

Memorandum

To: Members of the U.N. Committee against Torture

From: U.S. Civil Society Organizations (list of signatories at end of document)

Re: Information for the elaboration of the list of issues for the U.S. government

Date: September 16, 2005

We would like to thank the Committee for the opportunity to submit information regarding the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the United States (CAT). We are submitting this memo in order to assist the Committee in developing its list of issues to discuss with the United States government in May 2006. All of the signatories to this submission strongly believe in the importance of adherence to the CAT and share strong concerns about the U.S. failure to comply fully with its international human rights obligations. The issues raised below constitute a compilation of the concerns of the various signatories, each of whom has a unique mandate and expertise. A list of the signatories is provided at the end of the document.

Article 1 (definition)

1. Does the United States consider any or all of the following treatment to be torture or cruel, inhuman or degrading treatment: (a) “waterboarding” (mock drowning) or other forms of mock execution; (b) extended and repeated sleep deprivation, prolonged exposure to cold, and prolonged shackling; (c) forced immobility for lengthy periods; (d) extended solitary confinement; (e) the use of unmuzzled guard dogs during interrogations, (f) rape and other forms of sexual assault, (g) coerced unwanted sexual contact or nudity, or (h) the combination of some or all of these techniques?

Background: U.S. forces in Afghanistan, Iraq and at Guantánamo Bay have been implicated in various forms of abuse against detainees, which have been widely reported. While the U.S. government has often insisted that such acts occurred because of a “few bad apples,” it has shied away from denouncing specific practices. For instance, during Senate testimony in March 2005, Porter Goss, the Director of Central Intelligence, while claiming that his agency was not now using torture, stated that “waterboarding” was a “professional interrogation” technique. And during his July 2005 confirmation hearings for deputy attorney general, the second-ranked spot at the Justice Department, Timothy E. Flanigan said he was reluctant to state whether he considered several interrogation methods, including mock executions and the simulated drowning of a prisoner (“waterboarding”), to be inappropriate or to constitute torture.¹

¹ Eric Lichtblau, “Justice Nominee is Questioned on Department Torture Policy,” *The New York Times*, July 27, 2005.

2. Has the U.S. government adopted the position of the U.N. Special Rapporteur on Torture that “rape or other forms of sexual assault ...in detention [are] a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constitute[] an act of torture”?² What standard does the U.S. government use to define the nature of torture or CID involving rape, sexual assault and abuse, forced nudity and invasive searches of persons, and coerced performance of sexualized acts? Is the U.S. government’s understanding that this definition extends to rape and sexual assault committed by federal, state, and local law enforcement officers acting in their official capacity with respect to women in their custody? To military personnel and contractors?

Article 2 (prohibition of torture)*

** The discussion of extraterritorial and personal jurisdiction is also relevant to articles 3, 4, and 16. The discussion of rape and sexual assault is also relevant to article 16.*

1. How does the federal government ensure that statutes and acts of the state legislatures are consistent with the Convention? What legal and administrative measures does the federal government have in place to ensure that the Convention’s prohibition against torture or other acts of cruel, inhuman or degrading treatment or punishment is understood and observed in state prisons, jails and juvenile and immigrant detention and other facilities (both public and private), and when individuals are held in police custody, in police precinct holding cells, patrol cars, or other locations controlled by law enforcement officers?
2. During his January 2005 confirmation hearings, U.S. Attorney General Alberto Gonzales expressed the view that the Convention’s terms limit its geographical reach to spaces within a state’s territory. In its November 25, 2004 response to the U.K.’s submission, the Committee rejected this view of a jurisdictional limit and stated that the Convention was applicable in “all areas under the de facto effective control of the State party’s authorities.” Similarly, the well-established practice of the Human Rights Committee and other bodies has demonstrated that human rights obligations apply to acts within the personal jurisdiction of a state agent. Does the U.S. accept the Committee’s interpretation of the jurisdiction of the Convention to extend to all areas under its de facto effective control? Does the U.S. accept the application of the Convention to acts within the personal jurisdiction of its agents?
3. The U.S. Report provides information on legal mechanisms to prohibit torture per se. Is it true that there have been no prosecutions under the federal anti-torture statute or the War Crimes Act? If not, why not?

Background: As described in its Report, the United States has adopted an anti-torture statute, 18 U.S.C. 2340, as implementing legislation to the Convention, criminalizing torture “outside the United States.” There is no record of any person being prosecuted under this law.

² U.N. Commission on Human Rights, U.N. Doc. E/CN.4/1992/SR.21, 21 February 1992, par. 35.

The War Crimes Act of 1996 (18 U.S.C. § 2441) makes it a criminal offense for U.S. military personnel and U.S. nationals, whether inside or outside the United States, to commit war crimes, which by their definitions include “violence to life and person . . . cruel treatment and torture; . . . outrages upon personal dignity, in particular humiliating and degrading treatment.” There is no record of any person being prosecuted under this law.

As the United States mentions in its Second Periodic Report, contractors working abroad for the Department of Defense or performing any Department of Defense contract can be prosecuted under the Military Extraterritorial Jurisdiction Act of 2000 (Public Law 106-778), known as MEJA. MEJA permits prosecutions in U.S. federal court of U.S. civilians who, while employed by or contracted to U.S. forces abroad, commit a federal criminal offense punishable by imprisonment for more than one year. As noted in the U.S. Report, there have been two prosecutions of civilian personnel under MEJA for criminal acts against U.S. military personnel (the original aim of the law). It has not been tested in cases of sub-contractors committing abuse against detainees.

4. What specific places outside the regular territory of the United States does the government consider to be within the Special Maritime and Territorial Jurisdiction (SMTJ) of the United States? Does this include military posts in foreign countries, including forward operating bases and firebases? Does this include short-term or ad hoc detention facilities set up by U.S. forces in foreign countries?

Background: Credible evidence exists that the United States is detaining, acquiescing in or ordering the arbitrary detention of individuals suspected of involvement in terrorism in detention facilities other than those facilities in Afghanistan and Iraq. Evidence exists that the United States is detaining individuals in secret, unacknowledged facilities located on territories or vessels under its control, for example, on board the U.S.S. Bataan.³ Other individuals are being detained in secret facilities allegedly operated by the United States but located in the territory of other sovereign states, e.g. an alleged Central Intelligence Agency (CIA) facility in Jordan.⁴ There is no official list of U.S. detention facilities abroad and there is likewise no public accounting of how many people are detained or for what reasons they are held, much less any notice to family members of their relatives’ detentions, nor any information on their health or whereabouts or how to challenge their detention, in many cases amounting to a de facto policy of “disappearance.” Moreover, the U.S. Administration has challenged the applicability of the ICCPR, the CAT, and the Geneva Conventions to the arrest and detention of individuals caught up in the “war on terror” around the globe.⁵

³ “Rumsfeld Ordered Prisoner Hidden”, *CBS NEWS*, June 17, 2004. available at: <http://www.cbsnews.com/stories/2004/06/17/iraq/main624411.shtml>; See also, Human Rights First, *Behind the Wire: An Update to Ending Secret Detentions*, Mar 2005, at 7 available at: http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf

⁴ Amnesty International, *Torture and Secret Detention: Testimony of the ‘Disappeared’ in the ‘War on Terror,’* (August 2005). available at: <http://web.amnesty.org/library/Index/ENGAMR511082005>

⁵ For more information on the use of secret detentions by the U.S., see Human Rights First’s report, *Ending Secret Detentions* (June 2004), at http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf And their recent update to that report entitled, *Behind the Wire: An Update to Ending Secret Detentions* (March 2005), available at http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf

5. How many persons have been held by the U.S. overseas as “Ghost Detainees” since September 2001? Please provide more information regarding “Ghost Detainees” who remain in U.S. custody today, including an official accounting of the number, nationality, legal status, and place of detention. Please provide the list of measures taken to insure that those persons have not been and are not subject to torture or cruel, inhuman or degrading treatment. Please provide a list of locations outside the United States at which detainees are being held under the effective control of the U.S. What steps have been taken to ensure that these individuals have access to communication with their families, legal counsel, and humanitarian agencies?

Background: In March 2005, a government report confirmed the U.S. Department of Defense’s practice of holding “Ghost Detainees” for the Central Intelligence Agency (CIA) whose existence was kept secret from the ICRC. The military investigation reported 30 cases of “Ghost Detainees” who were held under “oral, ad hoc agreements and was result, in part, of the lack of any specific, coordinated interagency guidance.” Official documents obtained pursuant to the FOIA litigation confirmed, however, the existence of memorandum of understanding between the U.S. military and the CIA on “Ghost Detainees.”⁶ According to the same military report the “practice of DOD holding ghost detainees has now ceased.”⁷

6. What steps has the U.S. taken to ensure that all detentions and interrogations of individuals under U.S. effective control are undertaken with adequate protection of the rights and obligations set out in the Convention against Torture?
7. What steps have been taken to ensure that all U.S. government agencies, including the Central Intelligence Agency and other intelligence services, U.S. government contractors, and foreign governments to whom the U.S. renders detainees are bound by the obligation not to use cruel, inhuman or degrading treatment, regardless of where they are acting?
8. What conduct by U.S. officials abroad is not covered by existing U.S. laws, such as the Uniform Code of Military Justice, the War Crimes Act, the anti-torture state, the MEJA, and the expanded SMTJ under the USA PATRIOT Act, but would still be in violation of the Convention’s prohibition on torture? What is the U.S. government doing to address allegations of abuse in these cases?

Background: The U.S. is “outsourcing” interrogations to either civilian contractors or foreign governments in an attempt to avoid accountability under international law. CACI International and Titan Corporation employees participated in or failed to report abuses at the notorious Abu Ghraib prison in Iraq. The U.S. has also been using several private jets, including ones leased from Premier Executive Transport Services Inc., to fly suspects from the U.S. and other countries to states where torture is well-documented as a method of interrogation. In addition, the U.S. has

⁶ See, “Newly Released Army Documents Point to Agreement Between Defense Department and CIA on ‘Ghost’ Detainees”, March 10, 2005. *available at:* <http://www.aclu.org/SafeandFree/safeandfree.cfm?id=17692&c=206>; See also, http://www.aclu.org/torturefoia/released/030905/DOD695_737.pdf

⁷ See, <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf#page=18>

also instituted a policy of conditioning the release of detainees from indefinite detention without charge on their continued detention in their state of nationality or even requesting or directing the detention of individuals by foreign states without charge (for example, the detention of U.S. citizen Ahmed Omar Abu Ali in Saudi Arabia at the request of U.S. authorities, or the detention of Yemeni citizens Muhammad Faraj Ahmed Bashmilah and Salah Nasser Salim ‘Ali in Yemen at the direction of the U.S.).⁸

9. Explain why relatively few military personnel, members of the Central Intelligence Agency, and military contractors, implicated in the hundreds of cases of detainee abuse in Afghanistan, Iraq, and Guantánamo Bay, have been brought before federal courts or courts martial. Why have such a large proportion of military personnel implicated in serious offenses against detainees, including homicide, been given non-judicial punishments (like discharge, rank reduction, and reprimands)? Provide more details and statistical information regarding the number of all criminal investigations into allegations of torture or cruel, inhuman or degrading treatment, including the charges filed, the number of convicted personnel, and the sentences issued.

Background: There is deep cause for concern about the hundreds of cases of torture, cruel, inhuman, and degrading treatment that have been reported publicly involving detainees in U.S. custody in Afghanistan, Iraq, and Guantánamo Bay.⁹ Yet to date, only about 45 cases have been prosecuted, mostly in the military, and mostly resulting in relatively light sentences—less than a year. The military has admitted that at least 86 detainees have died in U.S. custody in Afghanistan and Iraq since 2002; twenty-six of these cases were homicides, and in almost all of these 26 cases, there is evidence strongly suggesting that the detainees were beaten or tortured before death. In the majority of criminal cases involving military personnel accused of torture or cruel, inhuman or degrading treatment, the cases have been taken out of the courts martial system and put before administrative hearing boards, which issue punishments like “reprimands,” “admonishments,” rank reductions, and discharges, and cannot order incarceration. Using information provided by the U.S. military and documents obtained by the American Civil Liberties Union, The Associated Press compiled a partial list of 108 people who have died while in U.S. custody in Iraq and Afghanistan.¹⁰

10. What is the existing and proposed structure of accountability for members of the military as well as non-military contractors regarding serious crimes amounting to torture and CID?

⁸ For more information on rendition to torture and use of privately contracted transportation to facilitate such renditions, see A Secret Deportation Of Terror Suspects, by Craig Whitlock <http://www.washingtonpost.com/wp-dyn/articles/A11976-2004Jul24.html>. For more information about the cases of Muhammad Faraj Ahmed Basmillah and Salah Nasser Salim ‘Ali, see Amnesty International, “Torture and Secret Detention: Testimony of the ‘Disappeared’ in the ‘War on Terror,’” <http://web.amnesty.org/library/print/ENGAMR511082005>.

⁹ See “Getting Away with Torture? : Command Responsibility for the U.S. Abuse of Detainees,” *A Human Rights Watch Report*, vol. 17, no. 1(G), April 2005; “Still at Risk: Diplomatic Assurances no Safeguard against Torture,” *A Human Rights Watch Report*, vol. 17, no. 3(D), April 2005; “The Road to Abu Ghraib,” *A Human Rights Watch Briefing Paper*, June 2004; “Empty Promises: Diplomatic Assurances No Safeguard Against Torture,” *A Human Rights Watch Report*, vol.16 no.4 (D), April 2004; “Enduring Freedom:” Abuses by U.S. Forces in Afghanistan,” *A Human Rights Watch Report*, vol. 16, no. 3(C), March 2004 ; Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, (New York: Human Rights Watch, 2003).

¹⁰ see: <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/03/16/national/w113007S95.DTL>

Background: Despite the involvement of high-level civilian and military officials in unlawful conduct, thus far only a handful of low-ranking soldiers have been held accountable.¹¹ The U.S. government has refused to authorize any independent investigation of the abuses and no high-level official has been charged with any criminal activity in relation to the abuses. Indeed, some of the officials who were involved in developing the policies that led to the abuse and torture of prisoners have been nominated and confirmed to higher government posts despite some government reports that held them responsible.¹²

There is ample evidence regarding the mistreatment of detainees and widespread use of approved harsh and abusive interrogation methods in various U.S. detention centers. However, Air Force Lt. Gen. Randall Schmidt, who was appointed in February 2005 to investigate allegations of abuse and ill treatment of detainees in Guantánamo, concluded that abuses have not “crossed the threshold of being inhumane.”¹³ The report, from which only the executive summary has been released, found that U.S. interrogators’ application of techniques including the use of dogs, the use of extreme heat and cold as well as sleep deprivation were not improper because the Secretary of Defense had specifically approved them. While the report did not examine the legal validity of interrogation techniques, it found that other techniques used by U.S. interrogators, including interrogation for 18-20 hours per day for 48 out of 54 consecutive days, forcing a detainee to wear a woman’s bra and placing a thong on his head, tying a leash to a detainee and forcing him to perform “a series of dog tricks” were not improper because they had been authorized by the Secretary of Defense for use on a specific detainee.¹⁴

Also, despite evidence that civilian contractors and CIA personnel were involved in numerous abuse cases, no one has been prosecuted in a federal court for abuse except for a single CIA contractor put on trial for a homicide committed in Afghanistan in 2003 (and in that case the contractor was charged only with assault, not homicide).

11. By what means will the U.S. government ensure that women, including transgender women, and transgender individuals, are protected from rape, sexual assault and abuse, violations of their bodily integrity and privacy rights, and coerced nudity? What measures is the U.S. government taking to monitor, document, and address sexual assault and rape of women and transgender individuals, in police custody by law enforcement

¹¹ Human Rights First, Getting to Ground Truth: Investigating U.S. Abuses in the ‘War on Terror,’ (September 2005). See also, http://www.usatoday.com/news/graphics/abu_ghraib/flash.htm

¹² See, <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> As the The Final Report of the Independent Panel To Review DoD Detention Operations, (August 2004) of former Defense Secretary James Schlesinger concluded, the abuses of detainees were “widespread,” and “were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline... There is both institutional and personal responsibility at higher levels.”

¹³ http://www.defenselink.mil/news/Jul2005/20050713_2053.html

¹⁴ See, Donald Rumsfeld, Memorandum for the Commander, US Southern Command: Counter-Resistance Techniques in the War on Terrorism, (April 16, 2003). (These techniques included isolation for up to thirty days, dietary manipulation, environmental manipulation, “sleep adjustment,” and “false flag”-leading detainees to believe that they have been transferred to a country that permits torture- none of which is consistent with the authorized interrogation techniques in Army Field Manual 34-52). See also, Memorandum from Lieutenant General Sanchez to Commander, U.S. Central Command, re: CJTF-7 Interrogation and Counter-Resistance Policy (Sept. 14, 2003).

officers acting in their official capacities outside of correctional facilities – i.e. while policing communities and in police controlled short term detention facilities? Does the U.S. government have the capacity to disaggregate data by gender, gender identity, sexual orientation, age and race in monitoring these concerns?

Background: Credible evidence exists that rape, sexual assault, and sexual harassment of women, including transgender women, as well as of transgender and gender non-conforming individuals who do not identify as women, by on-duty law enforcement officers is a serious problem in the U.S. Sex workers and homeless people in particular report endemic extortion of sexual favors by police officers in exchange for leniency or to avoid routine police violence against them, as well as frequent rapes and sexual assaults. Sexual harassment and assault of women subjected to traffic stops has also been reported in a number of jurisdictions. Latina immigrants, both documented and undocumented, are routinely raped by local law enforcement and border patrol in the borderlands between Mexico and the U.S. While several high profile criminal prosecutions of officers charged with sexual assaults or rapes of women have taken place, including those cited in Paragraphs 18 and 19 of the United States' report to the Committee, individuals and advocates across the country report that such conduct is far more pervasive than the limited number of such prosecutions would suggest, and takes place with impunity in some instances.

12. Please detail the number of: 1) reports; 2) allegations; 3) investigations; and 4) prosecutions of rape, sexual abuse and assault, coerced nudity, or sexually degrading treatment of all persons, with specific attention to women or transgender individuals, by federal, state and local law enforcement officers in the United States. With regard to each, please provide demographic information regarding the age, gender, gender identity, sexual orientation, race and occupation of the complainant, location and date of the complaint, outcome of the investigation, steps taken to address the officer's conduct, nature and results of any criminal prosecutions.
13. Please detail what steps have been taken to ensure that the cases described as *United States v. Arizona* and *United States v. Michigan* resulted in significant changes in the conditions of confinement for female inmates in those states. In particular, please detail the number of sexual assaults that have occurred and/or have been alleged by women incarcerated in those states subsequent to the settlements and please detail what steps were or have been taken to protect those individuals, who complained to the federal government regarding sexual abuse by male staff, against ill treatment and intimidation as a consequence of their complaints.
14. What has the federal government done to ensure that transgender and intersex individuals in state and federal prisons are protected against torture or cruel, inhuman and degrading treatment, including rape, sexual and verbal abuse and assault and harassment, coerced nudity, and forced medical procedures or medication, or denial of access to medications including hormonal treatments, perpetuated by both prison staff and other prisoners? What steps has the federal government taken to prevent isolation and psychological torture of transgender and intersex people in federal and state prisons, based solely on prison systems' inability to classify intersex prisoners as either male or female and

unwillingness to classify transgender prisoners based on their gender identity? What steps has the government taken to develop model policies and best practices regarding classification and housing transgender and intersex people in federal and state prison that comply with Article 2 of the Convention against Torture?

Background: The U.S. continues to use male guards inside housing units for female prisoners despite the UN Standard Minimum Rules for the Treatment of Prisoners which requires same sex guards and despite the continued evidence of sexual abuse, intimidation and invasions of privacy, particularly traumatizing for a population (women prisoners) who already have high rates of sexual and physical abuse in the past.

15. What responses does the U.S. government provide to detainees who experience assault, including sexual assault? How are necessary services and supports provided, and are providers of these services and supports able to ensure their ethical obligations to the well-being of patients independent of other pressures?
16. What steps has the U.S. government taken to ensure that federal, state and local law enforcement agencies adopt mechanisms to ensure strict guidelines and reporting with respect to all uses or displays of “tasers”? Are departments required to document the circumstances under which “tasers” are used, including the gender/gender identity, race, age and location of the individual against whom it was used? Is this data regularly monitoring and available to the public?
17. Does the federal government require federal, state and local law enforcement authorities to conduct rigorous, independent and impartial inquiries into the use of “tasers” and other electro-shock weapons?

Background: The use of “less lethal” weapons such as “Tasers” and other electric devices has been trumpeted by the U.S. government as representing progress in the face of allegations of pervasive use of excessive force by law enforcement officers. However, use of “tasers” against elderly individuals, women, including pregnant women, and young children, including children in schools has been reported across the country. In many cases, “tasers” are used without lawful justification, and often lead to serious medical consequences, up to and including death. Amnesty International reports that more than 114 people have died shortly after Tasers were used on them in the US and Canada since 2001. As a result, several top law enforcement officials have expressed concern regarding the health effects of “tasers” and the propriety of their use. The City of Dolton, Illinois has gone so far as to file a lawsuit against the Arizona-based company that manufactures the hand-held electrical shock devices, alleging that the weapon has not been adequately tested and was sold to police through faulty marketing. The U.S. Securities and Exchange Commission is also investigating whether Taser International, which invented and manufactures and markets the weapons, misled its shareholders with safety claims. In Kansas City, two officers’ dismissals were recently upheld by a the city board of police commissioners for a August 2004 incident in which one officer shocked a man five times, four of which were

when he was in handcuffs, and three of which were when the suspect was on the ground. The second officer encouraged the Tasings, saying, "Hit him again."¹⁵

18. Please provide information regarding the procedure for reporting findings of torture and abuse by medical staff, including doctors and paramedics. How many reports were received from doctors or paramedic regarding marks of torture or cruel, inhuman or degrading treatment found after medical examinations? How many of these reports were investigated? Please provide more details.

Background: There is evidence of failure on the part of health professionals to report acts of abuse, as well as evidence of health professional complicity in acts of physical and psychological torture.¹⁶ The Fay report cited some medical corps personnel for observing and failing to report instances of abuses at Abu Ghraib.¹⁷ Moreover, there is evidence that interrogators had direct access to detainees' medical files in Guantánamo and that health professional participated more directly in interrogations. The International Committee of the Red Cross (ICRC) called what was happening in Guantánamo a "flagrant violation of medical ethics."¹⁸ The U.S. military formed "behavioral science consultation teams" composed of psychologists and psychiatrist, with the purpose of facilitating interrogation at Abu Ghraib and Guantánamo.¹⁹ Physicians for Human Rights released a report, *Break them Down*, on the complicity of medical staff in torture, including sharing Guantánamo Bay medical files with interrogators.²⁰

Article 3 (non-refoulement)

1. How has the Real ID Act limited judicial review of immigrants' Article 3 cases? How many Art. 3 cases have been reviewed; how many cases have been dismissed as a result of the court finding no jurisdiction pursuant to REAL ID? What is the total number of Art. 3 cases appealed to federal courts relative to the number of cases that have been denied review or dismissed as a result of REAL ID's judicial review provisions?

Background: On May 11, 2005, the U.S. Congress passed the REAL ID Act, a bill that alters standards and procedures for many individuals fleeing persecution and torture, including those who may be eligible for relief under Art. 3. Among other changes, if interpreted restrictively, REAL ID could bar meaningful judicial review over some individuals' Art. 3 claims.

¹⁵ Andrew Stelzer, *Backlash Against Taser Company May Turn Tide on Shock Weapons*, New Standard, July 25, 2005, available at <http://newstandardnews.net/content/index.cfm/items/2143> (last visited September 13, 2005).

¹⁶ Physicians for Human Rights, *Break them Down: Systematic Use of Psychological Torture by US Forces*, 2005. http://www.phrusa.org/research/torture/report_breakthemdown.html

¹⁷ The Fay-Jones Report: Investigation of Intelligence Activities at Abu Ghraib, AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade LTG Anthony R Jones, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade MG George R. Fay (Aug. 2004). available at: http://www.cbc.ca/news/background/iraq/pdf/fay_report20040825.pdf

¹⁸ Lewis NA. "Red Cross Finds Detainee Abuse in Guantánamo," *New York Times*, November 30, 2004.

¹⁹ http://www.aclu.org/torturefoia/released/t3186_3187.pdf

²⁰ See <http://www.phrusa.org/publications/index.html>, p. 45-7.

2. How has the lack of a right to counsel in immigration removal proceedings impacted U.S. compliance with its *non-refoulement* obligation? Please provide data showing CAT grant rates for individuals in removal proceedings with counsel and those without counsel. Please provide information on the current status of measures being taken to monitor and address detained CAT applicants' access to counsel in detention.
3. What measures has the United States taken to guarantee its compliance with its *nonrefoulement* obligations under "reinstatement of removal" procedures? Do United States immigration officials proactively inquire whether a pro se individual subject to reinstatement of removal fears torture or persecution in his/her homeland?
4. What measures has the United States taken to guarantee its compliance with its *nonrefoulement* obligations under "expedited removal" procedures?

Background: Under the procedure called "reinstatement of removal," an individual with a prior removal order is removed without a hearing unless the individual expresses fear of returning to his/her home country. "Expedited removal" allows immigration inspectors at points of entry into the United States to summarily deport certain immigrants who do not possess proper travel documents without providing them the opportunity to appear before an Immigration Judge. The nonpartisan United States Commission on International Religious Freedom issued a report on February 8, 2005, which documented numerous occasions on which asylum seekers and those fleeing torture were subjected to expedited removal in violation of the United States' *nonrefoulement* obligation.²¹

5. How does the U.S. understand Article 3's phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture." How does this compare to the U.S. standard of "if it is more likely than not that he would be tortured"? Please provide examples, or explanations of policy, illustrating how the United States determines that a person is "more likely than not" to be tortured. Provide examples where persons have been afforded Art. 3 protection and where the claim was rejected.

Background: The U.S. standard appears to inappropriately raise the evidentiary bar for Art. 3 claims by placing the burden on the claimant to provide proof that there is a likelihood that he or she would be tortured.

6. How does the United States interpret the term "acquiescence" in Art. 1(1) as it is used in the context of Art. 3?

Background: In 2002, the Bureau of Immigration Appeals held that *refoulement* protection does not extend to persons who fear private entities a government is unable to control.²² Although at least one U.S. federal appellate court has held that Art. 3 prohibits return when the government in the receiving country is aware of a private entity's behavior and does nothing to stop it,²³ the

²¹ See http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/

²² See *Matter of S-V*, 22 I&N Dec. 1306 (BIA 2000).

²³ See *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. Jun 18, 2003); *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. May 16, 2005); and *Perez v. Loy*, 356 F.Supp.2d 172 (D.Conn. Feb 17, 2005).

United States continues to apply a different understanding of the term “acquiescence” in immigration cases. *See Matter of S-V-*.

7. How have diplomatic assurances been used in Art. 3 cases in the context of immigration removal cases, extradition, extraterritorial rendition, and transfers from Guantánamo Bay? Please provide statistics regarding the number of cases where assurances have been negotiated and secured, details of the requirements that must be fulfilled by the receiving country to be deemed “adequate” or “reliable,” and specific measures taken by the U.S. to ensure the assurances have been honored. How has the U.S. responded to requests for information regarding the use of diplomatic assurances, including the federal lawsuit of Maher Arar and removal challenges by detainees at Guantánamo Bay?

Background: Despite concerns that diplomatic assurances cannot be relied upon to provide effective protection against torture and ill-treatment,²⁴ U.S. immigration regulations provide that diplomatic assurances from a receiving country defeat an Art. 3 claim.²⁵ The executive determines if the assurances are “sufficiently reliable,” and there is no judicial review. In the extradition context, the Secretary of State determines whether a planned transfer should be refused due to a risk of torture, and regulations give the Secretary the ability to surrender a fugitive “subject to conditions.”²⁶ At least one court has held that an extraditee may seek review of the Secretary’s decision to surrender him based on assurances through a habeas corpus petition,²⁷ but no such petition has ever been reviewed on the merits. In other contexts – returns from Guantánamo Bay, and extraterritorial transfers per rendition – the U.S. government has stated that diplomatic assurances against torture are secured as a matter of policy prior to transfer. In these contexts, no process at all is provided for a claimant to challenge a transfer based on the reliability or adequacy of such assurances.

In September 2002, U.S. authorities detained Maher Arar, a Canadian-Syrian citizen who was transiting through JFK airport on his way home to Canada. Arar was held for nearly two weeks without the ability to effectively challenge his detention or imminent transfer. Despite Arar’s repeated statements to U.S. officials that he would be tortured in Syria and requests that he be returned to Canada, U.S. immigration authorities flew Arar to Jordan, where he alleges he was beaten by security officers and then driven across the border to Syria. Arar was detained in Syria for ten months and alleges that he was tortured repeatedly, often with cables and electrical cords. The United States may have executed the transfer subject to diplomatic assurances from Syria.

²⁴ See “Still at Risk: Diplomatic Assurances no Safeguard against Torture, *A Human Rights Watch Report*, vol. 17, no. 3(D), April 2005; “Empty Promises:” Diplomatic Assurances No Safeguard Against Torture,” *A Human Rights Watch Report*, vol.16 no.4 (D), April 2004.

²⁵ See C.F.R. §208.18(c).

²⁶ 22 C.F.R. Sec. 95.

²⁷ *Cornejo-Barreto v. Siefert*, 218 F.3d 1004 (9th Cir. 2000), *disapproved in later appeal by Cornejo-Barreto v. Siefert*, 379 F.3d 1075 (9th Cir. 2004), *reh’g en banc granted by Cornejo-Barreto v. Siefert*, 386 F.3d 938 (9th Cir. 2004), *opinion vacated on reh’g by Cornejo-Barreto v. Siefert*, 389 F.3d 1307 (9th Cir. 2004) (en banc).

The U.S. government has consistently refused to provide information on how diplomatic assurances are negotiated and secured.²⁸ The U.S. government should give further details as a part of its obligations under the Convention.

8. How are U.S.' obligations under Art. 3 reflected in U.S. policy concerning (a) transfers of so-called "enemy combatants" from detention at Guantánamo Bay, Cuba, to their countries of origin or to third countries; and (b) extraterritorial renditions of persons by U.S. government agents? What procedural safeguards govern these processes to ensure effective challenges of transfers based on a fear of the risk of torture or cruel, inhuman or degrading treatment?

Background: Art. 3 applies to all transfers from a state party's jurisdiction to a state where there are substantial reasons for believing that the transferee would be in danger of being subjected to torture. This includes situations where the transfer is executed extraterritorially; that is, when the transfer is executed by and from the custody of the agent of a state party from the territory of a third country or international waters.²⁹ Although U.S. agencies that carry out transfers from within the United States have promulgated regulations implementing Article 3,³⁰ agencies conducting extraterritorial transfers, including the Department of Defense, the Federal Bureau of Investigations, and the Central Intelligence Agency, apparently have not.³¹ Individuals subject to extra-territorial transfers must be able to claim Convention protection and have basic procedural guarantees that allow effective challenge of transfers.³²

Article 4 (punishment of torture)

1. The U.S. government asserts its continuing efforts to prevent and punish acts of sexual violence committed against prisoners. Yet, the government's own report in July 2005 showed that in the majority of cases when prosecution was recommended following investigation of staff sexual misconduct within federal prisons, alleged perpetrators were not prosecuted. Private contracted facilities (a growing percentage of total federal prison

²⁸ The U.S. government has invoked the "state secrets privilege" in Maher Arar's federal case; has refused to cooperate with a Canadian Commission's inquiry in the Arar case; and has challenged counsel's request for notice and information regarding assurances secured in advance of transfers from Guantánamo Bay back to some detainees' home countries.

²⁹ Examples of extraterritorial transfers reportedly effected by the United States include: the transfers of Egyptian citizens Ahmed Agiza and Mohammed al-Zari from Sweden to Cairo; the transfer of Hassan Osama Nasr, known as Abu Omar, from Milan (Italian authorities have issued indictments of 19 alleged CIA agents for Abu Omar's "kidnapping" and transfer); and the transfer of German citizen Khaled al-Masri from Macedonia, etc. For additional examples, see Association of the Bar of the City of New York & NYU Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Rendition"* (October 2004), and NYU Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush* (June 2005).

³⁰ See 8 C.F.R. Sec. 235.8 (summary removal); 8 C.F.R. Sec. 208.16 (removal); and 22 C.F.R. Sec. 95.2 (extradition).

³¹ It has been reported that the CIA has promulgated regulations prohibiting its agents from participating in torture carried out by foreign agents, but these regulations have not been made public. See *Torture by Proxy*, *supra* note 3, at 30.

³² See *Agiza v. Sweden*, Communication No. 233/2003, and *Arana v. France*, Communication No. 63/1997; see also Committee Against Torture, *Concluding Observations: Sweden* (2002) (expressing concern that a new expulsion law did not include provisions for appeal).

beds) are not even subject to federal laws on sexual abuse. How does the U.S. government explain the discrepancy between its report to the CAT and the findings of its internal investigation?

Background: The U.S. Department of Justice Office of Inspector General is responsible for investigating allegations of staff sexual abuse of prisoners held in federal bureau of prison facilities. It issued its critical report “Deterring Staff Sexual Abuse of Federal Inmates” in April 2005. The report also notes that in federal prisons sexual abuse by staff without threat of force is only a misdemeanor with a maximum punishment of one year in prison. <http://www.usdoj.gov/oig/special/0504/final.pdf>

Article 10 (education and information)

1. Please detail what training programs have been implemented at the federal, state and local level (in both public and private facilities) to educate corrections officers, immigration officials, sheriffs, jail personnel, and juvenile detention facility officials – at entry into service and throughout term of service - regarding the proper treatment and protection of persons in custody, specifically related to the prohibition against torture or cruel, inhumane or degrading treatment or punishment. When are those programs provided and what information do they contain? Specifically, do they use standards outlined in the (UN) Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials?

Background: The U.S. report talks of a variety of training programs that exist at the federal, state and local level and says that it attaches “considerable importance to the task of providing education and information.” However, given the diversity of federal, state and local authorities responsible for different facilities and the lack of any national standards, it is unclear without further detail how either of these claims can be substantiated.

Article 11 (systemic review)

1. How does the State party reconcile its obligation to keep under systemic review methods and practices for the custody and treatment of prisoners with the lack of a domestic statutory framework, national standards or any national system or requirement for monitoring places of detention? Also, how does the U.S. government keep under systemic review the policies and practices of federal, state and local law enforcement agencies with respect to treatment of individuals in their custody?
2. Although the State Party discusses the issue of racial discrimination in cases of abuse, including in direct response to a question posed by the Committee (see para. 148), this discussion is limited to litigation, which necessarily occurs after an infringement of victim’s rights. What affirmative steps (i.e. beyond creating remedies at law) is the State Party taking, at both the federal and state levels, to address police brutality and other custodial torture and cruel, inhuman, and degrading treatment that is shown to be occurring in a racially discriminatory manner or in a manner evidencing discrimination based on gender, gender identity, sexual orientation, or some combination of all of these factors?

Article 12 (prompt investigation of torture)

1. Please detail any past or active federal investigations of local, state or federal law enforcement agencies relating to sexual harassment and assault and rape by law enforcement officers acting in their official capacities. In the case of past investigations, please provide the details of any settlements reached and enforcement of such settlements.

Article 13 (right to complain)

1. Are there policies or guidelines requiring or ensuring the existence of an adequate reporting mechanism for torture or other acts of cruel, inhuman or degrading treatment or punishment or for the reporting of ill treatment or intimidation as a consequence of such a complaint for each federal, state, county jail, juvenile detention facility (public and private), and/or location where individuals may be held in police custody? If so, please provide the details of the guidelines and reporting mechanism. Also set forth the method of monitoring and assurance that such systems are implemented.
2. The state report makes repeated reference to cases brought under CRIPA as providing redress for the treatment of prisoners which is in contravention of the CAT. Please report on the number and nature of prisoner requests for Department of Justice (DOJ) assistance under CRIPA, and describe when these requests were made, and what DOJ action resulted from the request. Describe in detail the standard used by the DOJ to decide whether to investigate and/or file complaints regarding the conditions that led to requests for help, whether it is related to the number of requests or their gravity, etc.

Background: The Civil Rights of Institutionalized Persons Act (CRIPA) provides the statutory authority for the federal government, Department of Justice, to investigate the treatment of people in state and local institutions and prosecute when violations are found.

3. Given the provision of the Prison Litigation Reform Act that requires the exhaustion of all internal prison grievance procedures before a case can be taken to the courts, please detail what training and reporting mechanisms are in place for protecting individuals incarcerated in the federal facilities, state prisons, county jails and juvenile and INS detention facilities from intimidation as a consequence of complaints of abuse.

Background: The Prison Litigation Reform Act, a federal statute signed into law in 1996, amended 42USC §1983 and requires all possible internal investigative mechanisms be exhausted before a case can be taken to court even in cases where torture or degrading and inhumane treatment are alleged.

4. Do all of the provisions listed in the recent U.S. report to the Committee as securing the rights of torture survivors apply to victims of torture at the hands of law enforcement officers acting in their official capacities?

Article 14 (right to redress and/or compensation)

1. Pursuant to Article 14, the United States reports that individuals may file civil suits seeking redress for violating their rights which may involve seeking monetary damages. The government states that redress is available under 42 USC §1983. Please specify how damages and compensation are available for degrading treatment and/or torture which results in serious mental and emotional injury but does not cause actual physical injury – which may be the case where rape, sexual abuse, assault, and harassment, coerced nudity, or invasive and degrading strip searches and body cavity searches and other forms of CID have taken place.

Background: The Prison Litigation Reform Act, a federal statute signed into law in 1996, amended 42USC §1983 to prohibit prisoners from seeking compensatory redress for any treatment which does not result in physical injury.

Article 15 (prohibition of coerced statements)

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

Background: The military commission rules do not prohibit the use of statements gathered through coercive techniques of interrogation. Although the U.S. government has used coercive interrogation methods at Guantánamo Bay and elsewhere, it is not clear that defendants before military commissions will be able to prevent consideration of evidence gathered through such methods. Under the commission rules, the standard for admission of evidence is simply whether, in the opinion of the presiding officer or majority of commission members, the evidence “would have probative value to a reasonable person.”³³ Defendants also may not be able to challenge the voluntariness of information they themselves provided to interrogators. Additionally, the defense is unlikely to learn whether evidence was obtained from coercive interrogation of other detainees, whether held at Guantánamo or elsewhere, because the witness need not be brought before the commission; a hearsay account of what was said could be introduced into the evidence instead. Defense counsel therefore will be hard-pressed to challenge the circumstances under which such third-party evidence was obtained.³⁴ On August 31, 2005, the Department of Defense introduced certain amendments to the military commission procedures.³⁵ Those procedural changes do not change the commission rules with regard to admissibility of evidence. Commission rules will continue to permit the admission of evidence extracted under torture or other form of coercion.

³³ Military Commission Order No. 1, 6(D)(1).

³⁴ See generally, Human Rights Watch, “Briefing Paper on Military Commissions,” July 2005.

³⁵ See, <http://www.defenselink.mil/news/Aug2005/d20050831fact.pdf>

The Combatant Status Review Tribunals permit detainees at Guantánamo to contest their status as “enemy combatants.” The Administrative Review Boards determine annually whether each Guantánamo detainee remains a threat to the United States or its allies or can provide intelligence. These procedures were instituted in response to the Supreme Court ruling in *Rasul v. Bush*, 124 S.Ct. 2886 (2004) in June 2004, that detainees have a right to *habeas corpus* review of their detention before a U.S. federal court. Neither procedure addresses the concern over the use of coerced statements. The Department of Defense contends that both processes are informal review mechanisms and not legal proceedings -- even though they determine whether a detainee will remain incarcerated or not -- and thus deny detainees the participation of legal counsel and other fundamental due process protections. Decisions are based on evidence presented at the hearings and classified information that is not made available to the detainee. There are no expressed limits on this information, and so could include information gathered through the use of torture and other mistreatment. In any event, these tribunals do not hear prisoners’ complaints regarding conditions of confinement and allegations of torture and ill-treatment in Guantánamo.

2. Were there any amendments introduced to the Army Field Manual 34-52 (Army intelligence interrogations)? Please provide the Committee with the most updated copy of the manual.
3. What measures is the U.S. government taking to promulgate videotaping and audio taping of questioning of all criminal suspects – including those charged with “terrorism related” offenses – in order to prevent torture in order to elicit confessions?

Article 16 (other cruel, inhuman or degrading treatment or punishment)

1. A recent Bureau of Justice Statistics report shows that racial profiling continues to be a problem in the U.S., with drivers of color being searched, subjected to force or threat of force, and issued tickets at higher rates than white drivers.³⁶ However, contrary to normal practice, the government attempted to hide the study by not issuing a press release on the report, and demoted an official who complained about this evasion.³⁷ How does the government explain this in light of its obligation to take affirmative steps to prevent cruel, inhuman and degrading treatment, including that which is “based on discrimination of any kind” by public officials? What steps are being taken to reduce racial profiling during all periods of custodial detention, from initial contact with officials through sentencing?
2. What mechanisms are in place to monitor the use and length of isolation for juveniles held in custody in jails and in adult prisons? What guidelines are in place for ensuring juveniles are not subject to long term isolation and/or sensory deprivation while in custody in prisons, county jails and detention facilities? What is the reporting mechanism for monitoring the placement and treatment of incarcerated juveniles in adult prisons and jails? Please detail what monitoring is undertaken to ensure that juveniles are kept

³⁶ See BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN THE POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY, 2005, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf>.

³⁷ See Eric Lichtbau, *Profiling Report Leads to a Demotion*, The New York Times, Aug. 24, 2004, available at <http://www.nacdl.org/public.nsf/mediasources/20050824b>.

separate from adults and protected from abusive and degrading treatment, including that based on race, gender, gender identity, sexual orientation.

3. While the State Party has come into conformity with international law in abolishing the juvenile death penalty last year, the adult death penalty and juvenile life without parole continue to be implemented in a manner with racially discriminatory impact. What steps is the government taking to address this problem?

Background: The prosecution of juveniles as adults has dramatically increased since the 1990s resulting in many juveniles incarcerated in adult facilities for property or drug offenses as well as violent crime. Furthermore, juveniles held in adult facilities are five times more likely to be sexually abused than those held in juvenile facilities. And, one study shows that juveniles held in adult facilities are eight times more likely to commit suicide. In terms of racial disparities, in Michigan, for example, although the population as a whole is 15% African American, African American youth make up 69% of those sentenced to juvenile life without parole.³⁸

4. Given the well-documented adverse mental health effects of solitary confinement, provide information on the penological justification for long term solitary confinement and current status of measures being taken to monitor, address and protect prisoners in long term isolation from mental illness, including the number of prisoners with diagnosed mental health problems currently held in solitary confinement.
5. What steps is the United States taking to abolish practices that violate the mental and bodily integrity of people with psychiatric disabilities?

Background: Involuntary psychiatric interventions with mind-altering drugs and procedures such as electroshock can cause profound suffering and increased disability, and disrupt the individual's personality and identity. Such interventions appear to violate the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. Aversive interventions that restrict liberty, such as physical and chemical restraints, raise similar concerns. For more information, see <http://www.un.org/esa/socdev/enable/rights/art11suppl.htm> and <http://www.mdac.info/documents/NYLaw-article.doc> p.60, Section IV Inhuman and degrading treatment, part B Applications, 4. Protection from coerced treatment.

6. Given the extreme conditions in supermaximum security prisons and the evidence from a number of court cases of the heightened danger of torture and/or cruel, inhuman or degrading treatment or punishment within these facilities, please elucidate further the State party's necessity for these kinds of facilities. In particular, describe the term "certain violent offenders" as used in the report at Item 25, "Supermaximum security prisons", and describe in detail the review procedures in place to determine whether supermax prisons are used exclusively for the purposes of housing these individuals.

Background: The US has a much higher proportion of supermax beds to regular security beds than other nations and there is some evidence that once these expensive beds have been built,

³⁸ Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons. ACLU of Michigan, 2004, available at <http://www.aclumich.org/pubs/juvenilelifefers.pdf>.

corrections departments feel pressure to keep them filled, often with people who do not belong there (like the mentally ill).

7. What policies and practices does the U.S. government promulgate and promote with respect to searches of persons, body cavity searches, and conditions of detention of women and transgender individuals in the custody of federal, state, and local law enforcement officers and agencies in order to comply with the Convention's prohibition against "cruel, inhuman, and degrading treatment?"

Background: Individuals and advocates report that searches of persons, and particularly of women and transgender individuals, are frequently conducted under conditions amounting to cruel, inhuman and degrading treatment, including strip searches conducted on the street in full public view or in police precincts in view of other detainees and officers, often by officers of a different gender to the person being searched, searches conducted in an abusive fashion, and invasive strip searches or body cavity searches performed under circumstances which do not justify a search under U.S. or international law – for instance for the purpose of ascertaining a person's "true" gender. The United Nations Human Rights Committee has stated that to ensure the protection of the dignity of a person who is being searched by a state official, a body search should be conducted only by someone of the "same sex."³⁹ In her 1999 Report on women in prison in the United States, the UN Special Rapporteur on Violence Against Women, its causes and consequences, recommended that certain jobs in women's prisons – such as guarding housing units and performing body searches -- should be restricted to female staff.⁴⁰ The Committee Against Torture has expressed concern at mistreatment and discriminatory treatment based on sexual orientation in police stations and prisons in Brazil,⁴¹ and recommended that urgent steps be taken to improve conditions of detention in police stations and prisons, and that a systematic and independent system be established to monitor the treatment of the persons arrested, detained or imprisoned.

8. The U.S. government claims to continue to address the issue of the treatment of aliens held in immigration detention centers. How are these claims reconciled with numerous reports of sexual and other abuse of immigration detainees received by human rights organizations, and the unwillingness of immigration detention facilities to allow independent advocacy organizations access to Immigration and Customs Enforcement (ICE) facilities? The Department of Homeland Security has issued an operations manual that does not address the issue of prisoner rape inside immigration detention facilities. Given the evidence of continuing sexual abuse, does the U.S. government plan on revising the manual to include this topic?

Background: Some reports indicate that the United States Department of Homeland Security detains more than 200,000 individuals annually in Immigration and Customs Enforcement (ICE) detention centers. Reports also indicate that immigration officials have raped detainees, abused

³⁹ General Comment 16 to Article 17 of the ICCPR, "Compilation of General Comment and General Recommendations Adopted by Human Rights Treaty Bodies," UN Document HRI/GEN/Rev.3, 15 August 1997

⁴⁰ Amnesty International, "United States of America. A Briefing for the UN Committee Against Torture," May 2000, Page 18.

⁴¹ Concluding Observations of the Committee Against Torture: Brazil. 16/05/2001. A/56/44, paras. 115-120. (Concluding Observations/Comments).

their power by exchanging goods for sexual favors, used threats of violence and deportation to force detainees to perform sex acts, allowed male guards to observe female detainees as they shower or use the toilet, and have verbally and physically harassed those in their custody. Due to their fear of deportation, lack of guaranteed access to court appointed counsel, and varying literacy skills, immigration detainees represent some of the most vulnerable inmates in the U.S.

9. The federal government has yet to enact the End Racial Profiling Act, which would require documentation of traffic stops according to the race of the person stopped. What progress has been made toward uniform data collection about incidents of use of force by law enforcement officers at the federal, state, and local levels, in order to monitor patterns for the purpose of directing federal resources toward redressing these patterns of abuse? Will these steps ensure that use of excessive force by law enforcement officers is tracked by race, age, location, gender, gender identity, and sexual orientation of the individual against whom excessive force was used?
10. What mechanisms exist under U.S. law to punish or remedy acts of cruel, inhuman or degrading treatment committed by U.S. agents or military personnel?

Background: The United States has adopted an anti-torture statute, 18 U.S.C. 2340, criminalizing torture “outside the United States,” and the War Crimes Act of 1996 (18 U.S.C. § 2441). However, there is no federal statute explicitly criminalizing acts that constitute cruel, inhuman or degrading treatment.⁴² Further, there is no record of any person ever being prosecuted under the War Crimes Act.

11. Does the U.S. consider the Convention applicable to acts of cruel, inhuman or degrading treatment or punishment committed by U.S. non-military personnel outside the United States? Does the prohibition on cruel, inhuman or degrading treatment apply to areas in the Special Maritime and Territorial Jurisdiction as defined in 18 U.S.C. 7, including subsection (9)?

Background: In his January 2005 confirmation hearings, Attorney General Alberto Gonzales stated that Art. 16’s reach is geographically limited by the U.S. reservation to Article 16⁴³ and the terms of the Convention. Gonzales stated that the U.S. would be in compliance with Art. 16 if U.S. personnel subjected detainees to “cruel, inhuman or degrading treatment” because “as a legal matter” “aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth and Fourteenth Amendments.” In a written response, Gonzales

⁴² We recognize, as does the U.S. Report, that there is a patchwork of federal criminal statutes criminalizing acts which amount to cruel, inhuman or degrading treatment, including in regions that are outside regular U.S. territory. Nevertheless, by failing to adopt legislation that specifically prohibits cruel, inhuman or degrading treatment the United States has created legal lacunae because of its reservation under Article 16 by not explicitly prohibiting conduct that is not already prohibited under the U.S. Constitution

⁴³ “...the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

further stated that “under Article 16 there is no legal obligation under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas.” This is consistent with Gonzales’ statements regarding the geographical reach of the Convention.

12. Does the United States believe the detention of certain categories of non-citizens who cannot be removed from the United States for longer than the time limits established by the United States Supreme Court is consistent with the Convention’s prohibition on cruel, inhuman or degrading treatment or punishment?

Background: Expert commentators, including the U.N. Special Rapporteur on Torture have raised concerns about indefinite detention as a violation of the Convention’s prohibition on cruel, inhuman and degrading treatment.⁴⁴ Moreover, the indefinite detention on security grounds of a non-citizen who cannot be removed from the United States may also constitute a violation of the prohibition against the imposition of severe mental pain and suffering in the Convention – a prohibition which the United States, unfortunately, interprets narrowly.

The United States’ report correctly states that the Supreme Court cases *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Benitez v. Wallis*, 540 U.S. 1147 (2004) limit the government’s authority to detain non-citizens who cannot be removed from the United States.⁴⁵ However, the government also refers to the need to ensure “the proper balance between U.S. obligations under the Convention and the Department of Homeland Security’s mission to improve the security of the United States.”⁴⁶ There is concern that the United States may justify indefinite detention of individuals who cannot be removed and who are not charged for criminal activities on “security grounds.”

Jordanian national Abdel-Jabbar Hamdan has been detained since July 27, 2004. He was found to be entitled to *refoulement* protection under the Convention and is not deportable to his country of origin. As of July 2005, Ahmed Ali, a Somali refugee, has been detained for more than three years by the U.S. Department of Homeland Security. Ali continues to be detained despite a decision by the U.N. Working Group on Arbitrary Detention that his detention was arbitrary in violation of international law.

⁴⁴ See, e.g. Statement by Theo van Boven to the 58th Session Of The General Assembly, November 11, 2003 (noting with concern “the creation of legal and jurisdictional limbos or human rights no-man’s-lands entailing the indefinite detention of suspects without charge under circumstances which amount to cruel, inhuman or degrading treatment.”).

⁴⁵ U.S. Report ¶ 35.

⁴⁶ U.S. Report ¶ 35.

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