Human Rights Watch

Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

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Public Facing Advocacy Writing

During its Consideration of the Second Periodic Report of the United States

In August 2005, Human Rights Watch submitted a list of questions for the Committee to inquire of the United States. Since our last submission, the United States has enacted or begun to undertake new laws, policies, and practices that reflect the continuing failure of the U.S. to fully accept its obligations under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. We outline here some of those developments, and hope the Committee will consider these matters as well. We also wish to apprise the Committee of relevant new research that Human Rights Watch has completed since our last submission.

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I. Detainee Treatment Act (Articles 1, 2, 10, 11, 13, 14 and 16)

In December 2005, President George W. Bush signed into law the Detainee Treatment Act (DTA). On the positive side, the DTA includes the McCain amendment, which prohibits the use of torture and cruel, inhuman, or degrading treatment by any U.S. official or employee operating anywhere in the world. It also sets the Army Field Manual on Intelligence Interrogation as the standard for all interrogations carried out by the Department of Defense.

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

In ongoing litigation, the administration has taken the position that the Graham-Levin amendment precludes detainees at Guantanamo Bay from challenging in federal court the use of torture and cruel, inhuman or degrading treatment. If the courts of appeal agree with this position and uphold the amendments constitutionality, the gains from the McCain amendment will be significantly vitiated, with victims of abuse held at Guantanmo having no independent legal forum in which to seek to vindicate their rights. Denying these individuals the opportunity to redress such abuse violates the U.S.s obligations under Article 13, 14, 16 of the Convention.

The United States also continues to circumvent its obligations under the Convention and undermine the McCain amendment by defining torture in a manner that is inconsistent with the Conventions definition of torture. Of particular concern, the United States has failed to denounce waterboarding, a type of mock drowning, as a form of torture or cruel and inhuman treatment. In an interview with ABC news on November 29, 2005, CIA Director Porter Goss refused to state that waterboarding was an impermissible interrogation technique.

Human Rights Watch is also concerned that planned revisions to the Army Field Manual on Intelligence Interrogation, which will reportedly include a classified annex, will also undercut the gains of the McCain amendment. Given that military personnel have been authorized to use abusive interrogation techniques against terrorist suspects in the past, and given the administrations continued refusal to denounce waterboarding as torture, Human Rights Watch is worried that the contents of this annex will allow for practices that violate the prohibition against torture and other abuse. Human Rights Watch hopes that the Committee will inquire of the United States as to the need for and scope of interrogation techniques that will be included in the classified annex.

Moreover, the United States has also never stated what steps if any it has taken to ensure compliance with the provisions of the McCain amendment by the Department of Defense and the Central Intelligence Agency (CIA). The McCain amendment does not provide a mechanism for individual victims of torture and abuse to bring civil court cases to seek redress for violations of the amendment. As a result, the administrations role in internally monitoring and enforcing the amendment takes on heightened importance. Has the CIA

issued and promulgated new interrogation guidelines in response to the passage of the McCain amendment? How are the new rules communicated to agents and contractors in the field? What steps is the United States taking to monitor and enforce these obligations?

Our concerns in this respect are magnified by the Presidents signing statement issued at the time the McCain amendment became law, in which the President suggested that his powers as Commander-in-Chief trumped any restrictions on the use of torture and cruel, inhuman and degrading treatment imposed by the amendment.

II. Use of Evidence Obtained Through Torture (Article 15)

The Detainee Treatment Act includes a troubling provision that appears to sanction the use of evidence obtained through torture. Specifically, the DTA requires the Combatant Status Review Tribunals and Annual Review Boards (military bodies convened to evaluate the status of detainees at Guantanmo Bay) to assess whether statements from the detainee were obtained through coercion and then assess the probative value of the statement. The implication of this rule is that statements obtained through torture or cruel, inhuman or degrading treatment could be used as evidence if they have sufficient probative value. Moreover, there is no prohibition on the use of statements of other witnesses against the detainees that are obtained through torture or other coercion. According to Pentagon documents, Mohammed Al-Qahtani accused 30 fellow prisoners of being Osama bin Laden's bodyguards -- after Qahtani was reportedly tormented by weeks of sleep deprivation, isolation and sexual humiliation.

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

Another area of concern is the recent case that appears to turn a blind eye to the use of evidence based on torture. In November, Ahmed Omar Ali was convicted on terrorism conspiracy charges and subsequently sentenced to thirty years in prison. At trial, the government relied extensively on a confession made by Ali while he was detained in Saudi Arabia. Ali maintains that he was tortured, beaten, whipped, and ultimately coerced into confessing. The court, however, denied the defense teams request to present evidence of scars on his back suggesting that he had been tortured. It also precluded the defense from presenting general evidence regarding Saudi Arabias poor human rights record on torture, instead taking at face value Saudi officials statements denying the existence of torture in Saudi Arabia. In so doing, they ignored U.S. Department of State reports of widespread abuse of prisoners by the Saudi Arabian government.

III. Disappearances (Articles 2, 5, 1, 13, 14, 16)

In April, John Negroponte, Director of National Intelligence, acknowledged to media sources that the Central Intelligence Agency continues to hold approximately three dozen al-Qaeda suspects in secret overseas prisons. He maintained that the United States is likely to keep them in captivity for as long as the war on terror continues. These detainees are effectively disappeared, denied access to the International Committee of the Red Cross, and subjected to treatment and interrogation that is not monitored by any court or independent entity. The only plausible reason for disappearing these detainees is that the United States wants to keep their treatment and conditions of confinement secret presumably because it includes torture and abuse.

Notably, the State Department, in its recent Annual Country Reports on Human Rights Practices (released on March 8, 2006 and covering events in 2005), condemned Belarus, Burma, China, Equatorial Guinea, Ethiopia, Indonesia, Nepal, North Korea, Philippines, Russia, Sudan, Syria, Uzbekistan, and Zimbabwe for holding individuals in incommunicado detention and for engaging in disappearances.

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

IV. Diplomatic Assurance and Rendition to Torture (Article 3)

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

(a) Past Cases

The Committee is already well aware of the highly publicized case of Maher Arar, a Canadian citizen who was detained by the United States. in September 2002. U.S. immigration authorities held him for two weeks, during which time he was unable to challenge either his detention or imminent transfer to a country likely to torture him. Relying on diplomatic assurances from Syria, the United States then flew Arar to Jordan, where he was driven across the border to Syria and detained there for ten months. The United States relied on the Syrian assurances despite repeated statements from Arar to immigration authorities that he would be subject to torture if sent to Syria. Arar reports that he was beaten by security officers in Jordan and tortured repeatedly, often with cables and electrical cords, during his confinement in a Syrian prison.

But the Arar case is not the only instance in which someone in United States custody has been rendered to torture.

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

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

Presumably the United States followed its stated policy of reliance on diplomatic assurances before it sent either Habib or Madmi to Egypt. Alternatively, it rendered these individuals to Egypt without such assurances despite the State Departments own finding that [t]orture and abuse of prisoners and detainees by [Egyptian] police, security personnel, and prison guards remained common and persistent.

Human Rights Watch hopes that the Committee will ask the United States whether it obtained diplomatic assurances in these cases. If not, why not, given the evidence of persistent torture and abuse of detainees. And if so, what did they do to follow up to ensure that these detainees were not subject to torture?

(b) Future cases

Human Rights Watch is extremely concerned about the potential for large-scale reliance on diplomatic assurances in future transfers of individuals out of Guantanamo Bay. There is growing international pressure on the United States to close Guantanamo Bay. The United States has begun making public statements that it has slated 14 detainees eligible for release and 120 for transfer to their home country.

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

V. Lack of Accountability (Articles 1, 4, 5, 6, 7, 16)

Human Rights Watch, Human Rights First, and the Center for Human Rights and Global Justice at NYU School of Law have jointly undertaken a Detainee Abuse and Accountability Project (DAA Project) to collect and analyze information about allegations of detainee abuse in U.S. custody in Afghanistan, Iraq, and the Guantanamo Bay detention facility; and to assess what actions if any were taken in response, from investigations to, where appropriate, disciplinary actions and punishments. These findings have just been released in a report published on April 26, 2006. Among the findings are the following:

There are over 330 cases in which U.S. military and civilian personnel are credibly alleged to have abused or killed detainees. These cases involve at least 600 U.S. personnel and over 460 detainees. Allegations have come from U.S. facilities throughout Afghanistan, Iraq and at Guantnamo Bay.

Only fifty-four military personnelfewer than ten percent of the more than 600 U.S. personnel implicated in detainee abuse casesare known to have been convicted by court-martial. Forty of these individuals have been sentenced to prison time, but only a small number have resulted in significant prison time. Many sentences have been for less than a year, even in cases involving serious abuse. Of the hundreds of personnel implicated in detainee abuse, only ten people have been sentenced to a year or more in prison.

Of the hundreds of allegations of abuse collected by the DAA Project, only about half appear to have been properly investigated. In numerous cases, military investigators appear to have closed investigations prematurely or to have delayed their resolution. In many cases, the military has simply failed to open investigations, even in cases where credible allegations have been made.

DAA Project researchers found over 400 personnel have been implicated in cases investigated by military or civilian authorities, but only about a third of them have faced any kind of disciplinary or criminal action. And even in cases where U.S. military investigations have substantiated abuse, military commanders have often chosen to proceed with weaker non-judicial forms of disciplinary action instead of criminal prosecution.

No U.S. military officer has been held accountable for criminal acts committed by subordinates under the doctrine of command responsibility. That doctrine provides that a superior is responsible for the criminal acts of subordinates if the superior knew or should have known that the crimes were being committed and failed to take steps to prevent them or to punish the perpetrators. Only three officers have been convicted by court-martial for detainee abuse; in all three instances, they were convicted for abuses in which they directly participated, not for their responsibility as commanders.

The CIA has investigated several cases of abuse involving its personnel, and reportedly referred some individuals to the Department of Justice for prosecution. But few cases have been robustly investigated.

Out of twenty civilians, including CIA agents, referred for criminal prosecution for detainee abuse by the military and the CIA since 2002, the Department of Justice has prosecuted just one civilian contractor. Two of the cases have been closed for insufficient evidence, and the other seventeen remain under investigation. The Department of Justice has not indicted a single CIA agent for abusing detainees.

One case that particularly highlights the failure of accountability is that of Mohammad al-Qahtani. Human Rights Watch has obtained an

unredacted copy of al-Qahtanis interrogation log, detailing interrogations from a six-week period from November 2002 to January 2003. The interrogation log reveals that al-Qahtani was subjected to a regime of physical and mental mistreatment from mid-November 2002 to early January 2003. For six weeks, he was intentionally deprived of sleep, forced into painful physical positions (known as stress positions) and subjected to forced exercises, forced standing, and sexual and other physical humiliation, including the administration of a forced enema. In 2005, the Judge Advocates General of the U.S. Army, Navy and Marine Corps told the U.S. Senate Committee on Armed Services that the techniques used on al-Qahtani violated the U.S. Army Field Manual on Intelligence Interrogation, and would have been illegal if perpetrated by another country on captured U.S. personnel.

In December 20, 2005, the Army Inspector General, completed a report, obtained by salon.com in April 2006, that investigated the allegations of abuse in the al-Qahtani case. The report contains a sworn statement by Lt. Gen. Randall M. Schmidt that implicates Defense Secretary Donald Rumsfeld in the abuse of detainee Mohammad al-Qahtani. Gen. Schmidt, who conducted an investigation into the case in early 2005 that included two interviews with Rumsfeld, describes the defense secretary as being personally involved in al-Qahtanis interrogation. Gen. Schmidt describes Rumsfeld as talking weekly with General Geoffrey Miller, then a senior commander at Guantanamo, about the interrogation of al-Qahtani.

The report findings and recommendations were rejected by the head of U.S. Southern Command, Gen. Bantz J. Craddock, who said in July 2005 that the al-Qahtani interrogation did not violate military law or policy. As a result, neither Secretary Rumsfeld, General Miller, nor any of the interrogators who took part in the interrogations have been criminally investigated or made to account in any way for their actions.

VI. Lethal Injection (Articles 13, 14, and 16)

Thirty-seven of the thirty-eight death penalty states and the federal government have adopted lethal injection as the procedure by which the death penalty is administered; for nineteen states it is the only legal method of execution. Human Rights Watch has just completed a report examining these practices, which finds that the states have failed to develop methods of lethal injection that will, in accordance with international law, reduce to the greatest extent possible the risk of pain and suffering during the execution. Indeed, there is growing evidence suggesting that in a number of cases the method used may have caused an agonizing death.

In the standard method of lethal injection used in the United States, the prisoner lies strapped to a gurney, a catheter is inserted into his vein with an intravenous line attached. A series of three drugs is injected into his vein by executioners hidden behind a wall. A massive dose of sodium thiopental, an anesthetic, is injected first, followed by pancuronium bromide, which paralyzes voluntary muscles, but leaves the prisoner fully conscious and able to experience pain. A third drug, potassium chloride, quickly causes cardiac arrest, but the drug is so painful that veterinarian guidelines in the United States prohibit its use unless a veterinarian first ensures that the pet to be put down is deeply unconscious. No such precaution is taken for prisoners being executed.

Although supporters of lethal injection believe the prisoner dies painlessly, there is mounting evidence that prisoners may have experienced excruciating pain during their executions. Logs from recent executions in California, and toxicology reports from recent executions in North Carolina, suggest prisoners may in fact have been inadequately anesthetized before being put to death. This should not be surprising given that corrections agencies have not taken the steps necessary to ensure a painless execution. The sequence of drugs and a method of administration used were created three decades ago, and were then adopted unquestioningly by state officials with no medical or scientific background. Little has changed since then. As a result, prisoners in the United States are executed by means that the American Veterinary Medical Association regards as too cruel to use on dogs and cats.

Human Rights Watch has found that none of the states that employ lethal injection consulted medical experts to ascertain whether the original three-drug sequence could be adapted to lessen the risk of pain to the prisoner by using other drugs or methods of administering them. Human Rights Watch opposes capital punishment in all forms as inherently cruel. But until the 38 death penalty states and the federal government abolish capital punishment, they have an obligation to develop methods of execution that will reduce, to the greatest extent possible, the condemned prisoners risk of mental or physical pain and suffering. Human Rights Watch hopes that the Committee will question the U.S. about its failure to ensure that the method of lethal injection does not cause needless agony.

International Alternatives to Detaining Immigrants

United States Deportation Policies Expose Salvadorans to Death and Abuse