U.S. government after a month-long inspection visit to the Guantanamo Bay detention facility, in which it complained that prisoners at Guantanamo were subjected to intentional psychological and physical coercion “tantamount to torture.”¹⁶ During its visit in June 2004, the Red Cross noted an intensification of abusive techniques at the detention facility in comparison to earlier visits it had been conducting since January 2002.¹⁷ According to the *New York Times*, the report from the humanitarian group noted “a system devised to break the will of the prisoners at Guantanamo” that is marked by “humiliating acts, solitary confinement, temperature extremes, use of forced positions,” persistent noise, some beatings, and the use of medical professionals to convey information about prisoners’ mental health vulnerabilities to interrogators.¹⁸ The Red Cross observed a coordinated policy of torture, reportedly conveying to the U.S. government in no uncertain terms that “[t]he construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture.”¹⁹

In addition, memoranda and emails by FBI agents released pursuant to a lawsuit by human rights groups provide further corroboration of detainee allegations of abuse at Guantanamo. FBI agents reported that detainees were “chained hand and foot in a fetal position to the floor, with no food or water” in interview rooms and were often left to urinate or defecate on themselves after being shackled in that manner for up to 24 hours.²⁰ In one memo, an agent describes the condition of a detainee left unconscious on the floor of a hot interrogation room “with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night.”²¹ In addition, Thomas Harrington, an FBI counterterrorism expert who headed an investigation at Guantanamo Bay, informed Maj. Gen. Donald J. Ryder, the Army’s chief law

¹⁵ Carol D. Leonnig, “Further Detainee Abuse Alleged” *The Washington Post*, Dec. 26, 2004; Human Rights Watch, “The Road to Abu Ghraib,” June 2004; Neil A. Lewis, “Fresh Details Emerge on Harsh Methods at Guantánamo,” *New York Times*, Jan. 1, 2005.

¹⁶ Neil A. Lewis, “Red Cross Finds Detainee Abuse in Guantanamo,” *New York Times*, Nov. 30, 2004.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Dan Eggen & R. Jeffrey Smith, “FBI Agents Allege Abuse of Detainees at Guantanamo Bay,” *Washington Post*, Dec. 21, 2004.

²¹ *Id.*

enforcement officer charged with investigating abuses at U.S-run detention facilities in Iraq, Afghanistan, and Guantanamo Bay, of ‘highly aggressive’ interrogation techniques and mistreatment being employed at Guantanamo.²² In a letter sent to the Justice Department more than a year before revelations of the abuses at Abu Ghraib, the FBI official noted abuses including a female interrogator grabbing a detainee’s genitals and bending back his thumbs.²³ The letter also recounted FBI agents witnessing the use of a dog “in an aggressive manner to intimidate a detainee” and a detainee being subjected to “intense isolation for over three months. . .totally isolated in a cell that was always flooded with light.”²⁴ The agents noted that a detainee subjected to such abuse evidenced “behavior consistent with extreme psychological trauma.”²⁵

The *New York Times* recently reported new information indicating the astonishing lengths military officials at Guantanamo may have gone to extract intelligence information from suspected terrorists, including the use of forced enemas to degrade and cause discomfort for detainees and staging an elaborate ploy to convince a detainee he had been sent to Egypt for interrogation.²⁶ According to unnamed military intelligence officials and Guantanamo interrogators who provided information to the newspaper, at least one detainee at Guantanamo “was given a tranquilizer, put in sensory deprivation garb with blackened goggles,” and put on a plane supposedly bound for the Middle East.²⁷ The plane returned to Cuba after hours in the air, where the detainee was placed in an isolation cell, subjected to harsh interrogation methods, and encouraged to believe he was being interrogated by Egyptian national security operatives and would be tortured if he did not provided required information.²⁸

Detainees at Guantanamo have been subjected to other forms of cruel, inhuman or degrading treatment or punishment in violation of CAT. The letter sent by FBI official Harrington to the Justice Department noted an FBI agent’s observation of a female interrogator whispering into the ear of a shackled detainee, caressing him, and applying lotion to his arms, during the month of Ramadan, a religious period during which Muslim men consider contact with females offensive.²⁹ FBI agents observed another detainee “gagged with duct tape that covered much of his head” to stop him from chanting from the Quran.³⁰ In another incident of cruel, inhuman and degrading treatment, a detainee at

²² Paisley Dodds, “FBI Agents Allege Prisoner Mistreatment in Guantanamo,” *Associated Press*, Dec. 7, 2004.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Neil A. Lewis, “Fresh Details Emerge on Harsh Methods at Guantánamo,” *New York Times*, Jan. 1, 2005.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Paisley Dodds, “FBI Agents Allege Prisoner Mistreatment in Guantanamo,” *Associated Press*, Dec. 7, 2004.

³⁰ *Id.*

Guantanamo was observed in an interrogation room by a FBI agent draped with an Israeli flag while music blared and strobe lights flashed around him.³¹

2. Official Policy Support for the Use of Torture

Reports and memoranda prepared by the Department of Defense, Department of Justice, and White House Counsel suggested that torture may be justified in order to obtain information from suspected terrorists, and that the President or those acting under his authority are not bound by domestic and international law prohibiting torture in these instances. An August 1, 2002, Justice Department memo, for example, concluded that “under the circumstances of the current war against Al-Qaeda and its allies, application of Section 2340A (the Convention Against Torture) to interrogations undertaken pursuant to the President’s powers as Commander-in-Chief may be unconstitutional,” since the prohibition against torture would conflict with military orders issued by the President exercising his military authority.³² An April 2003 Defense Department memorandum echoed the same argument, asserting that “in order to respect the President’s inherent authority to manage a military campaign ... [the prohibition against torture] must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority.”³³ Both the Justice and Defense Department memos make the argument that torture “may be justified” on grounds of self-defense, necessity, or extenuating circumstances related to threats of terrorism. It was not until June 22, 2004, that the President expressed disapproval of that policy.

The memos also would apply a different and far more narrow definition to what constitutes torture than the one spelled out in CAT and U.S. laws implementing that treaty. The memos suggested that only the most extreme forms of injury, that would cause “organ failure, impairment of a bodily function, or even death,” or where “the pain is difficult for the subject to endure,” would constitute torture, and that anything falling short of that would not be prohibited. They also suggested that only acts resulting in “significant psychological harm of significant duration, e.g. lasting for months or even years” would constitute mental torture. Although the U.S. Department of Justice has very recently retreated from that definition, publishing a statement on December 30, 2004 that accepts a revised and broader definition of torture,³⁴ the role of the earlier torture

³¹ Carol D. Leonnig, “Further Detainee Abuse Alleged” *The Washington Post*, A01, Dec. 26, 2004.

³² Dana Priest and R. Jeffrey Smith, “Memo Offered Justification for Use of Torture,” *Washington Post*, June 8, 2004; Memorandum from the U.S. Department of Justice Office of Legal Counsel, “Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,” August 1, 2002.

³³ Jess Bravin, “Pentagon Report Set Framework for Use of Torture,” *Wall Street Journal*, June 7, 2004; Dana Priest and R. Jeffrey Smith, “Memo Offered Justification for Use of Torture,” *Washington Post*, June 8, 2004; Neil A. Lewis and Eric Schmitt, “Lawyers Decided Ban on Torture Didn’t Bind Bush,” *New York Times*, June 8, 2004; “Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations,” Draft March 6, 2003.

³⁴ R. Jeffrey Smith & Dan Eggen, “Justice Expands ‘Torture’ Definition,” *The Washington Post*, Dec. 31, 2004.

memos in creating a government policy that authorized and favored the use of torture is not so easily erased. The authors of the memoranda and the officials of the agencies adopting their reasoning must be investigated and prosecuted for their role in the torture that has occurred and is continuing at U.S. detention facilities.

Another critical component of the U.S. government policy that encouraged torture was the position taken by officials of the U.S. government that the Geneva Conventions did not apply to the individuals being held at Guantanamo Bay, Cuba. A January 2002 memorandum from the Justice Department and the White House Counsel argued that the Geneva Conventions did not apply to the detainees from the war in Afghanistan.³⁵ The Bush Administration at one point declared that Guantanamo detainees were not protected by the Geneva Conventions by virtue of their alleged “unlawful enemy combatant” status. Though it later backpedaled on those positions, the government’s statements signaled a more general policy of attempting to limit legal protections for detainees so as to justify more stressful interrogations. Moreover, any public repudiation of that policy has apparently not been effective in changing the approach of officials and interrogators at Guantanamo. One interrogator at Guantanamo Bay, Cuba told the *New York Times*, that new interrogators who arrive at Guantanamo Bay are specifically informed that because the Geneva Conventions do not apply to the Guantanamo detainees, interrogators have greater flexibility in extracting information during interrogations.³⁶

To comply with its obligations under the Convention, the United States must repudiate all of its policies that resulted in the torture of detainees in U.S. custody and proceed with a full investigation and prosecution of all those responsible for both authorizing and carrying out such acts.

V. INDEFINITE & SECRET DETENTIONS AS TORTURE

The Convention Against Torture’s prohibition against intentionally inflicted acts causing severe pain or suffering, whether physical or mental (Article 1) applies to the indefinite and secret detention of suspected terrorists at U.S. detention facilities. The United States’ policy of indefinitely detaining suspected terrorists without charges unlawfully subjects individuals to the physical and psychological suffering of perpetual confinement and total loss of liberty with no opportunity to establish their innocence or receive an appropriate hearing for alleged war crimes. It subjects detainees to the mental anguish of interminable uncertainty about their fate. This form of detainee abuse occurring in U.S. detention facilities in Iraq, Afghanistan, and Guantanamo Bay, Cuba constitutes an independent form of physical and mental torture that violates the Convention.

³⁵ “Documents Build a Case for Working Outside the Laws in Interrogations,” *New York Times*, June 9, 2004.

³⁶ Neil A. Lewis, “Fresh Details Emerge on Harsh Methods at Guantánamo,” *New York Times*, Jan. 1, 2005.

The United States has argued that according to its understanding regarding the definition of torture that accompanied its ratification of CAT,³⁷ an act must be specifically intended to inflict severe physical or mental pain or suffering in order to constitute torture. The government has taken the position that indefinite, long-term detentions are not aimed at producing pain or suffering, but rather, are driven by the need to keep suspected terrorists from going free. Administration officials are revealing such a mindset in discussions with reporters on their “long-range plans” to build new prisons to indefinitely imprison suspected terrorists.³⁸ As a form of torture, indefinite detention may not be excused by the need to keep suspected terrorists in custody, nor for any other reason. Under Article 2 of the Convention, the prohibition against torture is absolute. If an individual is suspected of terrorist activity, the United States must charge and prosecute them in order to keep them in custody.

A related component of this violation is the use of “secret detention” facilities to hide individual detainees and conceal their status and treatment from the outside world. The practice of holding so-called “ghost-detainees” violates a number of provisions of international law, including the Geneva Conventions. In addition, like indefinite detentions, the practice also constitutes torture by denying detainees access to outside monitoring and humanitarian intervention, and by imposing the penalty of indefinite detention without criminal prosecution. Moreover, secret detentions allow for rampant specific acts of torture because extreme measures are likely to be used in secret facilities where unlawful interrogations may occur with complete impunity. Government documents reveal that some U.S. officials were aware of “ghost detainees” being held in Iraq as early as November 2003.³⁹ According to information provided to *The Washington Post* by military officials and current and former intelligence officers, one such facility has been administered by the C.I.A. in Guantanamo Bay, Cuba.⁴⁰ A presidential directive and policies approved by administration lawyers purport to authorize the C.I.A.’s use of secret detention facilities to hold certain suspected terrorists without having to account for their capture or status in any public way.⁴¹ All secret and indefinite detentions without charge constitute torture under the CAT. Contrary to the U.S. government’s position, the President has no authority to authorize C.I.A. action in direct violation of the Convention’s basic prohibition against torture based on the claim of “military necessity” in the “war against terrorism.”

³⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Senate Committee on Foreign Relations, S. Exec. Rep. No. 30, 101st Cong., 2d Sess. At 17.

³⁸ Dana Priest, “Long-Term Plan for Terror Suspects,” *The Washington Post*, Jan. 2, 2005.

³⁹ Barton Gellman and R. Jeffrey Smith, “Report to Defense Alleged Abuse Prison Interrogation Teams; Intelligence Official Informed Defense Dept. in June,” *The Washington Post*, Dec. 8, 2004.

⁴⁰ Dana Priest & Scott Higham, “At Guantanamo, a Prison Within a Prison; CIA Has Run a Secret Facility for Some Al Qaeda Detainees, Officials Say,” *The Washington Post*, Dec. 17, 2004.

⁴¹ *Id.*

VI. EXTRA-JUDICIAL EXECUTIONS

Evidence is coming to light that a number of detainees subjected to torture or otherwise physically abused while in U.S. custody have died as a direct result of their improper treatment. Latest reports indicate that upwards of 37 deaths caused by violence against persons while in detention have been reported since December 2002 in Iraq and Afghanistan. Eight of these cases have been officially classified as homicides resulting from “assaults on detainees before or during questioning” and 30 took place inside U.S. managed detention facilities.⁴² Two of the confirmed homicides during interrogation took place in infamous Abu Ghraib prison. One of the suspicious deaths was of a former Iraqi general who died of “asphyxia due to smothering and chest compression” in Nov. 2003. At the time of his death, the U.S. military claimed he died of “natural causes.” Abu Ghraib also was the site where three Iraqi prisoners were killed and a number of others wounded on November 24, 2003 during a prison riot.

While criminal charges have been brought against individual soldiers in a handful of these cases, no action has been taken to prevent and punish the underlying policies that contributed to the abuse and produced the deaths of detainees other than a June 10, 2004 memorandum from Secretary of Defense Rumsfeld providing new guidelines for the investigation of prisoner deaths that mandates the filing of reports to the Armed Forces Medical Examiner to decide whether an autopsy is needed.

Extra-judicial executions of persons violate a number of international human rights norms, and are considered to constitute a form of (lethal) torture.

VII. RENDITION TO TORTURE

Under Article 3 of the Convention Against Torture, as well as comparable provisions in U.S. laws implementing CAT protections domestically, it is prohibited under any circumstances and for any reason to send anyone to another country where they would face the prospect of torture (the absolute prohibition against *refoulement*). Despite this clear and universally recognized principle, increasing information is coming to light that the U.S. Government is using on a widespread basis the practice of “rendition to torture,” that is, sending those suspected of terrorist ties to other countries where they can be subjected to “harsh” interrogation techniques not permitted in the U.S. as a means of obtaining information. A Canadian citizen, Maher Arar, was the first person subjected to rendition who revealed concrete information about the practice. Shortly thereafter, both *The Washington Post* and *The New York Times* broke front page stories suggesting that more than 200 individuals had experienced rendition at the hands of U.S. officials, and with the exception of Maher Arar were

⁴² “Eight More Detainee Deaths Probed as Homicides,” *Associated Press*, May 21, 2004.

still in custody in countries such as Syria, Egypt and Saudi Arabia that were well-known for the torture of detainees.

In June, 2003 Ahmed Abu Ali, a U.S. citizen studying in Saudi Arabia became the first known American victim of the rendition policy when he was detained, interrogated and likely tortured in that country at the request of the U.S. Government, seeking to link him to a criminal case against eleven suspected terrorists being prosecuted in the U.S. in the *Royer* (or what came to be known as the Virginia Jihad or Paintball 11 case). He was never charged with any crime, but has been held in Saudi Arabia for over 18 months. In December, 2004, in the first direct legal challenge to the rendition to torture policy (filed by the World Organization for Human Rights USA) a U.S. judge ruled that enough evidence had been presented to permit a trial to proceed to determine whether the U.S. Government was implicated (as alleged) in Ahmed Abu Ali's arrest, detention and torture in Saudi Arabia. The judge rejected the U.S. Government's contention that U.S. courts could not exercise jurisdiction over actions taking place in foreign countries in situations where the U.S. is responsible for setting these major human rights abuses in motion.

But despite this favorable opinion in that particular case, the practice of rendition to torture continues unabated. On December 27, 2004 *The Washington Post* broke another front page story indicating that the U.S. Government, most probably through the auspices of the Central Intelligence Agency, was responsible for arranging for the transport of a number of detainees to foreign nations for interrogation purposes through the use of a Gulfstream Jet plane that appears to be owned and operated by secret CIA front organizations (copy of article attached). Additional details of the experiences of other "secret" detainees who had been rendered to torture in foreign countries at the request of the U.S. have periodically been released and were reviewed in that same *Washington Post* article.

The U.S. denies involvement in these cases, or seeks to avoid responsibility by claiming that the other countries involved gave assurances that torture would not take place. But the facts emerging in the Arar, Abu Ali and other companion cases, as well as the Gulfstream Jet story, suggest that the U.S. Government was in fact heavily involved in these renditions, and has been using the practice of rendition as a means of avoiding responsibility for acts of torture by encouraging other governments to do what the U.S. Government is unable or unwilling to take responsibility for itself. Even if assurances were received from the receiving nations that the detainees would not be tortured, the U.S. Department of State in its annual Country Reports on Human Rights openly acknowledges that receiving countries, such as Syria, Egypt and Saudi Arabia, carry out torture of detainees on a regular basis, making such assurances meaningless. This is true particularly in circumstances where everyone involved understands that the purposes of the foreign detentions is to obtain information

about suspected terrorist activities and plans, using “harsh” techniques of interrogation.

VIII. CONCLUSION

For many years the U.S. Government has been one of the most forceful advocates in promoting human rights compliance, and preventing torture by other nations. These efforts, and the credibility of the U.S. as a leader in the effort to secure human rights observance on a worldwide basis, are seriously undermined when the U.S. itself is implicated in the practice of torture. This conduct is a direct violation of the absolute prohibition of torture in CAT, and the Article 3 prohibition against sending anyone to torture (refoulement), and must be firmly condemned by the Committee Against Torture. Nor does the justification given by the U.S. as the reason for engaging in these types of practices, namely fighting a war against terrorism and the “military necessity” of preventing further terrorist attacks, hold water. As the Convention Against Torture makes clear, the prohibition against torture is absolute, and can not be sidestepped for any reason or under any circumstances. Torture, like genocide, is one of those practices that the international community condemns and prohibits on a universal basis, allowing for no exceptions from the prohibition for any reason. The evidence is overwhelming that these practices have been carried out on a systemic basis by the U.S. Government in the context of the war against terrorism. These practices must be firmly condemned by the Committee Against Torture and those responsible for these abuses at the highest level of government must be held accountable.