

**Human Rights Watch Submission to
The Human Rights Committee
Regarding Post 9-11 Practices of the United States of America**

September 2005

Human Rights Watch recognizes with appreciation the Human Rights Committee's efforts to ensure that the United States honors its obligations under the International Covenant on Civil and Political Rights (hereinafter the "ICCPR"). Along with the Committee and many other human rights organizations, Human Rights Watch is very concerned that since its first submission in 1994, the United States has failed to report on its practices under the ICCPR, despite the expectation that it would do so approximately every four years.¹ One can only speculate as to the reasons for this failure. It may reveal reluctance on the part of the United States to submit its practices, particularly federal policies and the conduct of federal personnel, to public scrutiny. 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 does not even maintain a database, for example, on lawsuits brought by persons alleging abuse by state and federal authorities in detention and correctional facilities.

Reporting under the ICCPR is an essential duty of each State Party.² The United States must periodically undertake a comprehensive examination of actual practices in the country in order to adopt effective policies that protect rights and prevent abuses. We therefore hope that the United States will honor the Committee's request that it submit its combined Second and Third Periodic Reports on the occasion of the Committee's upcoming 85th session.

However, should the United States fail to submit the requested report, we understand that the Committee may adopt, at its 85th session, a list of issues of concern relating to practices of the U.S. government in the post-9/11 era that also implicate its obligations under the ICCPR. We are therefore limiting our comments to problematic post-9/11 practices by the United States, such as arbitrary detention, the lack of fair trial procedures, and other abuses of the rights of incarcerated persons detained in connection with counterterrorism measures. Additional important issues relating to U.S. compliance with the ICCPR, just one of which is the abusive treatment of prisoners accused or convicted of non-terrorism crimes, are not included here.

ARTICLE 2(3)(a): THE RIGHT TO A REMEDY

Failure to prosecute and inadequate sanctions for abuses

1. Public reports have documented hundreds of cases of torture, cruel, inhuman, and degrading treatment involving detainees in U.S. custody in Afghanistan, Iraq, and Guantánamo Bay.³ The military has admitted that at least 86 detainees have died in U.S. custody in Afghanistan and Iraq since 2002; 26 of

¹ The *Initial Report of the United States of America to the Human Rights Committee*, CCPR/C/81/Add.4 was submitted on August 24, 1994. The Bureau of the Human Rights Committee has required periodic reports approximately every four years subsequent to the State party's initial report. See *Rules of Procedure of the Human Rights Committee*, Rules 66 and 70A.

² ICCPR, Article 40.

³ 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).

these cases were determined to be homicides, and in almost all of these 26 cases, there is evidence indicating that the detainees were beaten or tortured before death.

2. Yet to date, only about 45 cases mostly against enlisted personnel have been prosecuted for violations of the Uniform Code of Military Justice. The government has tended to charge these individuals with lesser included offenses, and upon conviction they have received relatively light sentences. This contrasts sharply with standard prosecutorial practice, in which a prosecutor normally charges a defendant with the most serious offense that is consistent with the nature of his provable conduct, and that is likely to result in a sustainable conviction. In the majority of cases involving military personnel accused of acts of torture or cruel, inhuman or degrading treatment, the cases have not been prosecuted within the military courts martial, which are courts that try members of the military accused of violating military law. Instead, they have been handled by military administrative hearing boards, which may only issue non-judicial punishments such as reprimands, admonishments, rank reductions, and discharges. Persons sentenced to prison terms by courts martial have typically received less than one year imprisonment.

3. In addition, despite numerous credible reports that civilian contractors and Central Intelligence Agency (C.I.A.) personnel were involved in the abuse of detainees, no such personnel have been criminally prosecuted in a federal court on such charges, with one exception: a single C.I.A. 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).

Lacunae in domestic U.S. law

4. Of particular concern in the context of counterterrorism is the lack of a comprehensive framework to punish or remedy acts of cruel, inhuman or degrading treatment by U.S. civilian authorities *outside* the United States. We note that the United States government is obligated under Article 2 of the ICCPR to respect and ensure the rights of all individuals within its “power or effective control.”⁴

5. The United States has adopted an anti-torture statute, 18 U.S.C. § 2340, as implementing legislation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The statute criminalizes *torture* committed by a person acting under color of law outside the United States, but it does not criminalize acts that would constitute cruel, inhuman or degrading treatment. No person has ever been prosecuted under 18 U.S.C. § 2340.

6. 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 definition include “violence to life and person . . . cruel treatment and torture; . . . outrages upon personal dignity, in particular humiliating and degrading treatment.” However, we are not aware of any person ever being prosecuted under this law. Moreover, the statute is not sufficiently comprehensive because it prohibits such conduct only if committed during an armed conflict as provided under the Hague Regulations of 1907 and the 1949 Geneva Conventions.

7. 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. There have been two prosecutions of civilian personnel under

⁴ Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10.

MEJA for criminal acts against U.S. military personnel (the original aim of the law). However, sub-contractors accused of abusing detainees have never been prosecuted under this law.

Failure to establish national standards

8. Although the United States is a federal system, the national government has clear obligations to protect the rights of all persons within its territory or subject to its jurisdiction. The United States relies primarily on legal actions by the Department of Justice to fulfill this responsibility.

9. Yet, 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 abusing inmates, the terms of whatever court order or settlement it obtains setting forth procedures and standards governing such abuse would only apply to that facility. This impedes the development of appropriate national standards and procedures that could be applied to federal, state and local authorities violations of prisoners' rights under the ICCPR. In any case, federalism considerations do not obviate U.S. obligations under the ICCPR.⁵

No remedy for violation of nonrefoulement obligation

10. Since 9-11, Human Rights Watch has been actively monitoring the United States' increased reliance on "diplomatic assurances" when it transfers people to other countries (see ¶ 18-19, *infra*). We note that the obligation of states to prohibit torture and cruel or inhuman treatment under the ICCPR includes the duty of states not to expose individuals to these forms of mistreatment by returning them to another country.⁶ We believe that the United States has responded inadequately to attempts by individuals to hold the U.S. government accountable for returning persons to places where they were likely to be tortured under cover of diplomatic assurances. This has been the case with regard to the federal lawsuit of Maher Arar.

11. As the Committee is undoubtedly aware, in September 2002, U.S. authorities apprehended Canadian citizen Maher Arar and held him for nearly two weeks while effectively preventing him from challenging his detention or imminent transfer to a country likely to torture him. In reliance upon diplomatic assurances provided by the government of Syria, the country of Arar's birth, U.S. immigration authorities flew him to Jordan, where he was driven across the border to Syria and detained there for ten months. Arar was transferred despite his 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.

12. Human Rights Watch is disappointed that the U.S. government has consistently refused to provide information about its practices when negotiating and securing diplomatic assurances. In addition, the United States has invoked the "state secrets privilege" to avoid disclosing any information to the court in

⁵ See Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), § 4:

The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility.

⁶ See Human Rights Committee, General Comment No. 20, Article 7, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994). § 9.

Maher Arar's federal case; and has refused to cooperate in any manner with the Canadian commission of inquiry in the Arar case. We believe the U.S. government must fully cooperate and provide all information regarding its treatment of Mr. Arar to the relevant courts and commission of inquiry as a part of its obligations to provide remedies for violations under the ICCPR.

ARTICLE 7: PROHIBITION AGAINST TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT & ARTICLE 10: RESPECT FOR THE DIGNITY OF DETAINEES

Prohibited practices

13. Together with other entities monitoring human rights abuses around the world, Human Rights Watch has grave concerns that the United States is engaging in torture and other cruel, inhuman or degrading treatment as a part of its counterterrorism measures. For example: the United States has engaged in: (a) "waterboarding" (mock drowning);⁷ (b) extended and repeated sleep deprivation, prolonged exposure to cold, prolonged shackling, prolonged deprivation of facilities for urination, and forced immobility for lengthy periods;⁸ (c) extended solitary confinement;⁹ and (d) the use of unmuzzled guard dogs during interrogations.¹⁰ It is our view that the United States must publicly and unequivocally denounce these and other similar treatments.

14. The U.S. government has denied that unlawful acts were U.S. policy and has insisted that any unlawful abuse 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.¹¹

Exposing an individual to abuse through transfer to another country

15. As noted above, under the ICCPR the United States is prohibited from "exposing" any individual to torture, cruel, inhuman or degrading treatment by transferring them to another country. We believe that the United States lacks adequate procedural safeguards to ensure that a person can effectively challenge a transfer based on fears of risk of torture or cruel, inhuman or degrading treatment 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.

⁷ 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.

⁸ 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).

⁹ 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 Ruhel Ahmed," August 4, 2004 [online], <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>.

¹⁰ See Human Rights Watch, "Guantánamo: Detainee Accounts," *A Human Rights Watch Backgrounder*, October 2004.

¹¹ Eric Lichtblau, "Justice Nominee Is Questioned On Department Torture Policy," *The New York Times*, July 27, 2005.

16. It is our view that diplomatic assurances cannot be relied upon to provide effective protection against torture and ill-treatment.¹² 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 against Torture, and presumably under the ICCPR, is barred.¹³ 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.

Abuses against detained non-citizens

17. Human Rights Watch has previously documented the abusive conditions of confinement that non-citizens endure while in administrative immigration detention inside the United States. In particular, we have consistently raised concerns about the practice of detaining non-citizens within local, state, and private prisons and jails.¹⁴ We strongly supported the United States issuance of National Detention Standards in November 2000 as part of an effort to address the problems we and many others had identified.

18. Nevertheless, we believe that these standards are not enforced. We do not believe the U.S. undertakes sufficient monitoring of facilities in which immigration detainees are confined. When claims of abuse are raised, the U.S. is slow to respond if it responds at all. The conditions that seem to prompt the most concern are those connected to escapes.¹⁵ Otherwise the U.S. appears to display indifference.

19. We believe that abusive treatment of non-citizen detainees is of present concern because non-citizens are being detained and deported more often than in previous years,¹⁶ and may be more vulnerable to abusive treatment in the post 9/11 context. In fact, despite the promulgation of the National Detention Standards, which contain numerous guidelines on the use of force, there continue to be worrying examples of abusive treatment of non-citizen detainees in the United States. For example:

- 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.

20. Moreover, we have been disappointed with the U.S. government’s response to the abuse of non-citizen “special interest” detainees (see ¶¶ 28-29, *infra*) immediately after 9/11 by correctional officers at the Metropolitan Detention Center (MDC) in Brooklyn, New York.¹⁷ Non-citizen detainees alleged and

¹² 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;

¹³ See C.F.R. §208.18(c).

¹⁴ 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.

¹⁵ See Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, ¶ 57.

¹⁶ The number of non-citizens being deported as a result of criminal convictions or ordinary immigration violations has been rising on an annual basis during the past decade, including after the September 11th attacks. For example, the United States deported 89,044 non-citizens in 1999, 101,527 in 2001 and 134,137 in 2003. A large portion of these non-citizens are detained in jails, prisons, or immigration detention centers throughout the country.

¹⁷ “Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees,” *A Human Rights Watch Report*, vol. 14, no. 4(G), August 2002.

subsequent investigations confirmed that correctional officers “slammed” special interest detainees against the MDC walls, causing pain and bodily harm.¹⁸ 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 proceed with prosecutions. The Federal Bureau of Prisons has still not publicly revealed whether any of the individuals have been administratively sanctioned.

ARTICLE 9: PROHIBITION AGAINST ARBITRARY DETENTION

Guantánamo Bay

21. Human Rights Watch continues to believe that the treatment of detainees at Guantánamo Bay constitutes arbitrary detention both because of the failure of the United States to justify the legality of the detentions under U.S. and international law, as well as because of its reliance on discretionary administrative proceedings to review individual detainee cases. The first of these two proceedings, the Combatant Status Review Tribunals, set up by the Department of Defense in 2004; provide detainees with a one-time administrative determination as to whether they are “enemy combatants.” The second, the Administrative Review Boards determine annually whether each Guantánamo detainee remains a threat to the United States or its allies or is of intelligence value. Both procedures were instituted in response to Supreme Court rulings and challenges that the detainees at Guantánamo Bay were entitled to have the legality of their detentions reviewed. In our view neither procedure is adequate in terms of the procedures provided or the substantive laws applied during the hearings. In terms of procedure, according to the Department of Defense, neither mechanism constitutes a legal proceeding—even though they determine whether a detainee will remain incarcerated or not. Deemed outside the rubric of “legal proceedings” the Department of Defense has decided to deny the detainees the assistance of legal counsel, limit the detainees’ access to relevant information, deny the detainees’ the opportunity to rebut determinations made outside the process by agencies such as the C.I.A., and pre-judge detainees as “enemy combatants.”¹⁹

22. In terms of the substantive laws applied during these proceedings, the U.S. government has preferred to craft its own set of *ex post facto* standards, as opposed to applying one of the relevant laws in existence – either that of the Geneva Conventions, or U.S. constitutional and criminal law.

Arbitrary detentions pursuant to the material witness law

23. Congress enacted the current material witness law in 1984 to enable the government, in narrow circumstances, to secure the testimony of witnesses who might otherwise flee to avoid testifying in a criminal proceeding.²⁰ The law indicates a preference for ensuring the appearance of a witness by using alternatives to detention: “The judicial officer shall order the pretrial release of the person on personal recognizance ... unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required.”²¹ Nevertheless, if a court agrees that an individual has information

¹⁸ 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.

¹⁹ See Human Rights Watch, *Making Sense of the Guantanamo Bay Tribunals*, August 14, 2004 [online] <http://hrw.org/english/docs/2004/08/16/usdom9235.htm>.

²⁰ See 18 U.S.C. § 3144.

²¹ 18 U.S.C. § 3142(b); 18 U.S.C. § 3142(c), (f). The statute provides the court with a number of conditions to impose on a witness in lieu of detention to ensure that the witness will appear at the criminal proceeding. Such conditions include regularly reporting to the court or a government agency, maintaining employment, maintaining or commencing an educational program, abiding by restrictions on travel and abode, complying with a curfew, or returning to custody for specified hours. 18 U.S.C. § 3142(c)(1)(B).

“material” to a criminal proceeding and will likely flee if subpoenaed, the witness can be locked up—but, in theory, only for as long as is necessary to have him testify or be deposed.

24. Since September 11, however, the U.S. Department of Justice has deliberately used the material witness law for a very different purpose: to secure the indefinite incarceration of those it has wanted to investigate as possible terrorist suspects.²² It has used the law to cast men into prison without any showing of probable cause that they had committed crimes. We do not know how many individuals in total have been detained as material witnesses in the U.S. (we investigated a total of seventy such cases). U.S. citizenship is no guarantee of protection from the misuse of the material witness law: at least one-quarter of the known material witnesses were U.S. citizens.

25. In evading the requirement of probable cause of criminal conduct, the government bypassed checks on the reasonableness of its suspicion. As a result, men were imprisoned who had little or no information about, much less links, to terrorism. The Justice Department claimed each of the post-September 11 material witnesses had information relevant to grand jury terrorism investigations or to the trials of defendants alleged to support terrorist organizations. Yet at least thirty witnesses we know about were never brought before a grand jury or court to testify. Although our research suggests federal authorities suspected most if not all of the witnesses of terrorist-related conduct, only seven were ever arrested on terrorism-related charges.

26. Many of the seventy material witnesses we have identified suffered imprisonment because federal investigators and attorneys relied on false, flimsy, or irrelevant information and jumped to the wrong conclusions. Their judgment about evidence also appears to have been colored by ignorance and perhaps prejudice. Not only were almost all the witnesses Muslim, sixty-four of the seventy were of Middle Eastern or South Asian descent.

27. The material witness law does not specify how long a witness may be incarcerated before being presented in a criminal proceeding or released. The Department of Justice took full advantage of this gap in the law. One-third of the seventy post-September 11 material witnesses we identified were incarcerated for at least two months. Some endured imprisonment for more than six months, and one witness spent more than a year in detention.

Arbitrary detention of non-citizens

28. Human Rights Watch has documented and advocated against the U.S. government’s decision in the immediate aftermath of 9-11 to subject some 752 non-citizens to prolonged and sometimes arbitrary detention. Because of their “special interest” to the September 11 investigation, these detainees were arrested and placed in custody for routine immigration violations because they were “presumed guilty” of links to terrorism. It is a common misconception that these and other more recent detentions of non-citizens are due to the passage of the USA PATRIOT Act, which became law on October 26, 2001. In fact, the U.S. ignored procedural protections for immigration detainees and held them until they were “cleared” of links to terrorism.

29. Of the 752 “special interest” detainees held on immigration violations, 317 were held without charge for more than forty-eight hours, thirty-six were held for twenty-eight days or more without charge, thirteen were held for more than forty days without charge, and nine were held for more than fifty days without charge. One Saudi Arabian detainee was held for 119 days without charge. Even after final deportation orders were issued, non-citizens remained in detention for weeks or months until the

²² See generally, “Witness to Abuse Human Rights Abuses under the Material Witness Law since September 11,” *a Human Rights Watch Report*, Vol. 17, No. 2 (G), June 2005.

Department of Justice decided to deport them. Almost all of the special interest detainees were Muslim men from a handful of Middle Eastern and South Asia countries – i.e. they shared the same religious, ethnic and national origin profile with the nineteen alleged September 11 hijackers.

30. During this same period, federal immigration authorities issued quietly, and without a public comment period, a new custody rule.²³ It is unclear whether detentions under this custody rule, which has now become a permanent feature of U.S. immigration law, have occurred. Prior to the new rule, immigration authorities had to charge a detained non-citizen within twenty-four hours of detention or release him or her; there was no exception for emergency situations. The current custody rule contains a loophole by which the time limit on bringing a charge against a detained non-citizen 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 charge for "an additional reasonable period of time."²⁴ 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.

31. Even without specifically invoking this rule, immigration authorities continue to fight against the release of certain non-citizens from detention. In two recent cases, immigration enforcement officials have refused to comply with immigration judges' rulings that detained non-citizens should be released because they posed neither a danger to the community nor a flight risk. Jordanian national Abdel-Jabbar Hamdan has been detained since July 27, 2004 on national security grounds because of his involvement with the Holy Land Foundation, a Muslim charity he believed was legitimate. His detention continues even though he was found by an immigration judge to be in need of protection from refoulement under the Convention against Torture, and therefore not deportable to his country of origin, as well as eligible for release from detention. 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 detention by the U.S. government continues despite an immigration judge's ruling that he should be released. Moreover, the United Nations Working Group on Arbitrary Detention has ruled that Ali's detention was arbitrary in violation of international law. Indeed, other expert commentators have raised concerns about indefinite detention as an example of cruel, inhuman and degrading treatment.²⁵

32. We also have concerns about the federal government's recent encouragement of local governments at the city, county, or state levels to enforce federal immigration laws as a part of its increased monitoring of immigrant populations since 9-11.²⁶

33. The risks in empowering local law enforcement officials to enforce federal immigration laws are many. State and local officials have little or no training in the complexities of these laws, and we expect that their attempts to enforce such laws will result in legally and factually unsound arrests and detentions. For example, many local officials will arrest and detain non-citizens based on erroneous determinations that such individuals are "unlawfully present." However, this is a complex legal term that non-immigration officers are neither trained to interpret or enforce. In addition, local officials may detain non-citizens (who by definition are "unconvicted persons") together with individuals convicted of ordinary crimes held in the same local prison or jail, as prohibited by Article 10 of the ICCPR.

²³ 8 CFR 287, INS No. 2171-01

²⁴ 8 CFR 287, INS No. 2171-01

²⁵ 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.").

²⁶ See, e.g. "S.B. County to Help ID Illegal Immigrants," *L.A. Times*, August 17, 2005 (describing the decision by Los Angeles County and San Bernardino County to enable local law enforcement officials to enforce federal immigration laws); Lara Jakes Jordan, "U.S. reviews border security efforts," *Associated Press*, August 24, 2005 (noting prosecutions of immigrants increased by 65 percent between 2003 and 2004, and immigration-related cases made up for nearly 33 percent of all federal prosecutions last, according to a Syracuse University study).

ARTICLE 14: RIGHTS AND OBLIGATIONS IN A SUIT AT LAW

34. The United States has established trial procedures for the detainees at Guantánamo Bay and made use of the material witnesses law in a manner that circumvents ordinary protections for individuals accused of crimes. We believe that the standard fair trial provisions in Article 14 of the ICCPR apply in both of these contexts. (Detainees at Guantánamo Bay have also been denied protections due them under the Geneva Conventions. In trials of persons detained in accordance with the laws of armed conflict, certain provisions of the Geneva Conventions may apply as *lex specialis*).

35. With regard to Guantánamo, detainees are denied the participation of legal counsel and other fundamental due process protections required to guard against arbitrary detention. In addition, decisions are based on evidence presented at the hearings and classified information that is not made available to the detainee. Moreover, statements obtained as the result of torture or other cruel treatment appear to be admissible in any proceedings before the military commissions as well as the Combatant Status Review Tribunals and the Administrative Reviews Boards. 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.”²⁷

36. Defendants before commissions 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.²⁸

37. The federal government’s misuse of the material witness law (see ¶ 23-27, *supra*) provides another example of its post 9-11 attempts to circumvent ordinary criminal procedures. At the Justice Department’s insistence, courts have conducted virtually all the post-September 11 material witness proceedings behind closed doors and have sealed virtually all documents connected to the cases, including arrest warrants, affidavits, transcripts, legal briefs, and court rulings. Almost all the cases have been kept off the public court dockets. The government’s quest for secrecy has extended to obtaining gag orders for witnesses’ attorneys and family members, so they could not reveal anything witnesses told them or what happened in the courtroom, while strictly limiting witnesses’ communication with the outside world, so they could not contact the media.

38. The Justice Department has also refused to respect fundamental human rights of detainees, including the rights to be notified of charges, to have prompt access to an attorney, to view exculpatory evidence, and to know and be able to challenge the basis for arrest and detention.

ARTICLE 17: PROHIBITION ON INTERFERENCE WITH PRIVACY, FAMILY, HOME OR CORRESPONDENCE

²⁷ Military Commission Order No. 1, 6(D)(1).

²⁸ See generally, Human Rights Watch, “Briefing Paper on Military Commissions,” July 2005.

39. While detainees at Guantánamo Bay have been able to exchange written messages with their families through the International Committee of the Red Cross, no detainee (with the exception of David Hicks, on trial before a military commission) has been able to meet or directly speak with family members.