



TORTURE, ARBITRARY DETENTION, AND OTHER MAJOR HUMAN RIGHTS ABUSES BY THE UNITED STATES

**U.S. Non-Compliance with the International Covenant on Civil
and Political Rights in the Context of the “War on Terror”**

Submitted to the United Nations Human Rights
Committee in preparation for NGO hearings
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The World Organization for Human Rights USA

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For Submission to the United Nations Human Rights Committee

I. Executive Summary

The World Organization for Human Rights USA (Human Rights USA), the U.S. affiliate of the World Organization Against Torture (OMCT) international network, provides this updated shadow report to the Human Rights Committee in anticipation of the NGO hearings to be held at UN headquarters on March 13 and 17, 2006, and the formal hearing with U.S. government officials scheduled in Geneva in July.

This is the latest in a series of reports on U.S. compliance under the international human rights treaties that our group has provided over the years. We filed comprehensive “shadow reports” with the Human Rights Committee in 1995, with the Committee Against Torture in 1998, and with the Committee on the Elimination of Racial Discrimination on the CERD treaty in 2001. Our last submission to the Committee in February 2005, “Torture by the United States,” presented evidence of torture of detainees in U.S. military custody, the existence of secret detention facilities where detainees are held indefinitely, numerous renditions to torture, and extra-judicial executions of military detainees.¹

Since the submission of that report in February 2005, a number of significant developments show that the U.S. government continues committing major violations of established human rights law, especially in the context of efforts to combat terrorism. The government has taken the position that human rights legal standards are not binding on the actions of the U.S. military, and has improperly sought to justify these abuses as permitted as a matter of ‘military necessity’ in pursuit of the “Global War on Terror.”

This report focuses on these recent abuses committed in the context of the “War on Terror,” and the U.S. government’s claims of impunity for these violations based on the threat of terrorism. Among the most important human rights violations committed by the U.S. government that deserve attention and action by the Committee are the following:

Torture of Detainees in U.S. Military Custody: Recent statements made by the President in response to Congressional legislation banning the use of torture by the U.S. military indicate that the President continues to believe that he operates above the law as Commander in Chief and is authorized to order the use of torture whenever he deems such tactics necessary. This position is particularly troubling considering evidence that detainees in

military custody have been subjected to interrogation tactics that amount to torture. Such tactics include the use of dogs, stripping detainees naked, sleep deprivation, forced feeding, and other “aggressive” interrogation practices. Roughly 108 detainees have died in U.S. military and CIA custody, likely as a result of these forms of abuse.

Indefinite and Secret Detention in Black Site Prisons: The U.S. continues operating “black sites” where it holds terror suspects without charge and on an indefinite basis far from the reach of U.S. courts and U.S. media. Shockingly, more than seventy percent of those held in these black sites are considered to have no intelligence value to the U.S. The U.S. has announced plans to send a majority of the men currently held at Guantanamo Bay to U.S.-operated prison facilities in their countries of origin, a move that should be considered the latest extension of the government’s rendition to torture policy.

Rendition to Torture: Recent investigations by European governments have revealed that the U.S. has sent between two hundred and eight hundred men to Middle Eastern countries that practice torture under the “extraordinary rendition” or “rendition to torture” program operated by the CIA. While in foreign custody, these men, including U.S. citizen Ahmed Abu Ali and Canadian citizen Maher Arar, are detained on an indefinite basis and subjected to aggressive forms of interrogation as terror suspects. There are signs that this rendition program is still operational despite executive assurances to the contrary.

Limiting Access to Judicial Review for Guantanamo Bay Detainees and Asylum Seekers: Recent legislative developments have exacerbated the practice of the Bush administration to claim impunity from human rights abuses carried out in connection with anti-terrorism efforts. Two new laws have been passed (the Real ID Act and the Detainee Treatment Act) that strip Guantanamo Bay detainees and asylum seekers of their rights to seek judicial review in U.S. courts through the writ of habeas corpus. The Detainee Treatment Act strips Guantanamo Bay detainees of their habeas rights, eliminating the only legal remedy formerly available to challenge the legality of their prolonged and arbitrary detention. The Real ID Act strips aliens of their habeas rights, forcing many asylum seekers with legitimate fears of persecution and torture through hasty deportation proceedings without any meaningful judicial review.

Illegal Domestic Wiretapping: In the past few weeks, even more troubling evidence of the Bush administration’s disregard for the rule of law has come to light with news that President Bush authorized approximately 5,000 warrantless wiretaps on U.S. citizens and residents. This program constitutes a clear violation of federal law that requires the CIA and FBI to seek warrants from the Foreign Intelligence Surveillance Court.

Asserting Exemptions from Basic Human Rights Legal Protections: In an effort to justify these clear violations of U.S. and international law, the Bush administration stubbornly maintains the position that it is exempt from coverage of legal requirements for actions defined subject to military necessity or executive branch authority as part of the “War on Terror.” In particular, the U.S. has refused to apply the ICCPR standards to actions taken outside of the territorial jurisdiction of the United States. In its late-submitted Report to the Human Rights Committee in October 2005, the U.S. took the position that the application of the ICCPR is restricted to the geographic territory of signatory states, and thus is not binding on actions taken by agents of the U.S. in areas outside the U.S. but subject to its control (such as Afghanistan, Iraq, and Guantanamo Bay).

II. Torture of Detainees in U.S. Custody

Substantial evidence exists to show that the U.S. continues torturing detainees in military custody in violation of the Article 7 prohibition against torture and the Article 10 right to humane treatment. The President has asserted an inherent executive authority to order the torture of military detainees in connection with his military and general Executive Branch authority. In a Presidential statement attached to an Act of Congress that unequivocally bans the use of torture by the U.S. military, the President states:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.²

This statement suggests the President's intent to continue using harsh and aggressive interrogation tactics that amount to torture whenever the executive branch deems such tactics necessary as part of anti-terrorism efforts. Further evidence that torture of detainees held at Guantanamo Bay is likely to continue is shown by provisions of the Detainee Treatment Act of 2005 which allow the military to use confessions elicited by torture to establish "unlawful enemy combatant" status in Combatant Status Review Tribunal (CSRT) proceedings.³

A. Torture at Guantamo Bay

The U.S. military continues to indefinitely hold approximately 520 detainees at Guantanamo Bay, Cuba. Even though many of them have been held for over three years, only eight percent have been classified as Al Qaeda fighters.⁴ Many of the interrogation practices used by the U.S. military in Guantanamo have been recognized as amounting to torture in the recent report on the "Situation of Detainees at Guantanamo Bay" written by several UN special rapporteurs.⁵ Interrogation tactics used by the U.S. military that amount to torture include stripping detainees naked in the presence of women, the use of dogs, exposure to extreme temperatures, sleep deprivation, prolonged isolation, and the use of stress positions. Each of these tactics have been acknowledged and confirmed as operative and in regular use by the U.S. military.⁶

In 2003, the military's Working Group on Detainee Interrogations explicitly recommended that certain interrogation techniques universally recognized as violative of the Torture Convention be authorized for use with "unlawful combatants outside the United States."⁷ This was interpreted to include Guantanamo Bay. Techniques recommended for extraterritorial use include prolonged isolation and interrogations, sleep deprivation, stripping detainees naked, forcing detainees to shave their heads or beards, forced exercise, the use of dogs, and physical assaults such as slaps to the face and stomach.⁸

B. Retaliation Against Hunger Strikers

Since July 2005, approximately 200 detainees held at Guantanamo Bay have been engaged in a hunger strike to protest their ongoing, prolonged, and arbitrary detention and the conditions of their confinement. In retaliation, the U.S. military has deprived participating detainees of "comfort items" and has created isolation camps to keep the long-term hunger strikers apart from each other.⁹

The military also has force fed hunger strikers through the use of gastric feeding tubes, which are forced through the nostrils and esophagus, causing significant pain and bleeding. The use of forced feeding was recently acknowledged by U.S. military General Bantz J. Craddock.¹⁰ In recent weeks, the U.S. military has strapped detainees into "restraint chairs," sometimes for hours a day, to feed them through tubes and prevent them from vomiting afterward.¹¹ There is evidence that medical professionals have participated in this abuse and have passed unsanitized feeding tubes from one detainee to another.¹²

C. Deaths in U.S. Military Detention

Evidence has come to light that a number of detainees subjected to torture or otherwise physically abused while in U.S. custody have died as a direct result of their improper treatment. These deaths potentially constitute extra-judicial executions, which violate basic international and domestic human rights norms and constitute a form of torture.

As of February 2006, 108 detainees were known to have died in U.S. military and CIA custody, including 22 who died when insurgents attacked Abu Ghraib. Based on U.S. military records, at least 34 deaths have been identified as criminal homicides.¹³ Most recently, Human Rights First investigators revealed that 11 deaths were the result of physical abuse or harsh detention conditions and at least eight men, and as many as 12, were tortured to death.¹⁴

The cause of death is still officially undetermined or unannounced for at least 48 detainees.¹⁵ The military classified 15 of these deaths as a result of natural causes,¹⁶ although homicide would be a more accurate description, seventeen percent of deaths by unknown or natural causes followed either severe injuries indicative of physical abuse or harsh conditions of detention. Suspicious circumstances surround these as well as many other detainee deaths, but facts of deaths will probably never be known due to the lapse of time since death, and the inadequacy of investigations.

Investigative efforts into deaths of detainees have been severely lacking. Deaths often go unreported, witnesses are never interviewed, evidence is lost or mishandled, and record keeping is lax.¹⁷ Often Commanders report deaths weeks after they occur and close investigations with incomplete information, thus hindering the determination of the actual cause of death. If deaths are reported, information is usually classified broadly and restrictions on investigations have left the CIA and Special Forces immune from accountability.¹⁸ To date, no U.S. soldier has received a sentence longer than 5 months for their participation in extra-judicial executions of military detainees.

III. Indefinite and Secret Detentions in Black Site Prisons

The Bush administration's use of arbitrary and long-term detention continues outside of U.S. territory in secret "black sites" operated by the CIA.¹⁹ More evidence has come to light in recent weeks that the CIA continues operating these secret detention facilities abroad and refuses access to these prisons to international monitors such as the International Committee of the Red Cross (ICRC). These "ghost detainees" are being held abroad in secret sites to avoid judicial review of the legality of their detention and conditions of their confinement, and to avoid media attention. This denial of an impartial judicial determination of their status and treatment constitutes a violation of the Article 9 right to promptly challenge lawfulness of

detention before a court and the Article 14 right to a fair trial by a competent, independent and impartial court of law or tribunal.

Sources within the CIA indicate that approximately 100 “ghost detainees” are currently being held in these secret facilities despite the fact that over 70% of these detainees have little to no intelligence value to interrogators.²⁰ Eight detainees held at Guantanamo Bay revealed in December 2005 that they were held in a secret detention facility near Kabul, Afghanistan at different times between 2002 and 2004 before being sent to Guantanamo.²¹ There, the detainees reported being chained to walls, deprived of food and clean drinking water, and kept in total darkness with loud music and other sounds blared over a stereo system for weeks at a time. U.S. interrogators slapped and punched the detainees during interrogations and shackled them in such a manner that made sleep impossible.

IV. Rendition to Torture

Despite a clear and universally recognized prohibition against sending anyone to a country where they are likely to be tortured, the U.S. government continues the practice of “rendition to torture,” or sending terror suspects to other nations where they can be interrogated more harshly. Under a program titled “GST,” agents of the Central Intelligence Agency (CIA) have been authorized by the President to capture and detain terror suspects, to maintain secret prisons abroad, and to take detainees to locations around the globe for aggressive forms of interrogation.²² Renditions are considered convenient for they allow illegal interrogations to take place far away from the judicial oversight and media attention available in the U.S.

In January 2006, the Council of Europe reported that one hundred persons had been kidnapped by the CIA in Europe, and then rendered to countries where they may have been tortured. Earlier reports indicate that 6 different planes have operated 800 secret CIA flights over European airspace.²³ In December 2005 the U.S. Ambassador to Germany informed German authorities that Khaled Masri, a German citizen, had been the subject of a rendition and was wrongfully imprisoned in the United States for five months.²⁴ A number of men who were subjected to extraordinary rendition have made the abuses they suffered through this program public.

A. Case of Ahmed Abu Ali

In 2002, the U.S. played a major role in the arrest and detention by Saudi Arabia of Ahmed Abu Ali, a U.S. citizen who was pursuing religious studies in Medina. After his arrest, Abu Ali was held incommunicado for 20 months and interrogated with the participation of the U.S. Federal Bureau of Investigation (FBI). His family (with legal assistance from our group) petitioned for his release in federal court in Washington, D.C., where the U.S. government fought his habeas corpus case for several months until the judge ordered the government to turn over information relevant to the U.S. government’s involvement with Abu Ali’s detention in Saudi Arabia. As the court battle unfolded, Saudi officials released statements indicating that the Saudi government had no interest in Abu Ali, and that he was being held in Saudi Arabia until the U.S. requested his release. In order to avoid disclosing these documents and to avoid any further inquiry into the U.S. government’s role in Abu Ali’s unlawful detention, the U.S. returned him to the States in late February 2005.²⁵ There is evidence that Abu Ali was subjected to torture while in Saudi custody.

B. Case of Maher Arar

The U.S. has also subjected a citizen of Canada to its illegal rendition program. Maher Arar, a Canadian citizen, was arrested in a New York airport while returning from a family vacation in Tunisia, on suspicion that he was linked to a terror suspect (who in fact was merely a casual acquaintance). Arar was held and interrogated by U.S. officials for thirteen days, and was flown to Syria via Jordan in a Gulfstream V jet by members of a CIA "Special Removal Unit."²⁶ While in detention in Syria, he was tortured and beaten repeatedly. He reports that he was whipped repeatedly with electrical cables and locked in a windowless underground cell that he likened to a grave.²⁷ One year later, the Canadian government petitioned for his release, and he was released without charge.

C. *Reliance on Diplomatic Assurances*

Through the course of the "War on Terror," the U.S. government has increasingly relied on the availability of *diplomatic assurances* to secure the removal or rendition of men to countries of origin that frequently practice torture. These countries, whose poor record regarding their treatment of prisoners is well-documented by the U.S. State Department, include Syria, Egypt, Morocco, and Jordan. The government seeks to use diplomatic assurances to overcome a grant of Convention Against Torture protection given by a U.S. immigration judge, despite the clear non-return provisions enshrined in the UN Convention Against Torture.

The reliability of diplomatic assurances has been questioned by numerous human rights experts, including the UN Special Rapporteur on Torture,²⁸ the Human Rights Committee, and the UN High Commissioner for Refugees. Central to concerns over the use of diplomatic assurances is the lack of oversight or accountability mechanisms to ensure the safety of detainees who are transferred to countries where prisoners are frequently tortured. Despite this major deficiency in the use of diplomatic assurances, the U.S. relies heavily on their availability and has displayed a complete unwillingness to follow up on the status and well-being of transferred detainees. In Maher Arar's case, the U.S. government has flatly refused to cooperate with the Canadian government's inquiry into his rendition to Syria.²⁹

D. *Planned Transfer of Guantanamo Detainees to Prisons Built by the U.S. in Other Countries*

As the latest incarnation of the ongoing rendition to torture policy, the U.S. government has recently announced plans to transfer the majority of the Guantanamo Bay detainees to U.S.-built prison facilities in their countries of origin. Rather than providing for the regular repatriation for these men, these plans will assure their continued arbitrary and indefinite detention in sites that would be out of the reach of U.S. courts and away from U.S. media attention.

V. *Limits on Access to Judicial Review for Guantanamo Bay Detainees*

The problems associated with the U.S. government's policies that promote arbitrary detention and torture have been exacerbated in recent months by the adoption of legislation that eliminates one of the most long-standing and historically revered protections in the U.S. legal system - the writ of habeas corpus. The writ confers on detainees the right to seek judicial review of the grounds for their detention, and protects them against arbitrary arrest and detention. The Detainee Treatment Act (DTA), passed on December 30, 2005, severely restricts and suspends Guantanamo Bay detainees' rights to habeas corpus review.³⁰

Under the Act, detainees may seek review in U.S. courts only after completion of CSRT proceedings, or military tribunal trials that result in a sentence of ten or more years incarceration. Considering that only about 117 of the 500 detainees have been given a status hearing,³¹ that there are no time limits for the completion of the CSRT hearings, and that none of the military tribunal proceedings to this date have resulted in prison sentences, there is no guarantee that even the limited substitute proceedings for habeas will ever be available. Even if these very stringent threshold requirements for court access are met, the scope of judicial review under the new law will be restricted to an inquiry as to whether the military tribunals properly followed required procedures.

What is particularly troubling about the impact of the habeas stripping provisions of the Detainee Treatment Act is the way the executive branch is trying to apply it to cases that were pending on the date of enactment. Despite clear indication that Congress did not intend the Act to apply retroactively, the government has petitioned the Supreme Court and the U.S. Court of Appeals for the District of Columbia to apply the Act retroactively. If this position is accepted by U.S. courts, 186 pending Guantanamo Bay detainee cases³² would be retroactively dismissed, eliminating Guantanamo Bay detainees' access to the only legal remedy sufficient to test the legality of their detention and to raise claims of torture and other cruel, inhumane or degrading treatment or punishment in U.S. military custody.

These latest restrictions on military detainees' access to habeas corpus review violate the ICCPR's Article 2, Section 3 protection of effective legal remedies. Without access to legal remedies, Guantanamo Bay detainees are powerless to enforce the Article 7 prohibition against torture and Article 9 rights to liberty of the person and a fair hearing when subjected to detention.

A. Limits on Access to Judicial Review for Asylum Seekers through Real ID

Similar limits on access to judicial review through habeas have been placed on aliens and refugees seeking asylum protection in the U.S. The REAL ID Act, enacted on May 11, 2005, eliminates aliens' access to habeas review.³³ Prior to REAL ID, aliens were afforded habeas review to raise core constitutional and human rights violations inherent in the way the U.S. had attempted to remove them from the U.S. This form of review was essential for correcting grave injustices committed by the U.S. immigration service, an agency long criticized for its improper handling of sensitive cases that resulted in many improper refoulements to torture in violation of CAT and the ICCPR.

Habeas review also is essential in light of recent changes to the immigration court system that included "streamlining" of the Board of Immigration Appeals (BIA). Under the streamlining system, several of the more liberal BIA judges were dismissed, cases were pushed through the appeals process on an "expedited" basis without being given proper consideration, and three-judge panels were abandoned in favor of single-member review of appeals to make it more difficult to obtain proper review. Additionally, BIA judges are no longer required to issue opinions in cases that they review. Rather they are encouraged to offer "summary affirmance" of an Immigration Judge's decision without having to provide justifications for their actions.

Since the BIA streamlining regulations took effect, the success rate of immigration appeals by aliens has plummeted, making the successful resolution of meritorious claims nearly impossible. Whereas formerly approximately 20% of immigration appeals were resolved in favor of the alien, now less than 2% of those appeals result in favorable appellate review. Under Real ID, without the benefit of habeas review, aliens are restricted to seeking a very

narrow form of review in U.S. circuit courts of appeal in the form of Petitions for Review (PFR). This has resulted in a wholesale denial of adequate judicial review for aliens with meritorious claims and legitimate fears that they will be tortured upon return to their countries of origin.

VI. Unlawful and Unauthorized Domestic Wire Tapping

Media reports from December 2005 reveal that for the past four years the National Security Agency (NSA), with the approval of President Bush, targeted US citizens and residents by ordering warrantless electronic surveillance of telephone calls and emails. This practice violates the Article 2 right to an effective judicial remedy, the Article 17 prohibition of illegal and unauthorized government intrusions, as well as U.S. legal standards set out in the Foreign Intelligence Surveillance Act (FISA).

Passed in 1978, FISA regulates U.S. foreign intelligence surveillance by authorizing the issuance of secret warrants for wiretaps, telephone record traces and physical searches by a specially created court set up for that purpose. Under FISA, Justice Department lawyers are required to show the court probable cause to believe that a person in the United States is the agent of a foreign power or government through submission of an application to the special Foreign Intelligence Surveillance Court (FISC). FISA court warrant requests are processed within a few hours, and approve electronic surveillance for a period of ninety days to a year.³⁶ Since 1979, the FISA court has approved 18,748 applications for these types of special warrants and has rejected only five.³⁷ This straightforward and streamlined judicial procedure has been circumvented by the special NSA warrantless searches that the President has been authorizing.

The Bush administration refuses to say how many Americans in the past four years have been wiretapped without court authority, yet leaked figures estimate approximately 5,000 individuals have been the victims of wiretapping.³⁸ Since September 11th, President Bush has signed about thirty secret executive orders specifically allowing the NSA to wiretap without a warrant.³⁹ This wiretapping program persists in violation the ICCPR Article 17 right to protection under the law from illegal and unauthorized government intrusions.

VII. Limiting the Extraterritorial Application of the ICCPR

The U.S. government, in its most recent report to the Human Rights Committee, and in prior reports, has taken the position that the International Covenant on Civil and Political Rights (ICCPR) only applies within the territorial borders of signatory states.⁴⁰ The government has used this thesis as a basis for avoiding the operation of the treaty on actions taken by the U.S. military and the CIA in territories under U.S. control, such as Iraq, Afghanistan, and Guantanamo Bay. This position is not consistent with the terms and purpose of the ICCPR and violates the core principle that governments cannot commit torture and other major human rights abuses, regardless of the physical setting. This position also offends basic legal principles such as “good faith” interpretation standards enshrined in the Vienna Convention and various *jus cogens* norms.

A. The Non-Extraterritorial Approach Violates Universally Accepted Rules of Treaty Interpretation

Article 31 of the Vienna Convention on Treaties states that a treaty shall be interpreted in “good faith, in accordance” with the ordinary meaning of the text and context, and in light of its object and purpose. Article 32 permits recourse to “supplementary means of interpretation” to

confirm any results from article 31 or remedy results from the same which leave the treaty's meaning "manifestly absurd or unreasonable."⁴¹

The U.S. government's position that the text of the ICCPR's Article 2 suggests only territorial applicability is inconsistent with the context of that Article and frustrates the fundamental objects and purposes of the Convention. The surrounding text in Article 2 demonstrates the drafters' intent that governments apply the convention to nationals operating outside its territorial borders, with the intent of protecting all persons. The Human Rights Committee has stated that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party."⁴²

The preamble to the ICCPR refers to "all members of the *human family*," the "inherent dignity of the *human person*" and affirms that "the ideal of free human beings . . . can only be achieved if conditions are created whereby *everyone* may enjoy his civil and political rights" [emphasis added].⁴³ The contextual evidence is particularly strong with respect to acts of torture. For example, Article 4 declares what articles may be derogated from for reasons of public emergency or otherwise. Article 7, which prohibits torture, is unambiguously excluded from the list, suggesting the grave importance of the protection of that right at all times and in all places, even if beyond the boundaries of the U.S.

Article 31(3)(c) also requires that "any relevant rules of international law applicable in the relations between the parties" shall be accounted for together with the context.⁴⁴ According to Article 2 of the Convention Against Torture (CAT), a UN treaty constituting international law, "[e]ach state shall take effective...measures to prevent acts of torture *in any territory under its jurisdiction*" [emphasis added].⁴⁵

Furthermore, should the text of article 2 be understood to be limited to U.S. territory, it is clear that such an interpretation is manifestly unreasonable given the objectives of the Convention. As elucidated by the Human Rights Committee in *Cox v. Canada*, "it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State Party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."⁴⁶ Even where states have applied the extraterritorial approach, they have done so only for exceptional circumstances, and have included within such circumstances a state's "effective control of the relevant territory and its inhabitants as a consequence of military occupation," or when a state "exercises all or some of the public powers normally to be exercised by" the government of the territory.⁴⁷ Each of these scenarios is applicable to the ongoing situations in Guantánamo Bay, Afghanistan, and Iraq.

B. The Non-Extraterritorial Approach Violates *Jus Cogens* Norms Prohibiting Torture and Other Human Rights Abuses

The U.S. government's position deviates from international law for a second reason. If such an approach is followed it will, in certain circumstances, necessitate conflict with a peremptory norm of general international law, or *jus cogens*. *Jus cogens* norms are considered "so fundamental to the existence of a just international legal order that states cannot derogate from them, even by agreement."⁴⁸ Article 53 of the Vienna Convention states that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."

Torture is one such peremptory norm. In applying Article 53, it is clear that states are prohibited from entering into treaties which contemplate the use of torture. Should the ICCPR be applied only territorially, perfectly feasible scenarios will arise where U.S. nationals who remain in the country are prohibited from committing torture, but U.S. nationals who are outside of the country can commit these prohibited abuses. The ICCPR would thereby be permitting the use of torture by U.S. nationals so long as they stepped outside American borders. Such an interpretation of the ICCPR's jurisdictional applicability violates *jus cogens*, is inconsistent with some of the fundamental objectives of the ICCPR, and is therefore not permitted.

It is important to note that the U.S. Supreme Court has held that the Guantanamo Naval Base is considered part of the territory of the United States, by virtue of a lease agreement the United States has with Cuba.⁴⁹ Accordingly, the U.S. government's position that the ICCPR does not apply extraterritorially has no effect on its obligations under the Covenant with respect to military detainees held at Guantanamo Bay. Iraq and Afghanistan represent analogous scenarios to the extent that violations are committed in U.S.-operated facilities.

VIII. Conclusion

In light of the abuses discussed above and the need to clarify that the U.S. government is indeed bound by the ICCPR to treat its detainees, citizens, and residents in a humane manner, we request that the Committee require the U.S. government to provide detailed information about the "black sites" being used to house secret detainees and the policy and practice of "rendition to torture" that has been used for the detention and interrogation of terror suspects. Finally, we request that the Committee compel the U.S. to reject the policies and end the practices that have resulted in the unlawful detention and torture of terror suspects at Guantanamo Bay and other detention facilities. We propose the following questions to be incorporated in the Committee's list of issues:

- Has the U.S. government ever, or does the U.S. government now, detain terror suspects "in secret" or at "secret" detention facilities without reporting their detention to the ICRC or any other international authority?
- How many terror suspects are being detained by or at the request of the United States in facilities around the world, including the U.S.? List each detention facility that is being used for this purpose, where they are located, and how many detainees they house currently and have housed in the past five years. List the number of terror suspects who have been detained for over a year without having charges brought against them.
- Has any U.S. government official or employee or any U.S. contractor ordered, participated in, or helped carry out an extraordinary rendition? If so, how many have taken place, where were these individuals sent, and what was the role played by U.S. officials, employees, or entities?
- Does the executive branch still take the position that the President may authorize actions deemed necessary to carry out the "War on Terror" even if those actions violate the Convention Against Torture or other aspects of international and/or domestic law?

- Have any terror suspects have died while in U.S. custody? If so, how many, and how were their deaths reported and investigated?
- Does the executive branch continue to authorize wiretaps on U.S. citizens and residents without seeking warrants from the Foreign Surveillance Intelligence Court? If so, how many have been authorized in the past five years? Has any information gleaned from these wiretaps led to the arrest or prosecution of a U.S. citizen or resident? Has the government tapped domestic calls that do not have an international source under this program?
- How many times in the past five years has the U.S. government removed an alien who either has been granted Convention Against Torture protection to his or her country of origin or is considered a terror suspect after receiving diplomatic assurances that he will not be tortured? What steps does the government take to ensure that diplomatic assurances are reliable and are being properly observed in each case? Do consular officials make followup visits to aliens removed under diplomatic assurances at scheduled points following their removal?

ANNEX A

Title 10 of the Detainee Treatment Act of 2005

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(b) Consideration of Statements Derived With Coercion

(1) ASSESSMENT- The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess--

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY- Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) Report on Modification of Procedures- The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) Annual Report-

(1) REPORT REQUIRED- The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT- Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) Judicial Review of Detention of Enemy Combatants-

(1) IN GENERAL- Section 2241 of title 28, United States Code, is amended by adding at the end the following: (e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or any other action against the United States or its agents relating to any aspect of the detention by the Department of

Defense of an alien at Guantanamo Bay, Cuba, who is currently in military custody; or has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.'

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION-

(A) IN GENERAL- Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien--

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS-

(A) IN GENERAL- Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW- Review under this paragraph--

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien--

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT- The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) Construction- Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) United States Defined- For purposes of this section, the term `United States', when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) Effective Date-

(1) IN GENERAL- This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS- Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or

after the date of the enactment of this Act.

¹ Our staff has testified before the Human Rights Committee in Geneva and will present testimony on the concerns covered in this report before the Committee in New York on March 13, 2006, March 17, 2006, and in Geneva in July, 2006.

² *President's Statement on Signing of H.R. 2863*, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006". <<http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>> (last viewed Feb. 20, 2006).

³ *Detainee Treatment Act of 2005*, Pub.L. No.109-148, Div. A, Tit. X, 119 Stat. 2739. § 1005(b).

⁴ Warren Hoge. "Investigators for U.N. Urge U.S. to Close Guantanamo." *New York Times*. February 17, 2006.

⁵ *Working Group Report on Situation of Detainees at Guantanamo Bay*. Commission on Human Rights, 62nd Session. E/CN.4/2006/120 15 February 2006.

⁶ See, e.g., Annex to Working Group Report on Detainee Interrogations in the Global War on Terrorism [hereinafter Military Working Group Report], *Description of Interrogation Techniques*, April 4, 2003 (declassified June 21, 2004).

⁷ Military Working Group Report, April 4, 2003. p. 70.

⁸ *Id.*

⁹ Report on Guantanamo Bay Hunger Strike, January 23, 2006. <<http://www.reprive.org.uk>>

¹⁰ Eric Schmitt and Tim Golden. "Force-Feeding at Guantanamo is Now Acknowledged." *New York Times*, Feb. 22, 2006.

¹¹ Tim Golden, "Tough U.S. Steps in Hunger Strike at Camp in Cuba," *New York Times*, February 9, 2006

¹² Marjorie Cohn. "U.S. Force-Feeding Prisoners at Torture Camp." February 19, 2006. <www.truthout.org>

¹³ Hina Shamsi and Deborah Pearlstein, eds., *Command's Responsibility: Detainee Death's in US Custody in Iraq and Afghanistan*, Human Rights First, Feb. 06, 5.

¹⁴ *Id.*, 12.

¹⁵ *Id.*, 25.

¹⁶ *Id.*, 25.

¹⁷ *Id.*, 7.

¹⁸ *Id.*, 7.

¹⁹ Dana Priest. "CIA Holds Terror Suspects in Secret Prisons." *New York Times*. November 2, 2005; A01.

²⁰ *Id.*

²¹ Human Rights Watch, *U.S. Operated Secret 'Dark Prison' in Kabul*. December 19, 2005.

²² Dana Priest. "Covert CIA Program Withstands New Furor, Anti-Terror Effort Continues to Grow." *Washington Post*. December 30, 2005; A01.

²³ <<http://www.amnesty.org.uk/news/press/16659.shtml>>

²⁴ Dana Priest. "Wrongful Imprisonment: Anatomy of a CIA Mistake, German Citizen Released After Months in 'Rendition.'" *Washington Post*. December 4, 2005; A01.

²⁵ *Abu-Ali's Return a Victory*, Freedom Foundation, February 23, 2005, available at www.masnet.org/takeaction.

²⁶ Jane Mayer. "Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program." *The New Yorker*. Jan. 14, 2005.

²⁷ See *id.*

²⁸ Report by the Special Rapporteur on Torture, Theo van Boven, to the United Nations General Assembly, A/58/120, July 3, 2003, para. 15; see also Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard Against Torture*, April 2004 Vol.16 No.4(D), available at <http://hrw.org/reports/2004/un0404/>

²⁹ See *id.*

³⁰ See Annex A for the relevant portions of the Detainee Treatment Act as enacted by Congress.

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- ³¹ *Names of the Detained in Guantanamo Bay, Cuba*, The Washington Post, Dec. 13, 2005.
- ³² Josh White, *Levin Protests Move to Dismiss Detainee Petitions*, The Washington Post, January 5, 2006, p. A02.
- ³³ Real ID Act of 2005 § 106, Pub. L. No. 109-13, Div. B, Stat. 231 (May 11, 2005).
- ³⁶ <<http://www.epic.org/privacy/terrorism/fisa/>>
- ³⁷ Carol D. Leonnig, "Secret Court's Judges Were Warned About NSA Spy Data Program: May Have Led Improperly to Warrants," The Washington Post, Feb. 9, 2006.
- ³⁸ Barton Gellman, Dafna Linzer and Carol D. Leonnig, "Surveillance Net Yields Few Suspects NSA's Hunt for Terrorists Scrutinizes Thousands of Americans, but Most Are Later Cleared," The Washington Post, Feb. 5, 2006.
- ³⁹ Center for Constitutional Rights, "CCR Responses to State of the Union Defenses of the NSA Surveillance Program," Jan. 2006.
- ⁴⁰ *Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*. Annex I. "Territorial Application of the International Covenant on Civil and Political Rights." Oct 21, 2005.
- ⁴¹ See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UN Treaty Series 331; see also International Law: Norms, Actors, Process – A Problem Oriented Approach 300 (Dunoff, Ratner, Wippman eds., Aspen Publishers 2002).
- ⁴² *Human Rights Committee General Comment No. 31* (2004), CCPR/C/21/Rev.1/Add.13, para. 10.
- ⁴³ *International Covenant on Civil and Political Rights (ICCPR)*. Preamble. Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 371 (entered into force Mar. 23, 1976).
- ⁴⁴ Vienna Convention, Article 31(3)(c).
- ⁴⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 2, 465 U.N.T.S. 85.
- ⁴⁶ *Cox v. Canada*, Report of the Human Rights Committee, U.N. Doc. A/50/40 (1994), vol. 2 at 105.
- ⁴⁷ *Bankovic and Others v. Belgium and 16 Other Contracting States*, Decision on Admissibility, Dec. 19, 2001, <www.echr.coe.int>.
- ⁴⁸ Dunoff, supra note 2, at 55.
- ⁴⁹ See *Rasul v. Bush*, 542 U.S. 466 at 471 ("The United States occupies the base . . . pursuant to a 1903 Lease Agreement . . . Under the Agreement, 'the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba . . .'" while Cuba "'consents that during the period of occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas'").