

**LIST OF ISSUES TO BE TAKEN UP IN CONNECTION WITH THE
CONSIDERATION OF THE SECOND AND THIRD PERIODIC REPORTS
OF THE UNITED STATES OF AMERICA**

**Right to self-determination and rights of persons belonging
to minorities (art. 1 and 27)**

1. Does the State party rely on the doctrine of discovery in its relationship with indigenous peoples, and if so what are the legal consequences of such approach? What is the status and force of law of treaties with Indian tribes? Please indicate how the principle set forth in U.S. law and practice, by which recognized tribal property rights are subject to diminishment or elimination under the plenary authority reserved to the U.S. Congress for conducting Indian affairs, complies with articles 1 and 27 of the Covenant? (Previous concluding observations, § 290 and 302; Periodic report, § 15 and 484)

In the July 1994 U.S. Initial Report on its implementation of the Covenant and in the March 1995 discussions before the Human Rights Committee, the United States described at length the complex history of U.S. relations with Native American tribes and the legal regime within the United States that applies to such tribes, including the concept of "tribal self determination" under U.S. law. While it would not be possible to repeat that discussion in the space limitations imposed by the Committee, the United States response to this question is premised on that information.

To address the Committee's specific question, the doctrine of discovery in U.S. law was first discussed by the Supreme Court in Johnson v. M'Intosh, 21 U.S. 543 (1823). The Court noted this was not a doctrine that originated in the United States but rather with "European potentates."

The United States, when breaking away from England, inherited the rights England had with respect to lands in what is now the United States. They included the exclusive right of purchase of lands held or occupied by Indian tribes. They did not deny to the tribes the rights to their lands but only limited to whom those lands could be

sold or transferred. In fact, the states of the Union could not enter into treaties with tribes to acquire their lands.

The majority of the land that is now the United States was not acquired by conquest or "discovery" by the United States. The Louisiana Purchase from the French (1803), the Gadsden Purchase from Mexico (1853), cession from Mexico of what is now California, Nevada, Utah, New Mexico and Arizona, the Oregon compromise with Britain, and the purchase of Alaska from Russia all comprise the majority of U.S. territory. In each of those cases the Indian tribes retained the rights to their lands, and the United States, in some 67 other transactions with the tribes, by treaty, acquired actual title from the Indians.

During its first hundred years of existence, the United States engaged with Indian tribes through federal legislation and the treaty making process. Treaty making between the federal government and the Indian tribes ended in 1871, but the treaties retain their full force and effect even today as they are considered the equivalent of treaties with foreign governments and have the force of federal law. Unlike treaties with foreign governments, treaties with Indian tribes are subject to special canons of construction that tend to favor Indian interests. Treaties with Indian tribes are interpreted, to the extent that such original intention is relevant, as they would have been understood by the Indians at the time of their signing, not by the American authors of the treaties; and where the treaty is ambiguous as to its interpretation, the Court will interpret it to favor the Indians specifically because it was not written by them or in their language.

Further, the United States voluntarily has extended exceptional protections to Indian tribes by statute. The United States specifically provided in 1946 for the Court of Claims to allow tribes to bring actions against the United States where the tribes believe any of their treaty rights had been violated. The Indian Claims Commission Act (P.L. No. 79-726) also provided that the defenses of laches and the statute of limitations were not available to the United States in such cases. Previously, between 1836 and 1946, the Congress had by special bills waived the immunity of the United States from suit and provided for Indian tribes to sue in the Court of Claims on 142 occasions. Violations accruing before 1946 were to be brought before the Claims Commission and claims accruing after 1946 could be brought directly in the Court of Claims. In this regard, again, tribes enjoy extraordinary protections not

available to foreign states with which the United States may enter into a treaty.

Under the Constitution, the U.S. Congress, at the exclusion of state governments, is given the authority to regulate Indian affairs. This exclusive placement of authority with the federal government has been consistently described by the United States Supreme Court as "plenary power."

This power is subject to the limitations placed on Congressional actions by the Constitution, including the Fifth Amendment prohibitions on depriving individuals of life, liberty, or property, without due process of law," or on the taking of private property for public use without the payment of "just compensation." Congressional action, through use of its plenary power, is also subject to judicial review.

With respect to Article 1 of the International Covenant on Civil and Political Rights (hereinafter referred to as the "Covenant"), Indians are of course citizens of the United States with the same constitutional protections as all other citizens and the same rights to participate in public affairs and in the US democratic process. As stated during the hearing for the US initial report in 1995, the fact that the United States discussed the domestic concept of tribal self-determination under Article 1 of our report does not reflect a legal conclusion that tribes possess a right to self-determination under international law.¹ The concept of sovereignty of tribes is not the same concept as that of sovereignty of nation states under international law. With respect to Covenant Article 27, US law and practice, as described below, goes far beyond what is required by Article 27.²

Under federal Indian law, tribal self-determination means that tribes have a government-to-government relationship with the US government and have the right to operate their own governmental systems within the US political system. Such powers of self-government with

¹ See the explanation of U.S. delegation to the Committee in 1995 that "the concept of sovereignty as applied to tribes was not the same concept as the sovereignty of States under international law. Human Rights Committee Summary Record of the 1405th meeting (March 31, 1995), CCPR/C/SR.1405, paragraph 67.

² See, e.g., views of the Human Rights Committee in General Comment 23, paragraph 3.2.

respect to local affairs go beyond culture, religion, and language and extend to such areas as education, information, social welfare, family relations, economic activities, lands and resource management, environment, and entry into tribal lands by non-members as well as ways and means for financing these autonomous functions.

In addition, U.S. law specifically provides numerous protections for the continued use and practice of Native American languages and religions. The United States has enacted specific statutes to help preserve Indian languages and provides for the right, under certain circumstances, to vote and receive election information in the tribe's languages in federal and state elections. There are specific provisions within some federal criminal statutes that limit their application in order to protect and preserve Native religious practices, including for example, the sale, possession and use of Peyote and the possession and transfer of Eagle feathers and eagle parts.

**Constitutional and legal framework within which the
Covenant is implemented (art.2)**

2. Please explain further what are the obstacles to the withdrawal of reservations, in particular to articles 6(5) and 7 of the Covenant. (Periodic report, § 448; Previous concluding observations, § 278-279 and 292).

The U.S. reservation to Article 6(5) states:

(2) That the United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

This reservation remains in effect, and the United States has no current intention of withdrawing it. We note, as a courtesy to the Committee, that U.S. judicial decisions, independent of any obligation of the United States under the Covenant, recently have tightened restrictions on the death penalty in the United States. In Roper v. Simmons, 543 U.S. 551 (2005), the U.S. Supreme Court held that imposition of capital punishment on those who were under 18 years of age at the time of the offense violates the U.S. Constitution's Eighth Amendment

protection against cruel and unusual punishment. Id. at 578. Although the decision in the Roper case does not change the formal scope of the U.S. treaty reservation to Article 6(5), the effect of the decision is that the United States, as a matter of its own constitutional law, will not execute persons who were below the age of 18 years at the time of the offense. Thus, while the last sentence in the above-referenced reservation preserves the discretion of the United States under the Covenant to impose the death penalty "for crimes committed by persons below eighteen years of age," the fact is that the United States does not do so.

The U.S. reservation to Article 7 states:

(3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

The United States entered this reservation because of concern over the uncertain meaning of the phrase "cruel, inhuman or degrading treatment or punishment" ("CIDTP"), and this reservation was undertaken to ensure that existing U.S. constitutional standards would satisfy U.S. obligations under Article 7. The reasons underlying the decision by the United States to file its reservation to Article 7 have not changed, as the underlying vagueness of this provision remains. Because of the concern that certain practices that are constitutional in the United States might be considered impermissible under possible interpretations of the vaguely-worded standard in Article 7, the United States does not currently intend to withdraw that reservation.

Counter-terrorism measures and respect of Covenant guarantees

3. Please comment on the compatibility with the Covenant of the definition of terrorism under national law and of the Congress' Authorization for Use of Military Force Joint Resolution, which provides the President all powers "necessary and appropriate to protect American citizens from terrorist acts by those who attacked the U.S. on September 11, 2001". (Periodic report, § 90-94 and § 164-165; Core document, § 135-138)

A. Definition of Terrorism. The Covenant does not address the question of how a State Party might define the term "terrorism" under its domestic law. Within the United States, there is no uniform "definition of terrorism under [U.S.] national law." Some federal statutes use the term "terrorism" and define that term in a manner consistent with the specific purpose of those particular statutes. Such statutes arise in many different subject areas including, among other things, with respect to law enforcement, economic sanctions, immigration, and executive branch reporting requirements. This response will focus on one particular type of legal mechanism --established by statute and executive order --under which a person or organization is "designated" as a terrorist and that designation has a serious of financial consequences. This authority is crucial to the counterterrorism efforts of the United States Government.

Specifically:

(i) Under 8 U.S.C. § 1189(1)(a), the U.S. government has the authority to designate as a "foreign terrorist organization" (FTO) any organization that either engages in "terrorist activity" as defined in 8 U.S.C. 1182(a)(3)(B)(iii) or "terrorism" as defined in 22 U.S.C. 2656f³, and that meets other relevant legal criteria. Multiple consequences flow from an FTO designation. Certain financial assets may be frozen; aliens having certain associations with the organization are inadmissible to, and may be deported from, the United States; and it becomes criminally prohibited knowingly to provide material support to the organization.

(ii) Under 8 U.S.C. § 1182(a)(3)(B)(vi)(II), the U.S. government has the authority to include on the Terrorist Exclusion List any organization that "engages in terrorist activity" as defined in 8 U.S.C. § 1182(a)(3)(B)(iii). If an organization is included on the Terrorist Exclusion List, aliens having certain associations with that organization are inadmissible and may be deported from the United States.

(iii) Under Executive Order 13224, the U.S. government has the authority to designate as "Specially Designated Global Terrorists" individuals and entities that commit

³The definition of "terrorism" contained in 22 U.S.C. 2656f is also relevant to the requirement set forth therein that the Secretary of State prepare an annual report to Congress on terrorism.

acts of "terrorism" as defined in the Executive Order, or who have certain associations with already-designated individuals and entities. Designation under Executive Order 13224 results in the imposition of asset-blocking sanctions. Moreover, it is a criminal act willfully or intentionally to have dealings or transactions with an SDGT.

The definitions of "terrorism" and "terrorist activity" referred to above are set forth in Annex A. As is clear upon inspection, these definitions simply establish the ways in which terrorist activity is distinguishable from other forms of violent and dangerous activity, and contain nothing that is on their face incompatible with U.S. obligations under the Covenant. Moreover, the designation authorities of which these definitions form an integral part are themselves subject to appropriate procedural safeguards, and are compatible with U.S. obligations under the Covenant. (We additionally note that these designation authorities form an essential part of the legal framework by which the U.S. government implements its law enforcement, sanctions, and other obligations under international legal instruments such as UN Security Council Resolutions 1267 and 1373, and successor resolutions, and the UN counterterrorism conventions.) The U.S. government accordingly considers that the above-referenced definitions are compatible with U.S. obligations under the Covenant.

B. Congressional Authorization. There is no conflict between the Congressional Authorization for Use of Military Force (AUMF) and U.S. obligations under the Covenant. Congress passed the AUMF in response to the terrorist attacks against the United States on September 11, 2001. The AUMF serves as legislative authorization for the President to take military steps against the parties responsible for the attacks on the United States, and establishes a domestic legal basis for the U.S. determination that it is in an armed conflict with al Qaeda and the Taliban.

Paragraphs 4-9

In paragraphs 4 through 9, the Committee poses a number of questions about the conduct of U.S. military and other activities outside the territory of the United States. Many of these questions are similar to matters addressed at length by the United States in its public

statements as well as in its May, 2006 discussion of its report on its implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment with the UN Committee Against Torture.

In addressing these questions, the United States notes and reaffirms paragraph 130 of its Second and Third Periodic Report:

"130. The United States recalls its longstanding position that it has reiterated in paragraph 3 of this report and explained in detail in the legal analysis provided in Annex I; namely, that the obligations assumed by the United States under the Covenant apply only within the territory of the United States. In that regard, the United States respectfully submits that this Committee request for information is outside the purview of the Committee. The United States also notes that the legal status and treatment of such persons is governed by the law of war. Nonetheless, as a courtesy, the United States is providing the Committee pertinent material in the form of an updated Annex to the U.S. report on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."

While it reiterates this position, as a courtesy to the Committee, the United States provides additional written information to the Committee appended to this response as Annex B.

Question 4 also asks

"how the State Party ensures full respect for the rights enshrined in the Covenant in relation to its actions to combat terrorism . . . (d) on its own territory, in particular when it holds detainees. How would such practices comply with the Covenant, in particular with articles 7, 9 and 10?"

This question -- which appears to ask how all U.S. actions to combat terrorism comply with the Covenant -- is of extraordinary breadth. As the answer to particular aspects of this question is contained in U.S. responses to other questions, this reply addresses the broader question of how U.S. counterterrorism measures as a general matter satisfy U.S. obligations under the Covenant.

The struggle against al Qaida and its affiliates poses new kinds of challenges for all members of the international community. The United States is a democracy founded on the rule of law and is absolutely committed to conducting its actions in response to these challenges in a

manner consistent with the rule of law, its core values, and its obligations under both its domestic law -- most notably the United States Constitution -- and under the applicable international law. The U.S. Initial Report on its implementation of the Covenant from 1994 and its Second and Third Periodic Report from October 2005 describe in great detail the operation of the U.S. legal system that enables the United States to implement its obligations under the Covenant. Those mechanisms, including the operation of a well ordered legal system governed under the rule of law and implemented, inter alia, by an independent judiciary, continue to apply in full measure to U.S. measures to combat terrorism. In its Initial Report, the United States explained in detail the manner in which the comprehensive protections to individuals provided under the U.S. Constitution enabled the United States to implement its treaty obligations under the Covenant and indeed in many instances offered greater protections than those required under the Covenant. Terrorist suspects within the United States are subject to the protections under the U.S. Constitution and other laws, and these protections fully implement U.S. obligations under the Covenant.

10. Has the State party adopted a policy to send, or to assist in the sending of suspected terrorists to third countries, either from U.S. or other States' territories, for purposes of detention and interrogation? If so, please indicate the number of affected persons and their place of detention and/or interrogation. What measures have been adopted to ensure that their rights under the Covenant are fully respected? Please provide information on cases where removal/transfer was carried out based on diplomatic assurances received from a foreign government. Please explain in more detail whether there are exceptions, in particular for suspected terrorists, to the right of aliens to challenge their deportation before a court on the basis of the *non-refoulement* rule. Do such remedies have a suspensive effect? What were the results of the investigations conducted by the State party, if any, into the numerous allegations that persons have been sent to third countries where they have undergone torture and ill-treatment? In this regard, please comment on the case of Maher Arar, a Canadian citizen deported in October 2002 to Jordan and then Syria, and who was allegedly tortured, (articles 6, 7, 9, 10) (Periodic report, § 220-241; CAT/C/48/Add.3/Rev. 1, Annexes, Part I, § 45^7)

As an initial matter, the United States would like to emphasize that, unlike the Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment ("Convention Against Torture"), the Covenant does not impose a non-refoulement obligation upon States Parties. We are familiar with the Committee's statement in General Comment 20 regarding Article 7 of the Covenant that:

"States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."⁴

However, the United States disagrees that States Parties have accepted that obligation under the Covenant.

Unlike the Convention Against Torture, the Covenant does not contain a provision on non-refoulement. Indeed, the adoption of such a provision was one of the important innovations of the later-negotiated Convention Against Torture. States Parties to the Covenant that wished to assume a new treaty obligation with respect to non-refoulement for torture were free to become States Parties to the Convention Against Torture, and a very large number of countries, including the United States, chose to do so. Accordingly, States Parties to the Convention Against Torture have a non-refoulement obligation under Article 3 of that Convention not to

"expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

In becoming a State Party to the Convention Against Torture, the United States carefully reviewed the language in Article 3 of that instrument and adopted formal understandings to clarify the obligations that the United States accepted under Article 3. The totality of U.S. treaty obligations with respect to non-refoulement for torture are contained in the obligations the United States assumed under the Convention Against Torture.

⁴ The Human Rights Committee further expanded on this approach in Paragraph 12 of its General Comment 31. (CCPR/C/21/Rev.1/Add., adopted on March 13, 2004) The arguments of the United States with respect to General Comment 20 apply, mutatis mutandis, with respect to the non-refoulement arguments contained in General Comment 31.

The Committee's language in its General Comment 20 not only poses a new obligation not contained in the plain language of Article 7 of the Covenant, but it also poses an obligation beyond the non-refoulement protection contained in Article 3 of the Convention Against Torture. Specifically, it would change the standard regarding the degree of risk the individual must face and extends the protection to persons who face cruel, inhuman or degrading treatment or punishment. In contrast, under the Convention Against Torture, the protection against refoulement applies only to torture and not to cruel, inhuman or degrading treatment or punishment that do not amount to torture.

Although it disagrees that Covenant Article 7 contains a prohibition on non-refoulement, as a matter of courtesy, the United States provides the following information in response to the Committee's questions.

As the United States recently explained to the Committee Against Torture, pursuant to its obligations under the Convention Against Torture, the United States does not expel, return ("refouler") or extradite a person from the territory of the United States to another country where it is more likely than not that such person will be tortured.

For persons in U.S. custody outside of the territory of the United States, as a matter of policy, the United States follows a similar standard and does not transfer or return persons to countries where it determines that it is more likely than not that the person will be tortured.

This policy applies to all components of the U.S. Government and to individuals in U.S. custody, regardless of where they may be detained. Where appropriate, the United States seeks assurances it considers to be credible that transferred persons will not be tortured.

As has been stated publicly, the United States does not comment on information or reports relating to alleged intelligence operations. That being said, Secretary of State Condoleezza Rice recently explained that the United States and other countries have long used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice. The United States considers rendition a vital tool in combating international terrorism, which takes terrorists out of action and saves lives. However, as is true with the case of immigration removals and extraditions, in conducting renditions, the United States acts in accordance with its obligations under the CAT and, even in instances

in which the CAT does not apply, does not transport individuals to a country when it believes that the individuals would more likely than not be tortured in that country.

There are no exceptions to this policy, including for terrorists, though different procedures apply depending on the circumstances, including location of the individual, whether the individual is in immigration removal or extradition proceedings, and the nature of such proceedings. For more detailed information on such procedures, including the Committee's question regarding the suspensive effect of "non-refoulement" protections, the United States refers the Committee to its written answers to questions from the Committee Against Torture, submitted prior to its hearing before the Committee in May 2006.

Regarding diplomatic assurances, the United States would like to emphasize, as it did in paragraph 33 of the Second Periodic Report of the United States to the Committee Against Torture, that diplomatic assurances are used sparingly, but that assurances may be sought in order to be satisfied that it is not "more likely than not" that the individual in question will be tortured upon return. It is important to note that diplomatic assurances are only a tool that may be used in appropriate cases and are not used as a substitute for a case-specific assessment as to whether the standard established by the United States obligations under Article 3 of the Convention Against Torture is met. If, taking into account all relevant information, including any assurances received, the United States believed that the standard is not met, the United States would not approve the return of the person to that country. There have been cases where the United States has considered the use of diplomatic assurances, but declined to return individuals because the United States was not satisfied such an assurance would satisfy its obligations under Article 3 of the Convention Against Torture.

Finally, with respect to the removal of Mr. Arar from the United States, the United States notes, as it did before the Committee Against Torture, that the removal of Mr. Arar from the United States was done pursuant to U.S. immigration law and after a determination was made that his removal would be consistent with Article 3 of the Convention Against Torture.

11. Please indicate how many persons have been or are still being detained on the basis of the Material Witness Statute, for how long, how many of them have been charged

with crimes related to terrorism, and how their rights under the Covenant were and continue to be ensured. Please comment also on withholding information regarding such detainees and how far closing of the immigration court hearings to the public is compatible with the Covenant, (articles 9, 10 and 14) (Periodic report, § 168-169)

Material witness warrants are used to secure testimony before a grand or petit jury by witnesses who are flight risks. Their use is a long-standing practice authorized by statute and dating back to 1789 and the first Congress.⁵ These warrants are used in various cases, predominantly alien-smuggling, but also organized crime investigations and terrorism.

Every instance of detention of a material witness is subject to independent oversight by the Judicial Branch of the U.S. government. The Federal Bureau of Investigation cannot unilaterally arrest and detain an individual as a material witness, but rather must comply with a regimen of procedural requirements. The government must establish probable cause to believe that the witness's testimony is material and that it would be impracticable to secure that

⁵The use of material witness warrants is authorized by 18 U.S.C. § 3144, which provides for the arrest and detention of a person who may have testimony material to a criminal proceeding and whose presence may not be obtained by subpoena. The material witness statute applies to witnesses subpoenaed to testify before a grand jury as well as trial witnesses. *U.S. v. Awadallah*, 349 F.3d 42 (2d Cir. 2003). Each and every material witness is entitled by statute to counsel. Counsel will be appointed if the material witness cannot afford to pay for a lawyer. *See* 18 U.S.C. § 3006A(a)(1)(G). Once the warrant is issued and the witness is arrested, a court employs the standards in the Bail Reform Act, 18 U.S.C. 3142, to decide whether to detain the witness pending his or her testimony. The material witness is entitled to a speedy detention hearing before the court at which he or she is represented by counsel, can present evidence, and can cross-examine government witnesses, see 18 U.S.C. § 3142(f), and the government must establish that “no condition or combination of conditions will reasonably assure the appearance of the person as required.” 18 U.S.C. § 3142(e). Moreover, under Federal Rule of Criminal Procedure 46(h), a court must supervise the detention of material witnesses to eliminate unnecessary detention, and an attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days, and explaining why the witness should not be released. In short, there are numerous judicial safeguards built into the long-established practice of detaining material witnesses pursuant to a warrant. *See United States v. Awadallah*, 349 F.3d 42, 62 (2d Cir. 2003) (the material witness statute and related rules “require close institutional attention to the propriety and duration of detentions”).

witness's appearance by subpoena. Furthermore, every person held as a material witness has the right to be represented by an attorney, and an attorney will be appointed if the material witness cannot afford to pay for a lawyer. Every material witness has the right to challenge, in court, before a judicial officer, his or her confinement as a material witness. If a juvenile is confined as a material witness, statutes governing the treatment, segregation, and processing of detained juveniles (including but not limited to material witnesses) guide the handling of each particular case. Once a material witness gives full and complete testimony, he or she is released, unless there is some other source of authority for continued detention, such as an immigration detainer or criminal charges. At that point, the witness will be afforded the due process rights available in those types of proceedings.

An informal estimate by the Department of Justice in early 2005 revealed that approximately 10,000 material witness warrants had been issued nationwide since September 11, 2001, about 9600 of which were used in alien smuggling cases. About 230 warrants were issued in drug, weapons or other violent crime cases, and approximately 90 were used in terrorism cases. The exact number of those arrested who were subsequently ordered detained by a court is not available, nor is an individual breakdown of the types of cases.

That certain material witness hearings may, for good cause, be closed to the public does not conflict with U.S. obligations under the Covenant. Article 14 requires a "public hearing . . . in the determination of any criminal charge." A material witness hearing does not entail the resolution of any criminal allegations, but rather only a determination of whether there is an exceptional public need for securing the presence of a witness at future judicial proceedings. These hearings occasionally involve matters of exceptional sensitivity, especially because they often arise in the course of ongoing investigations.

Finally, the closure of administrative immigration hearings, in whole or in part, is fully consistent with Articles 9, 10, and 14 of the Covenant. The Covenant does not require immigration removal proceedings to be open to the public. On this point, the Covenant could not be clearer. Article 14 of the Covenant requires a "public hearing . . . in the determination of any criminal charge." But an immigration charge does not involve the resolution of any criminal charge; it is well established that removal

of an alien is not a criminal sanction. In any event, we provide the following information as a courtesy to the Committee.

The immigration regulations have long authorized full or partial closure of immigration hearings to protect "witnesses, parties, or the public interest." 8 C.F.R. § 1003.27(b). In recent years, immigration judges have also had authority to issue protective orders upon a showing by the government of a "substantial likelihood" that specific information submitted under seal will, if disclosed, harm the national security or law enforcement interests of the United States. 8 C.F.R. § 1003.46(a). Although these proceedings may on occasion be closed to the public, they do not limit the substantial procedural protections afforded aliens in such proceedings.

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For example, aliens in administrative removal proceedings, before an immigration judge pursuant 8 U.S.C. § 1229a regardless of whether they are deemed a national security risk, are given notice of the charges of removability against them. They have an opportunity to be heard and to present evidence, with the assistance of counsel and, if necessary, a certified interpreter. Moreover, while the Attorney General found it necessary to close a discrete category of removal cases to the public in the immediate aftermath of the September 11th terrorist attacks, even in those cases, the aliens and their counsel were free to disclose to the public any information about their removal proceedings that was not specifically subject to a protective order. These procedural protections are consonant with Articles 9, 10, and 14, which safeguard against arbitrary arrest and detention, require detained persons to be treated "with humanity," and ensure "a fair

and public hearing by a competent, independent and impartial tribunal established by the law.”

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12. Please report in more detail on the compliance with the Covenant of: (a) Section 213 of the Patriot Act, expanding the possibility of delayed notification of home and office

searches; (b) Section 215 of the Patriot Act, regarding access to individuals' personal records and belongings; (c) Section 505, relating to the issuance of national security letters; and (d) Section 412, regarding the possibility of indefinite detention of foreigners suspected to be terrorists. Please be more specific about the power granted to the judiciary to oversee the implementation of these provisions, and indicate to what extent affected individuals may challenge their implementation before a court. Please provide updated information on the extent to which the State party has invoked the above-mentioned provisions, and provide examples. (Periodic report, § 308-312)

Section 213 of the USA Patriot Act codified existing U.S. common law regarding delayed-notice search warrants, which have been available for decades and were in use long before the USA PATRIOT Act was enacted. In this way, section 213 was not a significant grant of new authority to law enforcement officials; rather, it simply created a nationally uniform process and standard for obtaining such search warrants. The judiciary continues to play an integral role in the use of such warrants. As with all criminal search warrants, a delayed-notice search warrant is issued by a federal judge only upon a showing that there is probable cause to believe that the property sought or seized constitutes evidence of a criminal offense.

The USA PATRIOT Improvement and Reauthorization Act of 2005 added new protection for subjects of the warrant. Section 213 of the initial Act had required that notice be given within a "reasonable" period of time, as determined by the judge. Section 114 of the reauthorization legislation provides a presumption that notice must be given within 30 days after the warrant is executed, with extensions limited to periods of 90 days or less. Congress also imposed a reporting requirement designed to provide information on how often delayed-notice search warrants are used and the periods of delay authorized. In fact, delayed-notice warrants are rare; according to an informal estimate in early 2005, they were used in less than 0.2 percent of all federal warrants authorized since the enactment of the USA PATRIOT Act.

Section 215 of the USA PATRIOT Act authorized federal prosecutors to issue subpoenas for records about an individual that are held by third parties. The Act extended to investigators in international terrorism and espionage investigations an authority comparable to a grand

jury subpoena, with the exception that section 215 orders require prior judicial approval. The USA PATRIOT Improvement and Reauthorization Act of 2005 explicitly provides that recipients of a section 215 order may consult an attorney and challenge it in court. The legislation also provided additional protections for information that is viewed as more sensitive, such as tax, education, and library records. Finally, the legislation provided for public reporting of the number of section 215 orders issued on an annual basis. During calendar year 2005, the court approved only 155 applications for access to certain business records.

National Security Letters (NSLs) predate the USA PATRIOT Act but procedures for their use were amended by section 505 of that Act. An NSL allows national security investigators to request certain types of information from specified entities, such as subscriber records from communications providers. NSLs do not authorize searches and are not self-enforcing; therefore, if a recipient does not comply, investigators must go to court to secure compliance. Recent legislation clarifies that recipients of NSLs may consult an attorney and challenge an NSL in court and that nondisclosure orders no longer automatically accompany an NSL and may be challenged in court. Again, these provisions ensure judicial oversight. During calendar year 2005, the Department of Justice made NSL requests for information concerning approximately 3,500 U.S. persons, using approximately 9,250 requests.

Section 412 of the USA PATRIOT Act allows the government, with extensive judicial supervision, to detain temporarily a narrow class of aliens until they are removed from the country. Under section 412, there must be "reasonable grounds to believe" that the alien: (1) entered the United States to violate espionage or sabotage laws; (2) entered to oppose the government by force; (3) engaged in terrorist activity; or (4) endangers the United States' national security. Section 412 expressly grants aliens the right to challenge their detention in court. Specifically, aliens may file a habeas petition in any federal district court that has jurisdiction, thus guaranteeing that a detained alien will have access to judicial review to examine the lawfulness of his or her detention. This provision is the equivalent of denying bail to a criminal defendant. Once the Government has taken such an alien into custody, it has seven days to initiate removal proceedings or file criminal charges. If the Government

does neither, it must release the alien. The United States has never used this authority to detain an alien.

These provisions are clearly compatible with U.S. obligations under the Covenant.

13. The State Party, including through the National Security Agency (NSA), reportedly has monitored and still monitors phone, email, and fax communications of individuals both within and outside the U.S., without any judicial oversight. Please comment and explain how such practices comply with article 17 of the Covenant.

Article 17 of the Covenant provides, in relevant part, that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." For reasons described in this response, the Terrorist Surveillance Program is consistent with this article.

Pursuant to the Terrorist Surveillance Program described by the President in December 2005, the National Security Agency targets for interception communications where one party to the communication is outside of the United States and where there are reasonable grounds to believe that either party is a member of al Qaeda or an affiliated terrorist organization. The "reasonable grounds to believe" standard is a "probable cause" standard of proof of the type incorporated into the Fourth Amendment. See *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) ("We have stated . . . that '[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.'). Thus, this program does not involve an arbitrary intrusion into personal privacy. Due to the speed and agility required to prevent a subsequent terrorist attack within the United States, judgments about whether individual communications meet these criteria are made by experienced intelligence officers rather than courts.

The Terrorist Surveillance Program fully complies with Article 17 of the Covenant. Under the Terrorist Surveillance Program, experienced intelligence officers carefully ensure that each communication involves a member of a terrorist organization -- or its affiliates -- that has executed or is planning terrorist attacks on the United States. In addition, the President reviews the need for and safeguards underlying this program every forty-five days. These standards and procedures prevent the

"arbitrary or unlawful interference with . . . privacy" prohibited by Article 17.

In any event and as explained in its Third Periodic Report, the United States implements its obligations under Article 17 of the Covenant through the Fourth Amendment to the United States Constitution, and the Terrorist Surveillance Program satisfies the Fourth Amendment. The Fourth Amendment bars unreasonable searches, but does not require a court order or warrant in all instances. Indeed, the Supreme Court has recognized that searches without a warrant are permissible for "special needs, beyond the normal need" for traditional criminal law enforcement. See, e.g., *Vernonia School Dist. v. Acton*, 515 U.S. 646, 653 (1995). The Terrorist Surveillance Program serves such a special need: protecting the nation from foreign attack by detecting and preventing plots by a declared enemy of the United States. Thus, the absence of judicial orders in the Terrorist Surveillance Program does not violate the Fourth Amendment and, given the significant interest at stake, constitutes neither an unreasonable search nor an "arbitrary or unlawful interference with . . . privacy."

14. Please provide information on measures taken by the State Party to reduce de facto segregation in public schools, reportedly caused by discrepancies between the racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which schools districts are created, funded and regulated. (Periodic report, § 46-49)

The Department of Justice is currently involved in monitoring 300 cases of de jure segregation, or segregation caused by intentional discriminatory action, under the authority of Title IV of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974. Each of these statutes prohibits unlawful intentional segregation proscribed by the Equal Protection Clause of the 14th Amendment. In this regard, the United States prohibits the discrimination covered by Article 26 of the Covenant and the understanding of the United States thereto deposited with its instrument of ratification. As noted in paragraph 49 of the U.S. Report, the Department of Education's Office for Civil Rights (OCR) enforces laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age in programs that receive federal financial assistance from the Department of

Education. These laws include: Title VI of the Civil Rights Act of 1964 (prohibiting discrimination based on race, color and national origin); Title IX of the Education Amendments of 1972 (prohibiting sex discrimination in education programs); Section 504 of the Rehabilitation Act of 1973 (prohibiting disability discrimination); Age Discrimination Act of 1975 (prohibiting age discrimination); and Title II of the Americans with Disabilities Act of 1990 (prohibiting disability discrimination by public entities, whether or not they receive federal financial assistance). OCR also enforces the Boy Scouts of America Equal Access Act of 2002. Under this law, no public elementary or secondary school, local educational agency, or State educational agency that provides an opportunity for outside groups to meet in school facilities may deny such access to, or discriminate against, the Boy Scouts of America or other patriotic youth groups. Pursuant to Title VI of the Civil Rights Act of 1964, OCR monitors a number of agreements with school districts designed to remedy school segregation.

Although it is unclear what would be meant by the phrase "de facto segregation", the United States assumes that the term may refer to situations where particular schools or other educational facilities have a strong preponderance of one race or other group described in Article 26 of the Covenant. This situation can arise through many different reasons, including a pre-existing preponderance of various groups living in a particular geographic area. Although the government authorities within the United States work to prevent discrimination, they cannot act under law absent an indication of discriminatory intent of state or local authorities. Accordingly, numerical preponderance by certain groups, in itself, is not actionable under the statutes enforced by the federal government and would not be inconsistent with Article 26 of the Covenant.

The Department of Education administers the Magnet Schools Assistance Program, which is a \$100 million annual grant program designed to reduce, eliminate or prevent minority group isolation in schools. Districts, including those with no history of race discrimination, are eligible to apply for these grants.

15. What measures has the State party adopted to assess and eliminate reported practices of racial profiling by law enforcement officials, in particular in the administration of the criminal justice system?

In a 2001 address to a Joint Session of Congress, President George W. Bush declared that racial profiling is "wrong and we will end it in America." He directed the Attorney General to review the use by federal law enforcement authorities of race as a factor in conducting stops, searches, and other law enforcement procedures. The Attorney General, in turn, issued guidance to all federal law enforcement agencies to prevent the use of racial profiling in law enforcement. The guidance, developed by the Civil Rights Division (CRD) of the Department of Justice, prohibits the use of racial profiling by federal law enforcement officers. Specifically, the guidance states: "In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful."

Furthermore, the CRD receives and investigates allegations of a pattern or practice of racial profiling by a law enforcement agency. If a pattern or practice of unconstitutional policing is detected, the Division will typically work with the local agency to revise its policies, procedures, training, and protocols to ensure conformity with the Constitution and the federal statutes prohibiting such patterns and practices, namely, the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d.

16. Please report on measures implemented during and after the disaster caused by Hurricane Katrina in order to ensure equal treatment of victims, without discrimination based on race, social origin and age, in particular in the context of evacuations. Please comment on the information that measures taken have exacerbated problems in respect of the Afro-American population, with regard to homelessness, loss of property, inadequate access to healthcare, loss of educational opportunities, legal remedies and voting rights. Right to life (art. 6)

As President Bush has acknowledged, the magnitude of destruction resulting from Hurricane Katrina strained and initially overwhelmed federal, state and local capabilities as never before during a domestic incident within our country. Valuable lessons are learned from all disaster

responses, and certainly from one of Hurricane Katrina's magnitude. The United States federal government is aggressively moving forward with implementing lessons learned from Hurricane Katrina, including improving procedures to enhance the protection of, and assistance to economically disadvantaged members of society.

The Committee has requested information about the measures taken to prevent discrimination in the context of evacuation after the disaster caused by Hurricane Katrina. With respect to evacuations specifically, it is important to note that, as set forth in the U.S. constitutional framework and most state laws, state and local governments bear primary responsibility for providing initial lifesaving and life support assistance in the event of a disaster. This includes evacuations such as those that occurred during Hurricane Katrina.

The Federal Emergency Management Agency (FEMA), an agency within the Department of Homeland Security (DHS), works with, and supports, state and local first responders, particularly when needs exceed state and local capabilities. FEMA is chiefly responsible for coordinating post-disaster relief and recovery efforts on behalf of the federal government.

FEMA's central focus is to provide relief assistance to all disaster victims as soon as possible without discrimination. This requirement of non-discrimination is reflected in long-standing U.S. law. Section 308 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, FEMA's foundational legislative mandate, prohibits discrimination on the basis of race, color, religion, nationality, sex, age, or economic status in all disaster assistance programs. In addition, Title VI of the Civil Rights Act of 1964 protects individuals from discrimination on the basis of their race, color, or national origin in programs that receive federal financial assistance. Section 504 of the Rehabilitation Act of 1973 affords comparable guarantees to individuals with disabilities, and adds protections against bias in programs conducted by the government itself.

FEMA's non-discrimination practices include (or have included):

- o The Federal Coordinating Officer (FCO) issues a directive at the beginning of each disaster which emphasizes his or her commitment to non-discrimination. The directive requires that all employees provide assistance and conduct

government actions in a non-discriminatory manner.

- o All FEMA Disaster Assistance Employees (DAE) are required to take equal rights, equal opportunity, and diversity training on an annual basis.
- o The Federal-State Agreement, upon which federal assistance is based, requires each state to provide assistance and benefits in a non-discriminatory manner, as a condition of receipt of federal funds.
- o FEMA engaged with a number of Louisiana Parishes and the Department of Justice to develop a strategy that utilized law enforcement and community resources to ensure equal access to disaster recovery centers for disaster survivors.
- o An Emergency Preparedness Demonstration Project (EPD) is in place to ensure that the most disadvantaged members of our society will be adequately prepared for any potential events.

Additionally, FEMA maintains a Civil Rights Program (CRP) within the Office of Equal Rights (OER). This Program provides the following services:

- o Technical Assistance -- The CRP offers policy guidance to FEMA in meeting Civil Rights mandates. In disaster operations, staff work closely with community organizations to resolve tensions and eliminate potential complaints. The office also provides assistance to the Agency and the national emergency management community in the effort to make publications, programs, and facilities accessible to people with disabilities.
- o Complaints Resolution -- Anyone who believes he or she has suffered discrimination in the provision of FEMA services or benefits may contact OER. Disaster applicants can obtain help from an Equal Rights Officer through the FEMA Helpline. If the Equal Rights Officer cannot resolve the issue, a formal written complaint may be filed with OER. This office is responsible for processing complaints, acknowledgement, acceptance/dismissal, investigations, compliance reviews, and issuing final decisions.

DHS maintains an Office of Civil Rights and Civil Liberties (CRCL), which is responsible, in part, for ensuring nondiscrimination in the provision of disaster relief with respect to persons with disabilities. CRCL

leads an Interagency Coordinating Council created by Executive Order 13347 - *Individuals with Disabilities in Emergency Preparedness*. In the aftermath of Hurricane Katrina, the Interagency Council mobilized an Incident Management Team, which received and responded to disability-related complaints and requests for assistance and coordinated private sector assistance and efforts by government responders in affected areas.

Massive efforts were made by the Civil Rights Division of the Department of Justice [CRD] and relevant state authorities to protect citizens from discrimination following Hurricane Katrina. For example, inspired by the plight of displaced victims of Hurricane Katrina who were suddenly forced to find new places to live, on February 15, 2006, Attorney General Alberto R. Gonzales announced Operation Home Sweet Home, a concentrated initiative to expose and eliminate housing discrimination. Under this initiative, the Attorney General pledged to bring the number of targeted investigations under the Fair Housing Act testing program to an all-time high, ensuring the rights of all Americans to obtain housing fairly. One of the key components of Operation Home Sweet Home is to conduct concentrated testing for housing discrimination in areas recovering from the effects of Hurricane Katrina and in areas where Katrina victims have been relocated.

In criminal matters, the Louisiana Attorney General's Office has been conducting an exhaustive inquiry into allegations that New Orleans residents were not permitted to cross the Greater New Orleans Bridge to Gretna, Louisiana, by local law enforcement officials. CRD will review the state's factual investigation once it is completed to determine whether additional investigation is necessary and whether the facts represent a violation of any federal statutes. The Department is in contact with the Louisiana Attorney General's Office and intends to review its report as soon as it becomes available.

Furthermore, the CRD requested that the FBI conduct an investigation into allegations that correctional officers did not properly transfer prison inmates from the Orleans Parish Prison during the aftermath of Hurricane Katrina. The FBI forwarded the report of its investigation to the Division. The Division reviewed that report and determined that it did not reveal sufficient evidence to establish a violation of any inmate's constitutional rights. Thereafter, the FBI informed the CRD that it was investigating additional complaints from inmates formerly housed at the Orleans Parish Prison. The FBI and CRD will

continue to coordinate regarding the ongoing investigation of those complaints. In addition to these allegations, the CRD is reviewing two other matters in relation to the Orleans Parish Prison.

With respect to the protection of voting rights, promptly after Hurricane Katrina, CRD took extraordinary action to ensure smooth elections in New Orleans. For example, in the fall of 2005, the Division began communicating with the Federal Emergency Management Agency (FEMA) about the need to release the agency's information about displaced individuals to the Louisiana Secretary of State so that the state could contact those persons and provide them with information on how to register to vote and/or cast ballots. The Civil Rights Division's Voting Section was instrumental in facilitating discussions between FEMA and the state and overcoming concerns about the confidentiality of FEMA's list.

In November 2005, CRD staff toured the affected parts of New Orleans with state officials and then later met with staff members from the Offices of the Secretary of State, Attorney General, and Members of the Louisiana Legislature to stress that state officials, in developing electoral plans, needed to be very sensitive to members of the minority community and to actively seek input from community leaders every step of the way. Voting Section staff subsequently worked closely with Louisiana leaders and advocacy groups to address issues as they arose, and Section personnel monitored the April 2006 primary and May 2006 run-off elections to ensure full compliance with all applicable federal voting rights laws.

The CRD raised and discussed a wide range of potential issues, such as the need to handle a dramatic increase in the number of absentee ballots and, the need to conduct an extensive voter outreach campaign to ensure that any displaced voter who wanted to vote but is not able to vote in person is aware of their right to vote absentee, is able to apply for and obtain an absentee ballot, and knows how to effectively cast that absentee ballot. Just as important as providing information to voters on how to request and vote absentee is counting their absentee ballots. To this end, the CRD discussed the need to ensure that absentee ballots would be received and counted. The Louisiana Secretary of State is now providing additional staff, office space, and a Baton Rouge post office box for the receipt of absentee ballots. CRD monitored the New Orleans mayoral primary and run-off election, and worked closely with the monitoring efforts of a coalition of civil rights

advocacy groups in order to ensure access to the franchise for all eligible citizens.

Finally, with respect to the public school system, many school districts in Louisiana, including those in the New Orleans area, are currently operating under school desegregation orders. When students displaced from their homes by Hurricane Katrina are relocated to areas with such court orders, the school districts are given broad discretion by CRD when assigning students to schools so that they can take into consideration issues such as capacity and the educational needs of the students. To this end, the Department of Justice interprets those orders flexibly so that they do not serve as obstacles to providing educational service to the displaced children.

Additionally, the Department of Education waived certain requirements of particular Federal education programs to provide affected States and districts additional flexibility to help meet the educational needs of students who were impacted by the hurricanes. Furthermore, the Department has awarded funds to States under new grant programs authorized by the Hurricane Education Recovery Act to help defray some of the additional costs that States and districts have faced as a result of the hurricanes.

17. Has the State party taken steps to review federal and state legislation with a view to assessing whether offences carrying the death penalty are strictly restricted to the most serious crimes? Please also indicate whether the death penalty has been expanded to new offences over the reporting period. What steps, if any, has the State party adopted to ensure that the application of death penalty is not imposed disproportionately on ethnic minorities as well as on low-income population, and to improve the quality of legal representation provided to indigent defendants?

(Periodic report, § 459; Previous concluding observations, § 281 and 296)

As an initial matter, the United States took a reservation to the Covenant, permitting it to impose capital punishment within its own constitutional limits. ("The United States reserves the right, subject to its Constitutional restraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment.") Accordingly, the scope of the conduct subject to the death penalty in the United States

is not a matter relevant to the obligations of the United States under the Covenant.

Nevertheless, U.S. constitutional restraints, federal and state laws, and governmental practices have limited the death penalty to the most serious offenses and has prevented the racially discriminatory imposition of the death penalty. Federal laws providing for the death penalty involve serious crimes which result in death, such as murder committed during a drug-related shooting, civil rights offenses resulting in murder, murder related to sexual exploitation of children, murder related to a carjacking or kidnapping, and murder related to rape. There are also a few very serious non-homicide crimes that may result in a death sentence, e.g., espionage, treason, and possessing very large quantities of drugs or drug receipts as part of a continuing criminal enterprise. Recently, Congress enacted several carefully circumscribed capital offenses intended to combat the threat of terrorist attacks resulting in widespread loss of life. (See 18 U.S.C. §§ 1991, 1992, 1993, 2282A, 2283, 2291). These exceptionally grave criminal acts all have catastrophic effects on society.

The federal government maintains a system for carefully examining each potential federal death penalty case, without consideration of the defendant's race, to ensure that the federal death penalty is sought in a fair, uniform, and non-discriminatory manner nationwide. Federal law specifically prohibits relying on a defendant's race or national origin in deciding to seek or impose the death penalty, and the federal death penalty statute additionally requires a sentencing authority to certify that the defendant's race was not considered in deciding the defendant's sentence.

State governments retain primary responsibility for establishing procedures and policies that govern state capital prosecutions. Recently, however, the United States Supreme Court excluded from application of the death penalty those offenders who, at the time of the offense, were under age 18, *Roper v. Simmons*, 543 U.S. 551, 578 (2005), or mentally retarded, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Those decisions are binding on the States. Congress also enacted in 2004 legislation permitting DNA testing in relevant federal and state cases, see 18 U.S.C. § 3600. Earlier this year, Congress also enacted legislation providing for the adoption of procedures to ensure appointment of highly qualified counsel for indigent capital defendants in state cases, see

18 U.S.C. § 3599. Many states have likewise adopted procedures of their own to provide experienced and highly competent counsel for indigent defendants.

18. In the view of the State party, what impact on the rights of women under articles 3, 6, 24 and 26 of the Covenant have (a) government regulations proscribing abortion counseling in programs receiving federal funding; (b) the reported policy of the State party to promote sexual education programs that sanction abstinence as the sole method of pregnancy and disease prevention; and (c) the reported states and federal legislation authorizing health care providers to refuse contraception, sterilization or other reproductive health services on the basis of moral disapproval? (Periodic report, § 329)

None of the examples described in this question adversely affect the rights of women set forth in articles 3, 6, 24 and 26 of the Covenant. The United States does not interfere with the equality of men and women under the law (3, 26), the rights of children under the law (24), and does not arbitrarily deny life (6) when it determines to fund some activities and view-points. The U.S. Constitution does not impose an affirmative obligation to finance the exercise of every right it recognizes. As explained below, the United States Government does not restrict or inhibit the rights of its citizens by declining to subsidize the exercise of those rights.

As a matter of domestic constitutional law, the Supreme Court recognized the right of a competent adult woman to terminate her pregnancy under certain circumstances. U.S. law also protects healthcare providers who object to taking part in abortions on religious or moral grounds. For example, no court or public official may require recipients of funds under the Public Health Service Act to perform or make their facilities available for abortions or sterilization procedures if it would be against the entities religious beliefs or moral convictions. 42 U.S.C. § 300a-7. The same law also forbids discrimination against individual healthcare personnel for refusing to take part in such procedures. These measures protect rights important under the Covenant itself, including Article 18 ("Everyone shall have the right to freedom of thought, conscience, and religion") and Article 26 (requiring freedom from discrimination because of religion).

The United States' decision to fund certain programs over others in no way impinges the rights of women or children under Articles of the Covenant. The intended beneficiaries of abstinence programs are free to seek out other education regarding sexual conduct. The United States funds a variety of programs aimed at preventing unintended pregnancies. For example, under 42 U.S.C. § 710, the United States provides grants to states for the purposes of, among other things, teaching the likely harmful consequences of sexual activity and pregnancy outside of marriage, as well teaching minors the harmful effects of drugs and alcohol on sexual decision-making. These programs provide refusal skills training, information on healthy relationships, and other activities that help youth make optimum choices. In 2006, the federal government will spend over \$50 million on these programs. Adolescents in these programs are not precluded from seeking health information or services in a different setting from the one in which abstinence education is provided.

Prohibition of torture and cruel, inhuman or degrading treatment or punishment (art. 7)

19. Please comment on the use of electronic control equipment (lasers, stun guns, stun belts etc.) by law enforcement officials. It is reported to the Committee that more than 160 people have died following the use of taser guns by law enforcement personnel since 2001. Please provide information on the results of investigations conducted into these deaths. Please report about current regulations for the use of such electronic equipment by the police and other law enforcement personnel.

Electro-muscular disruption devices (EMDs) have been in use by law enforcement agencies in the United States for many years. Several companies sell EMD-based devices, but Taser International, Inc. now dominates the market. Police agencies have deployed two models from Taser International, Inc., the M26 and X26, in large numbers in recent years. These weapons deliver high-voltage, low amperage electrical pulses to a targeted individual through two wire contacts and induce muscle tetany, thus incapacitating the individual. EMD devices are considered "less-lethal weapons," because they incapacitate without intending to kill the targeted individual. After the deployment of EMD

devices, many jurisdictions have seen dramatic drops in injuries and deaths in suspects, officers, and bystanders involved in use-of-force incidents.

The U.S. Government and others have conducted and continue to conduct extensive research into the safety and effectiveness of EMD devices. Research is underway to improve the understanding of electrical current flow through the human body, examine the effect of EMD on human volunteers, monitor the use of less-lethal devices in actual incidents, and determine if use-of-force outcomes improve when less-lethal devices are available. In addition, the Department of Justice works with law enforcement professional associations (such as the International Association of Chiefs of Police and the Police Executive Research Foundation), as well as individual State and local police agencies, to assist the law enforcement community to develop policies regarding the use of EMD devices. This policy guidance includes consideration of community acceptance, use-of-force protocols, continuous monitoring of all uses of EMD devices, medical response, and training. For example, the Department of Justice might help a local law enforcement agency develop a specific protocol regarding the removal of EMD taser probes and training officers to identify when emergency medical personnel should be contacted for such removal. Finally, the Department of Justice advises local departments to consider obtaining and using such options when they lack them. The Department of Justice and the Department of Defense have and continue to fund extensive development work toward improving existing less-lethal weapons, including EMDs and others, and toward developing new and safer such weapons that may provide improved safety and effectiveness to law enforcement and military personnel.

DOJ through its research arm, the National Institute of Justice, is undertaking an independent review of the approximately 30 deaths that have occurred following the use of an EMD device. This study will be led by a steering committee comprised of NIJ, the National Association of Medical Examiners, the College of American Pathologists, and the Centers for Disease Control. The study will involve independent medical examiners in a review of the cases where death occurred within 48 hours after the use of an EMD device. The results of this study will be made publicly available, in accordance with NIJ's long-standing policy. (The higher figure of fatalities cited in the question includes all deaths that occurred within a short

time after an EMD was used; however, only approximately 30 of those deaths have actually been associated by a medical examiner or coroner with the use of the EMD itself.)

The use of EMDs is not per se illegal and is often used because it is a non-lethal alternative for preventing crimes of violence and protecting law enforcement personnel. As with other tactics, however, improper use of EMDs might amount to violations of constitutional rights. Inmates have the right to be free from cruel and unusual punishment under the Eighth Amendment; arrestees have the right to be free from the use of unreasonable force under the Fourth Amendment; and pretrial detainees have the right to be free from conduct that shocks the conscience under the Fourteenth Amendment. Courts have found the use of stun technology, restraint chairs, or other devices unconstitutional where they were not used in good faith. See, e.g., *U.S. v. Tines*, 70 F.3d 891 (6th Cir. 1995) In this case, plaintiff prisoners prevailed in their suit against prison guards' use of stun guns, leg irons, handcuffs, and riot sticks against them as punishment for stealing another prisoner's shoes). In *Estate of Moreland v. Dieter*, 395 F.3d 747 (7th Cir. 2005), police officers' fatal beating and use of pepper spray and a restraint chair against a pre-trial inmate was found to be unconstitutional. In *Hickey v. Reader*, 12 F.3d 754 (8th Cir. 1993), the use of a stun gun on a non-violent inmate who refused to sweep his cell was held to be unconstitutional. On the other hand, the use of EMD devices does not constitute a constitutional violation where the force is applied in good faith to respond to the security risk posed. In, for example, *Caldwell v. Moore*, 968 F.2d 595 (6th Cir. 1992), the use of a straightjacket and stun gun to subdue an inmate after he kicked his cell door and shouted for hours was found to be in good faith and constitutional). The *Jasper v. Thalacker*, 999 F.2d 353 (8th Cir. 1993) case led to a ruling that there was no constitutional violation where stun gun was used on an inmate who threatened and lunged at a guard. Furthermore, use of EMDs often obviates the need to use more severe or even deadly forms of force.

Nevertheless, the Department of Justice remains committed to investigating and, where appropriate, prosecuting use of EMDs where the circumstances indicate a willful use of excessive force in violation of Constitutional standards. For example, earlier this year in Florida, a deputy with the Escambia County Sheriff's Office pleaded guilty to violating 18 U.S.C. § 242 for

repeatedly using a Taser on a victim. He is currently awaiting sentencing. The Department also has active investigations into other allegations involving the misuse of EMDs by law enforcement officers. Because these are ongoing investigations, we cannot comment further on the details or status of these cases.

20. Please report on the compliance with article 7 of the Covenant of (a) the practice of nontherapeutic research conducted on mentally ill persons or persons with impaired decision-making capacity, including minors, and (b) domestic regulations authorizing the President to waive the prior informed-consent requirement for the administration of an investigational new drug to a member of the U.S. Armed Forces, if the President determines that obtaining consent is not feasible, is contrary to the best interests of the military members, or is not in the interests of U.S. national security. (Periodic report, § 143 and 480; Previous concluding observations, § 286 and 300)

The U.S. Government maintains extensive and longstanding programs to protect the rights of welfare on humans involved as subjects in research. The national system oversees all human subjects research conducted or supported by the Federal Government, and all clinical investigations of health care products that require marketing approval from the Food and Drug Administration (FDA) within the U.S. Department of Health and Human Services (HHS). In addition to the Federal Policy for the Protection of Human Research Subjects, informally known as the "Common Rule," which provides basic protections for subjects in all research covered by the regulations, all research conducted or supported by HHS or regulated by HHS/FDA must comply with regulations that provide additional protections for children.

The 1978 *Belmont Report* of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research established respect for persons, along with beneficence and justice, as the ethical principles required for conducting research involving human subjects. Respect for persons requires that each individual's autonomy must be recognized, and that individuals with diminished autonomy must receive additional protections to compensate for the reduction in autonomy.

Informed consent of the research subject is a basic element of the regulations, reflecting the exercise of autonomy by individuals and the underlying principle of

"respect for persons." Conducting research without the consent of the human subjects is permitted only in the narrowly limited circumstances where the risk posed by the research is very low, a waiver of consent will not adversely affect the rights and welfare of the subjects, and the research could not practicably be carried out without the waiver. Waivers of consent in research that HHS/FDA regulates are prohibited in all circumstances except individual or national emergencies.

The Common Rule and HHS/FDA regulations provide that the Institutional Review Board that conducts the ethical review of all proposed research under the regulations must find, among other things, that:

When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects. 45 CFR 46.111(b), 21 CFR 56.111(b).

Where such vulnerable subjects are involved in studies, additional protections would be required. Those additional protections would have to compensate for any diminished autonomy making informed consent unavailable as a protection to be exercised individually by the subject.

In 1999 HHS/FDA issued an interim final rule in response to the enactment of Public Law 105-261, the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (the Defense Authorization Act). (See 64 FR 54180 - 54189) Under the Defense Authorization Act, the President of the United States may grant a waiver of informed consent for the administration of an investigational new drug or a drug unapproved for its applied use to a member of the armed forces in connection with the member's participation in a particular military operation. Specifically, the Defense Authorization Act authorized the President to waive the informed consent requirements of the Federal Food, Drug, and Cosmetic Act (the act) if the President found, in writing, that obtaining consent was infeasible, contrary to the best interests of the service member, or was not in the interests of national security. The interim final rule established criteria and standards for the President to apply in making a determination that informed consent was not feasible or was contrary to the best interests of the individual recipients. (See 21 CFR 50.23(d)).

In 2004 the law was changed again to narrow the circumstances under which the President of the United

States may grant a waiver of informed consent for the administration of an investigational new drug or a drug unapproved for its applied use to a member of the armed forces in connection with the member's participation in a particular military operation. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) revised 10 U.S.C. 1107(f) to specify that the President may waive the prior consent requirement only if the President determines, in writing, that obtaining consent is not in the interests of national security.

The U.S. armed forces do not conduct medical or scientific experimentation without consent on military members. As described above, the authority of the President (under 10 U.S.C. 1107) could be invoked to require mandatory administration of an investigational new drug or a drug unapproved for its applied use to a member of the armed forces. However, this Presidential authority has never been exercised.

Treatment of persons deprived of liberty (art. 10)

21. What are the conditions of detention and the rights of detainees in federal and state maximum security prisons, in comparison with ordinary prisoners? Please comment on the information that many inmates confined in these prisons do not meet the criteria required to be held in such facilities, and that many of them suffer from mental illness. What measures has the State Party taken to protect inmates in federal or state prisons against rape, abuse or other acts of violence? Please also comment on information of shackling women when giving birth in detention. (Periodic report, § 476; Previous concluding observations, § 285 and 299)

Maximum Security

The objective of the Bureau of Prisons' Administrative Maximum (ADX) facility, located in Florence, Colorado, is to confine inmates under close controls while providing them opportunities to demonstrate progressively responsible behavior; participate in programs in a safe, secure environment; and establish readiness for transfer to a less secure institution. The BOP ensures, through careful case reviews, that the ADX is used for only those offenders who clearly need the controls available there. As a result, it houses less than one-third of one percent of the BOP's overall inmate population. Since inmates in this facility

are considered the most dangerous in the BOP, all general population inmates are restrained at all times when they are in contact with staff. However, the central operating philosophy of this institution is to allow inmates as much unrestrained movement and program access within the institution as possible, consistent with staff and inmate safety.

Inmates have access to a broad range of classes, programs, and services. For example, individualized instruction is available from the Education Department to inmates enrolled in General Equivalency Degree programs to complete a secondary school diploma, or English as a Second Language programs. One-on-one tutoring is available to inmates upon request. All inmates have regular access to the prison chaplain each month, in addition to individual visits by the chaplain in response to inmate requests. Inmates receive a minimum of five hours out-of-cell recreation per week. Inmates have the opportunity to recreate in groups and for longer periods of time depending on their compliance with facility regulations.

Rape

Let us be clear at the outset: the rape of an inmate is a serious crime in the United States and is vigorously prosecuted. In this regard, the United States has charged 44 defendants with acts of sexual misconduct ranging from inappropriate sexual contact to forcible rape since October 1999. Of these defendants, sixteen were prison officials and the vast majority of the remaining defendants were police officers. (We have also prosecuted other state officials who committed sexual assault under color of law, such as judges and city officials.) Prison rapes within prisons operated by the fifty states are similarly criminal offenses and are prosecuted by the state law enforcement authorities.

These prosecutions have resulted in lengthy sentences for law enforcement officers and prison officials convicted of sexual assault. For example, in 2005 a former Jackson, Mississippi police officer was sentenced to 20 years in prison for raping a nineteen-year old woman in his custody. In addition, a sheriff in Latimer County, Oklahoma, who was convicted of sexually assaulting several female inmates and employees, was sentenced to 25 years in prison.

In addition, the United States also enforces the Prison Rape Elimination Act of 2003, 42 U.S.C. § 1501, et seq., which calls for: the gathering of national statistics on the incidence and prevalence of sexual assault within

correctional facilities by the Bureau of Justice Statistics; the development of guidelines for states to address prisoner rape; the creation of a review panel within the Department of Justice to hold annual public hearings concerning the operation of the three prisons with the highest incidence of rape, and the two prisons with the lowest incidence of rape; the provision of grants to States to combat the problem of prison rape; and the establishment of a National Prison Rape Elimination Commission ("the Commission") to carry out a comprehensive legal and factual study of the penalogical, physical, mental medical, social and economic impacts of prison rape in the United States. Under the Act, the Commission is required to submit a report no later than three years from its initial meeting to the President, the Congress, the Attorney General, the Secretary of Health and Human Services, the Director of the Federal Bureau of Prisons, the chief executive of each state, and the head of the department of corrections of each state. The report shall include: (1) the findings and conclusions of the Commission; (2) recommended national standards for reducing prison rape; (3) recommended protocols for preserving evidence and treating victims of prison rape; and (4) a summary of the materials relied on by the Commission in the preparation of the report. In addition, under the Act, not later than one year after receiving the Commission report, the Attorney General is to publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape. Within 90 days of publishing the final rule, the Attorney General is required to transmit the national standards to the chief executive of each State, the head of the department of corrections of each State, and to the appropriate authorities in those units of local government who oversee operations in one or more prisons.

Shackling

Regarding the Committee's request for information on shackling women when giving birth in detention, it is not the general policy or practice of the United States Government to shackle female prisoners during childbirth. Although the use of restraints is not prohibited, the Bureau of Prisons does not generally restrain inmates in any manner during labor and delivery. An inmate would be restrained only in the unlikely case that she posed a threat to herself, her baby, or others around her. The

determination of whether the shackling of inmates in labor is permissible therefore depends on the facts of each case.

Allegations of the misuse of shackles or other restraints in both federal and state prisons (whose policy and practices may vary from those of the federal government) are investigated by the Department of Justice. It should be noted that the use of shackles on prisoners is not per se unconstitutional. In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Supreme Court stated that violations of the Eighth Amendment's ban on cruel and unusual punishments are measures that are "unnecessary and wanton inflictions of pain," that is, those that are "totally without penological justification," which may involve "deliberate indifference to the inmates' health or safety." The Department's investigations of allegations of misuse of shackles are based on Eighth Amendment jurisprudence.

22. The Prison Litigation Reform Act of 1995 bars claims based on emotional and psychological mistreatment unless they are accompanied by physical injury. Please explain what the reasons for such restrictions are, and how these restrictions comply with articles 2(3), 7 and 10 of the Covenant.

The Prison Litigation Reform Act of 1995 (PLRA) contains several provisions designed to curtail frivolous lawsuits by prison inmates. One provision is that no federal civil action for damages may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury. 42 U.S.C. § 1997e(e). This provision is fully compatible with U.S. obligations under the Covenant.

Section 1997e(e) allows a prisoner to bring a federal civil action to redress allegations of torture or cruel, inhuman or degrading treatment or punishment. In this way, it permits redress for activities covered by Article 7 of the Covenant. Although nothing in the Covenant requires the availability of monetary damages as a remedy, a prisoner alleging actual physical injury may seek compensatory, nominal, and punitive damages, and injunctive and declaratory relief. See, e.g., *Thompson v. Carter*, 284 F.3d 411, 416 (2d Cir. 2002); see also 42 U.S.C. § 1997e(e). Courts of appeals have held that Section 1997e(e) permits prisoners alleging a non-physical constitutional injury to seek nominal and punitive damages, and injunctive and declaratory relief. See, e.g., *Thompson*, 284 F.3d at 416; see also *Mitchell v. Horn*, 318 F.3d 523, 533-534 (3d Cir. 2003); *Allah v. Al-Hafeez* 226

F.3d 247,251-252 (3d Cir. 2000). This extensive array of redress certainly constitutes the "effective remedies" contemplated by Article 2(3) of the Covenant.

Moreover, nothing in the PLRA displaces the wide range of administrative and other avenues by which prisoners may present complaints and grievances, including several judicial remedies before state courts. Importantly, Article 2(3)(b) of the Covenant expressly contemplates that the "competent authority" to which persons can complain may be an "administrative" body rather than a court of law. Those who violate the rights of prisoners are subject to both civil and criminal liability for their actions. See, e.g., 42 U.S.C. § 1997e(e); 18 U.S.C. § 242. In addition, the government is authorized under the Civil Rights of Institutionalized Persons Act (CRIPA) to investigate institutional conditions and file suit against state and local governments for a pattern or practice of egregious or flagrant unlawful conditions in government-run juvenile correctional facilities, and adult jails and prisons. See 42 U.S.C. § 1997a(a). The PLRA does not affect the United States' authority under CRIPA.

Freedom of association (art. 22)

23. Please explain any restriction imposed on the right to form and join trade unions of, inter alia, agricultural workers, domestic workers, federal, state and local government employees, and immigrant workers, including undocumented workers. Please comment on the information that meatpacking and poultry companies, for example in North Carolina (1996) and Nebraska (2001), have harassed, intimidated, and retaliated against workers - of whom a large proportion are immigrant workers - who have tried to organize, and provide information on measures adopted to combat such practices. In light of the Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. NLRB, please indicate what judicial remedies are made available to undocumented workers in such cases, (articles 2, 22, 26)

United States law and practice impose no restrictions on the right of individuals to form and join trade unions, including immigrant and undocumented workers, as well as individuals employed as agricultural workers, domestic workers, and federal, state, and local government workers. As indicated in the Second and Third Periodic Reports of the United States, freedom of association is principally protected by the First Amendment of the U.S. Constitution, which has been interpreted by the Supreme Court to include

an employee's right to form and join a union without interference from state actors. [See Thomas v. Collins, 323 U.S. 516 (1945)]. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Immigrant employees, including undocumented workers, are protected by the National Labor Relations Act (NLRA) and its guarantee to employees of the right to form, join or assist labor organizations and to act concertedly for mutual aid and protection. The NLRA is enforced by the National Labor Relations Board (NLRB). Many of the cases that come before the NLRB, including cases arising in the meatpacking and poultry industries, involve immigrant employees who are not proficient in English. The Board is committed to serving this population. To that end, it has: increased the number of fully bilingual Board agents to approximately 10% of its non-supervisory field staff (many additional staff are proficient, if not fully bilingual, in a language other than English); published in traditional and electronic format translations of Board publications and standard forms; and routinely ordered that election notices and remedial notices in unfair labor practice cases be posted in translation as well as English where affected employees are not proficient in English.

As to the cases cited by the Committee, without any more specific information, it is difficult to identify with any certainty what the cases were or how they were resolved by the NLRB. However, based on the Board's best estimate, the cases appear to involve organizing drives at Smithfield Foods in Tar Heel, North Carolina and Nebraska Beef in Omaha, Nebraska. In both cases, a large portion of the workers involved in the organizing campaigns were immigrant workers. In North Carolina, a petition to represent workers at Smithfield's Tar Heel facility was filed with the NLRB on July 7, 1997, and an election was conducted on August 22. Based on the Union's unfair labor practice charges and objections to that election, the Board found that while the election petition was pending, the Company, among other things, unlawfully threatened and interrogated employees, surveilled employees' union activities, discouraged them from wearing union paraphernalia, told them support for the union was futile and discriminatorily discharged employees. The Board ordered that the Company cease and desist from its unlawful conduct and make

employees whole for the losses suffered by virtue of that conduct; it further directed that the election be set aside and it directed a re-run election be held. Smithfield Packing, 344 NLRB No. 1 (2004). The D.C. Circuit recently enforced the Board's order. UFCW v. NLRB, ___ F.3d ___, 2006WL1192736 (May 5, 2006).

A petition to represent employees at Nebraska Beef's Omaha facility was filed in June 2001 and an election was conducted on August 16. A number of charges were filed with and investigated by the Regional Office. Where merit was found to the charges, the Regional Office negotiated settlement agreements that remedied the violations found, including back pay and offers of reinstatement to unlawfully discharged employees. In addition, the Board found that the Company had engaged in objectionable conduct and directed that the election be set aside and re-run. Before that election could be held, however, the Union withdrew its representation petition.

In Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002), the Supreme Court did not alter, but rather confirmed, the principle that undocumented workers in the United States may form and join trade unions. Consequently, undocumented workers who are fired illegally for engaging in union activities retain access to traditional remedies for such violations of the NLRA, which include cease and desist orders against employers and requirements that employers conspicuously post a notice to employees setting forth their rights under the NLRA and detailing the employer's prior unfair practices. The continued availability of such remedies, as well as back pay for work that was performed, but at improper wages, was affirmed by the NLRB in Tuv Taam Corp., 340 NLRB No. 86 (2003). The NLRB continues to treat all statutory employees as protected from unfair labor practices and entitled to vote in NLRB elections, without regard to their immigration status.

The Hoffman decision was very narrow, denying back pay to undocumented workers for work not performed if such employment was secured through fraud and in violation of U.S. immigration law. The judicial decisions interpreting Hoffman have continued this narrow reading and have not created any precedent that impairs the right to form or join a union.

Protection of children (art. 24)

24. Forty-two states are reported to have laws allowing children to receive life without parole sentences, and

about 2,225 children are allegedly currently serving such sentences in U.S. prisons. It is also reported that such children may be placed in long-term isolation as punishment for disruptive or disturbed behavior. Please comment, and explain how such legislation complies with the Covenant (Periodic report, § 287-288)

The sentencing and treatment of juveniles in custody in the United States fully complies with the obligations of the United States under the Covenant, including the "right to such measures of protection by his status as a minor".

It is true that persons under the age of 18 in the United States may be sentenced to life in prison without the possibility of parole. In imposing these sentences on persons under 18, governmental entities in the United States have "take[n into] account their age and the desirability of promoting their rehabilitation," consistent with Article 14(4) of the Convention. As a general matter, however, the lengthy sentences were imposed on persons who, despite their youth, were hardened criminals who had committed gravely serious crimes. Although these sentences may be of a type more often imposed on adults, the United States deposited a reservation with its instrument of ratification stating that it may, consistent with the obligations it assumed under the Covenant, treat certain juveniles as adults under exceptional circumstances.⁶ In any event, the imposition of such sentences is accompanied by extraordinary safeguards. If a person under the age of 18 has been sentenced to life in prison without parole, or has had his or her freedom otherwise severely restricted, that juvenile will already have been tried and convicted of an extremely serious crime as an adult (e.g., murder or rape) and would be determined through formally constituted judicial proceedings to be an extreme danger to society. Each state within the United States handles the prosecution, rehabilitation, treatment, and imprisonment of juvenile offenders pursuant to its own statutes.

Whether a juvenile offender is prosecuted as an adult depends upon a number of factors that are weighed by a court, such as, *inter alia*, the age or background of the juvenile, the type and seriousness of the alleged offense, the juvenile's role in committing the crime, and the

⁶ The U.S. reservation states, *inter alia*, that "[t]he United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14."

juvenile's prior record/past treatment records. This ensures that the juvenile is no longer amenable to the treatment and rehabilitative nature of the juvenile justice systems found in most states in our country. Sentencing patterns at the state level vary, but generally, once a juvenile who has been tried as an adult has been found guilty of a serious crime which is punishable by life in prison without parole, a sentencing court may impose a term of imprisonment similar to other adult defendants. Juvenile offenders are separated from adult prisoners to the extent possible, taking into account factors such as the security risk that they pose to other prisoners, the risk of harm to themselves, their need for medical and/or mental health treatment options, and the danger they pose to others and to the community.

At the federal level, the United States Government recognizes that juveniles are a special population with special needs. Juveniles committing delinquent acts, or other criminal acts not subject to federal jurisdiction, are usually returned to their respective states for handling according to their laws. Federal courts do not become involved in a juvenile's case unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that it is necessary to invoke federal jurisdiction over that particular case.

No juvenile committed to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with incarcerated adults who have been convicted of a crime or are awaiting trial on criminal charges. For less serious crimes, juveniles are usually committed to foster homes or community-based facilities located in or near the juvenile's home community. Every juvenile who has been committed must be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care including necessary psychiatric, psychological, or other care and treatment. Juveniles may be placed in facilities where they may have regular contact with other juveniles serving state-imposed adult sentences; or in a Community Corrections Center (CCC); in secure facilities, which are defined as those facilities which are surrounded by a security perimeter and where offenders do not have regular, unescorted access to the community. Placement alternatives vary, and each facility must provide the appropriate level of programming and security for a juvenile offender.

Additionally, if a juvenile is found under federal statute to have committed an illegal act because of a mental disease or defect, he or she is held in a suitable facility until after his or her 18th birthday. Facilities may include juvenile facilities, mental health facilities, and/or hospitals. Such a juvenile offender does not have contact with pre-trial or sentenced adults. After his or her 18th birthday, the offender's case is reviewed every six months by a Medical Designator to assess the continued handling of the offender's case.

The Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 authorizes the U.S. Department of Justice Civil Rights Division (CRD) to enforce the constitutional rights of juveniles confined to state prisons. In these juvenile justice matters, CRD has increased the number of settlement agreements, doubled the number of investigations authorized, and tripled the number of findings letters issued over the past five years. Federal CRIPA investigations focus on myriad issues, including the inappropriate use of isolation. The CRD has determined that the inappropriate isolation of juveniles, including long-term isolation as punishment for disruptive or disturbed behavior violates constitutional rights. The CRD has made findings that isolation should be used only to the extent necessary to protect juveniles from harm to themselves or others or to maintain institutional discipline. Moreover, the CRD has found that youth placed in disciplinary isolation are entitled to notice of their charges, a hearing before an independent decision-maker, and an opportunity to present evidence in their defense.

25. Please provide more details on the rules governing the removal and restoration of the right to vote for those convicted for criminal offences, and explain to what extent they comply with article 25 of the Covenant. Has the recommendation made in 2001 by the National Commission on Federal Election Reform that all states restore voting rights to citizens who have fully served their sentences been implemented and if not, for what reasons? Please comment on the information that about five million citizens cannot vote due to a felony conviction, and that this practice has significant racial implications. (Periodic report, § 410-412)

The recommendation made by the National Commission on Federal Election Reform has not been endorsed by all states. Because such decisions are up to state governments

and not the federal government, the United States is not in a position to explain definitively the various state rationales. The question of the application of federal law to felon disenfranchisement was addressed most recently by the United States Court of Appeals for the Second Circuit in *Hayden v. Pataki*, Docket No. 04-3886-pv (2d Cir. May 4, 2006). There the Court held that the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, does not preempt felon disenfranchisement statutes.

Although States are considering adjustments to the laws that disenfranchise convicted felons, felon disenfranchisement is not a violation of Article 25 of the Convention. A distinction drawn on the basis of an individual's commission of serious criminal acts leading to prior felony convictions is not a status of the sort listed in paragraph 1 of Covenant Article 2 (i.e., race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) as an inappropriate distinction in the availability of the franchise. Thus, such a distinction is not prohibited by the first clause in Article 25, which incorporates the Article 2 listing. In addition, as the disqualification of the felons from the franchise is a deeply rooted restriction on the participation in the public sphere through voting and is itself based on a characteristic wholly within the control of the individual, it cannot be regarded as "unreasonable."

Annex A

Selected Definitions of "Terrorism" and Related Terms from U.S. Federal Statutes and Related Authorities

From 8 U.S.C. § 1182(a)(3)(B)

Section (iii) "Terrorist activity" defined: As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116 (b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

Section (iv) "Engage in terrorist activity" defined: As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi) (I) or (vi) (II); or

(cc) a terrorist organization described in clause (vi) (III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this clause;

(bb) for membership in a terrorist organization described in clause (vi) (I) or (vi) (II); or

(cc) for membership in a terrorist organization described in clause (vi) (III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in clause (vi) (I) or (vi) (II); or

(dd) to a terrorist organization described in clause (vi) (III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity.

This clause shall not apply to any material support the alien afforded to an organization or individual that has committed terrorist activity, if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, concludes in his sole unreviewable discretion, that this clause should not apply.

From 22 USC 2656f:

Section (d) (2) the term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents;

From Executive Order 13224:

Sec. 3. (d) the term "terrorism" means an activity that --

(i) involves a violent act or an act dangerous to human life, property, or infrastructure; and

(ii) appears to be intended -

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

Annex A

Annex B

Factual Information Related to Human Rights Committee Questions 4 Through 9 Provided on the Basis Described in Paragraph 130 of the U.S. Second and Third Periodic Report

The United States notes and reaffirms paragraph 130 of its Second and Third Periodic Report:

"130. The United States recalls its longstanding position that it has reiterated in paragraph 3 of this report and explained in detail in the legal analysis provided in Annex I; namely, that the obligations assumed by the United States under the Covenant apply only within the territory of the United States. In that regard, the United States respectfully submits that this Committee request for information is outside the purview of the Committee. The United States also notes that the legal status and treatment of such persons is governed by the law of war. Nonetheless, as a courtesy, the United States is providing the Committee pertinent material in the form of an updated Annex to the U.S. report on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."

It remains the position of the United States that the questions contained in this Annex fall outside the scope of the Covenant. As a courtesy, the United States directs the Committee to the following information provided to the Committee Against Torture and in other public statements it has made on the issues and questions raised by the Committee.⁷

4. Please indicate in detail how the State Party ensures full respect for the rights enshrined in the Covenant in relation to its actions to combat terrorism (a) in Afghanistan; (b) in Iraq, (c) in any other place outside its territory, and (d) on its own territory, in particular when it holds detainees. In particular, please comment on the allegation that the State party has established secret detention facilities, on U.S. vessels and aircrafts as well as outside the U.S., and that it has not acknowledged all detentions of individuals captured within the framework of

⁷ Much of the information provided to the Committee Against Torture has been updated and is publicly available at: <http://www.state.gov/g/drl/rls/>.

counter-terrorism activities. How would such practices comply with the Covenant, in particular with articles 7, 9 and 10?

While the United States reiterates paragraph 130 of its second and third periodic report that the terms of the Covenant apply exclusively within the territory of the United States and that U.S. military operations in Iraq and Afghanistan are outside the scope of the Covenant,⁸ the United States also notes the exceptional breadth of the question (i.e., requesting a description "in detail" about how U.S. operations in two different theaters of combat would implement twenty seven operative articles of the Covenant).

The United States has made available to the Committee extensive detailed information provided to the United Nations Committee Against Torture on the treatment of detainees in its military operations in Iraq, Afghanistan, and Guantanamo Bay, Cuba. In addition to the October 2005 Annex to the U.S. report on its implementation of the Convention Against Torture, the United States has provided electronically to the Committee the United States Government's written responses to the questions of the Committee Against Torture, the opening statement by State Department Assistant Secretary Barry Lowenkron, the opening remarks by State Department Legal Adviser John B. Bellinger, the responses to questions from the Committee Against Torture delivered May 5, 2006, the responses to questions from the Committee Against Torture delivered May 8, 2006 and the U.S. delegation departure statement. Comments of the U.S. delegation during the May 2006 U.S. appearance before the Committee Against Torture include information about the U.S. combat against terrorism.

As this information demonstrates, the United States has developed extensive programs of legal prohibitions, training requirements, rules, and instructions, which are carefully designed to minimize the possibility of abuse. There are also mechanisms of systematic review of these policies. The United States has demonstrated it will hold accountable those who violate its laws and policy of humane

⁸ This statement also applies to U.S. responses related to questions 5-9. For purposes of brevity, the statement will not be repeated in each response.

treatment of detainees.

U.S. officials from all government agencies are prohibited from engaging in torture, at all times, and in all places. All U.S. officials, wherever they may be, are also prohibited by statute from engaging in cruel, inhuman or degrading treatment or punishment against any person in U.S. custody, as defined by our obligations under the Convention Against Torture. Despite these prohibitions and mechanisms for enforcing them, some individuals have committed abuses against detainees being held in the course of our current armed conflict in Iraq and against Al Qaida and its affiliates. The United States Government deplores those abuses. The United States investigates all allegations of abuse vigorously and when they are substantiated, holds accountable the perpetrators. These processes are all ongoing.

For further detailed information, the United States draws the Committee's attention to the information provided to the Committee as well as to the materials provided in connection with the United States meeting with the Committee Against Torture in May 2006.

As the United States informed the Committee Against Torture (pp 19-20 of the May 5, 2006 CAT transcript):

". . . the United States does not comment on information or reports relating to alleged intelligence operations. That being said, Secretary Rice recently explained that the United States and other countries have long used renditions to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice. Rendition is a vital tool in combating international terrorism, which takes terrorists out of action and saves lives. . . . the United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture. The United States has not transported anyone, and will not transport anyone, to a country if the United States believes he or she will be tortured. Where appropriate, the United States seeks assurances it considers to be credible that transferred persons will not be tortured."

With respect to the request for U.S. "comment on the allegation that the State party has established secret detention facilities, on U.S. vessels and aircraft as well as outside the U.S., and that it is has not acknowledged all detentions of individuals captured within the framework of counter-terrorism activities", as it informed the Committee Against Torture:

"The United States, like other countries, does not to comment on allegations of intelligence activities.

"However, the U.S. government is clear in the standard to which all entities must adhere. All components of the U.S. government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment, as defined in U.S. law. The U.S. government does not permit, tolerate, or condone unlawful practices by its personnel or employees under any circumstances. U.S. criminal law, specifically 18 U.S.C. §§ 2340 & 2340A, make it a felony offense for a person acting under the color of law to commit, attempt to commit, or conspire to commit torture outside the United States. In addition, pursuant to the Detainee Treatment Act of 2005, the prohibition on cruel, inhuman, or degrading treatment or punishment as defined by U.S. obligations under the Convention Against Torture applies as a matter of law to protect any persons "in the custody or under the physical control of the United States Government, regardless of nationality or physical location."

5. Please provide updated information on the identity, place of origin, place of deprivation of liberty and number of persons held in Guantanamo as well as information on the release of such persons and the date of their release, where applicable. Please provide also information on the status of proceedings of cases where detainees have challenged their detention and their legal status before a U.S. federal court, and on the outcome of such challenges. Please report on the significance of Section 1005 of the Detainee Treatment Act of 2005 in this regard, and on its impact on challenges already made by Guantanamo detainees.

What are the guarantees ensuring the independence of Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs) from the executive branch and the army, and how are the restrictions on the rights of detainees to have access to all proceedings and evidence justified? Please also report on the number of Guantanamo detainees who have been or are still on hunger strikes, and provide information on the methods used and the reasons justifying force-feeding. (Periodic report, § 173; CAT/C/48/Add.3/Rev.1, Annexes, Parts, § 29-43 and 55-62)

For further information, the United States refers the Committee to the information the United States provided at its meeting with the Committee Against Torture in May 2006.

As the United States informed the Committee Against Torture:

- "With respect to persons under the control of the United States Department of Defense (DoD), detainees are accounted for fully as required under DoD policies. Detainees under the control of the Department of Defense are issued an internment serial number, or "ISN," as soon as practicable, normally within 14 days of capture.
- "Because of operational security considerations, public disclosure of transfers or releases from DoD control are not announced publicly until the movement of detainees from DoD control is completed. The U.S. government will not transfer an individual to a country where it is more likely than not that the individual will be tortured.
- "As of February 20, 2006⁹, the Department of Defense holds approximately 490 detainees at its facilities in Guantanamo Bay, Cuba; approximately 400 detainees at its facilities in Afghanistan; and approximately 14,000 detainees at its facilities in Iraq.

⁹ Much of this information has been updated by the United States and publicly available at http://www.defenselink.mil/news/Jun2006/20060625_5503.html (visited July 6, 2006). As provided in that statement, as of June 25, 2006, there are about 450 persons being detained by the United States at Guantanamo Bay, Cuba.

- "Individuals detained by the Department of Defense in Afghanistan and at Guantanamo are held pursuant to the Order of the President of the United States of November 13, 2001 (Federal Register: November 16, 2001 (Volume 66, Number 222), Page 57831-57836). In addition, the classification of their legal status, the basis for their detention, and their expected duration of detention, is further described in the Memorandum of the President of the United States, February 7, 2002.
- "Individuals detained at DoD detention facilities in Iraq are detained as part of the ongoing military operations conducted by Multinational Forces Iraq (MNF-I). As an update to that information, it should be noted that the United Nations Security Council, on November 11, 2005, decided to extend the relevant provisions of UNSCR 1546 in issuing UNSCR 1637 until December 31, 2006.¹⁰
- "The standard for conditions under which detainees detained by the Department of Defense in Afghanistan and at Guantanamo are to be held, including their access to medical care, is set forth in the Memorandum of the President of the United States, February 7, 2002.
- "The United States recognizes that medical care is an important part of ensuring the safe and humane detention of individuals under its custody. The United States therefore has taken measures to ensure adequate medical care for detainees.¹¹
- "Detainees who have filed habeas corpus claims in the U.S. federal courts have access to counsel."

¹⁰ Available at

<http://daccessdds.un.org/doc/UNDOC/GEN/N05/592/77/PDF/N0559277.pdf?OpenElement> (visited July 5, 2006)

¹¹ Assistant Secretary of Defense (Health Affairs) Policy 05-006, Medical Program Principles and Procedures for the Protection and Treatment of Detainees in the Custody of the Armed Forces of the United States) (June 3, 2005), available at <http://www.ha.osd.mil/policies/2005/05-006.pdf> (visited July 5, 2006).

As the United States explained to the Committee Against Torture on May 5, 2006¹²:

"Question 34 asks whether the Combatant Status Review Tribunals and the Administrative Review Boards have any jurisdiction regarding complaints of torture and cruel, inhuman or degrading treatment or punishment. The Annex to the *Second Periodic Report* describes the scope, jurisdiction, and impartiality of these processes. Our answers to the Committee's questions provide an update on the judicial review applicable to the CSRTs under the Detainee Treatment Act of 2005. These are processes with specific purposes, namely to review the initial enemy combatant determination in the case of the CSRTs and to determine on an annual basis whether there is a continued need to detain an enemy combatant in the ARBs. Of course, if credible allegations of torture or cruel, inhuman, or degrading treatment or punishment were raised during such proceedings (or in any other context), they would be investigated and acted upon based upon the information that is uncovered."

With regard to procedures in place for Combatant Status Review Tribunals for detainees at Guantanamo Bay, the United States provided the following information to the Committee Against Torture in its October 2005 Annex to its report on its implementation of the Convention Against Torture:

"C. Combatant Status Review Tribunals (CSRTs) for Detainees at Guantanamo Bay

"Between August 2004 and January 2005, various Combatant Status Review Tribunals (CSRTs) have reviewed the status of all individuals detained at Guantanamo, in a fact-based proceeding, to determine whether the individual is still classified as an enemy combatant. As reflected in the Order establishing the CSRTs, an enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a

¹² Transcript of May 5 CAT Committee Session, pp 42-43.

belligerent act or has directly supported hostilities in aid of enemy armed forces." CSRT Order ¶B (at < <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>> (visited October 13, 2005)). Each detainee has the opportunity to contest such designation. The Deputy Secretary of Defense appointed the Secretary of the Navy, The Honorable Gordon England, to implement and oversee this process. On July 29, 2004, Secretary England issued the implementation directive for the CSRTs, giving specific procedural and substantive guidance. (At < <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>> (visited October 13, 2005)). On July 12-14, 2004, the United States notified all detainees then at Guantanamo of their opportunity to contest their enemy combatant status under this process, and that a federal court has jurisdiction to entertain a petition for habeas corpus brought on their behalf. The Government has also provided them with information on how to file habeas corpus petitions in the U.S. court system. (At <http://www.defenselink.mil/news/Dec2004/d20041209ARB.pdf> (visited October 13, 2005)). When the Government has added new detainees, it has also informed them of these legal rights.

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

- "Tribunals are composed of three neutral commissioned officers, plus a non-voting officer who serves as a recorder;
- "Decisions are by a preponderance of the evidence by a majority of the voting members who are sworn to execute their duties impartially;
- "The detainee has the right to (a) call reasonably available witnesses, (b) question witnesses called by the tribunal, (c) testify or otherwise address the tribunal, (d) not be compelled to testify, and (e) attend the open portions of the proceedings;

- "An interpreter is provided to the detainee, if necessary; and
- "The Tribunal creates a written report of its decision that the Staff Judge Advocate reviews for legal sufficiency. See CSRT Implementation Memorandum, July 29, 2004 (at < <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>> (visited October 13, 2005)).

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

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

"As of March 29, 2005, the CSRT Director had taken final action in all 558 cases. Thirty-eight detainees were determined no longer to be enemy combatants; twenty-eight of them have been subsequently released to their home countries, and at the time of this Report's submission, arrangements are underway or being pursued for the release of the others. (At < <http://www.defenselink.mil/releases/2005/nr20050419-2661.html>> (visited October 13, 2005))."

For further detailed information, the United States draws the Committee's attention to the information provided to the Committee as well as to the materials provided in connection with the United States meeting with the Committee Against Torture in May 2006. Specifically, the United States draws the Committee's attention to U.S. responses regarding issues the scope, jurisdiction, and impartiality of these processes at pages 42-43 of the May 5th transcript, the updated annex to the CAT report also submitted to the Human Rights Committee October 2005, and pages 76-77 of the USG's written response to the CAT.

As the United States responded to the Committee Against Torture's written questions:

"Pages 54-62 of the Annex to the *Second Periodic Report* describe the scope, jurisdiction, and impartiality of the Combatant Status Review Tribunal and the Administrative Review Board processes. These processes do not exercise jurisdiction over complaints of torture and/or cruel, inhuman or degrading treatment or punishment. To the extent such credible allegations would be raised during such proceedings, they would be investigated and acted upon based upon the information that is uncovered. The Department of Defense takes very seriously allegations of detainee abuse and will hold accountable those who have violated the law or DoD policy."

6. Please provide more information on the extent to which the 2001 Presidential Military Order, which authorizes the trial of non U.S. citizens suspected of terrorism before military commissions, complies with the Covenant. Please indicate how proceedings before these commissions ensure due process, and guarantee that evidence obtained via torture or ill-treatment shall not be used. Please comment also on how restrictions to the right to appeal sentences

are compatible with the Covenant, (articles 2, 6, 7, 14 and 26) (CAT/C/48/Add.3/Rev.1, Annexes, Part I, § 48-54)

In June of 2006, in the case *Hamdan v. Rumsfeld* (548 U.S. (no. 05-184) (2006)), the U.S. Supreme Court ruled that the military commissions established pursuant to the President's Military Order of November 13, 2001 would violate existing U.S. law. All military commission activity under that order has, consequently, ceased. The U.S. Government is carefully reviewing the Court's opinion in that case in order to determine how to proceed.

While the United States is reviewing this issue, it is important to note the extensive procedures that it had put in place to ensure that persons charged with offenses under the military commission procedures would receive full and fair judicial process. These procedures were described in the Annex to the October 2005 U.S. Report on its implementation of the Convention Against Torture:

"F. Military Commissions to Try Detainees Held at Guantanamo Bay

"In 2001, the President authorized military commissions to try certain individuals for violations of the law of war and other applicable laws. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001 (at <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> (visited October 13, 2005)).

"Military commissions have a long history as a legitimate forum to try those persons who engage in belligerent acts in contravention of the laws of war. The United States has used military commissions throughout its history. During the Civil War, Union Commanders conducted more than 2,000 military commissions. Following the Civil War, the United States used military commissions to try eight conspirators (all U.S. citizens and civilians) involved in President Lincoln's assassination. During World War II, President Roosevelt used military commissions to prosecute eight Nazi saboteurs for spying (including at least one U.S. citizen). A military commission tried a Japanese General for war

crimes committed while occupying the Philippine Islands. In addition to the international war crimes tribunals, Allied Powers States, including England, France, and the United States, tried hundreds of lesser-known persons by military commissions in Germany and the Pacific theater after World War II.

"To date, the President has designated seventeen individuals as eligible for trial by military commission. Of those, the United States has since transferred three of those designated to their country of nationality, where they have been released. Four Guantanamo detainees have been charged and have had preliminary hearings before a military commission. Pending the outcome of the appeal in *Hamdan v. Rumsfeld*, the Appointing Authority issued a directive on December 10, 2004, holding in abeyance these four cases. On September 20, 2005, the Appointing Authority revoked this Directive as to the case of *United States v. David Mathew Hicks*. On September 23, 2005, the Presiding Officer scheduled the initial session in this case for November 18, 2005.

"In Federal Court litigation concerning military commissions, the Court of Appeals for the District of Columbia Circuit recently confirmed the President's authority to convene military commissions as part of the conduct of war. *Hamdan v. Rumsfeld*, 415 F.3d 33, 37-38 (D.C. Cir. July 15, 2005). The petitioner in that case, Salim Ahmed Hamdan, has sought review of this decision by the U.S. Supreme Court. The Supreme Court has not decided whether it will consider the appeal.

"On August 31, 2005, the Secretary of Defense approved several changes to the rules governing military commissions. These changes follow a careful review of commission procedures and take into account a number of factors, including issues that arose in connection with military commission proceedings that began in late 2004. Other factors included a review of relevant domestic and international legal standards and suggestions from outside organizations on possible improvements to the commission process. DoD will continue to evaluate how it conducts commissions and, where appropriate, make changes that improve the process.

"The principal effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury. Under previous procedures, the presiding officer and other panel members together would determine findings and sentences, as well as resolve most legal questions. The new procedures remove the presiding officer from voting on findings and sentencing and give the other panel members sole responsibility for these determinations, while allocating responsibility for ruling on most questions of law to the presiding officer.

"The new changes also clarify the provisions governing the presence of the accused at trial and access by the accused to classified information. The new provisions make clear that the accused shall be present except when necessary to protect classified information and where the presiding officer has concluded that admission of such information in the absence of the accused would not prejudice a fair trial. These changes also make clear that the presiding officer must exclude information from trial if the accused would be denied a full and fair trial from lack of access to the information. If the accused is denied access to classified information admitted at trial, his military defense counsel will continue to have access to the information. Other changes approved include lengthening the amount of time for the Military Commissions Review Panel to review the trial record of each case."

7. Please report on interrogation techniques authorized or practised in Guantanamo, Afghanistan, Iraq, or other places of detention under U.S. control or by U.S. agents outside the U.S., including non-military services or contract employees. Has the State party authorized, and does it still authorise, the use of techniques such as stress positions, isolation, sensory deprivation, hooding, exposure to cold or heat, sleep and dietary adjustments, 20-hour interrogations, removal of clothing and of all comfort items, forced shaving, removal of religious items, use of dogs to instill fear and mock-drowning? If so, please report on the compliance of such techniques with articles 7, 10 and 18 of the Covenant. (CAT/C/48/Add.3/Rev. 1, Annexes, Part I, § 78-82)

As the United States informed the Committee Against Torture:

- "The Detainee Treatment Act of 2005 prohibits cruel, inhuman, and degrading treatment or punishment, as that term is defined by U.S. obligations under Article 16 of the Convention Against Torture, and applies as a matter of statute to protect any persons "in the custody or under the physical control of the United States Government, regardless of nationality or physical location." The Act also provides for uniform interrogation standards that "[n]o person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation." These standards apply to military, DoD civilians, and contract interrogators.
- "A revised version of the United States Army Field Manual on Intelligence Interrogation will be released soon. While it would not be appropriate to report on the contents of this document until it is released, the United States can confirm that it will clarify that certain categories of interrogation techniques are prohibited. For example, the revised manual will confirm that waterboarding, which the manual has never authorized, is not authorized.
- "As already noted, the United States does not comment publicly on alleged intelligence activities. But, like any other U.S. government agency, any activities of the CIA would be subject to the extraterritorial criminal torture statute and the Detainee Treatment Act's prohibition on cruel, inhuman, or degrading treatment or punishment."

8. Please comment on measures adopted to ensure full implementation of Section 1003 of the Detainee Treatment Act of 2005, including in relation to persons detained by nonmilitary services and contract employees, as well as on remedies available in cases of non-implementation of this provision. Does the State Party believe that there are any circumstances in which methods prohibited by article 7 of the Covenant may be lawfully used?

Consistent with the provisions of the Detainee Treatment Act of 2005, the Department of Defense will provide the United States Congress with a report as specified under the Act on its implementation.

As the United States informed the Committee Against Torture:

"The prohibitions on torture and on cruel, inhuman or degrading treatment or punishment contained in Section 1003 of the Detainee Treatment Act of 2005 apply to all U.S. officials from all government at all times and in all places. Accordingly, it is clear that the United States does not believe that there are any circumstances in which the methods prohibited by these statutes may lawfully be used. These prohibitions are codified in United States law. All allegations are thoroughly investigated and violations punished."

9. Please provide information about the independence and impartiality of the official investigations conducted into allegations of torture and ill-treatment by agents of U.S. military and non-military services, or contract employees, in detention facilities in Guantanamo, Afghanistan and Iraq, and into alleged cases of suspicious death in custody in any of these locations. Please also indicate whether the role of all U.S. agencies, including the Central Intelligence Agency, was fully investigated. What made it possible for such acts to occur? Please provide updated information on the results of the criminal investigations on the allegations of torture and ill-treatment by U.S. military or nonmilitary services, or contract employees in the Abu Ghraib prison, as well as on prosecutions launched and sentences passed. Has compensation been granted to the victims? (articles 6 and 7) (CAT/C/48/Add.3/Rev.1, Annexes, Part I, § 83-93 and Part II, § 110-125)

As the United States informed the Committee Against Torture:

- "The Department of Defense has conducted 12 major reviews of its detention operations. These reviews have focused on all aspects of detention operations - from the point of capture to theatre level detention facility operations. The investigations were not overseen or directed by DoD officials. Panels were

allowed access to all materials and individuals they requested. They were provided any resources for which they asked, including the assignment of more senior personnel when investigations required it. Finally, senior DoD officials did not direct the conclusions drawn by the panels.

- "All investigations conducted by the Department have been impartial fact-finding reviews of detention operations. The recommendations generated by these investigations have been taken seriously.
- "The Department of Defense has conducted numerous investigations into all aspects of its detention operations following the events of Abu Ghraib. It has conducted over 12 major reviews and continues to examine this issue. Further, the United States refers the Committee to Section III(B) (1) of the Annex to the *Second Periodic Report* which describes in detail the reviews and investigations that have already occurred. Of particular relevance to the Committee's question is the citation to the testimony of Vice Admiral Church to the U.S. Senate Armed Services Committee that after his lengthy investigation - the broadest review of interrogation policies to date - he had concluded that "clearly there was no policy, written or otherwise, at any level, that directed or condoned torture or abuse; there was no link between the authorized interrogation techniques and the abuses that, in fact, occurred."
- "There are extensive programs of training and information, rules and instructions, and mechanisms of systematic review that apply to military personnel involved in the custody, interrogation or treatment of detainees. Education programs and information for military personnel, including contractors, involved in the custody, interrogation or treatment of individuals in detention include training on the law of war, which is provided on at least an annual basis (and more frequently as appropriate) for the members of every service and for every person, including contractors, who works with detainees. This extensive training on law of war includes instruction on the prohibition against torture and the requirement of humane treatment and other subjects, including human rights. Of course, no training program, however extensive, will be able to prevent every case of abuse.

- "Mechanisms for systematic review regarding the custody, interrogation, and treatment of detainees include inspector general visits, command visits and inspections, Congressional and intelligence oversight committees and visits as well as reviews conducted pursuant to unit procedures and by the chain of command. They also include case-specific investigations and overall reviews, including the 12 major Department of Defense reviews of detainee policy described above.
- "On June 9, 2004, the Secretary of Defense issued a directive regarding the procedures and policies governing the death of a detainee in the control of the Armed Forces of the United States. This directive prescribes the processes and procedures to ensure that the circumstances and causes of death of a detainee are accurately determined and that violations of law or policy, if the cause of such death, is properly investigated and appropriate action taken.
- "Investigations regarding detainee deaths are conducted through Service Components, typically the Army Criminal Investigation Division (CID) or the Naval Criminal Investigation Service (NCIS). Prosecutions for alleged violations of the UCMJ are conducted by the Service Components."

Extensive additional information relating to investigations conducted with regard to allegations of abuse arising outside the territory of the United States were provided to the Committee Against Torture and are available to the Human Rights Committee. For example, as the United States informed the Committee Against Torture:

"With respect to the question related to investigations of activities of U.S. intelligence agencies, the United States notes that U.S. intelligence activities are also subject to monitoring and oversight. All of the activities of our Central Intelligence Agency are subject to inspection and investigation by the CIA's independent Inspector General and to oversight by the intelligence committees of the United States Congress. The CIA continues to review and, where appropriate, revise its procedures, including training and legal guidance, to

ensure that they comply with U.S. Government policies and all applicable legal obligations, including the Convention Against Torture and the Detainee Treatment Act. To this end, the CIA has put new guidelines and procedures in place during the last several years."