

**Human Rights Watch Submission to the Committee against Torture  
During its Consideration of the  
Second Periodic Report of the United States  
August 2005**

Human Rights Watch notes with appreciation the Committee against Torture's efforts to ensure that the United States honors its obligations under the Convention against Torture (hereinafter the "Convention"). It is our view that the United States' Second Periodic Report to the Committee (the "U.S. Report") does not satisfactorily address the serious questions raised by the Committee in its previous sessions. We also believe that the Second Periodic Report fails to discuss certain new practices by the U.S. government and factual developments in the United States that are relevant to its Convention obligations. In light of these failings, we welcome this opportunity to highlight several questions to which we believe the United States should be requested to respond.

**ARTICLE 1: DEFINITIONAL**

1. Does the United States consider any or all of the following treatment to be torture or cruel, inhuman or degrading treatment: (a) "waterboarding" (mock drowning) or other forms of mock execution;<sup>1</sup> (b) extended and repeated sleep deprivation, prolonged exposure to cold, prolonged shackling, prolonged deprivation of facilities for urination, and forced immobility for lengthy periods;<sup>2</sup> (c) extended solitary confinement;<sup>3</sup> and (e) the use of unmuzzled guard dogs during interrogations.<sup>4</sup>

- U.S. forces in Afghanistan, Iraq and at Guantanamo Bay have been implicated in various forms of abuse against detainees, which has been widely reported. While the U.S. government has often insisted that such acts occurred because of a "few bad apples," it has shied away from denouncing specific practices. For instance, during Senate testimony in March 2005, Porter Goss, the director of central intelligence, while claiming that the C.I.A. was not now using torture, stated that "waterboarding" was a "professional interrogation" technique. And during his July 2005 confirmation hearings for deputy attorney general, the second-ranking spot at the Justice Department, Timothy E. Flanigan said he was reluctant to state whether he considered several interrogation methods, including mock executions and the simulated drowning of a prisoner ("waterboarding"), to be inappropriate or to constitute torture.<sup>5</sup>

2. How does the United States interpret the term "acquiescence" in Article 1(1) of the Convention?

- In 2002, the Bureau of Immigration Appeals decided that protection from refoulement under the Convention does not extend to persons who fear private entities that a government is unable to control.<sup>6</sup> However, Human Rights Watch believes that the correct standard under the Convention is that an individual must be protected from return to a place where the government is aware of a private entity's behavior and does nothing to stop it. We note that at least one U.S. federal circuit court agrees

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<sup>1</sup> Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004; James Risen, David Johnston and Neil A. Lewis, "Harsh CIA Methods Cited in Top Qaeda Interrogations," *The New York Times*, May 13, 2004.

<sup>2</sup> See Human Rights Watch, "Enduring Freedom: Abuses by U.S. Forces in Afghanistan," *A Human Rights Watch Report*, March 2004; Adam Zagorin and Michael Duffy, "Inside the Interrogation Of Detainee 063," *Time Magazine*, June 20, 2005 (revealing a log of tactics used by the United States in the interrogation of Mohammed al-Qahtani at Guantánamo).

<sup>3</sup> See Human Rights Watch, "Guantánamo: Detainee Accounts," *A Human Rights Watch Backgrounder*, October 2004 [online], <http://www.hrw.org/backgrounder/usa/gitmo1004/>; Center for Constitutional Rights, "Composite Statement: Detention in Afghanistan and Guantanamo Bay; Shafiq Rasul, Asif Iqbal and Rihel Ahmed," August 4, 2004 [online], <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>.

<sup>4</sup> *Ibid.*

<sup>5</sup> Eric Lichtblau, "Justice Nominee Is Questioned On Department Torture Policy," *The New York Times*, July 27, 2005.

<sup>6</sup> See *Matter of S-V*, 22 I&N Dec. 1306 (BIA 2000).

with this interpretation.<sup>7</sup> Nevertheless, the United States continues to present its own understanding of the term “acquiescence” as reflected in *Matter of S-V-* in immigration cases. We believe that this interpretation violates the Convention.

## **ARTICLE 2: EFFECTIVE PREVENTION MEASURES**

3. Please provide an overview of the extent to which law enforcement personnel engage in torture or other cruel, inhuman or degrading treatment or punishment and whether such treatment exists in federal state or local detention facilities.

- The U.S. Report fails to provide any detailed information about actual practices against which to assess U.S. compliance with the Convention. We believe that such a comprehensive overview of actual practices (as opposed to isolated lawsuits) is necessary to help the United States formulate effective and appropriate prevention measures. Instead, the U.S. Report restricts itself primarily to noting particular laws and referring to what appear to be randomly selected examples of legal proceedings – federal as well as state – challenging particular abuses. This failure may reflect reluctance on the part of the United States to be candid with the Committee or the public, particularly with regard to federal policies and the conduct of federal personnel. It may also reflect the absence of any mechanism by which the United States gathers systematic information on state and local policies and practices. The United States, for example, does not even maintain a database on lawsuits against police or state and local correctional facilities or systems.

## **ARTICLE 3: PROHIBITION AGAINST REFOULEMENT**

4. Please provide detailed information regarding the incorporation of Article 3 into U.S. law and its implications for U.S. policy in the following areas: (a) both ordinary and expedited immigration removals for national security reasons, for failing to arrive with adequate documents, or for having a criminal conviction; (b) extraditions; (c) transfers of so-called “enemy combatants” from detention at Guantánamo Bay, Cuba, to their countries of origin; and (d) extraterritorial renditions of persons by U.S. government agents. What procedural safeguards govern these processes to ensure that any person can effectively challenge a transfer based on fears of risk of torture or cruel, inhuman or degrading treatment?

- Article 3 applies to transfers from the jurisdiction of a state party – including personal custody of a state agent – to another state where there are substantial reasons for believing that a person would be in danger of being subjected to torture. Article 3 is thus applicable in situations where such a transfer is executed extraterritorially; that is, not directly from the physical territory of a state party but from the territory of a third country or in international waters from the direct custody of agents of a state party.
- In cases of any such transfer, a person claiming Convention protection must have recourse to basic procedural guarantees to ensure that s/he can effectively challenge a transfer based on Article 3 rights. Thus, Article 3 contains both a substantive and a procedural guarantee.<sup>8</sup>

5. Please provide information regarding the United States’ understanding of the Article 3 phrase, “where there are substantial grounds for believing that he would be in danger of being subjected to torture” as opposed to the U.S. statutory standard of “if it is more likely than not that he would be tortured.” In particular, provide the Committee with case examples, or explanations of policy, that illustrate how the United States makes the determination that a person is “more likely than not” to be tortured. Provide examples where persons subject to transfer have been afforded protection under the Convention and where the claim was rejected.

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<sup>7</sup> See *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. Jun 18, 2003); *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. May 16, 2005); and *Perez v. Loy*, 356 F.Supp.2d 172 (D.Conn. Feb 17, 2005).

<sup>8</sup> See *Agiza v. Sweden*, Communication No. 233/2003. Other examples include: the transfers of two Egyptians from Sweden to Cairo; the transfer of Abu Omar from Milan and the U.S. response to the Italian indictment of thirteen CIA agents for Abu Omar’s “kidnapping” and transfer; the transfer of al-Masri from Macedonia, etc. . .

- It is Human Rights Watch's view that the U.S. standard inappropriately raises the evidentiary bar and places a burden on the claimant to provide proof according to a standard not grounded in the Convention. The claimant does not have to prove that there is a likelihood that he or she would be tortured, but instead must present evidence of risk of such abuse, which is not in accordance with the Convention.
- As the Committee is aware, its General Comment No. 1 does not articulate an evidentiary standard beyond noting that the risk of torture "must be assessed on grounds that go beyond mere theory or suspicion," "does not have to meet the test of being highly probable," and must be determined to be "personal and present." Factors to be taken into consideration include evidence of a pattern of gross, flagrant, or mass human rights violations in the receiving country; evidence that a person had been subject to torture or other abuse in the past; corroborating evidence of such abuse; personal circumstances of the claimant that would make her/him more vulnerable to abuse; and the credibility of the claimant, among other things.

6. Please provide detailed information regarding the use of diplomatic assurances in immigration removal cases and the use of such assurances in the extradition context, via extraterritorial rendition, and from Guantánamo Bay, Cuba. In particular, provide statistics regarding the number of cases in each area where assurances have been negotiated and secured, details of the requirements that must be fulfilled by the receiving country in order for the U.S. government to deem them "adequate" or "reliable" under Article 3, and specific measures taken by the U.S. to ensure the assurances have been honored.

- Human Rights Watch has determined that diplomatic assurances cannot be relied upon to provide effective protection against torture and ill-treatment.<sup>9</sup> Despite this, according to U.S. immigration regulations, if the U.S. government secures diplomatic assurances against torture from a receiving country, a claim under the Convention is immediately halted.<sup>10</sup> The executive determines whether the assurances are "sufficiently reliable" and there is no provision for judicial review of a transfer based on assurances. In other contexts – extraditions, returns from Guantánamo Bay, and extraterritorial transfers per rendition – the U.S. government has stated that diplomatic assurances against torture are secured as a matter of policy prior to transfer. In those contexts, no judicial review is provided for a claimant to challenge a transfer based on the reliability or adequacy of such assurances. Thus, in cases where diplomatic assurances are secured, the executive alone determines the legality of the transfer.
- As the Committee is undoubtedly aware, a particularly high profile case relating to diplomatic assurances is that of Maher Arar. In September 2002, U.S. authorities apprehended Arar and held him for nearly two weeks without providing him with the ability to effectively challenge his detention or imminent transfer. In reliance upon diplomatic assurances provided by the government of Syria, U.S. immigration authorities flew Arar to Jordan, where he was driven across the border to Syria and detained there for ten months. The transfer was effected despite Arar's repeated statements to U.S. officials that he would be tortured in Syria and his repeated requests to be sent home to Canada. Arar has credibly alleged that he was beaten by security officers in Jordan and tortured repeatedly, often with cables and electrical cords, during his confinement in a Syrian prison.

7. How has the United States responded when a transferred individual has tried to hold the U.S. government accountable for a breach of diplomatic assurances? In particular, provide details regarding the federal law suit of Maher Arar and challenges against removal by detainees at Guantánamo Bay.

- Human Rights Watch is gravely concerned that the U.S. government has consistently refused to provide any information regarding how diplomatic assurances are negotiated and secured. The

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<sup>9</sup> See "Still at Risk: Diplomatic Assurances no Safeguard against Torture, *A Human Rights Watch Report*, vol. 17, no. 3(D), April 2005; "Empty Promises:" Diplomatic Assurances No Safeguard Against Torture," *A Human Rights Watch Report*, vol.16 no.4 (D), April 2004;

<sup>10</sup> See C.F.R. §208.18(c).

government has invoked the “state secrets privilege” to avoid disclosing any information to the court in Maher Arar’s federal case; has refused to cooperate in any manner with the Canadian commission of inquiry in the Arar case; and has challenged counsel’s request for notice and information regarding assurances secured in advance of transfers from Guantánamo Bay back to some detainees’ home countries. We believe the U.S. government is obligated to give further details on all of these cases as a part of its obligations under the Convention.

#### **ARTICLE 4: TORTURE AS A CRIME**

8. Please provide more information on the staff and budget resources allocated to the Civil Rights Division within the Department of Justice, the division that is responsible for federal legal civil and criminal proceedings against abusive correctional or law enforcement officers or agencies. Have the division’s staff and budgets grown commensurate with the growth in the number of detention facilities and police over the past decade?

- Human Rights Watch continues to monitor and document abuses of prisoners and detainees by correctional staff and law enforcement personnel inside the United States. There is good reason to question whether the federal government is doing enough to fulfill its obligations under the Convention and, indeed, whether it has allocated the resources to do so. In the twenty-four years between 1980 and 2004, the Department of Justice has initiated investigations under the Civil Rights of Institutionalized Persons Act in over 400 facilities, including mental health hospitals and homes for the elderly as well as jails and prisons.<sup>11</sup> This averages to less than twenty per year. This hardly seems adequate given that there are an estimated 5080 jails and prisons in the U.S., not counting facilities for the mentally ill, the elderly or juvenile detention. In addition, there are 800,000 police in the country and more than 17,000 police departments. Yet between October 1999 and January 2005, the Department of Justice States has convicted only 284 officers of using excessive force and has negotiated only 16 settlements with law enforcement agencies.

#### **ARTICLES 10 & 11: EDUCATION AND PERIODIC REVIEW OF STATE PRACTICES**

9. Other than sending copies of the U.S. Report to state Attorneys General and posting it on the Web, what specific steps does the federal government of the United States take to ensure that federal, state and local corrections and law enforcement personnel are knowledgeable about their obligations under the Convention? How does it ensure that the findings and concerns of the Committee are transmitted to correctional and law enforcement authorities?

- Human Rights Watch has conducted countless interviews and conversations with correctional and law enforcement authorities suggesting that they are completely ignorant of the existence of the Convention, much less of its applicability to their work. We do not know of efforts by the United States to adhere to Article 10 by ensuring that education and information regarding the prohibition against torture and cruel, inhuman or degrading treatment is included in the training of persons involved in the arrest, interrogation, detention or imprisonment of individuals.
- Furthermore, we do not know of any efforts by the U.S. government to disseminate the Committee’s response to the U.S. Initial Report, which included statements and queries that are directly relevant to correctional and law enforcement practices.

10. Does the Civil Rights Division investigate and bring civil proceedings against the federal Bureau of Prisons, including investigations of the treatment of prisoners in supermaximum security prisons?

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<sup>11</sup> See *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (New York: Human Rights Watch, 2003).

- The U.S. Bureau of Prisons (BOP) is responsible for over 110,000 prisoners and detainees—most housed in BOP facilities, some housed in other facilities with whom the BOP contracts. On a few occasions, the Department of Justice has initiated criminal proceedings against BOP staff who have abused prisoners. But those have typically been cases in which the violent conduct of the criminal defendants was malicious and clearly violated prison rules.
- Based on our own investigations, Human Rights Watch has been critical of the practices in supermaximum security facilities for several years.<sup>12</sup> We also note that in its response to the Initial U.S. Report, the Committee expressed its concern about the unduly harsh conditions in supermaximum security prisons. In response to the Committee's concerns and requests for additional information, the United States simply indicates in its Report that supermaximum security facilities may be necessary for certain violent inmates. We disagree. For example, based on our visits to ADX, the federal supermaximum security prison in Florence, Colorado, Human Rights Watch believes that the treatment of many prisoners in that facility (particularly those in the control and high security units) is unnecessarily harsh and restrictive, dehumanizing, dangerous for mental health, and inconsistent with basic human rights standards as well as the Convention.<sup>13</sup>
- While there is no doubt that particularly stringent security measures may be required for certain prisoners, the U.S. experience with supermaximum security prisons reveals that many prisoners confined in such facilities are not especially violent; that many are mentally ill; that the deprivations (e.g. a lack of windows; denial of access to reading materials; the inability to speak with other inmates much less engage in normal interactions with them) often exceed reasonable security requirements. Moreover, prisoners are confined under such extraordinarily harsh conditions for years on end. Prolonged confinement in these conditions can take a terrible toll on anyone, and is particularly disastrous for mentally ill prisoners. As one federal judge noted, it pushes the boundaries of what a person can psychologically tolerate.

11. What specific steps has the United States taken to ensure that corrections officials and law enforcement personnel respect the Convention when using electronic stun devices; chemical sprays and restraints?

- Corrections and law enforcement personnel are authorized to use force only when necessary and only in the amount required to restore order and prevent injury. All too often, however, Human Rights Watch has found that officers use force to punish, to retaliate against, or to end annoying but non-dangerous conduct. They also use more force than is necessary in particular circumstances. New portable, easy to use and non-lethal devices that leave few marks have increased the potential for the abusive use of force.
- The U.S. Report cites federal agency policies and rules governing “restraint devices, including electro-shock devices.” While on their face the policies appear appropriate, the U.S. Report does not include a discussion of the extent to which the policies appear to be followed in practice. The Report provides only skimpy information regarding the policies of state and local agencies – and contains no assessment at all of their actual practices.
- Research by Human Rights Watch and other groups indicates that there is widespread misuse of these electronic and chemical devices as well as restraints. Indeed, in its response to the U.S. Initial Report, the Committee noted its own concerns about them.
- Electronic stun devices—belts and stun or “taser” guns that give 50,000 volt charges—and chemical sprays are used to punish prisoners or to maliciously retaliate against those who are annoying or unpleasant. They are also used unnecessarily when no force or lesser amounts of force might have sufficed. Chemical sprays can cause severe skin burns, eye problems and respiratory problems. Electric shocks from the stun devices are extremely painful. They can be particularly

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<sup>12</sup> See “Out of Sight: HRW Briefing Paper on Supermaximum Prisons,” *A Human Rights Watch Briefing Paper*, vol. 12, No 1 (G), February 2000; *Red Onion State Prison: Super-Maximum Security Confinement in Virginia, A Human Rights Watch Report*, April 1999; Human Rights Watch, *Cold Storage: Super-Maximum Security Confinement in Indiana*, (New York: Human Rights Watch, 1997).

<sup>13</sup> See The American College of Physicians, Human Rights Watch, The National Coalition to Abolish the Death Penalty, and Physicians for Human Rights, *Breach of Trust*, (New York: March 1994).

dangerous, even lethal, for persons with certain medical conditions. Tasers are implicated in the deaths of at least 100 persons in the United States.

- Human Rights Watch has also uncovered instances in which corrections and law enforcement staff have used restraints as punishment or retaliation; keeping the inmate restrained longer than is necessary; and without properly monitoring the medical condition of the person restrained. Inmates have died after improper use of restraints for prolonged periods.<sup>14</sup>

## ARTICLE 13: ACCESS TO COMPLAINT PROCEDURES

12. What steps will the United States take to remove limitations in the federal Prison Litigation Reform Act of 1996 (PLRA), which impede the ability of prisoners who have been subjected to torture or cruel, inhuman or degrading treatment from seeking relief and remedies in federal courts?

- Based on our research inside prisons in the United States, Human Rights Watch has called for amendments to the PLRA for several years.<sup>15</sup> In its response to the U.S. Initial Report, the Committee also expressed concern about the PLRA's restrictions on legal actions by prisoners. In its current report, the United States addresses that concern by noting that the PLRA has succeeded in curbing frivolous law suits. Much to our dismay, however, the U.S. Report overlooks the question of whether the PLRA has also restricted *meritorious* lawsuits.
- Given the limited action by public agencies to protect prisoners, lawsuits by or on behalf of prisoners alleging violations of their constitutional rights have been the most significant vehicle for preventing and redressing prison abuses. Many provisions of the PLRA, however, erect formidable barriers to prisoners' ability to undertake such lawsuits and limit the relief prisoners can receive. Under the PLRA, for example:
  - A prisoners' lawsuit is barred if she has previously failed to complete all the requirements of internal administrative complaint procedures in a timely fashion. For example, if a prisoner misses by even one day the deadline for making an administrative complaint about sexual abuse by a guard, she can be prevented from ever seeking judicial relief for that conduct.
  - The low fees granted to attorneys for successful prison conditions suits discourage lawyers from taking such cases. Since most prisoners are not able to afford the costs of private lawyers, they must look to public interest lawyers or private lawyers who operate on contingency basis to take their cases. Both must rely on court awarded legal fees to help finance their representation of the prisoners. The levels set by PLRA are so low—and below reasonable market levels—that lawyers cannot afford to take on prisoner cases or are limited in how many they can take.
  - Recovery of damages is barred for emotional or mental pain and suffering not accompanied by physical injury. For example, a prisoner who is forced to dance naked in front of jeering staff would not be able to bring suit for damages for such humiliating and degrading treatment because there was no physical injury.

13. As noted in the U.S. Report, in 2003, the U.S. Congress enacted the national Prison Rape Elimination Act, which authorizes the creation of standards for the prevention, investigation and prosecution of sexual violence in detention facilities. However, have similar national standards been developed by the federal government in the other areas of corrections and law enforcement that raise the potential for torture or cruel, inhuman or degrading treatment or punishment?

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<sup>14</sup> The only proper use of restraints—securing a prisoner in four or five point restraints (on back with hands and feet tied down, sometimes with strap across chest) or through the use of restraint chairs or boards—is to prevent someone from hurting himself or others when there is no other way of control.

<sup>15</sup> See, e.g. Statement of Human Rights Watch to the United States Senate Committee on the Judiciary Hearing on the Prison Rape Reduction Act of 2002, July 31, 2002; *No Escape: Male Rape in U.S. Prisons*, (New York: Human Rights Watch, April 2001); *Nowhere to Hide: Retaliation Against Women in U.S. Prisons*, *A Human Rights Watch Report*, vol. 10, no. 2 (G), July 1998.

- Although the United States is a federal system, the national government has clear obligations to protect all people in the hands of state and local authorities (corrections or police) from torture or other cruel, inhuman or degrading treatment or punishment. The United States relies primarily on legal actions by the Department of Justice to fulfill this responsibility.
- Yet, Human Rights Watch is concerned that the decisions in legal proceedings only address and bind the specific individuals, facility, system or agency that was a party to that proceeding. Thus, for example, if the United States has undertaken a successful civil rights case against a local jail for misusing restraints, the terms of whatever court order or settlement it obtains setting forth procedures and standards governing the use of restraints would only apply to that facility. The development of appropriate national standards and procedures applicable to federal, state and local authorities might better protect more people from Convention violations than individual legal proceedings. Certainly concerns about federalism should not be permitted to outweigh the United States' obligations under the Convention.

#### **ARTICLE 15: PROHIBITION ON USE OF COERCED STATEMENTS**

14. Are statements that are obtained as the result of torture or other cruel treatment admissible in any proceedings before the military commissions established under the president's military order of November 13, 2001, as well as the Combatant Status Review Tribunals and the Administrative Reviews Boards established at Guantánamo Bay?

- The military commission rules nowhere prohibit the use of statements gathered through coercive techniques of interrogation. Although the U.S. government has used coercive interrogation methods at Guantánamo Bay and elsewhere, it is not clear that defendants before military commissions will be able to prevent consideration of evidence gathered through such methods. Under the commission rules, the standard for admission of evidence is simply whether, in the opinion of the presiding officer or majority of commission members, the evidence "would have probative value to a reasonable person."<sup>16</sup>
- Defendants also may not be able to challenge the voluntariness of information they themselves provided to interrogators. Additionally, the defense is unlikely to learn whether evidence was obtained from coercive interrogation of other detainees, whether held at Guantánamo or elsewhere, because the witness need not be brought before the commission; a hearsay account of what was said could be introduced into the evidence instead. Defense counsel therefore will be hard-pressed to challenge the circumstances under which such third-party evidence was obtained.<sup>17</sup>
- The Combatant Status Review Tribunals permit detainees at Guantánamo to contest their status as "enemy combatants." The Administrative Review Boards determine annually whether each Guantánamo detainee remains a threat to the United States or its allies or can provide intelligence. They were instituted in response to Supreme Court rulings and challenges that the detentions at Guantánamo Bay were in violation of the Geneva Conventions. In our view neither procedure addresses these concerns. The Department of Defense contends that both processes are informal review mechanisms and not legal proceedings—even though they determine whether a detainee will remain incarcerated or not—and thus deny detainees the participation of legal counsel and other fundamental due process protections. Decisions are based on evidence presented at the hearings and classified information that is not made available to the detainee. There are no expressed limits on this information, and so could include information gathered through the use of torture and other mistreatment.

#### **ARTICLE 16: CRUEL, INHUMAN OR DEGRADING TREATMENT**

15. What impermissible treatment or punishment under Article 16 is permissible in the United States under the U.S. reservation to Article 16, which limits the meaning of "cruel, inhuman or degrading treatment or

<sup>16</sup> Military Commission Order No. 1, 6(D)(1).

<sup>17</sup> See generally, Human Rights Watch, "Briefing Paper on Military Commissions," July 2005.

punishment," to such treatment or punishment "prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States"?

- The United States reservation to Article 16 provides that the U.S. considers itself bound to prevent "cruel, inhuman or degrading treatment or punishment" only to the extent such treatment or punishment is prohibited under the U.S. constitution. Unfortunately U.S constitutional jurisprudence fails to condemn many practices in the United States that clearly constitute cruel, inhuman and degrading treatment. Examples include incarceration in circumstances that deprive prisoners of human contact, access to fresh air, exercise, or visits from friends or family; long-term round-the-clock isolation; gross negligence in the provision of medical and mental health treatment to prisoners; and shackling women prisoners while they are in childbirth.

16. What is the United States doing to prevent the cruel, inhuman and degrading treatment or persons with serious mental illness who are confined in jails and prisons?<sup>18</sup> Has the United States used the Mentally Ill Offender Treatment and Crime Reduction Act of 2004, which devises grants to states to keep mentally ill persons out of jail to improve mental health services for those who are housed in jails and prisons?

- Human Rights Watch has concluded that the mistreatment and failure of the United States to treat mentally ill prisoners constitutes cruel, inhuman and degrading treatment.
- The strict rules and tense, highly stressful conditions of confinement can exacerbate symptoms of illness as well as cause prisoners to be punished for conduct over which they have little control. They are more likely to be victimized by other inmates, they are more likely to end up in solitary confinement, and they may even be more likely to experience abusive use of force by staff. Without proper treatment and care, they suffer terribly. They are afflicted with delusions and hallucinations, debilitating fears, extreme and uncontrollable mood swings. They beat their heads against cell walls, smear themselves with feces, self-mutilate, and commit suicide.
- Some sixteen percent of prisoners in the U.S. are mentally ill. Jails and prisons have become the country's new mental health facilities: the rates of mental illness of prisoners are two to four times greater than the rates of members of the general public. Yet prison and jail mental health services are woefully deficient, crippled by understaffing, insufficient facilities and limited programs. Many seriously ill prisoners receive little or no meaningful treatment. Without the necessary care mentally ill prisoners suffer painful symptoms and their conditions can deteriorate.

17. Please indicate whether or not certain U.S. practices towards non-citizens nevertheless constitute violations of Convention's prohibition on "cruel, inhuman or degrading treatment or punishment"?

- Human Rights Watch has documented the various abuses that non-citizens endure while in administrative immigration detention. In particular, we have consistently raised concerns about the practice of the United States of detaining non-citizens within local, state, and private prisons and jails.<sup>19</sup> We were very pleased when the United States issued National Detention Standards in November 2000 as part of an effort to address the problems we and many others had identified. Nevertheless, we note that these standards continue to be insufficiently enforced. For example, instead of implementing preventative programs when problems with conditions of confinement in detention facilities are raised, often the United States has employed a reactive approach. In fact, in several cases the United States has decided to focus investigations on detention centers from which detainees have escaped.<sup>20</sup> Therefore, investigations of conditions of confinement are being undertaken not as a matter of course, but rather as a part of investigations into escapes from detention facilities.
- Despite the promulgation of the National Detention Standards and their concomitant enforcement mechanisms, there continue to be worrying examples of abusive treatment of non-citizen detainees in

<sup>18</sup> See *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (New York: Human Rights Watch, 2003).

<sup>19</sup> See, e.g. "Locked Away: Immigrant Detainees in Jails in the United States," *A Human Rights Watch Report*, vol. 10, no. 1 (G), September 1998.

<sup>20</sup> See Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, ¶ 57 ("U.S. Report").

the United States. These examples (some of which are currently under investigation) highlight the need for more preventative action on behalf of non-citizen detainees:

- Allegations throughout 2005 of physical abuse by guards against non-citizen detainees at Hudson and Passaic county jails in New Jersey, including multiple allegations of assault, an attack by a guard dog and another severe beating resulting in a detainee defecating on himself.
- Allegations in March 2005 of physical abuse by guards against non-citizen detainees at the Terminal Island Immigration and Customs Enforcement detention facility in Los Angeles, California.
- Moreover, we have been disappointed with the U.S. government's response to the abuse of non-citizen "special interest" detainees immediately after 9-11 by correctional officers at the Metropolitan Detention Center (MDC) in Brooklyn, New York.<sup>21</sup> Non-citizen detainees alleged and subsequent investigations confirmed that correctional officers "slammed" special interest detainees against the MDC walls, causing pain and bodily harm.<sup>22</sup> Other detainees had their fingers and wrists painfully twisted, or their restraints pulled to cause pain and injury to their legs and arms, or were tripped so that they fell to the floor. Detainees subjected to this treatment were not resistant and had been cooperative with correctional personnel. While several investigations were undertaken, the Department of Justice determined that the evidence was insufficient to progress with prosecutions.

18. Does the incarceration of juvenile offenders with adult inmates by state governments inside the United States constitute a violation of the Convention's prohibition on "cruel, inhuman or degrading treatment or punishment?"

- We note with appreciation the reference in the U.S. Report to prohibitions on contacts between offenders below the age of eighteen and adults in U.S. prisons and jails. However, the prohibition cited (18 U.S.C. § 5039) applies to *federal* facilities only. The vast majority of youth offenders are housed together with adult inmates in *state* prisons and jails, to which the federal standards do not apply. For example, we conducted an investigation of these conditions in the state of Maryland in 1999, and have documented similar conditions in other states throughout the country.<sup>23</sup> In Maryland, we found children commingled with adults to some degree in all the state facilities we visited. In smaller jails, no effort was made to house children apart from adult inmates; in many cases, juveniles shared cells with adults in these jails. In larger facilities, children placed on administrative segregation were routinely housed in close proximity to adults. Finally, we found that in nearly all facilities juveniles are commingled with adults when placed in protective custody or in medical and psychiatric areas.

19. Under what circumstances would the United States determine that the long-term detention (exceeding the time limits established by the United States Supreme Court) of non-citizens who cannot be deported is consistent with the Convention's prohibition on cruel, inhuman or degrading treatment or punishment?

- In the immediate aftermath of 9-11 the United States engaged in a widespread practice of questioning and detaining certain non-citizens pursuant to a custody rule that the federal immigration authorities issued quietly and without a public comment period, on September 20, 2001.<sup>24</sup> It is unclear whether further detentions under this custody rule, which has now become a permanent feature of U.S. immigration law, have occurred. The rule contains a loophole by which the ordinary time limit on bringing a charge against a detained non-citizens within forty-eight hours may be ignored: "[I]n the event of an emergency or other extraordinary circumstance," the agency can hold non-citizens without

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<sup>21</sup> "Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees," *A Human Rights Watch Report*, vol. 14, no. 4(G), August 2002.

<sup>22</sup> See generally *U.S. Department of Justice, Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn*, New York, December 2003.

<sup>23</sup> See Human Rights Watch, *No Minor Matter: Children in Maryland's Jails*, (New York: Human Rights Watch, November 1999).

<sup>24</sup> 8 CFR 287, INS No. 2171-01

charge for "an additional reasonable period of time."<sup>25</sup> The custody rule contains no criteria as to what constitutes an emergency or other extraordinary circumstance, nor does it set any limits on the period of time a non-citizen can be held without charge in such circumstances.

- Human Rights Watch has serious concerns about the U.S. government's interpretations of its obligations to non-citizens with regard to arbitrary and indefinite detention. In its Second Periodic Report, the United States correctly states that the decisions by the U.S. Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), as well as the decision in *Benitez v. Wallis*, 540 U.S. 1147 (2004) limit the government's authority to detain non-citizens who cannot be removed from the United States.<sup>26</sup> Nevertheless, we note with concern the government's reference to the need to ensure "the proper balance between U.S. obligations under the Convention and the Department of Homeland Security's mission to improve the security of the United States."<sup>27</sup>
- We believe our fears are not mere speculation. For example, Jordanian national Abdel-Jabbar Hamdan has been detained for over one year, since July 27, 2004 after being found in need of protection from refoulement under the Convention, and therefore not deportable to his country of origin. In addition, as of July 2005, Ahmed Ali, a Somali refugee, had been detained for more than three years by the U.S. Department of Homeland Security. Ali's continued detention by the U.S. government follows a decision by the United Nations Working Group on Arbitrary Detention that his detention was arbitrary in violation of international law.
- We believe that serious questions under the Convention are raised when the United States justifies indefinite detention of individuals who cannot be removed from the United States, and who are not charged for criminal activities, by resort to "security grounds." Indeed, expert commentators have raised concerns about indefinite detention as a violation of the Convention's prohibition on cruel, inhuman and degrading treatment.<sup>28</sup> Moreover, the indefinite detention on security grounds of a non-citizen who cannot be removed from the United States may also constitute a violation of the prohibition against the imposition of severe mental pain and suffering in the Convention – a prohibition which the United States, unfortunately, interprets narrowly.

20. The Human Rights Commission and independent experts have repeatedly questioned the United States about its practice of sentencing child offenders to life without parole.<sup>29</sup> What is the United States' response to the claim that this practice constitutes cruel, inhuman or degrading treatment or punishment under the Convention?

- The United States is one of only a few countries in the world that permits life without parole sentences to be imposed on under-eighteen offenders. Both the federal system and forty-one states allow this sentencing practice. In twenty-six states, the sentence of life without parole is mandatory for anyone who commits first degree murder, regardless of age. The Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia, forbids life without parole sentences for such youth. At least 132 countries have rejected the sentence for any young offender. In the fourteen countries that have laws allowing for youth to receive the sentence, there are thirteen young offenders in total who are serving the sentence.

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<sup>25</sup> 8 CFR 287, INS No. 2171-01

<sup>26</sup> U.S. Report ¶ 35.

<sup>27</sup> U.S. Report ¶ 35.

<sup>28</sup> See, e.g. Statement by Theo van Boven to the 58th Session Of The General Assembly, November 11, 2003 (noting with concern "the creation of legal and jurisdictional limbos or human rights no-man's-lands entailing the indefinite detention of suspects without charge under circumstances which amount to cruel, inhuman or degrading treatment.").

<sup>29</sup> See Human Rights Advocates, Submission to the Sixty-First Session of the Commission on Human Rights, *The Death Penalty and Life Imprisonment without the Possibility of Release for Youth Offenders who were Under the Age of 18 at the time of the Offense*, Spring 2005, <http://www.humanrightsadvocates.org/images/Juvenile%20Sentences.doc> (retrieved August 3, 2005). Several international treaty bodies in which the United States regularly participates regularly reiterate the prohibition in their general comments and annual resolutions. See, e.g. Commission on Human Rights, Human Rights in the Administration of Justice, in particular juvenile justice, 2004/43; Report on the Twenty-Fifth session of the Committee on the rights of the Child, September / October 2000, CRC/C/100, p. 130; European Union, Memorandum on the Death Penalty, <http://www.eurunion.org/legislat/DeathPenalty/eumemorandum.htm> (retrieved August 1, 2005) (stating that "The United Nations Convention on the Rights of the Child prohibits sentencing minors both to death and also to imprisonment for life without the possibility of release. These are juvenile justice standards of paramount relevance and the EU urges the USA to ratify the Convention.").

- Human Rights Watch believes that an excessive punishment such as a life without parole sentence becomes cruel, inhuman or degrading if its severity or length is greatly disproportionate to the crime for which it has been imposed. The special vulnerability of children renders them more susceptible to cruel, inhuman or degrading treatment or punishment, which will in turn have a much more profound impact on the body and mind of a developing child than an adult.

## **ARTICLES 2, 3, 4 & 16: EXTRATERRITORIAL AND PERSONAL JURISDICTION**

21. The U.S. Report provides information on legal mechanisms to prohibit torture per se, but what legal mechanisms exist under U.S. law to punish or remedy acts of cruel, inhuman or degrading treatment committed by non-military personnel outside the United States?

- As described in its Report, the United States has adopted an anti-torture statute, 18 U.S.C. 2340, as implementing legislation to the Convention, criminalizing torture “outside the United States.” But there is no federal statute criminalizing acts that would constitute cruel, inhuman or degrading treatment as such.<sup>30</sup> In addition, no person has ever been prosecuted under 18 U.S.C. § 2340.
- The War Crimes Act of 1996 (18 U.S.C. § 2441) makes it a criminal offense for U.S. military personnel and U.S. nationals, whether inside or outside the United States, to commit war crimes, which by their definitions include “violence to life and person . . . cruel treatment and torture; . . . outrages upon personal dignity, in particular humiliating and degrading treatment.” We are not aware of any person ever being prosecuted under this law.
- As the United States mentions in its Second Periodic Report, contractors working abroad for the Department of Defense or performing any Department of Defense contract can be prosecuted under the Military Extraterritorial Jurisdiction Act of 2000 (Public Law 106-778), known as MEJA. MEJA permits prosecutions in U.S. federal court of U.S. civilians who, while employed by or contracted to U.S. forces abroad, commit a federal criminal offense punishable by imprisonment for more than one year. As noted in the U.S. Report, there have been two prosecutions of civilian personnel under MEJA for criminal acts against U.S. military personnel (the original aim of the law). It has not been tested in cases of sub-contractors committing abuse against detainees.

22. Does the Convention apply to acts of cruel, inhuman or degrading treatment or punishment committed by U.S. non-military personnel outside the United States?

- Human Rights Watch was concerned to hear Attorney General Alberto Gonzales in his January 2005 confirmation hearings state that the reach of Article 16 of the Convention is geographically limited because of the U.S. reservation to Article 16 and the terms of the Convention. Asked whether it was legally permissible for U.S. personnel to subject detainees to “cruel, inhuman or degrading treatment,” Gonzales responded that because of the U.S. reservation, the United States was “as a legal matter . . . in compliance” with the prohibition because “aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth and Fourteenth Amendments.” In a written response, Gonzales further stated that “under Article 16 there is no legal obligation under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas.” This interpretation would create a legal framework under which the Convention would prohibit torture committed by U.S. personnel overseas, but not cruel, inhuman or degrading treatment or punishment against non-citizens.
- Gonzales also expressed the view that the geographical reach of the Convention was limited to within the state’s territory by the terms of the treaty. The Committee has already rejected this view of a jurisdictional limit in its November 25, 2004 response to the UK submission, when it stated that the

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<sup>30</sup> We recognize, as does the U.S. Report, that there is a patchwork of federal criminal statutes criminalizing acts which amount to cruel, inhuman or degrading treatment, including in regions that are outside regular U.S. territory. Nevertheless, by failing to adopt legislation that specifically prohibits cruel, inhuman or degrading treatment the United States has created legal lacunae because of its reservation under Article 16 by not explicitly prohibiting conduct that is not already prohibited under the U.S. Constitution.

Convention was applicable in “all areas under the de facto effective control of the State party’s authorities.”

23. What specific places outside the regular territory of the United States does the government consider to be within the Special Maritime and Territorial Jurisdiction (SMTJ) of the United States? Does this include all military posts in foreign countries, including forward operating bases and firebases? Does this include short-term or ad hoc detention facilities set up by U.S. forces in foreign countries? Finally, does the prohibition on cruel, inhuman or degrading treatment apply to areas in the SMTJ as defined in 18 U.S.C. 7, including subsection (9)?

24. What conduct by U.S. officials abroad is not covered by existing U.S. laws, such as the Uniform Code of Military Justice, the War Crimes Act, the anti-torture state, the MEJA, and the expanded SMTJ under the USA PATRIOT Act, but would still be in violation of the Convention?

25. Explain why relatively few military personnel, members of the CIA, and military contractors, implicated in the hundreds of cases of detainee abuse in Afghanistan, Iraq, and Guantánamo Bay have been brought before federal courts or courts martial. Why have such a large proportion of military personnel implicated in serious offenses against detainees, including homicide, been given non-judicial punishments (like discharge, rank reduction, and reprimands)?

- Human Rights Watch is deeply concerned by the hundreds of cases of torture, cruel, inhuman, and degrading treatment that have been reported publicly involving detainees in U.S. custody in Afghanistan, Iraq, and Guantánamo Bay.<sup>31</sup> Yet to date, only about 45 cases have been prosecuted, mostly in the military, and mostly resulting in relatively light sentences—less than a year. The military has admitted that at least 86 detainees have died in U.S. custody in Afghanistan and Iraq since 2002; 26 of these cases were homicides, and in almost all of these 26 cases, there is evidence strongly suggesting that the detainees were beaten or tortured before death.
- To date only a handful of prosecutions have gone forward in these cases, mostly for lesser assault charges. In the majority of criminal cases involving military personnel accused of torture or cruel, inhuman or degrading treatment, the cases have been taken out of the courts martial system and put before administrative hearing boards, which issue punishments like “reprimands,” “admonishments,” rank reductions, and discharges; and cannot order incarceration.
- Despite evidence that civilian contractors and CIA personnel were involved in numerous abuse cases, no one has been prosecuted in a federal court for abuse, except for a single CIA contractor put on trial for a homicide committed in Afghanistan in 2003 (and in that case the contractor was charged only with assault, not homicide).

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<sup>31</sup> See “Getting Away with Torture? : Command Responsibility for the U.S. Abuse of Detainees,” *A Human Rights Watch Report*, vol. 17, no. 1(G), April 2005; “Still at Risk: Diplomatic Assurances no Safeguard against Torture,” *A Human Rights Watch Report*, vol. 17, no. 3(D), April 2005; “The Road to Abu Ghraib,” *A Human Rights Watch Briefing Paper*, June 2004; “Empty Promises: Diplomatic Assurances No Safeguard Against Torture,” *A Human Rights Watch Report*, vol.16 no.4 (D), April 2004; “Enduring Freedom:” Abuses by U.S. Forces in Afghanistan,” *A Human Rights Watch Report*, vol. 16, no. 3(C), March 2004 ; Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, (New York: Human Rights Watch, 2003).