

Human Rights Watch
Supplemental Submission to the Human Rights Committee
During its Consideration of the Second and
Third Periodic Reports of the United States

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Introduction

In January 2006, Human Rights Watch submitted a list of issues for the Human Rights Committee's reference while posing questions to the United States about its adherence to the International Covenant on Civil and Political Rights (the "ICCPR"). We welcome the comprehensive and precise list of questions submitted by the Human Rights Committee to the United States on March 30, 2006.¹

Since our last submission, the United States has enacted or begun to undertake new laws, policies, and practices that reflect the continuing failure of the U.S. to fulfill its obligations under the ICCPR. We outline here some of those developments, and hope the Committee will consider these issues as well. We also highlight some additional issues that we believe are central to the Committee's work and apprise the Committee of relevant new research that Human Rights Watch has completed since our last submission.

I. Secret Detention (Question 4, ICCPR Articles 7, 9, and 10)

In April 2006, John Negroponte, U.S. Director of National Intelligence, acknowledged to media sources that the Central Intelligence Agency (CIA) continues to hold approximately three dozen al Qaeda suspects in secret overseas prisons.² He maintained that the United States is likely to keep them in captivity for as long as the "war on terror continues."³ These detainees are effectively "disappeared,"⁴ denied access to the International Committee of the Red Cross (ICRC) and subjected to treatment and interrogation that is not monitored by any court or independent entity.⁵ The only plausible reason for "disappearing" these detainees is that the United States wants to keep their treatment and conditions of confinement secret – presumably because it includes mistreatment in violation of international law. In fact, allegations of the deaths and torture of "disappeared" detainees have been documented by Human Rights Watch, and have appeared in official U.S. government documents and in numerous press articles.⁶

The United States has defended its policy of holding detainees incommunicado and without trial in the "global war on terror" by invoking the laws of armed conflict. The U.S. has stated that the Fourth Geneva

¹ See *List of Issues to be Taken up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America*, Human Rights Committee, Eighty-Sixth Session, CCPR/C/USA/Q/3, 30 March 2006.

² Michael Duffy and Timothy J. Burger, "Spy Chief: CIA Detainees Will Be Held Indefinitely," *Time Magazine*, April 12, 2006.

³ *Id.* The memorandum of understanding between the U.S. military and the CIA outlining a policy on secret detainees, which was released during litigation pursued by the American Civil Liberties Union, further confirms that the U.S. is engaged in a policy of "disappearing" prisoners. See American Civil Liberties Union, "Newly Released Army Documents Point to Agreement between Defense Department and CIA on 'Ghost' Detainees," March 10, 2005. See also American Civil Liberties Union, "Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad," April 2006.

⁴ See The Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), ("[E]nforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.") A similar definition is found in the newly drafted (but not yet approved) International Convention for the Protection of All Persons from Enforced Disappearance.

⁵ Richard Esposito and Brian Ross, "Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons," *ABC News*, December 5, 2005. See also "U.S. Holding at Least Twenty-Six 'Ghost Detainees': List of Detainees," Human Rights Watch, press release, December 1, 2005, <http://hrw.org/english/docs/2005/11/07/usint11995.htm> (retrieved June 14, 2006); and Dana Priest, "CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11," *Washington Post*, November 2, 2005.

⁶ See Sworn Statement of [officer's name redacted] taken in Baghdad, Iraq, Annex B70-71, (June 4, 2004), available at <http://www.aclu.org/Safeand%20Free/safeand%20free.cfm?id=17692&c=206> (retrieved June 14th, 2006, describing the death of a detainee held in so-called "ghost cells" in Iraq); National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004) p.146, <http://www.9-11commission.gov/report/911Report.pdf> (retrieved June 14, 2006, reporting that some detainees are held in secret locations and have been subjected to torture and abuse); Dana Priest, "Covert CIA Program Withstands New Furor," *Washington Post*, December 30, 2005; Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *Washington Post*, November 2, 2005; Dana Priest, "CIA Avoids Scrutiny of Detainee Treatment," *Washington Post*, March 3, 2005; and James Risen, David Johnson, Neil A. Lewis, "Harsh C.I.A. Methods Cited in Top Qaeda Interrogations," *New York Times*, May 13, 2004. See generally American Civil Liberties Union, "Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad," April 2006.

Convention recognizes that, in certain circumstances, spies and saboteurs shall be regarded as having forfeited their rights of communications and has argued that laws of international armed conflict do not prohibit incommunicado detention and denial of ICRC access.⁷

Human Rights Watch hopes that this Committee challenges the U.S. on its legal position on this issue. As the Committee noted in its General Comment 31:

The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.⁸

The laws of armed conflict do not even apply to many of the detainees being held. The United States has conceded that not all of the detainees were picked up during an international armed conflict, but were often picked up far from any battlezone. They are protected by the ICCPR without consideration of the law of armed conflict.

Holding persons incommunicado would require a lawfully applied derogation under the ICCPR or a clear justification under the law of armed conflict. There has been no derogation under the ICCPR and “[a] fundamental requirement for any measures derogating from the Covenant, ... is that such measures are limited to the extent strictly required by the exigencies of the situation.”⁹

As a matter of international humanitarian law, the U.S. interpretation of the Fourth Geneva Convention on permissible incommunicado detention is incorrect. The “spies and saboteurs” provision that the United States refers to was designed for an obvious and valid purpose: to keep the capture of a spy secret and to prevent spies and saboteurs from passing on information to their side. Under this provision, the U.S. could legitimately limit detainee contacts with the outside world that would create a security risk. That would include, as is already done with detainees at Guantánamo, censoring letters sent via the ICRC. It might even mean prohibiting all letters from a detainee in a specific case. But the ICRC does more than carry letters – it investigates the well-being of detainees, and does so in a confidential manner. There is no justification for the denial of ICRC visits to check on the health and well-being of an entire group of detainees.

Lastly, the 1949 Geneva Conventions as well as customary laws for international armed conflicts provide that the ICRC be granted regular access to all persons deprived of their liberty in order to verify the conditions of detention and restore contacts between these persons and their families.¹⁰ According to the Geneva Conventions, visits may be refused for reasons of imperative military necessity, but only as an exceptional and temporary measure. The ongoing long-term incommunicado detention of persons held by the United States can no longer be described as either exceptional or temporary.

Of note, the United States routinely criticizes other governments for holding people in incommunicado detention and for engaging in “disappearances.” Belarus, Burma, China, Equatorial Guinea, Ethiopia, Indonesia, Nepal, North Korea, the Philippines, Russia, Sudan, Syria, Uzbekistan and Zimbabwe are all

⁷ See “List of issues to be considered during the examination of the second periodic report of the United States of America: Response of the United States of America,” p.20, <http://us-mission.ch/Press2006/CAT-May5.pdf> (retrieved June 14, 2006).

⁸ Human Rights Committee, *General Comment 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. 11.

⁹ Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 4.

¹⁰ See Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 U.N.T.S. 135, entered into force Oct. 21, 1950, Article 126; and Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, Article 7, par. 6 and Article 143.; ICRC, *Customary International Humanitarian Law* (2005), rule 124.

criticized by the United States for the use of “disappearances” and incommunicado detention in the latest release of the State Department’s annual Country Reports on Human Rights Practices (released on March 8, 2006, and covering events in 2005).¹¹

Human Rights Watch hopes that the Committee will vigorously question the United States about its “disappeared” detainees and its use of practices that it rightly condemns when engaged in by other nations.

II. Indefinite Detention (Questions 5, 12, ICCPR Articles 7, 9, and 10)

Since Human Rights Watch’s last submission, new information has emerged about the 460 individuals still being detained at the U.S. military facility at Guantánamo Bay, Cuba. In the first quarter of 2006, as part of agreements between the U.S. government, the Associated Press, and federal courts, the U.S. Department of Defense (DoD) made public thousands of pages of unclassified allegations and hearing transcripts regarding the detainees at Guantánamo Bay. Classified evidence was deleted, but what emerges is how many of the prisoners were simply Taliban foot soldiers or have no evident link to terrorism. Only about half were accused of even taking part in hostilities against the U.S. or its allies in Afghanistan. Many were foreign nationals turned over by Pakistan for cash bounties rather than any apparent involvement with terror groups. Many appear to be held simply because they were living in a house associated with al Qaeda or working for a charity linked to the group.¹²

Notably, about one in five appear to be associated with the Taliban – not al-Qaeda. Under the international laws of war, these individuals could be legitimately apprehended as combatants and detained during the duration of the international armed conflict with Afghanistan. But the war in Afghanistan is long over. At least as of June 19, 2002, when Hamid Karzai was elected to the presidency of the transitional administration of Afghanistan, the international armed conflict between the United States and Afghanistan concluded. These individuals should be either tried for war crimes or other criminal offenses, or returned to Afghanistan – as they should have been four years earlier.

Only 10 of the detainees at Guantánamo Bay have been formally charged with any crime. The outcome of these cases will depend significantly on the Supreme Court’s ruling in the pending case, *Hamdan v. Rumsfeld*, which is expected this month. *Hamdan* raises the question of the legality of the military commissions established to try those detainees charged with crimes and held at Guantánamo Bay. President Bush has stated that the future of Guantánamo will depend significantly on the Supreme Court’s decision. In a press conference last week, President Bush stated that he would like to see the detainees tried in “U.S. courts” after the Supreme Court issues its opinion. Just last month, he told German TV that he would like to try the detainees in “U.S. courts” and would even consider closing down Guantánamo Bay after the Supreme Court rules. Human Rights Watch notes that there is no reason to wait for the *Hamdan* ruling to begin trying detainees and holding those implicated in acts of terrorism publicly accountable for their crimes. But the detainees should be tried by civilian courts or military courts-martial - and not the military commissions, which are neither independent nor impartial courts of law.

In addition to the 460 detainees still being held in Guantánamo Bay and the unknown number of detainees held abroad in secret prisons, there is an alleged “enemy combatant” detained within the United States— Saleh Kahleh al-Marri, whose case has largely been forgotten. Al-Marri was in the middle of criminal proceedings, when the U.S. administration unilaterally declared him an “enemy combatant,” and sent him

¹¹ United States Department of State Bureau of Democracy, Human Rights, and Labor, “Country Report on Human Rights Practices 2005,” March 8, 2006, <http://www.state.gov/g/drl/rls/hrrpt/2005/> (retrieved June 14, 2006).

¹² Human Rights Watch is currently working on an analysis of these documents and will provide its findings to the Committee at the earliest possible date.

to a military brig in South Carolina where he has been held in solitary confinement for three years, essentially incommunicado. His only contact is with his lawyers, who had to sue in U.S. court to get access to their client. The charges against al-Marri are based on a single hearsay declaration that relies heavily on accusations made by Khalid Sheikh Muhammed, who is widely reported to have been tortured in a secret CIA-run detention center.¹³ Al-Maari is in ongoing litigation challenging the conditions of confinement and lawfulness of his detention.

The U.S. also continues to indefinitely detain non-citizens subject to removal orders under its immigration laws. Although the U.S. Supreme Court has ruled that non-citizens may not be detained for more than six months after a final order of removal if there is not a significant likelihood of removal in the reasonably foreseeable future,¹⁴ some continue to face conditions of indefinite detention.

In one case documented by Human Rights Watch, Z. is a non-citizen who was first taken into custody by United States immigration authorities in 1998.¹⁵ Z. was subjected to an egregiously prolonged period of immigration detention, totaling eight years. Z.'s order of removal became final in 2004, and his custody was reviewed after six months. However, the U.S. government refused to release him from detention, claiming that it was seeking diplomatic assurances from Z's country of origin that he would not be tortured.¹⁶ These assurances, Human Rights Watch asserts, cannot provide effective protection against torture and other ill-treatment (see section VII, *infra*). In this case, the U.S. government's futile efforts to obtain diplomatic assurances caused Z. to be subjected to a full year and half of detention *after* the Supreme Court sanctioned six month period. Z. was finally released from immigration detention in 2006.

III. Use of Evidence Obtained through Torture (Question 6, ICCPR Articles 7, 9, and 10)

The Detainee Treatment Act (the "DTA"),¹⁷ enacted in 2005, includes a troubling provision that appears to sanction the use of evidence obtained through torture.¹⁸ Specifically, the DTA requires the Combatant Status Review Tribunals and Annual Review Boards (military bodies convened to evaluate the status of detainees at Guantánamo Bay) to assess whether statements from detainees were obtained through coercion and then assess the "probative value of the statement."¹⁹ The implication of this rule is that statements obtained through torture or cruel, inhuman or degrading treatment could be used as evidence if they have sufficient probative value. Moreover, there is no prohibition on the use of statements of other witnesses against the detainees that are obtained through torture or other coercion.²⁰ According to Pentagon documents, detainee Mohammed al-Qahtani was reportedly tormented by weeks of sleep

¹³ See James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (Free Press, 2006) p.32; Brian Foss & Richard Esposito, "CIA's Harsh Interrogation Techniques Described," *ABC News*, Nov. 18, 2005; and Douglas Jehl, "Report Warned C.I.A. on Tactics In Interrogation," *New York Times*, Nov. 9, 2005 (reporting use of water-boarding against KSM).

¹⁴ *Zadvydas v. Davis* 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005).

¹⁵ "Z." is a pseudonym used to protect the identity and confidentiality of the non-citizen described in this case.

¹⁶ Declaration of U.S. government official, on file with Human Rights Watch.

¹⁷ Federal Judiciary Emergency Special Sessions Act of 2005, Pub.L.No. 109-163, § 1001 et seq. Stat. 1993, 119 (2005).

¹⁸ As the Committee is aware, credible allegations and substantiated instances of the U.S. government's use of torture and cruel, inhuman, degrading treatment have been presented to the Committee against Torture and the Commission on Human Rights, as well as to the Human Rights Committee. These practices also have been reported on by non-governmental organizations and have appeared in numerous press accounts. The mistreatment described in these reports includes, *inter alia*: extreme physical abuse, forced nudity, food and water deprivation, sleep deprivation, sensory deprivation, the use of dogs, shackling for prolonged periods in painful stress positions, exposure to extreme temperatures, sexual abuse, sexual humiliation, prolonged use of solitary confinement under conditions of indefinite detention, and death in custody. See Human Rights First, Human Rights Watch, New York University's Center for Human Rights and Global Justice, "By the Numbers: Findings of the Detainee Abuse and Accountability Project," April 2006, Volume 18, No. 2(G); "Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees," *A Human Rights Watch Report*, April 2005 Vol. 17, No. 1(G); ACLU, "Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad," April 2006, pp. 35-45; and Human Rights First, "Command's Responsibility, Detainee Deaths in U.S. Custody in Iraq and Afghanistan," February 2006.

¹⁹ Federal Judiciary Emergency Special Sessions Act of 2005, Pub.L.No. 109-163, §100(3)(b).Stat.1993,119(2005).

²⁰ See Corine Hegland, "Empty Evidence," *National Journal*, February 4, 2006 (According to press accounts based on document review and discussions with habeas counsel, "false confessions and false accusations are rampant."). Hegland reports that one of the detainees made accusations against more than 60 of his fellow inmates – more than 10 percent of the entire prison population in Guantánamo.

deprivation, isolation and sexual humiliation, after which he accused 30 fellow prisoners of being Osama bin Laden's bodyguards.²¹

Somewhat more positively, the Pentagon released a Military Commission Instruction in April 2006 that bars the use of evidence obtained through torture in any of the military commission proceedings at Guantánamo Bay.²² However, the Instruction falls far short of what is required under Article 7 of the ICCPR. It does not bar the use of evidence acquired by abusive interrogations that fall short of torture but nonetheless violate the prohibitions against cruel, inhuman or degrading treatment. It is also unclear how evidence acquired through torture would be excluded in practice. The Instruction does not oblige the prosecution to ascertain and disclose that evidence was obtained through torture. Nor does it establish who has the burden of proof in a case where the accused challenges evidence by alleging that it was obtained through torture. If the burden is placed on the accused, without a concomitant obligation on the prosecution to disclose, this will be a meaningless prohibition. It will be extremely difficult, if not impossible, for an accused to corroborate a claim of torture or abuse, without the assistance of an independent investigation by the prosecution who, unlike the defense, has access to the interrogators and interrogation logs.²³

Human Rights Watch is also concerned about a recent federal court case, in which a district court judge appears to have sanctioned the government's use of evidence obtained through torture. In November, Ahmed Omar Ali was convicted on terrorism conspiracy charges and subsequently sentenced to thirty years in prison. At trial, the government relied extensively on a confession made by Ali while he was detained in Saudi Arabia. Ali maintains that he was tortured, beaten, whipped, and ultimately coerced into confessing.²⁴ The court, however, rejected Ali's challenge to the admission of the evidence, and concluded that the government met its burden, establishing that the statement was not produced pursuant to undue coercion.²⁵ Then, at trial, the court denied the defense team's request to present to the jury evidence of scars on his back suggesting that he had been tortured.²⁶ It also precluded the defense from presenting to the jury general evidence regarding Saudi Arabia's poor human rights record on torture, instead taking at face value Saudi officials' statements denying the existence of torture in Saudi Arabia. In so doing, the court ignored U.S. Department of State reports of widespread abuse of prisoners by the Saudi Arabian government.²⁷

The reliance on statements made by Khalid Sheikh Muhammad as a basis for the ongoing detention of al-Marri also points to the troubling acceptance of evidence obtained through torture. As described above, Khalid Sheikh Muhammad is widely reported to having been subjected to waterboarding and other abusive interrogation techniques that amount to torture.

²¹ Adam Zagorin, "One Life Inside Gitmo", *Time Magazine*, March 13, 2006.

²² U.S. Department of Defense, "Military Commission Instruction No. 10. "Certain Evidentiary Requirements," March 24, 2006, <http://www.defenselink.mil/news/Mar2006/d20060327MCI10.pdf> (retrieved June 14, 2006).

²³ In its recent report on the U.S., the Committee Against Torture has expressed concerns about the implementation of this Instruction and about the use of torture in the Combatant Status Review Tribunals and the Administrative Review Boards. See Conclusions and Recommendations of the Committee Against Torture: United States, Par. 30 (May 1-19, 2006).

²⁴ Matthew Barakat, "Man Found Guilty of Plotting to Assassinate Bush gets 30 Years in Prison," *Associated Press*, March 30, 2006.

²⁵ In federal court, unlike the military commissions, the standards and burdens of proof are well-established. Once the defense launches a credible challenge that a statement was coerced, the burden is upon the government to establish by a preponderance of evidence that the statement was voluntary.

²⁶ Order, filed 2/3/05, United States v. Abu Ali, Criminal Docket No. 1:05-cr-00053-GBL-1 (E.D.VA).

²⁷ United States Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices 2005: Saudi Arabia," March 8, 2006, <http://www.state.gov/g/drl/rls/hrrpt/2005/61698.htm> (retrieved June 14, 2006). ("Ministry of Interior (MOI) officials were responsible for . . . incidents of abuse of prisoners, including beatings, whippings, and sleep deprivation. In addition, there were allegations of beatings with sticks and suspension from bars by handcuffs. There were allegations that these practices were used to force confessions from prisoners").

IV. Implementation of the Detainee Treatment Act (Question 8, ICCPR Article 7)

The Detainee Treatment Act (DTA) includes a positive provision, known as the “McCain amendment,” which prohibits the use of torture and cruel, inhuman, or degrading treatment by any U.S. official or employee operating anywhere in the world. It also sets the Army Field Manual on Intelligence Interrogation as the standard for all interrogations carried out by the Department of Defense.

Unfortunately, the DTA raises important new concerns. The DTA includes a provision, known as the “Graham-Levin amendment,” that precludes detainees at Guantánamo Bay from bringing any future challenge to their ongoing detention or conditions of confinement before the courts.

In ongoing litigation, the administration has taken the position that the Graham-Levin amendment precludes detainees at Guantánamo Bay from challenging in federal court the use of torture and cruel, inhuman or degrading treatment.²⁸ If the courts of appeal agree with this position and uphold the amendment’s constitutionality, the gains from the McCain amendment will be vitiated, with victims of abuse held at Guantánamo having no independent legal forum in which to vindicate their rights. Denying these individuals the opportunity to redress such abuse violates the U.S.’s obligations under the ICCPR.²⁹

The United States also continues to circumvent its obligations under the ICCPR – and undermine the McCain amendment – by defining torture in a manner that is inconsistent with the ICCPR and the Convention against Torture’s definition of torture. Of particular concern, the United States has failed to denounce “waterboarding,” a type of mock drowning, as a form of torture or cruel and inhuman treatment. In May, members of the Committee Against Torture repeatedly asked the U.S. whether waterboarding constituted torture, and the U.S. consistently refused to answer. Although the U.S. told the Committee against Torture on May 8 that the soon-to-be-revised Army Field Manual on Intelligence Information will prohibit waterboarding, this prohibition only applies to the military and the Department of Defense, but does not bind CIA intelligence officers or their contractors.

Moreover, the United States has also never stated what steps if any it has taken to ensure compliance with the provisions of the McCain amendment by the Department of Defense and the CIA. The McCain amendment does not provide a mechanism for individual victims of torture and abuse to seek redress for violations of the amendment. As a result, the administration’s role in internally monitoring and enforcing the amendment takes on heightened importance. Has the CIA issued and promulgated new interrogation guidelines in response to the passage of the McCain amendment? How are the new rules communicated to agents and contractors in the field? What steps is the United States taking to monitor and enforce these obligations?

Our concerns in this respect are magnified by the president’s “signing statement” issued at the time the McCain amendment became law, in which the president suggested that his powers as commander-in-chief trumped any restrictions on the use of torture and cruel, inhuman and degrading treatment imposed by the amendment.

V. Accountability for Abuse (Question 9, ICCPR Articles 2, 6, and 7)

²⁸ *Al-Adahi v. Bush*, “Respondent’s Opposition to Petitioner’s Emergency Motion for Injunction Against Further Torture of Mohammad Bawazir,” Civil Action No. 05-280 (GK), Document 69-1, filed 3/1/06.

²⁹ There is no alternative mechanism in place for detainees to raise claims that they are subject to torture and other abuse, other than through independent federal court review. Neither the Combatant Status Review Tribunals, which assess the detainee’s classification as an “enemy combatant,” nor the Annual Review Boards, which assess whether the detainee poses a continuing threat or is of intelligence value, have jurisdiction to consider claims that the detainee is subject to torture or abuse.

Human Rights Watch, Human Rights First, and the Center for Human Rights and Global Justice at NYU School of Law have jointly undertaken a Detainee Abuse and Accountability Project (“DAA Project”) to collect and analyze information about allegations of detainee abuse in U.S. custody in Afghanistan, Iraq, and the Guantánamo Bay detention facility; and to assess what actions if any were taken in response, from investigations to, where appropriate, disciplinary actions and punishments. These findings were published on April 26, 2006.³⁰ Among the findings are the following:³¹

- There are over 330 cases in which U.S. military and civilian personnel are credibly alleged to have abused or killed detainees. These cases involve at least 600 U.S. personnel and over 460 detainees. Allegations have come from U.S. facilities throughout Afghanistan, Iraq and at Guantánamo Bay.
- Approximately 90 military personnel—fewer than fifteen percent of the more than 600 U.S. personnel implicated in detainee abuse cases—are known to have been court-martialed. Approximately forty of these individuals have been sentenced to prison time, but of the hundreds of personnel implicated in detainee abuse, only about ten people have been sentenced to a year or more in prison.
- Of the hundreds of allegations of abuse collected, only about half appear to have been properly investigated. In numerous cases, military investigators appear to have failed to open investigations, closed them prematurely or delayed their resolution.
- No U.S. military officer has been held accountable for criminal acts committed by subordinates under the doctrine of command responsibility.³² Only three officers have been convicted by court-martial for detainee abuse; in all three instances, they were convicted for abuses in which they directly participated, not for their responsibility as commanders.
- Out of twenty civilians, including CIA agents, referred for criminal prosecution for detainee abuse by the military and the CIA since 2002, the Department of Justice has prosecuted just one civilian contractor. Two of the cases have been closed for “insufficient evidence,” and the other seventeen remain “under investigation.” The Department of Justice has not indicted a single CIA agent for abusing detainees.

One case that particularly highlights the failure of accountability is that of Mohammad al-Qahtani. Human Rights Watch has obtained an unredacted copy of al-Qahtani’s interrogation log, detailing interrogations from a six-week period from November 2002 to January 2003. The interrogation log reveals that al-Qahtani was subjected to a regime of physical and mental mistreatment from mid-November 2002 to early January 2003. For six weeks, he was intentionally deprived of sleep, forced into painful physical positions (known as stress positions) and subjected to forced exercises, forced standing, and sexual and other physical humiliation, including the administration of a forced enema. In 2005, the Judge Advocates General of the U.S. Army, Navy and Marine Corps told the U.S. Senate Committee on Armed Services that the techniques used on al-Qahtani violated the U.S. Army Field Manual on

³⁰ Human Rights First, Human Rights Watch, New York University’s Center for Human Rights and Global Justice, “By the Numbers: Findings of the Detainee Abuse and Accountability Project,” April 2006, Volume 18, No. 2(G). The findings are based primarily on documents released by the U.S. government, including tens of thousands of pages of internal government documents obtained under the Freedom of Information Act (FOIA) by the American Civil Liberties Union and other non-governmental groups. Additional sources include personal interviews, court filings, detainee accounts, credible media sources, and official U.S. military statements. The numbers presented are likely an undercount for two reasons: (1) U.S. military and intelligence officers maintain a high level of secrecy with respect to detainee operations, allegations of abuse, and investigation; (2) the Project has taken a conservative approach, only including accounts from nongovernmental sources if they are specific, detailed and coherent.

³¹ At the May Committee Against Torture hearings, the U.S. delegation criticized the numbers in this report as underreporting the number of persons subject to and convicted by courts-martial, and released for the first time its own accounting of the numbers of courts-martials. Human Rights Watch had repeatedly asked the Department of Defense and the Department of Justice for exactly such an accounting, but had never been provided with any response. Human Rights Watch welcomes the new transparency and has incorporated these updated numbers into what is being reported to the Committee here.

³² ‘Command responsibility doctrine’ provides that a superior is responsible for the criminal acts of subordinates if the superior knew or should have known that the crimes were being committed and failed to take steps to prevent them or to punish the perpetrators.

Intelligence Interrogation, and would have been illegal if perpetrated by another country on captured U.S. personnel.³³

On December 20, 2005, the Army Inspector General completed a report, obtained by salon.com in April 2006, that investigated the allegations of abuse in the al-Qahtani case. The report contains a sworn statement by Lt. Gen. Randall M. Schmidt that implicates Defense Secretary Donald Rumsfeld in the abuse of al-Qahtani. Gen. Schmidt, who conducted an investigation into the case in early 2005 that included two interviews with Rumsfeld, describes the defense secretary as being “personally involved” in al-Qahtani’s interrogation. Gen. Schmidt describes Rumsfeld as “talking weekly” with General Geoffrey Miller, then a senior commander at Guantánamo, about the interrogation of al-Qahtani. But the report’s findings and recommendations were rejected by the head of U.S. Southern Command, Gen. Bantz J. Craddock. According to Gen. Craddock, the al-Qahtani interrogation did not violate military law or policy. As a result, neither Secretary Rumsfeld, Gen. Miller, nor any of the interrogators who took part in the interrogations have been criminally investigated or made to account in any way for their actions.

VI. Redress for Victims: Guantánamo Detainees, el-Masri and Arar (Question 9, ICCPR Articles 2, 6 and 7)

As stated above, the Detainee Treatment Act includes a provision that prohibits Guantánamo Bay detainees from bringing any future action challenging the use of torture or cruel, inhuman, or degrading treatment in U.S. courts. This prohibition applies even after they are released. Detainees are forever precluded from seeking redress for abuse and torture that occurred while they were held at Guantánamo.

In addition, in at least two instances the government has successfully barred individuals from seeking redress for abuse. Consider the cases of Kahled el-Masri and Maher Arar.

El-Masri, a German citizen, states that he was seized in Macedonia in December 2003 and eventually transferred to a CIA-run prison in Afghanistan where he was beaten and held incommunicado for several months. In May 2004, he was flown to Albania, deposited on an abandoned road, and eventually made his way back to Germany. El-Masri states that one of the detaining officials admitted that his arrest and detention was a mistake.

El Masri filed a suit in U.S. federal court against the former CIA Director George Tenet and the corporations and individuals allegedly involved in his rendition. He alleged violations of his due process rights and the international prohibitions against arbitrary detention and cruel, inhuman, or degrading treatment. The U.S. government, however, moved to dismiss, arguing that discovery in the case would require revealing “state secrets.” Despite the fact that the case had been widely reported in the U.S. and international media. The court agreed and on February 16, 2006, dismissed the case.³⁴ El-Masri plans to appeal the ruling. If he loses, he will have no avenue for seeking relief and compensation for the 5-month period of physical and psychological abuse.

Maher Arar, a Canadian citizen, was detained by the United States in September 2002. U.S. immigration authorities held him for two weeks, during which time he was unable to challenge either his detention or imminent transfer to a country likely to torture him. Relying on diplomatic assurances from Syria, the United States then flew Arar to Jordan, where he was driven across the border to Syria and detained there for ten months. Arar reports 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.

³³ United States Senate, “Hearing of the Personnel Subcommittee of the Senate Armed Services Committee, Military Justice and Detention Policy in the Global War on Terrorism,” 108th Cong., 1st sess., 14 July 2005.

³⁴ *El-Masri v. Genarge Teneta*, No. 1:05 cv 1417, Slip Copy, 2006 WL 1391390 (E.D.Va. 12 May 2006).

Arar sued former Attorney General John Ashcroft and others involved in his detention and rendition for compensation for the physical and psychological harm suffered in Syria. The United States asserted a national security privilege. The district court agreed and dismissed the case, reasoning that it could not second-guess the government's claims that the need for secrecy was paramount and that discovery about what happened in the case could have negative impacts on foreign relations and national security. Arar, like el-Masri, is denied a remedy, even though the facts of his case, like in the el-Masri case, are widely reported.

In both cases, the U.S. government has shut down any inquiry into practices that appear to violate international prohibitions on *non-refoulement* and use of torture and cruel, inhuman, and degrading treatment. Violations of non-derogable rights cannot and should not be justified or shielded from review on grounds of national security.

VII. Rendition to Torture and Diplomatic Assurances (Question 10, ICCPR Articles 6, 7, 9, 10)

By returning individuals subject to its power or effective control³⁵ to countries where they were at risk of being tortured or otherwise mistreated, the United States was in violation of its obligations under Article 7 of the ICCPR.³⁶

Extraterritorial transfers

While the U.S. states that as a policy matter it will not transfer individuals to countries where they are more likely than not to be subject to torture, it makes a legal distinction between non-nationals arrested and detained within the U.S. and those arrested and detained extraterritorially. Specifically, the U.S. argues that Article 7 of the ICCPR (as well as the prohibition on return to torture under Article 3 of the Convention against Torture) do not apply when an individual is arrested and detained outside the jurisdiction of the U.S. Human Rights Watch hopes that the Committee challenges this legal argument. It is the clear purpose and intent of the ICCPR to prohibit states party from sending individuals to countries where they will be subjected to torture.

There is no basis for making the geographic location of where an individual is detained the triggering factor in its application. It is also irrelevant whether an individual is detained in a center run by another government at the behest of the U.S. government. Neither is it relevant whether the individual presents a danger to national security.³⁷ The appropriate inquiry is whether the individual is under the power and effective control of the state party prior to or during the transfer to a place where he or she runs the risk of being subjected to torture. Moreover, it is a general principle of international law that a state may not avoid its international obligations by allowing a second state to commit acts that would be prohibited if committed by the first state. Article 15 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission states that a state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

³⁵ See U.N. Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004.

³⁶ See U.N. Human Rights Committee, *General Comment No. 20, Article 7*, 44th Session, U.N. Doc. HRI/GEN/1/Rev.1, at 30, para. 9 (1994).

³⁷ See U.N. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant (Canada), Concluding Observations of the Human Rights Committee*, U.N. Doc. CCPR/C/CAN/CO/5, para. 15, April 20, 2006 (stating that “[n]o person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment.”).

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.³⁸

The United States merely accepts the prohibition against extraterritorial return to torture as a general policy – which can always be changed and modified – rather than as a binding legal obligation. The U.S. claim that ICCPR article 7 does not apply to non-nationals under the extraterritorial power or effective control of the United States creates a dangerous loophole in the prohibition against sending individuals to torture.

One case that highlights the problems inherent in the U.S. government's narrow interpretation of its obligations is that of Mohammed al-Zari. Al-Zari, together with Ahmed Agiza, was returned to Egypt in December 2001 by U.S. intelligence operatives to whom Swedish officials handed custody of the two men at Stockholm's Bromma Airport. In March 2005, a report by the Swedish chief parliamentary ombudsman concluded that the Swedish security service and the airport police "displayed a remarkable subordination to the American officials" and "lost control of the situation," resulting in the ill-treatment of Agiza and al-Zari, including physical abuse and other humiliation, at the airport immediately before they were transported to Cairo. There is considerable evidence that Egyptian security agents tortured the men during detention³⁹. In May 2005, the U.N. Committee against Torture ruled that Sweden had violated the absolute prohibition on torture by expelling Agiza to Egypt in 2001. Al-Zari's case, with facts very similar to that of Agiza, remains pending before the Human Rights Committee.

Use of Diplomatic Assurances

Once the United States acknowledges that a risk of torture exists in a specific country, it is incumbent upon it to refuse to transfer a person to that country. Human Rights Watch remains deeply concerned that the U.S. continues to seek so-called diplomatic assurances in such cases. In contexts where torture is a serious and persistent problem, or there is otherwise reason to believe that particular individuals will be targeted for torture and ill-treatment, diplomatic assurances do not and cannot prevent torture. Governments such as the United States that rely on such assurances are either engaging in wishful thinking or using the assurances as a fig leaf to cover their complicity in torture and their role in the erosion of the international norm against torture.

Nevertheless, the United States continues to promote its policy of relying on diplomatic assurances as a purportedly effective means of safeguarding against return to torture.⁴⁰ In December 2005, Secretary of State Condoleezza Rice stated: "The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured."⁴¹ But the United States does not have any meaningful mechanism to monitor these assurances – even when the individual is being sent to a country with a known record of engaging in torture. Moreover, there do not appear to be any opportunities for individuals to formally challenge their rendition or transfer on the grounds that the diplomatic assurances are not likely to provide sufficient protection from torture.⁴² Despite numerous examples in which

³⁸ *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its Fifty-third Session (2001). (Extract from the *Report of the International Law Commission on the work of its Fifty-Third Session*), *Official Records of the General Assembly*, Fifty-sixth session, Supplement No. 10, (A/56/10), Ch. IV.E.1).

³⁹ "Black Hole: The Fate of Islamists Rendered to Egypt," *A Human Rights Watch Report*, Vol. 17, No. 5(E)

⁴⁰ See 8 CFR Section 208.18 (c); 8 C.F.R. Section 1208.18 (c).

⁴¹ Rice, Condoleezza, U.S. Secretary of State, "Remarks Upon Her Departure for Europe," Andrews Air Force Base, December 5, 2005, available at: <http://www.state.gov/secretary/rm/2005/57602.htm> (retrieved June 14, 2006).

⁴² The United States has one of the few legal systems that provides in law for the use of diplomatic assurances in the context of its obligations under the Convention against Torture (CAT). See federal regulations, 8 C.F.R. § 208.18(c) (discussed below).

diplomatic assurances were secured and individuals were subjected to torture anyway, the United States continues to rely on these unenforceable assurances.⁴³

Human Rights Watch hopes that the Committee will challenge the U.S.'s assertion that diplomatic assurances protect individuals from torture and abuse. The Committee may wish to question the federal regulations, 8 C.F.R. § 208.18(c), which allow the U.S. Secretary of State to secure assurances from a government that a person subject to return would not be tortured. In consultation with the Attorney General, the Secretary of State will determine whether the assurances are "sufficiently reliable" to allow the return. Once assurances are approved, any claims a person has that he or she fears torture or cruel, inhuman or degrading treatment will not be given further consideration by U.S. authorities. It is our position that such assurances cannot and do not serve as an adequate safeguard against torture and abuse, as the following cases highlight.

The Committee is already well aware of the highly publicized case of Maher Arar, described above. Relying on diplomatic assurances from Syria, the United States then flew Arar to Jordan, where he was driven across the border to Syria and detained there for ten months. The United States relied on the Syrian assurances despite repeated statements from Arar to immigration authorities that he would be subject to torture if sent to Syria. Arar reports 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.

Another example is that of Mamdouh Habib, who was arrested in Pakistan in 2001 and transferred by U.S. officials to a prison in Egypt⁴⁴ where he says he was tortured with electric shocks until he fainted, kicked, punched, beaten, and rammed with what he describes as an electric cattle prod. Dr. Hajib al-Naumi, Qatar's former justice minister provides corroboration for Habib's account. Dr. al-Naumi states that contacts of his in Egypt told him that Habib "was in fact tortured. He was interrogated in a way which a human cannot stand up... We were told that he -- they rang the bell that he will die and somebody had to help him."⁴⁵

An additional case is that of Mohammad Saad Iqbal Madmi, who was arrested in Jakarta allegedly at the request of the CIA and flown to Cairo, where he says he was held for 92 days and severely tortured with electrodes.⁴⁶ Madmi was subsequently sent from Egypt to Afghanistan and then to the U.S. detention facility at Guantánamo Bay. Other detainees in Guantánamo Bay have given similar accounts to the media and to their attorneys of being transferred to a third party country and tortured before being sent to Guantánamo.⁴⁷

Presumably the United States followed its stated policy of reliance on diplomatic assurances before it sent either Habib or Madmi to Egypt. Presumably, it followed its policy of relying on diplomatic assurances before sending Agiza or al-Zari to Egypt as well. Alternatively, it rendered these individuals to Egypt without such assurances despite the State Department's own finding that "[t]orture and abuse of prisoners and detainees by [Egyptian] police, security personnel, and prison guards remained common and

⁴³ "No Guidelines on Empty 'No Torture' Promises," Human Rights Watch press release, April 3 2006, http://hrw.org/english/docs/2006/04/03/eu13110_txt.htm (retrieved June 14, 2006); "Empty Promises: Diplomatic Assurances no Safeguard against Torture," *A Human Rights Watch Report*, April 2004 Vol.16 No.4 (D), "Still at Risk: Diplomatic Assurances no Safeguard against Torture," *A Human Rights Watch Report*, April 2005 Vol. 17, No. 3(D)

⁴⁴ "Dateline: The Trials of Mamdouh Habib," *SBS Television*, July 7, 2004. Makhdoom Syed Faisal Saleh Hayat, Pakistan's Interior Minister, told Dateline that Habib was sent to Egypt on U.S. orders and in U.S. custody.

⁴⁵ *Id.*

⁴⁶ Rajiv Chandrasekaran and Peter Finn, "U.S. Behind Secret Transfer of Terror Suspects," *Washington Post*, Mar. 11, 2002.

⁴⁷ Farah Stockman, "Seven Detainees Taken to Nations of Torture-Guantánamo Prisoners say they were Abused before Arrival," *Boston Globe*, April 26, 2006.

persistent.”⁴⁸ Finally, regardless of whether or not assurances were sought, the United States in each of these cases violated its obligations under Article 7 of the ICCPR.

Human Rights Watch hopes that the Committee will question the United States about its practice of seeking diplomatic assurances, including by asking the United States whether it obtained diplomatic assurances in the cases described above. Human Rights Watch hopes that the Committee will find that diplomatic assurances cannot provide effective protection against torture and other ill-treatment; and make clear that diplomatic assurances should not be relied upon.

Human Rights Watch is also extremely concerned about the administration’s statements that they plan to rely on diplomatic assurances as they accelerate the process of transferring individuals out of Guantánamo Bay. There is growing international pressure on the United States to close Guantánamo Bay. The United States has begun making public statements that it has slated 14 detainees eligible for release and 120 for transfer to their home country.⁴⁹

There is no administrative or legal mechanism, however, for a detainee at Guantánamo Bay to challenge his transfer to a country on the grounds that he would be in danger of torture and that diplomatic assurances are not likely to provide sufficient protection from torture. Prior to the passage of the DTA, some detainees were able to raise such claims in federal court as part of their habeas challenges. In several cases, the federal court required the government to give 30-days notice prior to any such transfer. Now, the administration has taken the view that the DTA cuts off even this limited avenue of review for the detainees.

II. Material Witness Warrant Statute (Question 11, ICCPR Articles 9, 10, 14)

Human Rights Watch welcomes the Committee’s inquiries into the use of material witness warrants to bypass basic fair trial rights and to hold criminal suspects indefinitely and without charge. The United States continues to refuse to provide any information about the numbers of persons held as material witnesses and the length of time of detention. Human Rights Watch hopes that the Committee presses the U.S. on this issue and demands answers to its questions about the numbers subject to the material witness statute and length of time of detention.

III. Death Penalty (Question 17, ICCPR Article 6)

Human Rights Watch advocates for the abolition of the death penalty in the United States based on the inherently cruel and inhuman nature of this punishment. In the interim, states must ensure that their administration of the death penalty comports with their international human rights obligations.⁵⁰ One such obligation requires that death-eligible offenses be limited to the most serious crimes--those which involve murder.⁵¹ Yet, nine states and the federal government allow defendants to be sentenced to death for crimes that do not involve murder.

⁴⁸ United States Department of State Bureau of Democracy, Human Rights, and Labor, "2005 Country Reports on Human Rights Practices," March 8, 2006, <http://www.state.gov/g/drl/rls/hrrpt/2005/61687.htm> (retrieved June 14, 2006).

⁴⁹ U.S. Department of Defense, "Guantánamo Bay Detainee Administrative Review Board Decisions Completed," No. 124-06, February 9, 2006, available at: <http://www.defenselink.mil/releases/2006/nr20060209-12464.html>

⁵⁰ Article 6 of the ICCPR. See also *Kindler v. Canada*, HRC, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993) (citing *Soering v. United Kingdom*, European Court of Human Rights) (noting that, while capital punishment is not per se a violation of the prohibition on torture and other cruel punishment, courts must consider the facts and circumstances of each case in determining whether or not states have violated their international human rights obligations, including personal factors regarding the condemned person, conditions on death row, and whether the proposed method of execution is particularly abhorrent).

⁵¹ Article 6 of the ICCPR states that, "the sentence of death may be imposed only for the most serious crimes." Although the Human Rights Committee has not defined which crimes fall into the category of "most serious crimes," they have in their general comments indicated that "the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure." ICCPR, General Comment 06, U.N. HRC, 16th Session, U.N. Doc. CCPR/c/60/Add.6 (1982).

Three states--California, Georgia, and Louisiana--make treason, defined generally as waging war against a state or providing aid and comfort to state enemies, a capital offense.⁵² Three states--Florida, Louisiana, and Montana--list certain sex offenses as capital crimes, usually where the crime involves a minor.⁵³ Two states--Indiana and South Dakota--allow the death penalty for aggravated kidnapping, where the perpetrator demanded ransom and the victim was physically harmed.⁵⁴ In Mississippi, hijacking an airplane is a capital offense.⁵⁵ And the federal government lists certain drug offenses, those involving connections to large-scale criminal enterprises (e.g. blackmarket weapons sales), as capital crimes. Finally, in May 2006, legislatures in South Carolina and Oklahoma moved closer to passing legislation that would allow individuals convicted twice of sexual assault against a child to be sentenced to death. Governors in both states have indicated they will sign the bills into law.⁵⁶

States have an obligation to develop methods of execution that will reduce, to the greatest extent possible, the condemned prisoner's risk of mental or physical pain and suffering.⁵⁷ Yet, recent research by Human Rights Watch suggests that the most common method of execution in the United States – lethal injection – is administered according to procedures adopted without scientific study three decades ago. There is growing evidence suggesting that in a number of cases the method used may have caused an agonizing death.⁵⁸ In fact, the method used to execute most prisoners has been prohibited by the American Veterinary Medical Association as too cruel to use on dogs and cats.

In the standard method of lethal injection used in the United States, the prisoner lies strapped to a gurney, and a series of three drugs is injected into his vein by executioners hidden behind a wall. The first two drugs, sodium thiopental (an anesthetic) and pancuronium bromide (inducing muscle paralysis), leave the prisoner fully conscious and able to experience pain. A third drug, potassium chloride, quickly causes cardiac arrest, but the drug is so painful that veterinarian guidelines in the United States prohibit its use unless a veterinarian first ensures that an animal is deeply unconscious. No such precaution is taken for prisoners being executed.

Although supporters of lethal injection believe the prisoner dies painlessly, there is mounting evidence that prisoners may have experienced excruciating pain during their executions. Logs from recent executions in California, and toxicology reports from recent executions in North Carolina, suggest prisoners may in fact have been inadequately anesthetized before being put to death. Human Rights Watch hopes that the Committee will question the U.S. about its failure to ensure that the method of lethal injection does not cause needless agony.⁵⁹

⁵² California Penal Code 37-38; Georgia Code 35-8; Louisiana Penal Code 14:113.

⁵³ FL Code 775.021; La. Rev. Stat. Ann. § 14:42; and Seanna Adcox, "Death for Some Sex Offenders OK'd," *Associated Press*, May 31, 2006

⁵⁴ ID Code 18-4502; SD Code 22-19-1.

⁵⁵ MS Code 97-25-55(1).

⁵⁶ Tim Talley, "Oklahoma Sex Offender Legislation Raises Constitutional Questions," *Associated Press*, June 7, 2006; and John Frank, "Death Penalty for some Molesters OK'd," *The Charleston Post and Courier*, June 1, 2006.

⁵⁷ The HRC has stated that when the death penalty is applied, "it must be carried out in such a way as to cause the least possible physical and mental suffering." See *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/469/1991 (1994). In addition, The U.N. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty provides that where capital punishment occurs, it shall be "carried out so as to inflict the minimum possible suffering." *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc E/1984/84 (1984), safeguard 9, <http://www1.umn.edu/humanrts/instree/i8sgpr.htm> (retrieved on June 14, 2006).

⁵⁸ "U.S.: States Negligent in Use of Lethal Injections-Execution Method May Cause Agonizing Death," *A Human Rights Watch Report*, vol. 18, no. 1(G), April 2006, <http://hrw.org/reports/2006/us0406/> (retrieved on June 14, 2006).

⁵⁹ On June 12, 2006, the Supreme Court, in *Hill v McDonough*, ruled unanimously that death row inmates seeking to challenge the lethal injection method of execution may pursue the issue as a civil rights claim, a broader option than a federal habeas claim. While not ruling itself on the constitutionality of that execution procedure, the Court said that inmates who contend that the three-drug protocol most commonly used causes unnecessary pain and suffering may go forward with an Eighth Amendment claim under the 1871 civil rights statute, Section 1983. *Hill v McDonough*, 2006 U.S. LEXIS 4674.

X. Juveniles Sentenced to Life without Parole (Question 24, relating to ICCPR Articles 10, 14, and 24)

Every day in the United States, children convicted of serious crimes risk being sent to prison for the rest of their lives. In forty-two states and under federal law, children who are too young to legally buy cigarettes, vote, or in some cases even drive, are being tried for crimes as adults, and if convicted they receive adult prison sentences, including life without the possibility of parole (LWOP). According to research by Human Rights Watch and Amnesty International, there are at least 2,225 youth offenders serving LWOP in U.S. prisons.⁶⁰ Each year, a larger percentage of youth offenders convicted of serious offenses are receiving the sentence.

Though all 2,225 youth sentenced to life without parole in the United States have been convicted of serious crimes, few match the fears of politicians and the public, who thought their communities were or would be besieged by vicious teenagers with long records of crime. In response to those fears, U.S. politicians decided to send greater numbers of youth to adult prison for the rest of their lives. The actual profiles of these youth show how misguided that decision was.

The majority of youth (59 percent) sentenced to life without parole in the U.S. are first offenders. These youth had neither an adult criminal record nor a juvenile adjudication. In 26 percent of the cases sampled, the sentence was imposed on children convicted of felony murder—that is, on teens who participated in a felony such as robbery during which another participant in the crime killed someone without the child offender having intended the murder to occur—and sometimes without even knowing the other participant was armed. Racial disparities are dramatic. When the racially disaggregated rates of youth sentenced to life without parole are compared, the rate for black youth sentenced to life without parole greatly exceeds that of white youth. The average rate of sentencing black youth to life without parole 6.6 per every 10,000 black youth in the population is eleven times greater than the average white rate of .6 per every 10,000 white youth.

Human Rights Watch believes that LWOP sentences for youth offenders violate the ICCPR's prohibition on cruel, inhuman, or degrading treatment. In addition, according to the ICCPR, criminal procedures involving juveniles should "take account of their age and desirability of promoting their rehabilitation"⁶¹ and juveniles should be "segregated from adults and be accorded treatment appropriate to their age and legal status."⁶² When it became a party to the ICCPR, the United States reserved the right to treat juveniles as adults in exceptional circumstances; nevertheless the U.S. reservations are insufficient to shield the government from the violations of Articles 10(3) and 14(4) created by its policy of sentencing youth to LWOP.⁶³ According to the United States Senate Committee on Foreign Relations, the reservation was included because, at times, juveniles were not separated from adults in prison due to their criminal backgrounds or the nature of their offenses.⁶⁴ In other words, the reservation is *not about* the length or severity of sentences, only about the need to sometimes try children as adults and incarcerate them in

⁶⁰ See generally Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (New York: Human Rights Watch/Amnesty International, 2005).

⁶¹ ICCPR, Art. 14 (4).

⁶² ICCPR, Art. 10 (3).

⁶³ United Nations Treaty Collection, International Covenant on Civil and Political Rights, United States of America: Reservations, para. 5. In its report to the ICCPR, the United States explained that it entered this reservation in order to "retain a measure of flexibility to address exceptional circumstances in which trial or incarceration of juveniles as adults might be appropriate, for example, prosecution of juveniles as adults based on their criminal histories or the especially serious nature of their offences, and incarceration of particularly dangerous juveniles as adults in order to protect other juveniles in custody." See Human Rights Committee, *Initial Reports of States Parties Due in 1993: United States of America*, CCPR/C/81/Add.4, para. 286, August 24 1994.

⁶⁴ United States, *Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645, 651 (1992) ("Although current domestic practice is generally in compliance with these provisions, there are instances in which juveniles are not separated from adults, for example because of the juvenile's criminal history or the nature of the offense. In addition, the military justice system in the United States does not guarantee special treatment for those under 18.").

adult prisons. We hope that the Committee will urge the United States to end its widespread and regular practice of sentencing youth offenders to life without the possibility of parole.

XI. Refugees Denied Asylum by the United States (ICCPR, Article 13)

Hundreds of asylum seekers and refugees are facing return to their countries of origin by the United States because of the U.S. Immigration and Nationality Act, which denies asylum to anyone who associated with, or provided any “material support” to any armed group – even if the group is supported by the United States, and even if the individual was forced at gunpoint to provide the support.

Asylum-seekers within the United States are being returned to their countries of origin and potentially *refouled* because of this bar. Currently, there are more than 550 reported material support cases relating to asylum seekers within the United States on hold at the Asylum Office in DHS, while an unknown number of other asylum claims before the immigration courts have also been rejected.

There are two primary problems with this law. First, the law does not make any exception for persons forced to provide “material support” under severe coercion or duress. As a result, the very facts that make up individuals’ refugee claims – that they were terrorized by armed rebel groups – become the same facts that are used to deny asylum.

Second, the definition of “terrorist organization” – defined as a group of two or more persons, whether organized or not, who bear arms against the law of the ruling country – is so broad as to include persons defending themselves against brutal and oppressive regimes – such as pro-democracy resistance movements in Burma. These asylum seekers are being labeled as providing material support to “terrorist organizations,” and their members denied asylum by the U.S., even if they have them been the victims of persecution.

For example, in May the Board of Immigration Appeals rejected the asylum claim of S.K., a Chin woman who began giving money to the Chin National Front (“CNF”), an ethnic, resistance movement dedicated to protecting Chin Christians in Burma, after her fiancé was killed by the Burmese military. The CNF has an armed resistance wing, and her support of the CNF was deemed “material support” to a terrorist organization that barred her asylum claim. As the concurring judge noted: “We are finding that a Christian member of the ethnic Chin minority in Burma, who clearly has a well-founded fear of being persecuted by one of the most repressive governments in the world, one that the United States views as illegitimate, is ineligible to avail herself of asylum in the United States despite posing no threat to the security of the country.”⁶⁵

Although the Secretary of State and Secretary of the Department of Homeland Security have the authority to waive the application of the law in certain cases, this authority has only been exercised once – to allow for the resettlement of a subset of Burmese refugees in one camp in Thailand. This limited waiver does nothing to protect the hundreds of asylum seekers, including S.K., whose cases are on hold and who could face serious persecution if they are returned to countries from which they fled. It also is insufficient to help the thousands of others such as Burmese in Thailand or Malaysia, Cubans, the Hmong, Montagnards, Sudanese, Liberians, and Colombians who are refugees awaiting resettlement into the United States.

Article 13 of the ICCPR, which obligates state parties to ensure that “[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached

⁶⁵ *In re S.K.*, 23 I & N Dec. 936, 947 (BIA June 8, 2006) (Osuna, J., concurring).

in accordance with law.”⁶⁶ In its General Comment 15, the Human Rights Committee has construed article 13 to apply “to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise,” and “to prevent arbitrary expulsion.”⁶⁷ Since the prohibition on arbitrary expulsions covers procedural as well as substantive elements of the law applied,⁶⁸ Human Rights Watch believes that the return of an individual to a place where he or she fears persecution based on such a broad definition that does not track the Refugee Convention’s standards for exclusion would constitute an arbitrary expulsion, not to mention a violation of the international standard of *nonrefoulement*, which is the cornerstone of refugee protection.

Human Rights Watch hopes that the Committee will urge the U.S. to amend its laws so that no one with a legal claim to remain in the United States – a valid refugee – could be denied asylum.

⁶⁶ Asylum-seekers within the United States who are facing return to their countries of origin because of the material support bar fit within one of two categories of “lawfully present” non-citizens. Some portion of these asylum seekers will have entered the United States lawfully under a tourist or student visa, and lodged their claims after entry. Another portion can be considered to have entered the United States “in accordance with its legal system (not necessarily a law in the formal sense)” – that is, a legal system set up to assess and recognize the refugee status of asylum seekers. See Manfred Nowak, U.N. Covenant on Civil and Political Rights p. 229 ¶ 7 (1993).

⁶⁷ See also *Hammel v. Madagascar*, No. 155/1983; *Giry v. the Dominican Republic*, No. 193/1985; *Cañón García v. Ecuador*, No. 319/1988.

⁶⁸ *Maroufidou v. Sweden*, No. 58/1979, §9.3.