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## **PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT**

**Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,  
Philip Alston**

**Addendum**

**Mission to the United States of America\*\***

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\* The final edited version may, due to editing, contain minor modifications.

\*\* The summary of this document is being circulated in all official languages. The report, which is annexed to the summary, is being circulated in English.

## Summary

There is a good deal to commend about the record of the United States of America on extrajudicial killings: in most instances there is no lack of laws or procedures for addressing potentially unlawful killings and, at least domestically, data is generally gathered systematically and responsibly. I found, however, three areas in which significant improvement is necessary if the U.S. Government is to match its actions to its stated commitment to human rights and the rule of law.

First, the Government must ensure that imposition of the death penalty complies with fundamental due process requirements; the current systems' flaws increase the likelihood that innocent people will be executed. Second, the Government must provide greater transparency into law enforcement, military, and intelligence operations that result in potentially unlawful deaths. Third, the Government must overcome the current failure of political will and provide greater accountability for potentially unlawful deaths in its international operations; political expediency is never a permissible basis for any State to deviate from its obligation to investigate and punish violations of the right to life.

It is widely acknowledged that innocent people have likely been sentenced to death and executed. Yet, in Alabama and Texas, I found a shocking lack of urgency about the need to reform glaring criminal justice system flaws. Each state should undertake a systematic inquiry into its criminal justice system and ensure that the death penalty is applied fairly, justly, and only for the most serious crimes. Deficiencies that should be remedied include the lack of adequate counsel for indigent defendants and racial disparities in sentencing. The system of electing judges in both states should be reconsidered because it politicizes the death penalty and unfairly increases the likelihood of a capital sentence. Given the inadequacies of state criminal justice systems, Congress should enact legislation permitting federal court habeas review of state and federal death penalty cases on the merits.

I am also concerned that the death penalty could be imposed under the Military Commissions Act of 2006, the provisions of which violate the due process requirements of international human rights and humanitarian law. I welcome the Government's stay of commission proceedings. It should not resort to prosecutions under the Act again.

Significant attention needs to be given to promoting transparency into potentially unlawful killings. Domestically, although the Government does a strong job of collecting data generally, it fails to provide timely and meaningful information about deaths in immigration detention or arising out of law enforcement activities.

Transparency failures are far more acute in the Government's international military and intelligence operations. First, the Government has failed to track and make public the number of civilian casualties, or the conditions under which deaths occurred. Second, the military justice system fails to provide ordinary people, including U.S. citizens and the families of Iraqi or Afghan victims, basic information on the status of investigations into civilian casualties or prosecutions resulting therefrom. Third, the government has refused to disclose the legal basis for targeted killings conducted through drone attacks on the territory of other States, or to identify any safeguards in place to reduce collateral civilian casualties and ensure that the Government has targeted the correct person.

These transparency failures contribute to the lack of accountability for wrongful deaths. They represent a lost opportunity to learn from mistakes and apply policies and practices that reduce casualties. Unsurprisingly, they have undermined support for U.S. operations. Such failures are remedied relatively easily, and the measures I recommend should be implemented expeditiously.

All States have an obligation to effectively investigate, prosecute, and punish violations of the right to life, including in situations of armed conflict. It is important, of course, to acknowledge the unique characteristics and challenges of armed conflict, including that intentional killing may be permitted. But the obligation to enforce the law does not change: the rule of law must be upheld in war as in peace.

Some aspects of the rule of law have been taken seriously during U.S. military operations. Thus, after visiting Afghanistan in May 2008, I noted that I saw no evidence that international forces in Afghanistan, including those of the United States, were committing widespread intentional killings in violation of human rights or humanitarian law. In addition, the Government has implemented compensation programs for civilian victims of U.S. military

operations. While these programs should be improved, the United States has shown admirable leadership in relation to compensation payments.

However, there have been chronic and deplorable accountability failures with respect to policies, practices and conduct that resulted in alleged unlawful killings – including possible war crimes – in the United States’ international operations. The Government has failed to effectively investigate and punish lower-ranking soldiers for such deaths, and has not held senior officers responsible under the doctrine of command responsibility. Worse, it has effectively created a zone of impunity for private contractors and civilian intelligence agents by failing to investigate and prosecute them.

These accountability failures arise in part from a lack of political and prosecutorial will that is utterly inconsistent with the Government’s stated commitment to upholding the rule of law. The new administration’s expressed desire to “move forward” from past unlawful policies and practices is understandable, but cannot be accomplished without accountability. It would set a dangerous precedent, domestically and internationally, if the Government were to bow to political pressure and fail to enforce its own laws against wrongful deaths and illegal abuse.

Although there is no substitute for prosecution of violations of the right to life, in the short-term there are other steps the Government can take toward transparency and accountability. One step is the creation of a national “commission of inquiry” to conduct an independent, systematic and sustained investigation of policies and practices that lead to deaths and other abuses. Another is the appointment of a special prosecutor independent of the pressures on the political branches of Government. Adoption of both mechanisms would send the strong message that the United States truly is “moving forward.”

**Annex**

**REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY  
OR ARBITRARY EXECUTIONS, PHILIP ALSTON, ON HIS MISSION TO THE  
UNITED STATES OF AMERICA (16 -30 JUNE 2008)**

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## **I. BACKGROUND AND INTERNATIONAL LEGAL FRAMEWORK**

1. I spent two weeks (16-30 June 2008) visiting the United States of America at the invitation of the Government and met with federal and state officials, judges, civil society groups, and victims and witnesses in Washington DC, New York City, Montgomery (Alabama), and Austin (Texas).

2. I am grateful to the Government of the United States for its cooperation and for facilitating meetings with officials from the Departments of State, Justice, Defense and Homeland Security, as well as officials in Alabama and Texas. The Government's willingness to invite me and to engage in a constructive dialogue sends an important message. I am also grateful to the representatives of civil society organizations who met with me.

3. Although the title of my mandate may seem complex, it should be simply understood as including any killing that violates international human rights or humanitarian law. This may include unlawful killings by the police, deaths in military or civilian custody, killings of civilians in armed conflict in violation of humanitarian law, and patterns of killings by private individuals which are not adequately investigated and prosecuted by the authorities. My mandate is not abolitionist, but the death penalty falls within it with regard to due process guarantees, the death penalty's limitation to the most serious crimes and its prohibition for juvenile offenders and the mentally ill.

4. The United States is party to the International Covenant on Civil and Political Rights, the Convention against Torture and the Geneva Conventions of 1949. Like all parties to armed conflicts, the United States is also bound by customary and conventional international humanitarian law.

## **II. DOMESTIC ISSUES**

### **A. The death penalty: the risk of executing the innocent**

5. In the United States, 35 states, the federal Government and the U.S. military provide for the death penalty.<sup>1</sup> Some 3,300 people are on death row across the country, and, since 1976, 1,145 people have been executed. My mission focused on the federal death penalty and the application of the death penalty in Alabama and Texas. Alabama has the highest per

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capita rate of executions in the United States, while Texas has the largest total number of executions and one of the largest death row populations.<sup>2</sup>

6. Since 1973, 130 death row inmates have been exonerated across the United States. This number continues to grow. While I was in Texas, the conviction of yet another person on death row was overturned by the Court of Criminal Appeals.<sup>3</sup> Although in that case DNA testing ultimately prevented the execution of an innocent man, other possible innocents have been less fortunate. In many cases, either because of inadequate laws or practices governing the preservation of evidence or because of the passage of time, there is no longer any physical evidence that can be DNA tested and potentially exonerate the inmate. In some states, legal barriers – such as a lack of a post-conviction DNA access laws – make DNA testing difficult for death row inmates to obtain.<sup>4</sup> In yet other cases, biological evidence is immaterial and other evidentiary or procedural issues preclude a just or reliable basis for imposing the death penalty.

7. I met a range of officials and others who acknowledged that innocent people might have been executed. Serious flaws in the system are of obvious significance to the innocent convicted person, but also of serious concern for victims' families and the wider community, because wrongful convictions mean that true criminals remain at large.

8. At present, a great deal of time and energy is spent trying to expedite executions. A better priority would be to analyze where the criminal justice system is failing in capital cases and why innocent people are being sentenced to death. In Texas, there is at least official recognition that reforms are needed and that innocent people may have been executed. In Alabama, the situation remains highly problematic. Government officials seem strikingly indifferent to the risk of executing innocent people and have a range of standard responses to

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<sup>1</sup> The number of states does not include New Mexico; legislation repealing the death penalty in New Mexico will take effect on July 1, 2009.

<sup>2</sup> Since 1976, Texas has executed 429 people. The state with the next highest number of total executions is Virginia, which executed 102 people over the same period.

<sup>3</sup> *Ex Parte Michael Nawe Blair*, Court of Criminal Appeals of Texas, 25 June 2008.

<sup>4</sup> In Texas, by statute, a convicted person may apply for post-conviction DNA testing if certain requirements are met. Texas Code of Criminal Procedure, Article 64. The requirements are set at a high threshold and, as a result, some convicted persons are denied access to DNA testing. The situation is worse in Alabama. Alabama is one of seven states that does not have a specific post-conviction DNA access law at all. Inmates must seek DNA testing through the regular post-conviction claim channels, which have strict procedural and time requirements.

due process concerns (which are sometimes seen as “technicalities”), most of which are characterized by a refusal to engage with the facts. When I confronted them with cases in which death row inmates have been retried and acquitted, officials explained that a “not guilty” verdict does not mean the defendant was actually innocent and that most defendants “played the system” and probably were guilty. But the truth is that Alabama’s capital system is simply not designed to uncover cases of innocence, however compelling they might be. Alabama may already have executed innocent people, but its officials would rather deny than confront criminal justice system flaws.<sup>5</sup>

9. Given the rising number of innocent people being exonerated nationwide, both state and federal Governments need to investigate and fix the problems in their criminal justice systems. As a start, I recommend that: (1) problems already recognized as such, including lack of judicial independence and the absence of an adequate right to counsel, should be addressed immediately; (2) systematic review of criminal justice system flaws, including racial disparities in capital cases, should be undertaken to identify needed reforms; and (3) federal courts should be authorized to review all substantive claims of injustice in capital cases. In light of the United States’ international law obligations with respect to the death penalty, I also recommend that: (4) state and federal legislatures ensure that the death penalty only be applied for the “most serious crimes”; and (5) review and reconsideration be provided to foreign nationals on death row who were denied the right to consular notification.

### **1. Judicial independence**

10. Alabama and Texas both have partisan elections for judges.<sup>6</sup> My mandate does not extend to an evaluation of how a system of multi-million dollar campaigns for judicial office comports with judicial independence requirements. But if – as research and practice show – the outcome of such a system is to jeopardize the right of capital defendants to a fair trial and appeal, there is clearly a need to consider changes. Studies reveal that in states where judges

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<sup>5</sup> Alabama’s systematic rejection of concerns that basic international standards are being violated sits oddly alongside the Government’s determined and successful bid to attract foreign investment from the European Union in particular. Indeed, Alabama’s largest export market is Germany. See U.S. Department of Commerce, “Alabama: Exports, Jobs, and Foreign Investment” (September 2008), *available at* [http://www.trade.gov/td/industry/otea/state\\_reports/alabama.html](http://www.trade.gov/td/industry/otea/state_reports/alabama.html). Alabama’s death penalty policies are thus an appropriate subject for dialogue with the international community.

<sup>6</sup> Judges in both states are elected for 6-year terms. See Article 5, Constitution of the State of Texas; Amendment 328, Constitution of Alabama.

are elected there is a direct correlation between the level of public support for the death penalty and judges' willingness to impose or uphold death sentences. There is no such correlation in non-elective states. In particular, research shows that, in order to attract votes or campaign funds, judges are more likely to impose or refuse to reverse death sentences when: elections are nearing; elections are tightly contested; pro-capital punishment interest organizations are active within a district or state; and judges have electoral experience.<sup>7</sup>

11. The goal of an independent judiciary is to ensure that justice is done in individual cases according to law. Too often, though, under judicial electoral systems, the death penalty is treated as a political rather than a legal matter.<sup>8</sup> The significant impact of judicial electoral systems on capital punishment cases was recognized by many with whom I spoke. They strongly suggested that judges in both Texas and Alabama consider themselves to be under popular pressure to impose and uphold death sentences and that decisions to the contrary would lead to electoral defeat. Numerous government officials in both states openly stated that it was not possible to speak out against the death penalty and hope to get re-elected.<sup>9</sup>

12. In Alabama, the problem of politicizing death sentences is heightened because state law permits judges to "override" the jury's opinion in sentencing.<sup>10</sup> Thus, even if a jury unanimously decides to sentence a defendant to life in prison, the judge can instead impose a death sentence. When judges override jury decisions, it is nearly always to increase the sentence to death rather than to decrease it to life – 90% of overrides imposed the death penalty. And a significant proportion of those on death row would not be there if jury verdicts had been respected. Over 20% of those currently on death row were given the death sentence by a judge overruling a jury decision for life without parole.<sup>11</sup> According to one study, judicial overrides are twice as common in the year before a judge seeks re-election than

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<sup>7</sup> Brace and Boyea, "State Public Opinion, the Death Penalty, and the Practice of Electing Judges", 52 *American Journal of Political Science* (2008) 360; Baum, "Judicial Elections and Judicial Independence: The Voter's Perspective", 64 *Ohio State Law Journal* (2003) 13; and Hall, "Justices as Representatives: Elections and Judicial Politics in the American States", 23 *American Politics Quarterly* (1995) 485.

<sup>8</sup> De Muniz, "Politicizing State Judicial Elections: A Threat to Judicial Independence", 38 *Willamette Law Review* (2002) 367, 387-388.

<sup>9</sup> Indeed, I viewed a number of election advertisements by prospective judges in which the underlying message was the judge's commitment to handing down death sentences.

<sup>10</sup> Alabama Code § 13A-5-47. For a detailed review of the politicization of the death penalty in Alabama see, American Bar Association, "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report" (June 2006), (hereinafter "ABA Alabama Report"), pp. 226-228.

<sup>11</sup> Equal Justice Initiative, "Judicial Override in Alabama" (March 2008).

in other years.<sup>12</sup> In light of concerns about possible innocence and the irreversible nature of the death penalty, Alabama should relieve judges of the invidious influence of politics by repealing the law permitting judicial override.

## 2. Right to counsel

13. One of the most fundamental rights Governments must provide criminal defendants is the right to counsel, which helps ensure defendants receive fair trials.<sup>13</sup> But the right is empty, and reliable and just trial outcomes are threatened, if the quality of counsel is poor. In both Alabama and Texas, a surprisingly broad range of people in and out of government acknowledged that existing programs for providing criminal defense counsel to indigent defendants are inadequate.

14. Neither state has a statewide public defender system. Instead, individual counties in each state determine how counsel for the indigent will be appointed, with most opting for court-appointed counsel.<sup>14</sup> One effect of such a system is that defense counsel are less likely to be independent. Counsel must appear before the same judges for their appointed death penalty cases as for the rest of their legal practice. Not surprisingly, this can create structural disincentives for vigorous capital defense.<sup>15</sup> Such structural problems are compounded by inadequate compensation for counsel.<sup>16</sup> Until 1998, court-appointed counsel in Alabama could only be compensated up to \$1,000 per phase of the case.<sup>17</sup> A significant proportion of current death row inmates were convicted during the time that cap was in place. Although

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<sup>12</sup> See Burnside, "Dying to Get Elected: A Challenge to the Jury Override", [1999] *Wisconsin Law Review* 1017, 1039-44.

<sup>13</sup> Article 14, International Covenant on Civil and Political Rights.

<sup>14</sup> In Alabama, just four of 41 judicial circuits have a public defender (and only one represents capital defendants). Most of the circuits appoint attorneys for an hourly fee. The options for the counties are set out in state legislation: Alabama Code, § 15-12-4(e) (2006).

<sup>15</sup> A further structural problem with court-appointed defense counsel systems is that judges are likely to appoint defense counsel based on factors that could compromise counsel's independence, including: the advice of state prosecutors; the defense counsel's ability to move cases 'regardless of the quality defense they provide'; on the basis of campaign contributions; and based on personal friendships. Texas Defender Service, *A State of Denial: Texas and the Death Penalty* (2000), p. 79.

<sup>16</sup> ABA Alabama Report, n. 9 above, pp. 107-108.

<sup>17</sup> The \$1,000 cap no longer applies. Presently, trial counsel can receive \$60 per hour of work in court, and \$40 per hour of work out of court: Alabama Code, § 15-12-21(d) (2006). Appellate counsel on a direct appeal can receive \$60 per hour, capped at \$2,000 per appeal: Alabama Code, § 15-12-22(d)(3) (2006). There is no right to post-conviction counsel, but if such counsel is appointed, the fee is capped at \$1,000: Alabama Code, § 15-12-23(d) (2006).

hourly caps were subsequently enacted, they bear similarly little relation to the true costs of effectively defending a death penalty case.

15. Failure to provide an adequately-funded state-wide public defender has the predictable result of poor legal representation for defendants in capital cases.<sup>18</sup> In Texas, one well-informed Government official referred to the overall quality of appointed defense counsel as “abysmal.” In Alabama, I read appellate legal briefs, submitted on behalf of defendants on death row, that barely reached ten pages, did not request oral argument, or were largely a bare restatement of the facts. Cost concerns also limit the extent to which qualified experts can or will be retained for the defense.<sup>19</sup>

16. For there to be a meaningful right to counsel, major reforms are required. A positive first step is the system recently established in West Texas — a pilot multi-county public defender to provide capital defense in 85 counties. This project is an exception, however, and in both Texas and Alabama, state officials are considering half-measures they perceive to be money-saving, instead of the necessary establishment of state-wide, well-funded, independent public defender services.

### 3. Racial disparities

17. Studies from across the country show racial disparities in the application of the death penalty.<sup>20</sup> The weight of the scholarship suggests that the death penalty is more likely to be imposed when the victim is white, and/or the defendant is African American.

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<sup>18</sup> One study found nearly one in four Texas death row inmates had been represented by court-appointed attorneys who had been disciplined for professional misconduct. “Quality of Justice”, *Dallas Morning News*, (10 September 2000). Another study suggested court-appointed counsel in Texas were often “crippled by substance abuse, conflicts of interest and disciplinary problems”. Texas Defender Service, *A State of Denial: Texas and the Death Penalty* (2000), p. 83. Another study concluded that Texas death row inmates “face a one-in-three chance of being executed without having the case properly investigated by a competent attorney”. Texas Defender Service, *Lethal Indifference* (2002).

<sup>19</sup> Liebman and Marshall, “Less is Better”, 74 *Fordham Law Review* (2005-06) 1607, pp 1664-65.

<sup>20</sup> See, e.g., American Bar Association, “State Death Penalty Assessments: Key Findings” (29 October 2007) (reporting race of victim disparity in all eight states studied). See also United States General Accounting Office, “Death Penalty Sentencing: Resource Indicates Pattern of Racial Disparities” (1990) (reviewing studies published between 1972 and 1990 and finding race of victim disparity); Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, “Final Report” (2003) (finding race of defendant disparity); David C Baldus and George Woodworth, “Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research” (2003) 39 *Criminal Law Bulletin* 194 (reviewing studies published between 1990 and 2003 and finding race of victim disparity);

18. When I raised racial disparity concerns with federal and state Government officials, I was met with indifference or flat denial. Some officials had not read any specific reports or studies on race disparity and showed little concern for the issue. Others conceded racial disparity exists, but invoked a handful of studies suggesting the cause was not racial bias.<sup>21</sup> Thus, I was told that the overrepresentation of African Americans among those sentenced to death as opposed to life without parole was related to racial disparities in criminality, or to the overrepresentation of African Americans in the prison population generally. Many officials dismissed the results of studies showing racial disparity as biased, claiming they were written by researchers with anti-death penalty views. Some dismissed the results of studies but then admitted that they had not carefully looked at them. These responses are highly disappointing. They suggest a damaging unwillingness to confront the role that race can play in the criminal justice system generally, and in the imposition of the death penalty specifically. Given the stakes, both state and federal Governments need to systematically review and respond to concerns about continuing racial disparities.

#### 4. Systematic evaluation of the criminal justice system

19. There is a clear onus on states to systematically evaluate the workings of their criminal justice systems to ensure that the death penalty is not imposed unjustly. In Texas, the Court of Criminal Appeals recently set up a Criminal Justice Integrity Unit to examine wrongful conviction issues. This is a positive development, but much more is needed. An appropriate approach would be for the Texas legislature to establish, as some have proposed,<sup>22</sup> an Innocence Commission designed to assess systematically why people have

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Scott Phillips, "Racial Disparities in the Capital of Capital Punishment" (2008) 45 *Houston Law Review* 807 (finding both race of defendant and race of victim disparity); Jennifer L. Eberhardt, Paul G. Davies, Valerie Purdie-Vaughns, and Sheri Lynn Johnson, "Looking Deathworthy" (2006) 17(5) *Psychological Science* 383 (the likelihood of a black defendant being sentenced to death is influenced by the degree to which he or she is perceived to have a "stereotypical" black appearance).

<sup>21</sup> Federal Justice Department officials relied heavily upon a 2006 Rand Corporation study that identified the heinousness of the crime rather than race as the principal determinant in seeking the death penalty. But the study itself warned that its findings were not definitive given the difficulty of determining causation based on statistical modeling. See Klein, Berk, and Hickman, *Race and the Decision to Seek the Death Penalty in Federal Case*. The study's methodology has been criticised for using selective data, framing the issue very narrowly, and limiting its investigation to Janet Reno's term as Attorney-General. See: ACLU, *The Persistent Problem of Racial Disparities in the Federal Death Penalty* (25 June 2007). See also Death Penalty Information Center, "Racial and Geographical Disparities in the Federal Death Penalty" available at [www.capitalpunishmentincontext.org/issues/disparitiesfdp](http://www.capitalpunishmentincontext.org/issues/disparitiesfdp).

<sup>22</sup> See, e.g., Texas Senate Bill 263, *A bill to be entitled an act relating to the creation of a commission to investigate and prevent wrongful convictions* (23 April 2007).

been wrongly convicted and then to apply those lessons with recommendations for criminal justice system reform.

20. Alabama could draw on the in-depth analysis of its system produced by the American Bar Association (ABA).<sup>23</sup> While various state officials dismissed the ABA as biased, they generally acknowledged that those who conducted the study were serious lawyers. In any event, none of the officials with whom I spoke had undertaken a thorough analysis of the report. Given the seriousness of the problems identified, and officials' reluctance to undertake any alternative in-depth study, it is incumbent upon the authorities to formally respond to the ABA's findings and recommendations. Alabama officials could indicate the seriousness of their concern about alleged injustices if they gave reasons for accepting or rejecting the ABA's specific recommendations.

## 5. Federal habeas corpus review

21. A capital defendant convicted by a state court can (after exhausting state habeas corpus review) bring a habeas corpus suit in federal court to challenge the conviction.<sup>24</sup> But federal courts' role in reviewing state-imposed death sentences has been curtailed by legislation designed to "expedite" such cases. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) prevents federal habeas review of many issues, imposes a six-month statute of limitation for inmates seeking to file federal habeas claims, and restricts access to an evidentiary hearing at the federal level.<sup>25</sup> As initially enacted, AEDPA permitted states to opt in to expedited federal review of death penalty cases if the state provided counsel for indigent death row inmates in post-conviction cases.<sup>26</sup> But federal courts, which were originally responsible for determining whether states qualified for expedited review, found that few states met statutory requirements for proper provision of counsel. (Texas was among those states denied qualification.) The appropriate response to the federal courts' findings would have been to improve state indigent defense systems. Instead, Congress amended the law to permit the Department of Justice (DOJ) to issue regulations under which DOJ, rather than the

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<sup>23</sup> ABA Alabama Report, n. 9 above.

<sup>24</sup> In California, for example, "70 per cent of the habeas petitions in death cases have achieved relief in the federal courts, even though relief was denied when the same claims were asserted in state courts". See *Report and Recommendations on the Administration of the Death Penalty in California* (30 June 2008), p. 57.

<sup>25</sup> As amended, these provisions are at 28 U.S.C. § 2261.

<sup>26</sup> Public Law 104-132 (enacted 24 April 1996).

courts, would certify state indigent defense systems.<sup>27</sup> The regulations that came into effect on 12 January 2009 are grossly inadequate.<sup>28</sup> They do not specify: the level of competency that must be exhibited by state appointed counsel; the amount of litigation expenses that counsel must be provided with; or that counsel must receive reasonable or adequate compensation. Such matters are left to the discretion of the states, thus effectively eviscerating both the federal oversight function and incentives for states to improve indigent defense. These regulations should be amended or repealed.

22. When I asked one official with responsibility for handling federal habeas cases about the impact of AEDPA, I was told that although the restrictive legislation may prevent some meritorious claims from being raised, rules were necessary to enforce finality. I agree that finality is important in criminal cases, and that it serves important purposes both for victims and the system as a whole. But presently, too much weight is given to finality and too little to the due process rights of the accused and to the Government's obligation to ensure that innocent people are not executed. Given the serious concerns about the fairness of state-level trials and appeals, the federal writ of habeas corpus plays a critical role in capital cases. Congress should investigate whether state criminal justice systems fail to protect constitutional rights in capital cases, and also enact legislation permitting federal courts to review *de novo* all merits issues in death penalty cases, with appropriate exceptions, such as where a defendant attempts deliberately to bypass state court procedures.

## 6. Most serious crimes

23. States that retain the death penalty may only permit capital punishment for the "most serious crimes."<sup>29</sup> Under international law, this means crimes requiring an intention to kill that results in the loss of life.<sup>30</sup> However, several U.S. jurisdictions allow the death penalty for lesser crimes. For example, the Federal Death Penalty Act of 1994 permits the death penalty for crimes such as the running of large-scale drug enterprises.<sup>31</sup> During my mission, there was an encouraging development when the U.S. Supreme Court decided in *Kennedy v*

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<sup>27</sup> Public Law 109-177 (enacted 9 March 2006).

<sup>28</sup> AG Order 3024-2008, 73 FR 75338, (11 December 2008).

<sup>29</sup> ICCPR, article 6(2).

<sup>30</sup> See A/HRC/4/20, para. 53.

<sup>31</sup> 18 U.S.C. 3591(b).

*Louisiana* that the death penalty could not be imposed for the crime of rape of a child where death did not result.<sup>32</sup> The Court's decision brings U.S. law further in line with international human rights law. Federal and state Governments should amend the remaining laws permitting capital punishment to conform to international law.

## 7. Consular notification

24. Of particular importance in Texas are the cases in which foreign nationals have been sentenced to death without the opportunity to contact their national consulates for assistance as required by the Vienna Convention on Consular Relations (VCCR), to which the United States has been a party since 1969.<sup>33</sup> In 2008, Texas executed two Mexican nationals who had not been notified of their consular rights.<sup>34</sup> Of the remaining 25 foreign nationals on Texas's death row, 14 (twelve Mexicans, one Honduran and one Argentinean) were not informed of their consular rights at the appropriate time.<sup>35</sup>

25. The federal Government has acknowledged that it has a legal obligation to provide review and reconsideration of the cases of Mexican nationals on death row who were not notified of their consular rights.<sup>36</sup> Review is necessary to determine whether any of these individuals was prejudiced by the lack of consular notification. But the Texas Legislature has failed to authorize state courts to provide this review, and the U.S. Congress has similarly

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<sup>32</sup> 128 S. Ct. 2641 (2008). Five states (Louisiana, Montana, Oklahoma, Texas, South Carolina) permitted the death penalty for sexual crimes, not resulting in death, against children. Other positive recent developments in the Supreme Court's death penalty jurisprudence are *Roper v Simmons* 543 U.S. 551 (2005) (holding that juveniles or persons who committed crimes as juveniles could not be executed) and *Atkins v. Virginia* 536 U.S. 304 (2002) (striking down the death penalty for mentally retarded defendants).

<sup>33</sup> Article 36(1)(b) of the VCCR provides: "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph."

<sup>34</sup> Jose Ernesto Medellin Rojas was executed on 5 August 2008. Heliberto Chi Aceituno was executed on 7 August 2008.

<sup>35</sup> There are 126 foreign nationals on death row across the United States as of 19 May 2009. Mark Warren and Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the U.S.*, available at <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us>.

<sup>36</sup> *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (*Mexico v United States of America*) Judgment of 19 January 2009, ICJ Reports 2009, para 55

failed to authorize federal courts to do so.<sup>37</sup> The very simplicity of the available solutions makes it all the more disturbing that nothing has been done.

26. Texas officials told me their refusal to provide review was supported by the U.S. Supreme Court's decision, in *Medellin v. Texas*,<sup>38</sup> that the federal Government could not force Texas to abide by the United States' international legal obligations. As one senior Texas official noted, it is not a popular notion in Texas to be seen to be "submitting" to the International Court of Justice. But it is a bedrock principle of international law that when a country takes on international legal obligations, those obligations bind the entire state apparatus, whether or not it is organized as a federal system.<sup>39</sup> There are many federal systems around the world, and they have all devised means to ensure that treaties, whether dealing with trade, investment, diplomatic immunities, or human rights, bind the entire state, including its constituent parts. Nor is it "submission" to respect the treaty rights and obligations by which the United States voluntarily agreed to abide — and from which American citizens have benefitted for nearly 40 years. Consular rights protection not only affects foreign nationals currently on death row in Texas, it applies equally to any American who travels to another country.

27. Texas's refusal to provide review of the foreign nationals' cases undermines the United States' role in the international system, and threatens nation States' reciprocity with respect to the rights of each others' nationals. If Texas opts to put the United States in breach of its international legal obligations, Congress must act to ensure compliance at the federal level.

## **B. Deaths in immigration detention**

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<sup>37</sup> Presently, the regular procedural default rules apply to VCCR claims, so that foreign nationals who did not raise the failure of consular notification issue at trial or on direct appeal are largely prohibited from having the merits of their claim heard when seeking federal habeas corpus review. See e.g., *Sanchez-Llamas v Oregon*, 126 S Ct 2669 (2006).

<sup>38</sup> 128 S. Ct. 1346 (2008).

<sup>39</sup> On the application of the principle to the United States in particular, see *LaGrand Case (Germany v United States of America)*, ICJ Reports 1999, para. 28.

28. In June 2008, the Government acknowledged there had been at least 74 deaths in immigration detention facilities since 2003.<sup>40</sup> Subsequent newspaper reports indicate a significantly higher number. I received credible reports from various sources that deaths were due to: denial of necessary medical care; inadequate or delayed care; and provision of inappropriate medication.<sup>41</sup>

29. Immigration detention facilities, managed by Immigration and Customs Enforcement (ICE), an arm of the Department of Homeland Security (DHS), hold immigrants with ongoing immigration legal proceedings, or awaiting removal from the United States. ICE's Office of Detention and Removal Operations (DRO) carries out the detention function.<sup>42</sup> The standards of detention at each of these facilities are set by ICE's National Detention Standards, which include general medical care provisions.<sup>43</sup> The details of the medical care to be provided to detainees are in ICE's Division of Immigration Health Services (DIHS) Medical Dental Detainee Covered Services Package. The package states that it primarily covers emergency care, and other care is generally excluded unless it is judged necessary for the detainee to remain healthy enough for deportation.<sup>44</sup> Specialty care and testing believed necessary by the detainee's on-site doctor must be pre-approved by DIHS in Washington, DC. Reliable reports indicate that DIHS often applies an unduly restrictive interpretation in determining the provision of medical care. Officials at various detention centers have themselves reported difficulties in getting approval for medical care.<sup>45</sup> In defense, DIHS and DRO explained that truly urgent care is provided at the discretion of medical personnel at each detention center

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<sup>40</sup> There were 74 deaths to June 2008 according to a statement by Julie L Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement, Department of Homeland Security (4 June 2008).

<sup>41</sup> In one well-known case, a detainee's request for a biopsy was denied for nearly a year, despite a doctor's statement that it was urgent. During that period, the detainee developed cancer, and died after his release from detention. Nina Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, The New York Times, Aug. 12, 2008.

<sup>42</sup> Immigration detainees can be held in a range of facility types. Across the United States, about 350 facilities operate under Intergovernmental Service Agreements (most are county jails); 8 service processing centres are owned and operated by ICE; and 7 contract detention facilities are operated by private contractors.

<sup>43</sup> The ICE National Detention Standards require that detainees "have access to medical services that promote detainee health and general well-being."

<sup>44</sup> See DIHS Medical Dental Detainee Covered Services Package, p. 1: "The DIHS Medical Dental Detainee Covered Services Package primarily provides health care services for emergency care. Emergency care is defined as "a condition that is threatening to life, limb, hearing, or sight." Accidental or traumatic injuries incurred while in the custody of ICE or BP and acute illnesses will be reviewed for appropriate care. [...] Other medical conditions which the physician believes, if left untreated during the period of ICE/BP custody, would cause deterioration of the detainee's health or uncontrolled suffering affecting his/her deportation status will be assessed and evaluated for care."

<sup>45</sup> See U.S. Government Accountability Office, "Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance", GAO-07-875 (6 June 2007).

without the need for prior authorization. However, the care provider will not be reimbursed unless subsequent DIHS authorization is given. Denials of such requests have a chilling effect on medical personnel's subsequent decisions about proceeding without authorization.

30. The ICE standards are merely internal guidelines rather than legally-enforceable regulations. This has insulated ICE policies from the external oversight provided by the normal regulatory process and limits the legal remedies available to detainees when the medical care provided is deficient.<sup>46</sup> DHS should promulgate legally enforceable administrative regulations, and these should be consistent with international standards on the provision of medical care in detention facilities.

31. With respect to detention center conditions, I met with the DHS IG, whose office has prepared some valuable reports. A report on deaths in immigration detention was released shortly after my visit,<sup>47</sup> and made important recommendations,<sup>48</sup> but it reviewed only two deaths in detail. And the accountability system is incomplete by virtue of the fact that internal and external accountability functions are more or less combined. The law enforcement officers who investigate abuses by DHS personnel themselves report to the IG. Existing IG peer review arrangements appear to be an unlikely check on the performance of the IG in relation to sensitive and problematic cases.

32. ICE has no legal reporting requirements when a death occurs in ICE custody. The result has been a clear failure of transparency. Both civil society groups and Congressional staff members told me that for years they were unable to obtain any information at all on the numbers of deaths in ICE custody. ICE's recent public reporting of numbers, and its voluntary undertaking to report future deaths, are encouraging, but insufficient. ICE should be required to promptly and publicly report all deaths in custody, and each of these deaths should be fully investigated.

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<sup>46</sup> ICE assured me that there are internal grievance procedures. Detainees can also contact the DHS Inspector General (IG) via a dedicated hotline, or in writing, or they can make a complaint to the DHS Office for Civil Rights and Liberties. But detainees and their lawyers regularly report no or delayed responses to complaints, and hotline telephones that do not work.

<sup>47</sup> Department of Homeland Security, Office of Inspector General, "ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities", OIG-08-52 (June 2008).

<sup>48</sup> For example, the IG recommended that ICE be required to report to the IG whenever a death in ICE custody occurs. *Ibid.*, p 14.

### C. Killings by law enforcement officials

33. Data on deaths in custody in federal and state prisons and jails are compiled by the Bureau of Justice Statistics (BJS) of the Department of Justice (DOJ).<sup>49</sup> These data cover homicides (generally by other inmates), suicides, and other causes and show generally that there has been a significant decline in deaths both in jails and prisons.<sup>50</sup> The data do not separate out deaths caused by guards, however, so it is impossible to estimate the rate of such deaths or to assess whether the trends in this regard are similarly encouraging.<sup>51</sup> The Government also compiles three sources of data on law enforcement killings outside detention centers, the most comprehensive and reliable of which is likely BJS's data on "arrest-related killings."<sup>52</sup> The number of arrest-related killings has not changed dramatically over the past 30 years.<sup>53</sup>

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<sup>49</sup> The state-level data are gathered pursuant to the Death in Custody Reporting Act of 2000 (Public Law 106-297), but this provides only a weak financial incentive for compliance, and there is no law inducing federal institutions to provide data. However, while the program is essentially voluntary, compliance with reporting "requirements" is extremely high. According to the officials with whom I spoke, out of roughly 3,100 state jail jurisdictions, no more than 10 or so fail to report in any given year, and all state prisons have reported throughout.

<sup>50</sup> The data show that while the homicide rate in jails has remained fairly stable at 3-5 per 100,000 inmates, the homicide rate in state prisons has plummeted from 54 per 100,000 in 1980 to 4 per 100,000 in 2006. Data on homicides and suicides in state jails and prisons are from BJS, "Suicide and Homicide in State Prisons and Local Jails" (August 2005) and "Deaths in Custody Statistical Tables" available at <http://www.ojp.usdoj.gov/bjs/dcrp/dictabs.htm>. The suicide rate in jails also fell from 129 per 100,000 in 1983 to 38 per 100,000 in 2005. The suicide rate in state prisons was 34 per 100,000 in 1980 and had fallen to 17 per 100,000 in 2006. In the federal prison system, over a one-year period in 1999-2000, there were approximately 3 homicides and 12 suicides per 100,000 inmates. BJS, "Census of State and Federal Correctional Facilities, 2000" (August 2003).

<sup>51</sup> Officials stated that cases involving "positional asphyxiation" during cell extraction will generally end up in the "accidental" category even though some of the deaths in this category will constitute unlawful killings by guards. However, even if all such killings are so classified, this would permit one only to determine that there are somewhere between 0 and 3 unlawful killings by correctional officials per 100,000 inmates.

<sup>52</sup> BJS is mandated to gather data from states on the death of "any person who is in process of arrest", which BJS interprets to include "[a]ll deaths of persons in the physical custody or under the physical restraint of law enforcement officers" and "all deaths resulting from use of force by law enforcement officers". In addition to the statistics on "arrest-related deaths" gathered by the BJS, statistics on "justifiable homicides" by police are gathered by the FBI, and statistics on "deaths by legal intervention" are gathered by the National Center for Health Statistics of the Centers for Disease Control and Prevention (CDC). BJS, "Arrest-Related Deaths in the United States, 2003-2005" (October 2007).

According to BJS data, there were 703 arrest-related deaths in 2005, of which 364 were homicides (justified or unjustified) by law enforcement officers. BJS, "Arrest-Related Deaths in the United States, 2003-2005" (October 2007).

<sup>53</sup> BJS, "Trends in justifiable homicide by police and citizens" available at <http://www.ojp.usdoj.gov/bjs/homicide/tables/justifitab.htm>. Note that these data are for "justifiable homicides" as compiled by the FBI. These data are likely to be undercounts because three states and the federal Government did not report to BJS, and the law enforcement agencies concerned were often the principal sources of information.

34. Generally, police killings are investigated by a police department's internal affairs unit and prosecuted by the local district attorney. However, in cases involving the "willful" violation of constitutional rights, the Federal Bureau of Investigations (FBI) may investigate, and the Civil Rights Division of the federal Department of Justice may prosecute.<sup>54</sup> Statistics on the total number of prosecutions and convictions in such cases are not available, but it is clear that the number of prosecutions is small and the number of convictions smaller still. Because there are no statistics on killings that involved the use of excessive force, it is difficult to evaluate whether the low conviction rate reflects impunity for abuse or whether the use of lethal force is limited and disciplined.

35. Two measures that would improve transparency and analysis are: (1) enhanced use of technology to record police conduct, and (2) adapting existing data collection efforts to be more comprehensive and to play an "early warning" and "hot spot identification" role for unlawful killings by law enforcement officers.

36. Both prosecutors and plaintiffs' counsel emphasized the importance of increased use of video and audio recording equipment in police cars, jails, and prisons. These recordings have helped build cases that would otherwise be impossible to prove. At the same time, the presence of recording equipment deters many law enforcement officers from using excessive force. The primary limits to the effectiveness of recording are that it is not sufficiently widespread and that tapes too often "disappear." Additional federal funding and incentives would address the first problem. Measures to safeguard tapes include: increasing the penalties for tape destruction; establishing a presumption in civil litigation that the destruction of a tape indicates liability; and, making it technically impossible for individual officers to access the tapes.

37. Data collection by the Government on deaths related to law enforcement activities serves to create an historical record that is useful, *inter alia*, in assessing long-term trends. It is quite unhelpful, however, in providing "early warning" of emerging problems, whether at the national level or in particular jurisdictions. Indeed, most of the available statistics are

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<sup>54</sup> 18 U.S.C. § 242 makes it a federal crime for a Government official to willfully deprive someone of a constitutional or statutory right; 18 U.S.C. § 241 makes it a federal crime for a Government official to conspire to accomplish the same.

three years out of date. Officials explained that one cause of delay is the need to obtain local medical examiners certificates on the cause of death in each case. While such efforts are commendable, and the resulting impulse to delay the release of data understandable, BJS should consider adopting working methods that better accommodate the need for timely as well as accurate data. One possibility would be to adopt the approach used for economic indicators, which are released rapidly but are then subsequently revised as more information is gathered.<sup>55</sup>

### III. INTERNATIONAL OPERATIONS

#### A. Death penalty under the Military Commissions Act

38. Five men detained at the U.S. Naval Station at Guantánamo Bay, Cuba, have been charged with capital offences under the Military Commissions Act (MCA) and a number of other Guantanamo detainees face charges that may carry the death penalty.<sup>56</sup> I welcome the President's decision to seek a stay of all commission proceedings and to order a review of whether, and in what forum, individual detainees may be prosecuted.<sup>57</sup> Such steps send a strong signal that the United States is restoring its commitment to the rule of law in its treatment, detention and prosecution of Guantanamo detainees. However, the President's

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<sup>55</sup> As an illustrative example, see Eugene P. Seskin and Shelly Smith, "Annual Revision of the National Income and Product: Accounts Annual Estimates for 2004–2006; Quarterly Estimates for 2004:I–2007:I", *Survey of Current Business* (August 2007), which provides revisions by the Bureau of Economic Analysis of the U.S. Department of Commerce to previously released economic statistics. The authors explain that "these estimates incorporated newly available source data that are more complete, more detailed, and otherwise more reliable than those that were previously incorporated."

<sup>56</sup> Five men were arraigned on 5 June 2008: Khalid Sheik Mohammed; Ramzi bin al-Shibh; Ali Abd al-Aziz Ali; Mustafa Ahmed al-Hawsawi; and Walid bin 'Attash. The five will be tried at a joint trial. They were charged with: conspiracy; attacking civilians; attacking civilian objects; intentionally causing serious bodily injury; murder in violation of the law of war; destruction of property in violence of the law of war; hijacking or hazarding a vessel or aircraft; terrorism; and providing material support for terrorism (see: *United States of America v Khalid Sheikh Mohammed et al*, Charge Sheet, 9 May 2008).

Two other men faced charges for capital offenses, but the charges were either dismissed or have been withdrawn without prejudice and could be reinstated. On 11 February 2008, U.S. military officials announced charges against Mohammed al-Qahtani for his alleged role in the 11 September 2001 attack, but those charges were dismissed on 9 May 2008. According to the official responsible for approving military commission charges, the charges were dismissed because al-Qahtani had been subjected to torture by U.S. officials over a prolonged period, which had resulted in a negative impact on his health. Bob Woodward, *Detainee Tortured, Says U.S. Official*, Washington Post, Jan. 14, 2009. On 30 June 2008, prosecutors charged Abd al-Rahim Hussein Muhammed Abdu al-Nashiri, for his alleged role in the October 2000 USS Cole attack (see: *United States of America v Abd al-Rahim Hussein Muhammed Abdu al-Nashiri*, Charge sheet, 30 June 2008). Charges against him were withdrawn without prejudice on 5 February 2009. CIA Director Michael Hayden has publicly stated that al-Nashiri was one of three people subjected to waterboarding by the CIA.

<sup>57</sup> Executive Order directing the Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897, 4899 (22 Jan. 2009).

order appears to leave open the possibility that detainees may still be prosecuted – and subjected to the death penalty – under the MCA. Any such prosecution would be a violation of the United States’ obligations under international human rights and humanitarian law because the MCA does not comport with fundamental fair trial principles.

39. The United States has an obligation under international law to provide detainees with fair trials that afford all essential judicial guarantees. No State may derogate from this obligation, regardless of whether persons are to be tried for crimes allegedly committed during peace or armed conflict.<sup>58</sup> But the text of the MCA and the experiences of those involved in the military commission process with whom I met indicate that commission proceedings utterly fail to meet basic due process standards. I highlight just a few of the more egregious evidentiary due process flaws.<sup>59</sup>

40. There is now no doubt that detainees at Guantanamo were subjected to torture and coercion; senior Government officials have publicly admitted as much, and non-governmental organizations and counsel for individual detainees have provided credible accounts of cruelty and mistreatment. Contrary to international law, the MCA permits the taint of such coercion to pollute the U.S. justice system because it explicitly allows statements coerced by means such as cruel, inhuman, or degrading treatment to be admitted into evidence.<sup>60</sup> Also deeply problematic are the MCA provisions on classified information, which permit the Government to withhold from the defense the sources and methods by which evidence was acquired, and

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<sup>58</sup> See, e.g., International Covenant on Civil and Political Rights, Article 14; UN Human Rights Committee, General Comment No 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), paras 11, 16; Geneva Conventions, Common Article 3; International Committee of the Red Cross, *Customary International Humanitarian Law*, Volume 1: Rules, Rule 100.

<sup>59</sup> The jurisdictional flaws are equally troubling. For example, the MCA’s definition of an “alien unlawful enemy combatant” who may be subjected to military commission jurisdiction does not comport with international humanitarian law. The definition elides the fundamental distinctions humanitarian law makes between combatants and non-combatants and between types of armed conflict. MCA, section 3, amending Subtitle A of Title 10 U.S.C. §948a(1). Thus, civilians who have never directly participated in hostilities against the United States and even those without any connection to armed conflict could be militarily prosecuted under the MCA. The MCA’s subject matter jurisdiction provisions are also inconsistent with international humanitarian law because they include offenses that are not recognized as war crimes. See, e.g., MCA section 3, amending Subtitle A of Title 10 U.S.C. §950v(b)(25) (offense of “providing material support for terrorism”) and §950v(b)(28)(conspiracy).

<sup>60</sup> Statements obtained by cruel, inhuman or degrading treatment may be used, if they were obtained before December 2005 and the military judge finds that they are reliable, possess probative value and to do so would be in the interests of justice. See MCA, section 3, amending Subtitle A of Title 10 U.S.C. §948r(c) and (d).

permits the accused to be convicted on the basis of evidence he has never seen.<sup>61</sup> The MCA also presumptively permits second and third hand hearsay evidence.<sup>62</sup> Together, the provisions on coerced evidence, classified evidence, and hearsay make it likely that evidence obtained through torture, although formally prohibited,<sup>63</sup> may in practice be admitted.

41. The MCA's provisions constitute a gross infringement on the right to a fair trial and it would violate international law to execute someone under this statute.

## **B. Detainee deaths at Guantánamo**

42. Of the five reported deaths of detainees in U.S. custody at Guantánamo, four were classified by Government officials as suicides,<sup>64</sup> and one was attributed to cancer.<sup>65</sup> In the custodial environment, a state has a heightened duty to ensure and respect the right to life.<sup>66</sup> Thus, there is a rebuttable presumption of state responsibility — whether through acts of commission or omission — for custodial deaths. The state must affirmatively show that it lacks responsibility to avoid this inference,<sup>67</sup> and has an obligation to investigate and publicly report its findings and the evidence supporting them.<sup>68</sup> But until forced to do so through Freedom of Information Act lawsuits, the Department of Defense (DOD) provided little public information about any of the five detainee deaths. Although DOD has now released redacted copies of internal investigation documents and autopsies, it should provide fully unredacted medical records, autopsy files and other investigation records to the families of all the deceased.

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<sup>61</sup> MCA, section 3, amending Subtitle A of Title 10 U.S.C. §949d(f) and Title 10 U.S.C. §949d(b)(2)(B). Classified information can be privileged from disclosure. Also see §949j(c). Such secrecy impedes the defense's ability to answer accusations, and particularly inhibits the accused's ability to investigate whether specific evidence was acquired through torture or other coercion.

<sup>62</sup> MCA, section 3, amending Subtitle A of Title 10 U.S.C. §949a(b)(2)(e).

<sup>63</sup> MCA, section 3, amending Subtitle A of Title 10 U.S.C. §948r(b).

<sup>64</sup> On 10 June 2006, three detainees reportedly committed suicide by hanging at Camp Delta: Mani Shaman Turki al-Habardi al-Utaybi (Saudi Arabian); Yasser Talal al-Zahrani (Saudi Arabian); Salah Ali Abdullah Ahmed Al-Salami (Yemeni). Al-Zahrani was 17 when he was captured, and 21 when he died. Al-Salami was 37, had been detained over four years, and had been involved in hunger strikes. Al-Utaybi was 30 when he died, and had been cleared to be transferred to the custody of Saudi Arabia before his death. On 30 May 2007, a fourth detainee, Abd ar-Rahman Maadha al-Amry (Saudi Arabian), reportedly committed suicide in Camp 5.

<sup>65</sup> Abdul Razzak Hekmati (Afghan), 68 years old, died on 30 December 2007 of colorectal cancer. He had been held at Guantánamo for five years.

<sup>66</sup> See, e.g., A/61/311, paras 49-54.

<sup>67</sup> A/61/311, para 54. See also Communication No. 84/1981, *Dermitt Barbato v Uruguay*, A/38/40, annex IX.

<sup>68</sup> See, e.g., Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E/1989/89 (1989), Principle 17.

## **C. Lack of transparency regarding civilian casualties**

### **1. Military**

43. DOD officials confirmed to me that the military does not systematically compile statistics on civilian casualties in its operations in Afghanistan or Iraq. The purported reason is that “body counts” are not relevant to evaluating the effectiveness or legality of military operations. It is true that a simple “body count” may not on its own be useful. However, systematically tracking how different kinds of operations result in different levels of civilian casualties is critical if the United States is serious about minimizing casualties. Indeed, the Government’s own experience shows why this is so. Despite the general policy against tracking civilian casualties, in Iraq the military reportedly tracked checkpoint deaths when soldiers fire at civilians they believe, sometimes mistakenly, to be suicide bombers or other attackers. I understand these monitoring efforts resulted in procedural changes that saved lives. This kind of effort to track, analyze, and learn from the consequences of military operations should be routine, not exceptional. The numbers and trends should be reported publicly to strengthen external accountability.

44. The challenges of compiling statistics on civilian casualties during military operations are undeniable. The lack of secure access to incident sites, especially those of aerial bombardments, can make it difficult to determine the number of persons killed, much less the proportion that were civilians. Thus, the DOD has noted that, while information on civilian casualties is included in significant activity (SIGACT) reports, this information is not necessarily accurate.<sup>69</sup> But the solution is not to avoid compiling civilian casualty statistics

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<sup>69</sup> Letter of General Peter Pace, Chairman of the Joint Chiefs of Staff, to Representative John Warner, Chairman of the House Armed Services Committee, 19 April 2006: “SIGACT reports include data derived from a variety of sources and are based on incidents observed by or reported to U.S. forces. In some cases, estimates of civilian casualties may be included in SIGACT reporting of terrorist or insurgent attacks against Coalition or Iraqi forces due to U.S. presence at the scene. However, commanders also often include reports received from Iraqi ministries, civilians, or the press as SIGACTs. Such reports of significant civilian casualties or attacks against civilians are reported irrespective of ultimate authenticity in order to expeditiously notify senior leadership of possible significant civilian casualty events.” This letter also informed Congress that “[r]ecords maintained at military treatment facilities where civilian patients have been treated” and “[r]ecords of those incidents where compensation and assistance to the victims or victim’s family were deemed warranted” contain “some information related to civilian casualties” but reiterated that “[t]he Department of Defense does not maintain comprehensive records and/or databases of civilian casualties in Iraq and Afghanistan [and] [t]hese records are not maintained for the purpose of tracking civilian casualties, are not consolidated, and are not maintained within a comprehensive, searchable database”. See also Congressional Research Service Report for Congress, *Iraqi Civilian Death Estimates*, 27 Aug. 2008, available at <http://www.fas.org/sgp/crs/mideast/RS22537.pdf>.

altogether but to eschew simple counts in favor of releasing information that continually and systematically presents ranges and estimates with the necessary qualifications.

45. In relation to deaths in military custody, operational difficulties cannot be used to justify a failure to compile statistics. Making the numbers and causes of such deaths public is part of the United States' obligation to exercise diligence, to prevent deaths of prisoners in its custody, and to investigate and prosecute any illegal conduct.

## **2. Private contractors**

46. There have been numerous and credible accounts of private security and other contractors (PCs) engaging in a pattern of indiscriminate or otherwise questionable use of force against civilians.<sup>70</sup> At least in Iraq, that use of force has resulted in a significant number of casualties, conservatively estimated to be in the hundreds, perhaps thousands. Yet the failures of reporting and transparency by PCs employed by various Government military and civilian agencies are even more dramatic than those for the military. For example, in Iraq, the DOD established Reconstruction Operating Councils (ROCs), administered by a private security contractor, to provide coordination between the military and security contractors. While in theory DOD contractors report casualties and use of force in serious incident reports (SIRs) to the ROCs, doing so has not been compulsory for all contractors<sup>71</sup>. The most comprehensive study to date found that few firms ever report shooting incidents, that such incidents are often misreported, and that SIRs that are filed are almost uniformly cursory and uninformative.<sup>72</sup>

## **3. Civilian intelligence agencies**

47. There are credible reports of at least five custodial deaths caused by torture or other coercion in which the Central Intelligence Agency (CIA) has been implicated.<sup>73</sup> Although the

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<sup>70</sup> Upwards of 200,000 contractors to the Government are currently working in Iraq and Afghanistan in support of U.S. military and civilian agency missions.

<sup>71</sup> Steve Fainaru and Alec Klein, *In Iraq, a Private Realm of Intelligence Gathering*, Washington Post, July 1 2007.

<sup>72</sup> Human Rights First, *Private Security Contractors at War: Ending the Culture of Impunity* (2008).

<sup>73</sup> Mainstream media accounts and reports from civil society organizations indicate CIA involvement in the deaths of the following five people: an un-named detainee killed in November 2002 at a CIA site code-named the "Salt Pit," reportedly located to the north of Kabul, Afghanistan; Abdul Wali, killed in U.S. custody in Asadabad, Afghanistan, on June 21, 2003; Manadel al-Jamadi, killed in U.S. custody in Abu Ghraib, Iraq, on

role of the CIA in these wrongful deaths has reportedly been investigated (and in one instance, a CIA contractor prosecuted), no investigation has ever been released and alleged CIA involvement has never been publicly confirmed or denied. The CIA Inspector General told me that the number of cases involving possibly unlawful killings referred by the CIA to the DOJ is classified.

**D. Transparency and accountability for unlawful killings and custodial deaths**

48. As discussed above, the Government's failure to track civilian casualties in Iraq and Afghanistan means a lost opportunity to analyze causes and the lost possibility of reducing those deaths. Similarly, a failure to undertake transparent and effective investigations into, and meaningful prosecution of, wrongful deaths means the Government cannot fulfill its obligation to ensure accountability for violations of the right to life.

**1. Military justice system failures**

**a. Lack of transparency**

49. During my visit to Afghanistan, I saw first hand how the opacity of the military justice system reduces confidence in the Government's commitment to public accountability for illegal conduct.<sup>74</sup> It is remarkably difficult for the U.S. public, victims' families, or even commanders to obtain up-to-date information on the status of cases, the schedule of upcoming hearings, or even judgments and pleadings.<sup>75</sup> This lack of transparency is, in part, a side-effect of the decentralized character of the system, in which commanders around the world are given the authority to conduct preliminary investigations and act as "convening authorities" to initiate courts-martial.

50. This problem can be solved relatively quickly and easily. Each service, for example, is required by law to maintain a Court-Martial Management Information System for records

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November 4, 2003; Major General Abed Hamed Mowhoush, killed at U.S. Forward Operating Base Tiger, Iraq, on November 26, 2003; Lt. Col. Abdul Jameel, killed at a U.S. forward operating base in Iraq on January 9, 2004.

<sup>74</sup> Appendix B (describing lack of transparency into 4 March 2007 incident in which, in response to a suicide attack, U.S. Marines killed some 19 individuals and wounded many others).

<sup>75</sup> The military has only (and so far partially) released documents concerning civilian casualties in Iraq and Afghanistan since 1 January 2005 as a result of litigation brought under the Freedom of Information Act. The documents are available at [www.aclu.org/civilianscasualties](http://www.aclu.org/civilianscasualties).

of general and special courts-martial. A centralized system for reporting and providing public information about all courts-martial and non-judicial proceedings relating to civilian casualties could be added to the existing system, and this would markedly improve accountability and reduce the sense among Afghan and Iraqi civilians, and others around the world, that U.S. forces operate with impunity.

**b. Lack of effective investigation and prosecution**

51. While the U.S. military justice system has achieved a number of convictions for unlawful killings in Afghanistan and Iraq, numerous other cases have either been inadequately investigated or senior officers have used administrative (non-judicial) proceedings instead of criminal prosecutions. In cases in which criminal convictions were obtained, some sentences appear too light for the crime committed, and senior officers have not been held to account for the wrongful conduct of their subordinates.

52. The legal obligation to effectively punish violations is as vital to the rule of law in war as in peace. It is thus alarming when States either fail to investigate or permit lenient punishment of crimes committed against civilians and combatants. The legal duty to investigate and punish violations of the right to life is not a formality. Effective investigation and prosecution vindicates the rights of the victims and prevents impunity for the perpetrators. Yet, based on the military's own documents, one study of almost 100 detainee deaths in U.S. custody between August 2002 and February 2006 found that investigations were fundamentally flawed, often violated the military's own regulations for investigations, and resulted in impunity and a lack of transparency into the policies and practices that may have contributed to the deaths.<sup>76</sup>

53. States must punish individuals responsible for violations of law in a manner commensurate with the gravity of their crimes.<sup>77</sup> I raised this issue with the Government in relation to the January 2006 sentencing of Chief Warrant Officer Lewis E. Welshofer Jr. to two months confinement to his base, a fine of \$6,000, and a letter of reprimand after being

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<sup>76</sup> Human Rights First, *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (2006).

<sup>77</sup> See E/CN.4/2006/53, para. 39.

found guilty of negligent homicide and negligent dereliction of duty for the death of Major General Abed Hamed Mowhoush, an Iraqi general who had turned himself in to military authorities. I have received no response.

54. I also received no response to my request for data on sentences imposed for particular offences.<sup>78</sup> But military records released in Freedom of Information Act litigation make clear that the Welshofer sentence is not an anomaly.<sup>79</sup> Data compiled by journalists also reinforce the perception that sentences have not consistently been proportionate to the offence committed. According to a review of cases in Iraq between June 2003 and February 2006 conducted by the Washington Post, 39 service members were formally accused in connection with the deaths of 20 Iraqis, but only 24 were charged with murder, negligent homicide or manslaughter, of whom only 12 ultimately served prison time (with sentences ranging from 45 days to 25 years), 3 were convicted with no confinement, 1 was acquitted, charges against two others were dropped, and 6 received administrative, non-judicial punishments.<sup>80</sup>

55. It is noteworthy that “command responsibility,” a basis for criminal liability recognized since the trials after World War II,<sup>81</sup> is absent both from the Uniform Code of Military Justice (UCMJ) and the War Crimes Act. It appears that no U.S. officer above the rank of major has ever been prosecuted for the wrongful actions of the personnel under his or her command. Instead, in some instances, commanders have exercised their discretion to lessen the punishment of subordinates for wrongful conduct that resulted in a custodial

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<sup>78</sup> On 18 June 2008, during my visit to the U.S., I formally requested: “The number of courts-martial convened with charges of murder or manslaughter; of those that have concluded, their verdicts and sentences. These data would be broken down by charge (murder, manslaughter), time period (2007, 2008 to date) and country where the charged crime took place (Afghanistan, Iraq, elsewhere).”

<sup>79</sup> For example, four U.S. service members were charged with forcing two Iraqi men to jump into the Tigris River, resulting in the death of one of the men; the highest punishment any of the four appear to have received is six months imprisonment, reduction in rank, and a \$2,000 fine. See courts-martial records released on 4 September 2007 and available at <http://www.aclu.org/natsec/foia/log.html> (Army Bates 2834 - 3640).

<sup>80</sup> Josh White, Charles Lane and Julie Tate, *Homicide Charges Rare in Iraq War*, Washington Post, Aug. 28, 2006.

<sup>81</sup> *In re Yamashita*, 327 U.S. 1 (1946). The ICRC study on customary international humanitarian law surveys state practice and succinctly summarizes the law on command responsibility: “Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.” (Henckaerts & Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (ICRC 2005), p. 558.)

death.<sup>82</sup> Such failures of accountability undermine the importance of hierarchy and discipline within the military as well as the essential role of the commander in preventing and punishing war crimes. The criminal liability of commanders for failure to prevent or punish the crimes committed by subordinates should be codified in the UCMJ and the War Crimes Act.

## 2. Civilian justice system failures

56. For far too long, there has been a zone of *de facto* impunity for killings by private contractors (PCs) and civilian intelligence agents operating in Iraq, Afghanistan, and elsewhere. There is some debate whether federal court jurisdiction extends to PCs of Government agencies other than DOD, a debate that Congress should resolve expeditiously by clarifying that it does.<sup>83</sup> But the principal accountability problem today is not the inadequacy of the applicable legal framework. Rather, U.S. prosecutors have failed to use the laws on the books to investigate and prosecute PCs and civilian agents for wrongful deaths, including, in some cases, deaths credibly alleged to have resulted from torture and abuse. Prosecutors have also failed, even years after alleged wrongful deaths, to disclose the status of their investigations or the bases for decisions not to prosecute. One well-informed source succinctly described the situation: “The DOJ has been AWOL in response to these incidents.” This must change.

57. The Department of Justice (DOJ) is responsible for prosecuting PCs and civilian Government employees, as well as former military personnel who commit war crimes. DOJ has failed miserably. Its efforts are coordinated by two bodies. The first is a task force based at the U.S. Attorney’s Office for the Eastern District of Virginia, which handles detainee abuse cases. This task force has admitted that 24 cases of alleged detainee abuse were referred to it and that it has declined to prosecute 22 of these cases.<sup>84</sup> It is unclear why more cases have not been referred (or if they have, how many more), or how many of the 24

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<sup>82</sup> Department of the Army, *CID Report of Investigation-Final 0114-02-CID369-23525 -5H1A*, Part 1 (May 23, 2003) available at [http://www.aclu.org/torturefoia/released/745\\_814.pdf](http://www.aclu.org/torturefoia/released/745_814.pdf), at 11 (Army criminal investigation into shooting death of Afghan national Mohammed Sayari on 8 August 2002 recommended charges including conspiracy and murder against four members of Special Forces unit; commanding officer dropped all charges and issued only a written reprimand of a captain who had ordered his subordinates to destroy evidence).

<sup>83</sup> See Appendix C (describing legal framework applicable to prosecution of private contractors, civilian Government employees, and former military personnel).

<sup>84</sup> Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to Senator Richard J. Durbin (7 February 2008).

referred cases involved the detainee deaths credibly alleged to have occurred at the hands of PCs or the CIA.

58. The second entity, the Domestic Security Section (DSS) of DOJ's Criminal Division, coordinates the prosecution of other cases involving PCs, such as unlawful shootings committed while protecting convoys. Its track record has been somewhat better, although too often it appears investigations and prosecutions follow only the most notorious public cases, such as the shootings in Nissor Square.

59. DSS representatives acknowledged the lack of convictions to me, but refused to provide even ballpark statistics on the allegations received or the status of investigations.<sup>85</sup> They emphasized that conducting investigations in a war zone is extremely difficult and that they ultimately rely on the military either to conduct the investigation or to provide the FBI with logistical and security support. While there are significant challenges to conducting investigations in the context of armed conflict, DSS representatives' responses suggested serious thought had not been given to how such investigations can be conducted. Investigations into PCs's conduct can be conducted successfully, and one interlocutor who has done so suggested that these cases are actually relatively easy to investigate because they tend to take place in daylight in front of numerous witnesses who can go to safe locations to be interviewed.

60. The lamentable bottom line is that DOJ has brought a scant few cases against PCs for civilian casualties, achieved a conviction only in one case involving a CIA contractor, and brought no cases against CIA employees. Government officials with whom I met acknowledged this lack of accountability, and it now seems clear that this vacuum is neither legally nor ethically defensible. Indeed, many PCs themselves accept the need for legal

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<sup>85</sup> In testimony to Congress in April 2008, a Department of Justice official stated that, as of that date, there had been 25 allegations of private contractor wrongdoing under the Military Extraterritorial Judicial Act (MEJA), of which 12 resulted in federal criminal charges and one in state criminal charges, with others still pending and others being declined. Four of the seven successful prosecutions were for sexual abuse charges. Statement of Sigal P. Mandelker, Deputy Assistant Attorney General, Before the Senate Committee on Foreign Relations (9 April 2008), *available at* <http://foreign.senate.gov/testimony/2008/MandelkerTestimony080409a.pdf>. It is not clear how many of the cases under investigation relate to killings of Iraqi or Afghan civilians. In its response to this Report, the Department of State informed me that, as of December 2008, the Department of Justice had brought charges in 25 MEJA cases and that in one of those cases, in May 2009, a jury convicting Steven Green, a former soldier, of MEJA charges arising out of his murder and rape of Iraqi civilians in 2006.

regulation and accountability.<sup>86</sup> Unfortunately, accountability for CIA officials appears more remote because of a lack of political will.

### **3. Ensuring Transparency and Accountability**

61. The key to overcoming this record of failure, both in the civilian and military justice systems, is prosecutorial and political will to enforce the rule of law. However, the nearly universal sense I was given during my visit by those in Government is that systematic accounting of, and prosecutions for, wrongful deaths are unlikely. In short, war crimes prosecutions in particular are “politically radioactive.” That sense continues to be reflected by Government statements which indicate more of a commitment to “moving forward” than to ensuring transparency and accountability for policies, practices and conduct that led to illegal killings by Government personnel and their agents. But a refusal to look back inevitably means moving forward in blindness. Political expediency is never a permissible justification for a State’s failure to investigate and prosecute alleged crimes.

62. Although there is no substitute for prosecution of violations of the right to life, in the short-term there are a number of steps the Government can take towards transparency and accountability. One such step is the creation of a national “commission of inquiry” tasked with carrying out an independent, systematic and sustained investigation of policies and practices that lead to deaths and other abuses. Over the 27 years of their mandate, successive Special Rapporteurs for extrajudicial execution have focused on the procedures and results that make such commissions effective and give them credibility. I described in a recent report to the Council the situations to which a commission is best suited, and the principles and standards necessary for it to be successful.<sup>87</sup>

63. A commission is an especially attractive option in this context because it is likely that extrajudicial killings resulted from a set of policy failures on the part of a variety of Government actors and agents. In such complex circumstances, transparency may best be achieved through a commission rather than through prosecution alone. The commission

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<sup>86</sup> It is also encouraging that the United States has participated in efforts to clarify the relevant international standards as part of the Swiss Initiative on Private Military and Security Companies.

<sup>87</sup> A/HRC/8/3, paras. 12-58.

could propose structural or long-term reforms that would better ensure the right to life and other fundamental human rights.<sup>88</sup> Another option is the appointment of a special prosecutor who would be independent of the kinds of institutional and political pressures that could – and have – hindered effective investigation and prosecution by DOJ. Some have made proposals about the particular form a commission could take, and the merits of a special or independent prosecutor. I do not endorse any specific proposal, although I do note that a commission and an independent prosecutor are not mutually exclusive.

64. Regardless of the specific form of the commission, it should meet certain fundamental requirements, including that it must: be independent, impartial and competent; have the powers necessary to obtain all the information it requires; have sufficient resources and personnel; and, report all of its findings and recommendations publicly and disseminate them widely.<sup>89</sup> When the report is completed, the Government should reply publicly and indicate what it intends to do in response.<sup>90</sup> Any commission designed to provide the appearance of accountability rather than to establish the truth, or one that undermines the possibility of eventual prosecution, would fall short of the same international standards to which the United States often seeks to hold other countries.

65. The most credible response to the military justice system's investigative failures and sentencing distortions would be the creation of a Director of Military Prosecutions (DMP) position. Such positions have recently been instituted in Australia, Canada, Ireland, New Zealand and the United Kingdom to ensure greater separation between the chain of command

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<sup>88</sup> A successful example of such a commission of inquiry comes from Canada. E/CN.4/2006/53, p. 41 (“Canada’s experience in Somalia illustrates the complementary roles of criminal and non-criminal investigation. Canada prosecuted and punished several soldiers for their actions in Somalia, but it also established a Commission of Inquiry to determine the institutional defects that allowed those abuses to occur. By identifying pervasive problems in how rules of engagement were drafted, were disseminated through the chain of command, and were taught to soldiers on the ground, Canada improved its institutional capacity to better ensure the right to life in the future.”).

<sup>89</sup> See generally A/HRC/8/3, paras 12-58. See also, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, E/1989/89 (1989); United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Model Protocol for a Legal Investigation of Extra-Legal Arbitrary and Summary Executions (“Minnesota Protocol”), E/ST/CSDHA/.12 (1991); Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1 (8 February 2005) (“Combat Immunity Principles”); Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, annexed to UN General Assembly Resolution 55/89 of 4 December 2000.

<sup>90</sup> Combat Immunity Principles, fn. 86, Principle 12; Minnesota Protocol, fn.86, Principle 16.

and the prosecution function. Rather than permitting commanding officers to decide whether to prosecute their own soldiers – a decision in which superior officers have a direct and potentially conflicting interest – a DMP makes independent decisions.

66. Regarding investigation and prosecution of PCs, a significant problem is that cases are handled by U.S. Attorneys offices around the country. Prosecutors do not have an incentive to prioritize such difficult and expensive cases, especially when expected to conduct investigations within their ordinary operating budget. An office should be established within DOJ dedicated solely to investigating and prosecuting cases involving PCs, civilian Government employees, and former military personnel, and to provide appropriate funding.

#### **4. Reparations for civilian casualties**

67. The Government has implemented a number of programs to provide compensation and restitution to civilian victims of U.S. military operations. While the motivation for these programs is often cited as “winning hearts and minds” they are also responsive to international law’s requirement of reparations for violations of human rights and humanitarian law.<sup>91</sup> In some respects, the Government has done less than the law requires by de-linking reparation from the question of whether illegal conduct occurred. In other respects, the Government has done more, by providing reparations to the families of those killed in lawful attacks. My overall assessment is that the Government’s approach has, in practice, meant far more people have received reparations for the loss of their loved ones than has often been the case in previous conflicts, but that reparation programs need to be made more consistent and comprehensive.

68. The Foreign Claims Act authorizes payment of legal claims arising from a death negligently or wrongfully caused by military personnel outside of combat.<sup>92</sup> Payment under this law can be higher than in other programs. Two other programs make death-related

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<sup>91</sup> See ICCPR, Art. 2(3); Human Rights Committee, General Comment 31, “Nature of the General Legal Obligation on States Parties to the Covenant” (2004), para. 16; Henckaerts & Doswald-Beck, *Customary International Humanitarian Law* (ICRC 2005), Rule 150; International Law Commission, *Draft Articles on State Responsibility*, A/56/10 (2001).

<sup>92</sup> Army Regulation 27-20, para. 10-3; 10 U.S.C. § 2734. The exclusion of combat-related deaths has often been construed narrowly, to permit, for example, compensation for deaths at checkpoints. See the documentation on decisions by foreign claims commissions in Afghanistan and Iraq obtained by the American Civil Liberties Union at <http://www.aclu.org/natsec/foia/log.html>.

payments without any admission of fault or liability. In Afghanistan and Iraq, the military makes “condolence payments” using funds from the Commander’s Emergency Response Program (CERP).<sup>93</sup> In Afghanistan, the military also makes “solatia payments.”<sup>94</sup> The maximum payment amount provided under either program for a death is roughly \$2,500.<sup>95</sup> Other programs provide assistance to individuals and communities to help repair damage caused by military operations.<sup>96</sup>

69. In important ways, these are model programs. But they have developed in an *ad hoc* manner that permits innovation and rapid evolution, but has also resulted in a complex, overlapping and inconsistent system. This leads to unprincipled variation in compensation amounts and the unintentional exclusion of some victims. The United States is a leader in this area and should continue to build on its achievements by increasing funding, proactively seeking out victims and their families, and regularizing and better coordinating existing programs.

70. The lack of systematic compensation for civilian casualties caused by private contractors is acute. While some have offered compensation on their own account, this does not appear to be an approach that could be systematized. One interlocutor suggested the best approach would be for the Government to provide reparations for casualties caused by its contractors and then deduct the amount of this compensation from payments made under the contract.

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<sup>93</sup> Lt. Col. Mark Martins, *No Small Change of Soldiering: The Commander’s Emergency Response Program in Iraq and Afghanistan*, The Army Lawyer (Feb. 2004).

<sup>94</sup> Like CERP, the solatia program was designed by the military rather than by Congress; its funding is pursuant to a fairly general Congressional authorization to “use appropriated funds for certain investigations and security services” (10 U.S.C. 2242). These solatia payments were also made in Iraq up until January 2005.

<sup>95</sup> Thus, in fiscal year 2006, in Afghanistan, 1% of CERP funds were used for condolence payments, and, in Iraq, 5% of CERP funds were used for condolence payments. CERP funds are also used for a range of other activities, including supporting agricultural programs, repairing civic and cultural facilities, water and sanitation, and “other urgent humanitarian and reconstruction projects”. Similarly, funds for solatia payments come out of general “Unit Operations and Maintenance Funds”. Government Accountability Office, *Military Operations: The Department of Defense’s Use of Solatia and Condolence Payments in Iraq and Afghanistan* (May 2007), pp. 13, 19, 20.

<sup>96</sup> Thus, in Afghanistan, a woman whose husband was killed during an aerial bombardment might receive training in making clothes and a sewing machine to help her earn a livelihood. In Afghanistan, such assistance is provided through the Afghan Civilian Assistance Program (ACAP); in Iraq, it is provided through the Marla Ruzsicka Iraqi War Victims Fund. Government Accountability Office, *Military Operations: The Department of Defense’s Use of Solatia and Condolence Payments in Iraq and Afghanistan* (May 2007), p. 53.

**E. Targeted killings: lack of transparency regarding the legal framework and targeting choices**

71. The Government has credibly been alleged to have engaged in targeted killings on the territory of other States.<sup>97</sup> Senior Government officials have confirmed the existence of a program through which drones are used to target particular individuals, but have also caused civilian casualties.<sup>98</sup> On several occasions I have asked the Government to explain the legal basis on which a particular individual was targeted.<sup>99</sup> While I have welcomed the Government's willingness to engage in dialogue on targeted killings, it has been evasive about its grounds for targeting, and I am disturbed by the broader implications of its positions. Briefly, those positions are that: (a) the Government's actions against al-Qaeda constitute a world-wide armed conflict to which international humanitarian law applies; (b) international humanitarian law operates to the exclusion of human rights law; (c) international humanitarian law falls outside the mandate of the Special Rapporteur and of the Human Rights Council; and (d) States may determine for themselves whether an individual incident is governed by humanitarian law or human rights law.

72. I responded to these positions in detail both directly to the Government and in my 2007 report to the Council.<sup>100</sup> I have discussed the extent to which these positions constitute a radical departure from past practice, and the highly negative consequences that would flow from them.<sup>101</sup> Under the Government's reinterpretation of the law and the Council's and my mandate, the United States would function in a public accountability void – as could other

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<sup>97</sup> On 17 September 2001, the President signed a "presidential finding" pursuant to the authority of which the CIA developed the concept of "high-value targets" for whom "kill, capture or detain" orders could be issued in consultation with lawyers in DOJ, CIA, and the administration. Council of Europe, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States*, report submitted by Mr. Dick Marty, Doc. 11302 Rev. (7 June 2007), paragraphs 58-64. I asked the Inspector General of the CIA about this program, but he refused to confirm or deny any aspect of this account.

<sup>98</sup> Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, The New York Times, April 7, 2009; Jane Perlez, *Pakistan Rehearses Its Two-Step on Airstrikes*, The New York Times, April 15, 2009.

<sup>99</sup> A/HRC/4/20/Add.1, pp. 342-58 (one targeted killing in Pakistan); see also E/CN.4/2006/53/Add.1, pp. 264-65); A/HRC/4/20/Add.1, pp. 358-61 (three targeted killings in Pakistan).

<sup>100</sup> A/HRC/4/20/29; A/HRC/4/20/Add.1, pp. 342-58.

<sup>101</sup> These consequences include: (a) many of the worst human rights and humanitarian law violations in the world today would be removed from the purview of the Special Rapporteur and the Human Rights Council; (b) a State could target and kill any individual, anywhere in the world, whom it deemed to be an "enemy combatant" and it would not be accountable to the international community; (c) a State could unilaterally decide that a particular incident complied with international law – as interpreted solely by the State – and would not therefore be covered by the mandate; (d) it is widely agreed that international human rights and humanitarian law are complementary, not mutually exclusive. *Ibid.*

States – to the detriment of the advances made by the international human rights and humanitarian law regimes over the past sixty years.

73. The new administration should reconsider these positions and move to ensure the necessary transparency and accountability. Withholding such information replaces public accountability with unverifiable Government assertions of legality, inverting the very idea of due process.

#### **IV. RECOMMENDATIONS**

##### **A. Domestic issues**

##### **74. Due process in death penalty cases**

- **The system of partisan elections for judges should be reformed to ensure that capital defendants receive a fair trial and appeals process.**
- **Alabama and Texas should establish well-funded, state-wide public defender services. Oversight of these should be independent of the executive and judicial branches.**
- **Texas should establish a commission to review cases in which convicted people have been subsequently exonerated, analyze the reasons, and make recommendations to enable the criminal justice system to prevent future mistakes.**
- **Alabama should evaluate and respond in detail to the findings and recommendations of the American Bar Association report on the implementation of its death penalty.**
- **Federal and state governments should systematically review and respond to concerns about continuing racial disparities in the criminal justice system generally, and in the imposition of the death penalty specifically.**
- **In light of uncorrected flaws in state criminal justice systems, and given the finality of executions, Congress should enact legislation permitting federal courts to review on the merits all issues in death penalty post-conviction cases.**
- **Regulations permitting the Department of Justice to certify the adequacy of state indigent defense systems based on factors left to states' discretion should be amended or repealed.**
- **Federal and state governments should ensure that capital punishment is imposed only for the most serious crimes, requiring an intent to kill resulting in a loss of life.**

- **Foreign nationals who were denied the right to consular notification should have their executions stayed and their cases fully reviewed and reconsidered.**

75. **Deaths in immigration detention**

- **All deaths in immigration detention should be promptly and publicly reported and investigated.**
- **The Department of Homeland Security should promulgate regulations, through the normal administrative rulemaking process, for provision of medical care that are consistent with international standards.**

76. **Tracking and responding to killings by law enforcement officials**

- **Video and audio recording of interactions between law enforcement officers and members of the public should be increased. The destruction of tapes should be minimized through technical means and through the imposition of penalties.**
- **Existing data collection efforts regarding killings by law enforcement officers should be improved to increase their usefulness in an “early warning” and “hot spot identification” role.**

77. **Guantánamo Bay detainees**

- **The Military Commissions Act should not be used for capital prosecutions of any detainees, including those in Guantánamo. Any such prosecutions should meet due process requirements under international human rights and humanitarian law.**
- **Complete and unredacted investigations and autopsy results into the deaths of Guantánamo detainees should be released to family members.**

**B. International operations**

78. **Transparency into Civilian Casualties**

- **The Government should track and publicly disclose all civilian casualties caused by military or other operations or that occur in the custody of the Government or its agents.**

79. **Enhancing military justice transparency**

- **The Department of Defense should establish a central office or “registry” to maintain a docket and track cases from investigation through final disposition. The system should be capable of providing up-to-date statistical information. The registry should include information on upcoming hearings and copies of the findings of formal and informal investigations, rulings, pleadings, transcripts of testimony, and exhibits. Public internet access to the registry should be available, subject only to legal non-disclosure requirements related to national security and individual privacy.**

80. **Ensuring comprehensive criminal jurisdiction over offences in armed conflict**

- **The doctrine of “command responsibility” as a basis for criminal liability should be codified in the Uniform Code of Military Justice and the War Crimes Act.**
- **Congress should adopt legislation that comprehensively provides criminal jurisdiction over all private contractors and civilian employees, including those working for intelligence agencies.**

81. **Ensuring accountability**

- **A commission of inquiry should be established to conduct an independent, systematic and sustained investigation of policies and practices that led to deaths and other abuses in U.S. operations. The commission should have the mandate and resources to conduct a full investigation. Its results and recommendations should be publicly and widely disseminated, and the Government should publicly respond thereto. Given the importance of prosecutions, an independent special prosecutor should be considered and the commission should not undermine the possibility of eventual prosecution.**
- **Consideration should be given to establishing a Director of Military Prosecutions to ensure separation between the chain of command and the prosecution function.**
- **An office dedicated to investigation and prosecution of crimes by private contractors, civilian Government employees, and former military personnel should be established within the DOJ. The office should receive the resources and investigative support necessary to handle these cases. The DOJ should make public statistical information on the status of these cases, disaggregated by the kind, year, and country of alleged offence.**

82. **Enhancing reparations programs**

- **Existing reparation programs should be combined or replaced by a comprehensive and adequately-funded compensation program for the families of those killed in U.S. operations, including by military and intelligence personnel and private contractors. In missions involving a range of international forces, such as those in Afghanistan and Iraq, the Government should urge allies to implement similar programs and should promote coordination to ensure that all casualties are compensated.**

83. **Enhancing transparency in targeted killings**

- **The Government should explicate the rules of international law it considers to cover targeted killings. It should specify the bases for decisions to kill rather than capture particular individuals, and whether the State in which the killing takes place has given consent. It should specify the procedural safeguards in place, if any, to ensure in advance of drone killings that they comply with international law, and the measures the Government takes after any such killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures it would take.**
- **The Government should make public the number of civilians collaterally killed as a result of drone attacks, and the measures in place to prevent such casualties.**

## **Appendix A**

### **Program of Visit**

1. I visited the United States from 16-30 June 2008. I met with Government officials, judges, civil society groups, and victims and witnesses in Washington DC, New York City, Montgomery (Alabama), and Austin (Texas).
2. At the federal level, I met with officials from a range of Departments. In the State Department, I met with officials from the Office of the Legal Advisor, the Bureau of International Organizational Affairs, the Bureau of Democracy, Human Rights and Labor, and Diplomatic Security. At the Justice Department, I met with a range of officials. At the Department of Defence, I met with officials from the General Counsel's Office and the Air Force's Military Justice Division.
3. In the Department of Homeland Security, I met with the Office of Detention and Removal Operations and the Division of Health Services. I met with Inspectors-General or their staff from the State Department, the Department of Homeland Security, and the Central Intelligence Agency. In Washington DC, I also met with a range of Congressional staff members, including those working for Senators on the Armed Services Committee and the Judiciary Committee, and for House Representatives on the Committee on Oversight and Government Reform.
4. In both Alabama and Texas, I met with the Governor's office, the Attorney-General's office, the Board of Pardons and Paroles, judges from the highest state courts, and state Senators. In Alabama, I also met with the Federal Defender's office. In Texas, I met with the Consul General of Mexico.
5. On all issues, I met with a range of civil society advocates. In New York, Washington DC, Alabama and Texas, I met with lawyers and advocates for immigration detainees. In Texas and Alabama, I met with lawyers for death row inmates. In Washington DC and New York, I met with lawyers working on military commission cases and representatives from human rights and civil liberties organizations.

## Appendix B

### Case Study: Lack of Transparency in the Military Justice System

1. The troublingly opaque character both of investigation and of prosecution in the U.S. military justice system is well illustrated by a case described to me by witnesses and investigators when I visited Afghanistan.<sup>1</sup> On 4 March 2007, U.S. Marines responded to a suicide attack on their convoy, in which one soldier was wounded, by killing some 19 Afghans and wounding many others in the space of a ten mile retreat. I asked the regional commander in Afghanistan what follow-up had occurred. He could not tell me and explained that his unit had just arrived in Afghanistan, that accountability for incidents involving the previous unit was that unit's responsibility, and that the prior unit had taken all the relevant files when it left the country. In fact, at that time, a Court of Inquiry into the incident was proceeding in North Carolina.

2. Shortly after I returned from Afghanistan, the U.S. military released a short statement on this incident, indicating that the commander of U.S. Marine Corps Forces Central Command had conducted a "thorough review of the report of a Court of Inquiry" and had determined that the soldiers had "acted appropriately and in accordance with the rules of engagement and tactics, techniques and procedures in place at the time in response to a complex attack."<sup>2</sup> Unsurprisingly, this conclusory and unsubstantiated response to such a serious incident was met with dismay in Afghanistan. Afghans — and Americans — have a right to ask on what basis this conclusion was reached. But all of the documents produced by the Court of Inquiry have remained classified. The record of proceedings has not been released. The 12,000-page report of the Court of Inquiry, including recommendations and factual findings, has not been released. The Government has even disregarded its own regulation requiring the convening authority to ensure that an executive summary of the report be made public.<sup>3</sup> Whether or not

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<sup>1</sup> Press Statement, Kabul, 15 May 2008.

<sup>2</sup> Press Statement, 23 May 2008.

<sup>3</sup> The use of Courts of Inquiry is provided for in Article 135 of the Uniform Code of Military Justice (UCMJ). While the UCMJ authorizes the President to prescribe regulations to implement UCMJ provisions, with respect to Courts of Inquiry, the President has delegated most of this authority to the Secretaries of the Army, Navy, and Air Force. For the Navy, which includes the Marine Corps, the key regulation is JAGINST 5830.1A, "Procedures Applicable to Courts and Boards of Inquiry" (31 October 2005). This regulation distinguishes between three products of a Court of Inquiry: the "record of proceedings", the "report", and the "executive summary". On this last, the regulation states that:

"Given the nature of the major incidents investigated, officials of the DON, the DOD, other executive agencies, the legislative branch, and the media, often desire copies of the investigation. Where the

the decision not to initiate criminal proceedings in this case was justified, the manner in which the military justice system operated in this case is entirely inconsistent with principles of public accountability and transparency.

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incident results in death, the next of kin also will normally request a copy of the investigation. The report of the investigation, transcript of the proceedings, and enclosures can often be thousands of pages in length. For persons unfamiliar with military organizations, terminology, and operations, the task of deciphering an investigation can be difficult. Accordingly, convening authorities should ensure that an executive summary in plain English, which accurately reflects the findings, opinions, and recommendations of the investigation, is prepared prior to forwarding the investigation. The summary may be a part of the convening authority's endorsement or an enclosure thereto. There is nothing improper with requiring counsel to the investigation or the president of a Court or Board of Inquiry to prepare the summary. Participation by public affairs personnel in the preparation of the executive summary may also be advisable.”

(JAGINST 5830.1A, para. 9.)

## Appendix C

### Legal Framework Applicable to Prosecutions of Private Contractors and Civilian Government Employees

1. Congress has adopted a series of statutes expanding and clarifying jurisdiction over offences committed by contractors and civilian Government employees operating in areas of armed conflict and in peacetime. To date, however, these legislative initiatives have been largely reactive to specific incidents such as the abuses at Abu Ghraib and the shooting incident at Nisoor Square. The result is legislation that closes particular jurisdictional gaps but leaves others. Nevertheless, these statutes together should permit the justice system to punish all or virtually all killings prohibited by human rights or humanitarian law.

2. The USA Patriot Act of 2001 expanded the scope of “special maritime and territorial jurisdiction” over crimes committed overseas to include offenses committed “by or against a national of the United States” on U.S. bases, facilities and diplomatic missions.<sup>1</sup> This expanded jurisdiction applies to about 30 criminal statutes and is most likely to be of use in cases involving deaths in custody.<sup>2</sup> Indeed, the only private security contractor ever successfully prosecuted in the civilian justice system was convicted under this statute after beating a detainee to death during an interrogation in Afghanistan.

3. When the Military Extraterritorial Jurisdiction Act (MEJA) was enacted in 2000, it covered Department of Defense employees, former military personnel, contractors, and sub-contractors accompanying the military outside the United States.<sup>3</sup> After it came to light that contractors to other Government agencies were implicated in the torture and abuse of prisoners at Abu Ghraib, Congress amended MEJA in 2004 to cover any federal employee or Government contractor whose “employment relates to supporting the mission of the Department of Defense overseas” (except contractors who are nationals or residents of the country in which the missions takes place).<sup>4</sup> The intent was to cover the range of civilian employees and contractors operating in Afghanistan and Iraq, but there is some debate

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<sup>1</sup> 18 U.S.C. § 7(9), as amended by PL 107-56 § 804.

<sup>2</sup> The jurisdiction provision would not, however, apply if a foreign security contractor to the U.S.. Government were to kill a foreign national.

<sup>3</sup> PL 106-523.

<sup>4</sup> 18 U.S.C. § 3267, as amended by PL 108-375, § 1088.

whether a court would agree that all such persons are “supporting the mission of the Department of Defense.” I was briefed by a number of Congressional staffers on ongoing efforts to adopt new legislation that would definitively clarify MEJA in this regard.<sup>5</sup> This is most encouraging. There was, however, also talk of including a so-called “intelligence carve-out” that would provide impunity for contractors and employees working for U.S. intelligence agencies. This would be wholly inappropriate, and Congress should adopt legislation that comprehensively provides criminal jurisdiction over contractors and civilian employees.

4. The War Crimes Act was adopted in 1996 and amended in 1997 and 2006.<sup>6</sup> In contrast to MEJA and the Patriot Act, which define the scope of federal jurisdiction but do not codify new criminal offences, the War Crimes Act provides jurisdiction over a number of violations of international humanitarian law, including, *inter alia*, the “willful killing” of “protected persons” within the meaning of the Geneva Conventions (in international armed conflicts) and “murder” (in a non-international armed conflict).<sup>7</sup> In accordance with the United States’ humanitarian law obligations, the War Crimes Act originally made all violations of the Common Article 3 of the Geneva Conventions a war crime under U.S. domestic law. The 2006 amendments to the War Crimes Act – made as part of the Military Commissions Act of 2006 – however, exempted certain violations of Common Article 3 from prosecution as war crimes, including “humiliating and degrading treatment,” and sentencing or execution by courts that fail to provide “all the judicial guarantees . . . recognized as indispensable by civilized peoples.” Such provisions narrow the United States’ obligations under international humanitarian law and, together with the MCA’s provisions that violate fair trial principles, should be repealed.

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<sup>5</sup> The “Security Contractor Accountability Act of 2007” was passed by the House (HR 2740), and its companion bill (S 2147) is subject to ongoing discussions in the Senate.

<sup>6</sup> The War Crimes Act was originally adopted in Public Law 104-192 (enacted 21 August 1996) and was significantly amended in Public Law 105-118 (enacted 26 November 1997) and Public Law 109-366 (enacted 17 October 2006).

<sup>7</sup> Note that jurisdiction is also provided over several other offences that involve killing. The provision most relevant killings in the current conflicts in Afghanistan and Iraq is, however, that of “murder”. This is defined as:

“The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.”

This definition is qualified by another provision, which declares that the “intent specified . . . precludes the applicability of [the murder provision] to an offense under [Common Article 3] with respect to— (A) collateral damage; or (B) death, damage, or injury incident to a lawful attack.” (18 U.S.C. § 2441(d)(3).)

5. Finally, pursuant to a 2006 amendment, the Uniform Code of Military Justice (UCMJ) also provides jurisdiction over “persons serving with or accompanying an armed force in the field” whether “[i]n time of declared war or a contingency operation.”<sup>8</sup> This first conviction of a private security contractor under this provision occurred in June 2008 in response to one contractor stabbing another in Iraq.

6. There may be incidents over which both the military justice system and the civilian justice system have jurisdiction. With respect to killings by contractors or civilian Government officials in the context of armed conflicts, the military justice system may have jurisdiction under the UCMJ, and the civilian justice system may also have jurisdiction under a variety of statutes. With respect to unlawful killings by soldiers, both the UCMJ and the War Crimes Act could apply.

7. The current arrangement in cases implicating contractors or civilian Government employees is that the DOJ will generally prosecute the case in the federal courts, and the military justice system will only act if the DOJ declines to do so.<sup>9</sup> While the DOJ’s performance in these cases has thus far been abysmal, as I discuss in the body of this report, this is the right arrangement in principle.<sup>10</sup>

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<sup>8</sup> UCMJ, Art. 2(a)(10) was amended with Public Law 109-364 (enacted 17 October 2006) to expand its scope from declared wars to “contingency operations”. Military operations in Afghanistan and Iraq are characterized in U.S. law as “contingency operations.”

<sup>9</sup> In March 2008, the Secretary of Defense issued a memorandum to implement the 2006 amendment extending the UCMJ to cover private security contractors. *UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations* (10 March 2008). The memorandum provides that DOD will notify DOJ of cases so that the latter can “determine whether it intends to exercise jurisdiction”. If DOJ decides to pursue the case, DOD will withhold from commanders the authority to initiate court-martial charges. If DOJ decides not to pursue the case, DOD will notify the relevant geographic combatant commander that he may initiate action under the UCMJ and notifies DOJ that this authorization has been made.

<sup>10</sup> The general framework for DOD – DOJ cooperation is the Memorandum of Understanding Between Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes (August 1984) contained in Manual for Courts-Martial 2008, appendix 3. This requires the DOD to notify the DOJ of certain cases. The issue of the propriety of military jurisdiction over civilians raises complex questions that I do not address here.

