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# USA

## AMNESTY INTERNATIONAL'S SUPPLEMENTARY BRIEFING TO THE UN COMMITTEE AGAINST TORTURE

This briefing includes further information on the implementation by the United States of America (USA) of its obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention; UN Convention against Torture), with regard to the forthcoming consideration by the UN Committee Against Torture (the Committee) of the USA's second periodic report.<sup>1</sup> The briefing updates Amnesty International's concerns with regard to US "war on terror" detention, interrogation and related policies, as outlined in its preliminary briefing of August 2005, and provides additional information on domestic policies and practice.

### US OBLIGATIONS UNDER THE CONVENTION WITH RESPECT TO DETAINEES HELD IN THE CONTEXT OF THE "WAR ON TERROR"

#### 1. General supplementary observations on definitions of torture and use of torture under interrogation, including deaths in custody (Articles 1 and 16)

Evidence continues to emerge of widespread torture and other cruel, inhuman or degrading treatment of detainees held in US custody in Afghanistan, Guantánamo Bay, Cuba, Iraq and other locations. While the government continues to assert that abuses resulted for the most part from the actions of a few "aberrant" soldiers and lack of oversight, there is clear evidence that much of the ill-treatment has stemmed directly from officially sanctioned procedures and policies, including interrogation techniques approved by Secretary of Defense Rumsfeld for use in Guantánamo and later exported to Iraq.<sup>2</sup> While it seems that some practices, such as "waterboarding", were reserved for high value detainees, others appear to have been routinely applied during detentions and interrogations in Afghanistan, Guantánamo and Iraq. The latter include hooding, stripping and shackling of detainees in painful positions as well as using military dogs to intimidate blindfolded detainees; prolonged isolation, deprivation of food and

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<sup>1</sup> UN Doc. CAT/C/48/Add.3/Rev.1, 13 January 2006.

<sup>2</sup> Interrogation techniques Secretary Rumsfeld authorized for use at Guantánamo in memos dated December 2002 and April 2003 included 20 hour interrogations; stress positions; isolation; sensory deprivation; use of phobias (dogs); hooding, removal of clothing, forced shaving, "dietary manipulation" and "environmental manipulation" (adjustment of temperature). Similar techniques were authorized in September 2003 by then Commander of US Forces in Iraq General Ricardo Sanchez.

sleep and exposure to extremes of temperature also appear to have been common practice to punish detainees for failing to cooperate or to “soften them up” for interrogation.<sup>3</sup>

Many of the techniques listed above, even if applied in isolation or for limited periods, would in Amnesty International’s view violate the prohibition of cruel, inhuman or degrading treatment or punishment under Article 16. Such techniques have reportedly been used against “war on terror” detainees in combination and for prolonged periods, causing severe pain and suffering (physical, mental or both) and, being inflicted intentionally by officials for the purpose of obtaining information, thereby amount to torture.<sup>4</sup> Some of the approved techniques, such as forced shaving of facial and head hair, stripping and the use of dogs to inspire fear, appear to have had a specific discriminatory or racist application in the case of Muslim detainees.

It is now known that at least 34 detainees who died in US custody have had their deaths listed by the army as confirmed or suspected criminal homicides. The true number of such deaths may be higher as there is evidence that delays, cover-ups and deficiencies in investigations have hampered the collection of evidence.<sup>5</sup> In several cases, however, substantial evidence has emerged that detainees were tortured to death while under interrogation (revealed, for example, in military autopsy reports, investigation records and recent court testimony). What is even more disturbing is that standard practices as well as interrogation techniques believed to have fallen within officially sanctioned parameters, appear to have played a role in the ill-treatment, as the following cases illustrate:

- Two Afghan detainees, Dilwar and Habibullah died from multiple blunt force injuries inflicted while they were held in an isolation section of Bagram US airbase in December 2002. Army investigative reports later revealed that both men were kept hooded and chained to a ceiling while being kicked and beaten during sustained assaults by military personnel. A soldier who acknowledged inflicting more than 30 consecutive knee strikes to Dilwar (a slight, 22 year old taxi driver) as he stood in

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<sup>3</sup> There is ample evidence in detainee accounts, reports to inquiries and court documents of detainees in Afghanistan, Guantánamo and Iraq being hooded, shackled and often stripped during interrogations, as well as being intimidated by military dogs. The Schlesinger Panel found stripping was routine practice during interrogations at Abu Ghraib. Many Guantánamo detainees have described being held in prolonged isolation in harsh conditions as punishment for not providing information during interrogations; in occupied Iraq, the ICRC expressed concern about the USA’s systematic resort to keeping uncooperative detainees “completely naked in totally empty concrete cells and in total darkness” for days. (ICRC report February 2004)

<sup>4</sup> For example, detainees in Bagram airbase, Afghanistan, were forced to remain standing for days, naked and hooded, chained to ceilings and deprived of sleep, food and water; Guantánamo detainees have described being subjected to prolonged sleep deprivation, threats from dogs, sexual humiliation, exposure for days or hours to extreme temperatures, painful “short-shackling” for hours during interrogations (in which they had to squat with their hands and feet chained to the floor).

<sup>5</sup> See for example a recent report by Human Rights First: Command’s Responsibility, February 2006 listing cases and concerns about investigations.

shackles, told investigators that the blows were standard operating procedure for uncooperative detainees. An army criminal investigation report said both deaths were caused primarily by severe trauma to the men's legs, adding that "sleep deprivation at the direction of military intelligence soldiers" was also a "direct contributing factor" in Dilwar's death.<sup>6</sup> Army medical examiners found the prolonged shackling had also contributed to his death.<sup>7</sup> 7 low-ranking soldiers, charged variously with assault, maltreatment, dereliction of duty and making false statements eventually received sentences ranging from five months' imprisonment to reprimand, loss of pay and reduction in rank.

- Abdul Jaleel died in January 2004 in the US Forward Operating Rifles Base in Al Asad, Iraq, after being kicked and beaten during interrogation. He was tied by his hands to the top of a door frame and gagged when he died. The autopsy report recorded death from "blunt force injuries and asphyxia". A senior army official admitted Jameel had been "lifted to his feet by a baton held to his throat" causing a throat injury that "contributed to his death".<sup>8</sup> Military commanders rejected a recommendation by army investigators to prosecute soldiers involved, on the ground that his death had been the "result of a series of lawful applications of force in response to repeated aggression and misconduct by the detainee".<sup>9</sup>
- Major-General Abed Hamad Mowhoush, formerly of the Iraqi army, died during interrogation in the US detention facility in Al Qaim, Baghdad, in November 2003. An autopsy recorded cause of death as asphyxia and smothering due to chest compression. Mowhoush died after being rolled back and forth in a sleeping bag, which was placed over his head and bound with wire, while one of his interrogators sat on his chest. According to testimony in a subsequent court case, use of the sleeping bag was part of an approved "stress position" designed to play upon a detainee's claustrophobia. It was also reportedly interpreted by officers as falling within the "fear up harsh" tactics that may still be found in military operational manuals. There is evidence that abusive interrogation techniques at the Al Qaim facility were routine and authorized.<sup>10</sup>

The US military initially reported that Mowhoush had died from natural causes. However, several months later, in the wake of the Abu Ghraib scandal, four US soldiers were charged in the death. Only one went to trial and was sentenced to a

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<sup>6</sup> New York Times, 8 August 2005

<sup>7</sup> Tim Golden *Years after 2 Afghans Died, Abuse Case Falter*, New York Times 13 Feb 2006

<sup>8</sup> New York Times, 26 March 2005

<sup>9</sup> Army criminal investigators outline 27 confirmed or suspected detainee homicides for Operation Iraqi Freedom, Operation Enduring Freedom. United States Army Criminal Investigation Command, 25 March 2005.

<sup>10</sup> The case, with others, is described on pages 111-116 of *Guantánamo and Beyond*, May 2005 (AMR 51/063/2005) <http://web.amnesty.org/library/Index/ENGAMR510632005?open&of=ENG-USA>

reprimand, \$6,000 forfeiture of pay plus 60 days' restriction of movement. There is evidence that Mowhoush was subjected to a brutal beating two days before his death by personnel from other agencies, including the CIA, none of whom has been charged.

- A 27-year-old Iraqi male died while being interrogated by US Navy Seals in April 2004 in Mosul, Iraq. During his confinement he was hooded, flex-cuffed, deprived of sleep and subjected to extreme cold conditions, including the use of cold water on his body and hood. The exact cause of death was “undetermined” although the autopsy stated that hypothermia from wet and cold conditions may have contributed to his death.<sup>11</sup> His treatment included various techniques similar to those authorized by Secretary of Defense Rumsfeld in his April 2003 memorandum including “environmental manipulation (e.g. adjusting temperature)”, hooding and sleep deprivation.

Despite the shocking nature of the treatment described in the above cases, the government still has not referred to any any of the reported abuses as “torture”, nor were any of those prosecuted charged with torture. As we noted in our previous submission, the Schlesinger Panel also took an apparently narrow definition of torture. Inquiries into into detention practices such as the Church inquiry found no link between ill-treatment of detainees and authorized interrogation techniques, despite the fact that many of the authorized techniques in and of themselves constituted treatment proscribed under international standards in general, and the Convention in particular.<sup>12</sup>

The lack of clarity as to how the USA defines torture or other cruel, inhuman or degrading treatment was also reflected in the final report of a high level military investigation into complaints by FBI agents about abuses they allegedly witnessed of detainees in Guantánamo Bay between October 2002 and March 2004, a summary of which was released in July 2005. The report found that requiring one “high value detainee” to be led around by a leash tied to his chains, placing a thong on his head, forcing him to wear a bra and to stand naked in front of a female interrogator, insulting his mother and sister, and using strip searches as an interrogation technique was “abusive and degrading” in its cumulative effect “particularly when done in the context of the 48 days of intense and long interrogations”, but that this did not rise to the level of “prohibited inhumane treatment”. The investigation found that while all these tactics applied together could be considered abusive and degrading, each of the tactics was “authorized” under the Army field manual guidelines for the “pride and ego down” and “futility” approaches. Pentagon and U.S. Southern Command officials have reportedly told Congress and reporters that the approaches were consistent with the field manual.<sup>13</sup> The investigation (which did not involve interviews with any detainees)

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<sup>11</sup> Armed Forces Institute of Pathology, Autopsy No. ME 04-309 (name not given). The report is one of 44 autopsy reports obtained under the Freedom of Information Act and posted on the ACLU website: <http://action.aclu.org/torturefoia/released/102405/>

<sup>12</sup> AI's critique of these inquiries is given on pages 97-102 of *Guantánamo and Beyond* (*op cit*)

<sup>13</sup> See Josh White, “Military Lawyers Say Tactics Broke Rules,” *Washington Post*, 16 March 2006.

recommended no action in respect of most of the FBI's complaints on the ground that they were either unsubstantiated or the treatment fell within authorized procedures. It did not review the legal validity of the various interrogation methods which included techniques outlined in the Army Field Manual and the "more aggressive" techniques approved by the Secretary of Defense in his memorandum of April 2003 for use when "necessary".<sup>14</sup>

## **2. Effective legislative, administrative, judicial measures. No justification for torture, including in time of war or other emergency (Article 2)**

### *2. 1. Legislative measures/government's continued exceptionalism*

The measures taken by the US government in response to allegations of torture and ill-treatment remain far from adequate. As noted in our previous submission, inquiries to date have lacked independence and scope and none has served to hold senior officials accountable. Furthermore, legislation passed by Congress in December 2005 to protect "war on terror" detainees from ill-treatment (the Detainee Treatment Act of 2005), has serious limitations. Section 1003 of the Act prohibits the "cruel, inhuman or degrading treatment or punishment" of persons of any nationality under the custody or control of the US government anywhere in the world."<sup>15</sup>

Section 1003 (also known as the McCain Amendment) stipulates that the term "cruel, inhuman or degrading treatment or punishment" means the "cruel, unusual and inhumane" treatment or punishment prohibited under the US Constitution "as defined in the United States Reservations, Declarations and Understandings" to the UN Convention against Torture, and thus reflects existing US law. While the legislation is an important step forward, this could still leave the US open to employ a narrower interpretation of what constitutes such treatment than is recognized under the Convention. The USA should therefore withdraw its limiting reservations, declarations and understandings to the Convention against Torture.

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<sup>14</sup> Army Regulation 15-6: Final Report. Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility 1 April 05 (Amended 9 June 05). The approved techniques included stripping detainees; use of yelling, loud noise and strobe lights; isolation; sleep deprivation; use of dogs to exploit detainees' phobias; use of female interrogators to exploit the gender sensitivities of male Muslim detainees. The investigation did not evaluate the legality of otherwise of these methods, although it recommended that the military authorities in command of Guantánamo stop using females to provoke or humiliate detainees; clarify their policy on sleep deprivation and that certain other techniques, such as subjecting detainees to loud music and strobe lights should be "conducted within clearly prescribed limits". The investigation found there were no substantiated allegations of "serious abuse of detainees" at Guantánamo, but listed 10 substantiated "incidents" of "misconduct", listed in the US report to the Committee. (Update to Annex One, B, 2.)

<sup>15</sup> As included in the Defence Appropriation Act, 2006 (H.R.2863), Title X, signed by President Bush on 30 December 2005. It is also included in the Defense Authorization Act (Sections 1402-1405).

Although Section 1003 applies to the CIA, and some of the “enhanced interrogation techniques” such as “waterboarding”<sup>16</sup> may be outlawed under the legislation,<sup>17</sup> CIA activities remain largely secret and are exempt from new military rules on interrogation when outside a Department of Defense facility (see below). Thus, there is no way of monitoring whether or not they may continue to use interrogation techniques which violate international law.

Disturbingly, the legislation included another amendment (section 1005, also known as the Graham-Levin amendment<sup>18</sup>) which curtailed the right of the Guantánamo detainees to federal habeas corpus review and barred them from seeking review by US federal courts of their treatment or conditions of detention.<sup>19</sup> The amendment also allows evidence obtained by coercion (and therefore, possibly, torture) to be weighed for its probative value by the Combatant Status Review Tribunals in Guantánamo. These measures serve to fundamentally weaken the prohibition against torture or ill-treatment by removing key enforcement mechanisms.

The impact of the Graham-Levin amendment was graphically illustrated when the US government recently sought to have a torture claim brought by a Guantánamo detainee before a federal court thrown out. The detainee sought an injunction from a federal judge to ban “extremely painful” methods of force-feeding which included improper use of a restraint chair and heavy nasal tubing, which his lawyers described as “amounting to torture”.<sup>20</sup> During the proceedings, government lawyers reportedly contended that even if the treatment breached the “cruel, inhuman or degrading” ban in the McCain amendment, detainees in Guantánamo had no recourse to the US courts on account of section 1005 (above).<sup>21</sup> The case was still pending at the time of writing. More information on government attempts to have appeals thrown out on the basis of the Detainee Treatment Act is given below.

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<sup>16</sup> “Waterboarding” involves strapping a detainee to a board and submerging him in water until he believes he is drowning.

<sup>17</sup> In a classified report written in 2004, the findings of which were leaked in November 2005, the CIA’s then inspector general John L. Helgerson, while not concluding that it constituted torture, expressed concern that waterboarding would violate the “cruel, inhuman and degrading” provisions under the Convention against Torture (*Report Warned on CIA’s Tactics in Interrogation*, The New York Times 9 November 2005)

<sup>18</sup> Sec. 1005 of the Detainee Treatment Act of 2005, entitled “Procedures for Status Review of Detainees Outside the United States.”

<sup>19</sup> The amendment provides that “...no court justice or judge shall have jurisdiction to hear or consider (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense” (Sec. 1005 (e) (2)). The amendment provides that Guantánamo detainees can have access to the courts only to appeal their enemy combatant status determinations and convictions by military commissions.

<sup>20</sup> The UN Special Procedures also found methods of force-feeding Guantánamo hunger strikers to constitute torture (see 2, 4. below)

<sup>21</sup> J. White and C.D. Leonnig, *US Cites Exception in Torture Ban*, Washington Post, 3 March 2006



Of further concern is the “signing statement” President Bush attached to the legislation, in which he stated that he would construe the law:

“...in a manner consistent with the constitutional authority of the president ...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 ... of protecting the American people from further terrorist attacks.”<sup>22</sup>

According to legal experts including, reportedly, White House administration officials, this signals the executive’s intention to reserve the right to waive the provision on national security grounds. A similar exception was included in a policy directive governing interrogations of those in military custody which the government approved in December 2005 (see under Article 11, below). If this is indeed the case, this would further undermine the protection afforded by the legislation.<sup>23</sup> It would also be inconsistent with the US government’s obligation under the Convention to respect the absolute prohibition of torture and other cruel, inhuman or degrading treatment in all circumstances, including in time of public emergency which threatens the life of the nation<sup>24</sup>

Amnesty International is deeply concerned that this view is not limited to the Executive. In a recent decision, a U.S. Federal Court judge stated the following:

*“While one cannot ignore the “shocks the conscience” test established in Rochin v. California, 342 U.S. 165, 172-73, 72 S.Ct. 205, 209-10, 96 L.Ed. 183 (1952), that case involved the question whether torture could be used to extract evidence for the purpose of prosecuting criminal conduct, a very different question from the one ultimately presented here, to wit, whether substantive due process would erect a per se bar to coercive investigations, including torture, for the purpose of preventing a terrorist attack. Whether the circumstances here ultimately cry out for immediate application of the Due Process clause, or, put differently, whether torture always violates the Fifth Amendment under established Supreme Court case law prohibiting government action that “shocks the conscience” – a question analytically prior to those taken up in the parties’ briefing – remains unresolved from a doctrinal standpoint.”*<sup>25</sup>

<sup>22</sup> [www.whitehouse.gov/news/releases/2005/12/20051230-8.html](http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html)

<sup>23</sup> So far the position of the executive remains ambiguous, see for example Reuters, 20 January 2006: *Retired military leaders express concern after the president made ambiguous remarks on the new ban last month.*

<sup>24</sup> It should be noted that a White House memorandum of 7 February 2002 entitled *Humane Treatment of al Qaeda and Taliban Detainees*, in which the government states that some detainees are not entitled to humane treatment has never been withdrawn, thus raising further questions about the US government’s position in this regard (“our values ... call for us to treat detainees humanely, including those who are not legally entitled to such treatment.”).

<sup>25</sup> *Maheer Arar v. John Ashcroft et al.*, Civil Action No. CV-04-0249 (DGT)(VVP), United States District Court, Eastern District of New York, **Memorandum and Order**, 16 February 2006, per David

It is clear that there is a pervasive view within the USA that in times of war the President enjoys extremely wide discretion, including the power to violate non-derogable human rights protected under the Convention. Amnesty International believes that this must be rectified through legislation incorporating the provisions of the Convention, including provisions on non-derogability of certain rights, and a firm commitment by the US executive, judiciary and legislature to abide by the state's international obligations.

While the government has stated in broad terms that it does not condone torture, Amnesty International believes it is vital that the US issues a firm clarifying declaration before the Committee that no-one, the President included, has the right or authority to torture or otherwise ill-treat detainees and that anyone, the President included, who does so will have committed a crime; and that criminal law defences such as "superior orders", "self-defence" and "necessity" will not be available to perpetrators.

## *2.2. Legal, administrative and judicial status of "war on terror" detainees breach the Convention*

Also of grave concern is the fact that the US continues to hold thousands of detainees in Iraq, Afghanistan, Guantánamo Bay, and undisclosed locations in conditions which can facilitate torture or ill-treatment. These include denial of access to courts, prolonged incommunicado detention, and detention in secret locations amounting to enforced disappearances. Such conditions can in themselves amount to torture or ill-treatment.

The UN Commission on Human Rights has stated that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture".<sup>26</sup> The Human Rights Committee has stated that provisions should be made against the use of incommunicado detention<sup>27</sup>, and the Committee against Torture has called for its elimination.<sup>28</sup>

### *2.2. (i) Afghanistan*

Hundreds of detainees continue to be held in US custody in Afghanistan, with no recourse to due legal process or human rights protection. Some have been detained without charge or trial at Bagram US airbase for two or three years, yet have no access to lawyers, relatives or the

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G. Trager J, p. 55. In a footnote (no. 10), the Court distinguishes *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) as it "does not address the constitutionality of torture to prevent a terrorist attack." The Court also states that the relevant international obligations could be "repudiated" by "congressional legislation to the contrary." *Ibid*.

<sup>26</sup> Resolution: 2004/41. para 8, 19 April 2004

<sup>27</sup> Human Rights Committee General Comment 20, Article 7 (Forty-fourth session, 1992), para. 11.

<sup>28</sup> Human Rights Committee General Comment 20. Committee against Torture : UN Doc. A/52/44 (1997), para. 121 (d).

courts. Some of the worst abuses of detainees (including torture and deaths in custody) in 2002/3 are reported to have occurred in a section of the Bagram facility to which the ICRC had no access. While Amnesty International has been told that the ICRC now visits detainees in Bagram every two weeks, detainees remain incommunicado during the initial period of detention as well as between visits. The ICRC still has no access to detainees held in an unknown number of US Forward Operating Bases, where detainees may reportedly be held for up to ten days, or possibly longer.<sup>29</sup>

AI is concerned at the lack of a clear or recognized legal framework governing the US forces' actions in Afghanistan, including in respect of detentions and interrogations. There is no longer an international armed conflict in Afghanistan, and while provisions of international humanitarian law, such as Article 3 common to the four Geneva Conventions, apply to the ongoing non-international armed conflict in which US forces are involved, they provide little or no guidance as to the procedural aspect of "internment." AI believes that those deprived of liberty are protected directly by human rights law, including the requirement for a judicial review of the lawfulness of detention, the right for persons deprived of their liberty to challenge the lawfulness of their detention before a judicial body, the right to legal representation, and the prohibition of all forms of ill-treatment, including through indefinite detention (see below). However, currently detainees in Afghanistan may be held indefinitely in US military custody, without any such review.<sup>30</sup> An August 2005 agreement between the USA and Afghanistan to transfer Afghan detainees from US detention facilities at Bagram (and Guantánamo Bay) has yet to be implemented.

According to a recent report in the New York Times, based on interviews with current and former administration officials, the number of detainees held in the Bagram facility has been increasing since 2004 and holds about 40 non-Afghan prisoners, some of whom were previously held by the CIA in secret interrogation centres in Afghanistan and other countries.<sup>31</sup> According to unnamed officials cited in the article, the intelligence agency had been reluctant to send some of those prisoners to Guantánamo because of the possibility that their CIA custody could be eventually scrutinized in court. The article reported that some 500 detainees were being held in Guantánamo as of February 2006 and quoted a Pentagon official as stating that the average stay was 14.5 months. Because the military does not identify the prisoners or release other information on their detention, information on how long people were detained and under what circumstances had not previously come to light.

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<sup>29</sup> There were reports in early 2005 of detainees being held for up to two months in such facilities (see AI report: *USA: US detentions in Afghanistan: an aide-mémoire for continued action* (AI Index: AMR 51/093/2005))

<sup>30</sup> As the US report to the Committee states, there is an initial review of the designation of "enemy combatant" status by a Commander or designee within 90 days of detention after which the detainee will "remain under DOD control" with an annual review by the "detaining combatant commander" thereafter. Detainees "remain under DOD control until they no longer present a threat". Update to Annex One D. 2.

<sup>31</sup> *An Afghan Prison Expands, Filling Guantánamo's Role*, Tim Golden and Eric Schmitt, New York Times 26 February 2006

2. 2. (ii) *Iraq*

The US-led Multi-National Force (MNF) in Iraq has continued to detain people in connection with the ongoing insurgency, the vast majority of them in US military custody. Thousands of “security internees” have been held by the US for months, many for more than two years, without charge and with no right to challenge the lawfulness of their detention before a court.<sup>32</sup> While provisions of international humanitarian law, such as Article 3 common to the four Geneva Conventions, apply to the ongoing non-international armed conflict in which the MNF is involved, they provide little or no guidance as to the procedural aspect of “internment.” AI believes that those deprived of liberty are protected by human rights law, including the requirement for a judicial review of the lawfulness of detention.

In its Update to Annex One of its report to the Committee, the US refers to the practice of having a military magistrate conduct an initial review within 7 days of the decision to intern. However, such review appears to be generally conducted on the basis of files on individual internees without his or her presence and without the presence of legal counsel. Thereafter, there is a review by a non-judicial body at least every six months.<sup>33</sup>

Security internees are not allowed access to legal counsel for the first 60 days of internment and, it appears that, in practice, visits of security detainees by legal counsel at any time are extremely rare, the main reason being the belief that it is futile to seek legal counsel when the detainee will not be brought before a court of law.<sup>34</sup> Relatives of detainees have also reported difficulty in gaining access to internees.

Although the ICRC is in principle allowed to visit MNF-held detainees at locations throughout the country, AI has been told that access is limited to detainees in internment facilities, and the ICRC has no access to those held in US division or brigade holding facilities immediately after arrest. Detainees may be held for days or weeks in such facilities. On 28 November 2005, the MNF were holding 650 persons in such facilities.<sup>35</sup>

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<sup>32</sup> More than 14,000 security internees were in US custody as of November 2005: <http://www.mnf-iraq.com/TF134/Numbers.htm>.

<sup>33</sup> The Combined Review and Release Board, composed of six representatives of the Iraqi government and three from the MNF. The final approval for release rests with the Deputy Commanding General of the MNF.

<sup>34</sup> Amnesty International’s detailed concerns regarding the current detention system in Iraq are outlined in its report: *Beyond Abu Ghraib: detention and torture in Iraq*. AI Index: MDE 14/001/2006, 6 March 2006, hereinafter referred to as *Beyond Abu Ghraib*.  
<http://web.amnesty.org/library/Index/ENGMDE140012006>

<sup>35</sup> See MNF website, <http://www.mnf-iraq.com/TF134/Numbers.htm>

Regulations governing MNF detentions post-June 2004 (when the interim Iraqi government replaced the Coalition Provisional Authority) stipulate that security detainees must either be released after 18 months or transferred to Iraqi criminal jurisdiction. However, the rules allow for internment by the MNF beyond 18 months, and for an indefinite period, for reasons of “continued imperative reasons of security”.<sup>36</sup> Such extended internment requires the approval of the Joint Detention Committee (JDC), which is comprised of Iraqi, US and UK officials. By mid-February 2006, an application for the extension of internment beyond 18 months of 266 detainees had been made to the JDC.<sup>37</sup>

AI is concerned that hundreds of “security internees” held by the MNF since before the handover of power in June 2004 may be held indefinitely with no formal review procedure. In a letter to AI dated 19 February 2006, Major General Gardner, Commander of Task Force 134, which is in charge of MNF operations, stated that at the end of 2005 the number of security internees held for more than 18 months was estimated to be 751. The letter confirmed that approval by the JDC to keep an internee beyond 18 months is only required for those “internees detained after 30 June 2004”.<sup>38</sup>

AI considers that indefinite internment may constitute a violation of the prohibition on torture and other cruel, inhuman or degrading treatment or punishment, as well as constituting arbitrary detention in the absence of judicial review. Any deprivation of liberty, even when carried out in accordance with international humanitarian law, inevitably causes some stress or a degree of mental suffering to the internee and his or her family, although this will not automatically render the deprivation unlawful. However, AI is concerned that the “security internees” held by the MNF, are being deprived of their liberty in circumstances that cause unnecessary suffering, such as indefinite and incommunicado detention, that cannot be justified as an unavoidable part of a “lawful sanction”.<sup>39</sup> The Human Rights Committee has referred to prolonged, indefinite “administrative detention” as incompatible with the prohibition against torture or cruel, inhuman or degrading treatment under Article 7 of the

<sup>36</sup> CPA Memorandum No 3 (revised): Criminal Procedures, 27 June 2004

<sup>37</sup> Letter of 19 February 2006 to AI by Major General Gardner, Commanding Officer, MNF Task Force 134.

<sup>38</sup> *ibid*

<sup>39</sup> Under the definition of torture in Article 1(1) of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the UN Convention against Torture, respectively. Reports in recent years on persons held in indefinite detention in the context of the “war on terror” have shown the severe psychological effects of such detention. For instance, in October 2004, in a report on the mental health of detainees held at the time indefinitely in Belmarsh high security prison, in the UK, under the Anti-Terrorism Crime and Security Act (2001), eminent psychiatrists concluded that the detainees had become seriously clinically depressed and were suffering from anxiety, some of them becoming psychotic as a result of their indefinite detention. (Professor Ian Robbins, Dr James MacKeith, Professor Michael Kopelman, Dr Clive Meux, Dr Sumi Ratnam, Dr Richard Taylor, Dr Sophie Davison and Dr David Somekh, *The Psychiatric Problems of Detainees under the 2001 Antiterrorism Crime and Security Act*, 13 October 2004, <http://www.statewatch.org/news/2004/nov/belmarsh-mh.pdf> ).

International Covenant on Civil and Political Rights (ICCPR).<sup>40</sup> Similarly, the UN Committee against Torture has found that administrative detention by a party to an armed conflict may constitute cruel, inhuman or degrading treatment or punishment, based *inter alia* on its excessive length.<sup>41</sup>

## 2. 2. (iii) *Guantánamo*:

As of March 2006, around 490 detainees from more than 30 countries continued to be held without charge or trial in the US Naval Base at Guantánamo, many for more than four years. Although the US Supreme Court ruled in *Rasul v. Bush* that US courts had jurisdiction to consider challenges to the legality of their detentions, appeals by the US government have thus far prevented any such review. Furthermore, the Detainee Treatment Act of December 2005 curtailed the right of Guantánamo detainees to bring habeas corpus and most other actions before the US courts, a decision the US government is seeking to apply retroactively.<sup>42</sup> While the issue of retroactive application and the scope of the provisions remain the subject of further appeals, the government's position places further, severe, obstacles to court review and justice in these cases.

Neither the Combatant Status Review Tribunal (CSRT), an administrative body set up in 2004 to review the status of each detainee, nor the annual review by an Administrative Review Board (ARB), established in September 2004, satisfy the requirements for a judicial review of the legality of the detentions (see pages 47-63 of *Guantánamo and Beyond* (AI Index AMR 51/063/2005)).

In its Annex One of its report to the Committee against Torture, the US government reasserts its position that it is entitled to hold members of the Taleban, al-Qa'ida or their affiliates and supporters as "enemy combatants" under the "law of armed conflict" until the "cessation of hostilities". It justifies its initial decision not to grant POW status to detainees in Guantánamo or Afghanistan, or to have their cases determined by a competent tribunal as required by Article 5 of the Third Geneva Convention, on the ground that: "Because there is no doubt under international law as to the status of al-Qaida, the Taliban, their affiliates and supporters, there is no need or requirement to review individually whether such enemy combatant detained at Guantanamo is entitled to POW status".<sup>43</sup>

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<sup>40</sup> Human Rights Committee, Annual Report, vol.1 (1998), UN Doc. A/53/40, para.317.

<sup>41</sup> Concluding observations of the Committee against Torture: Israel, UN Doc. A/53/44. 16 September 1998, para. 238(b).

<sup>42</sup> The Detainee Treatment Act, Section 1005, limits US courts to considering appeals against decisions by the Combatant Status Review Boards to confirm an "enemy combatant" status and to appeals against death sentences or sentences of ten years or more imposed by military commissions (with other appeals against commission sentences being discretionary)..

<sup>43</sup> Annex One of the Second Periodic Report of the USA to the Committee against Torture, 21 October 2005, B: Status of Detainees at Guantánamo Bay and in Afghanistan

This position has been repudiated by international human rights bodies who have emphasized, *inter alia*, the following principles:

- International human rights law and international humanitarian law complement each other in times of armed conflict, rather than the latter superseding the former. Accordingly, the status of the Guantánamo detainees is well within international human rights law;
- Under international humanitarian law, of all those captured during an international armed conflict must enjoy the status of prisoners of war (POWs) until and unless a competent tribunal has determined otherwise. This means that persons so captured who have neither been treated as POWs nor had their status determined by a competent court are being arbitrarily deprived of their liberty, in violation of international human rights law. As discussed above, the suffering caused by arbitrary detention, especially when prolonged, may constitute violations of the Convention;
- Under international humanitarian law, POWs and “internees” captured during an international armed conflict must be released once hostilities have ceased, unless they face criminal proceedings for an indictable offence. The continued detention of those captured during the international armed conflict in Afghanistan, which ceased in June 2002,<sup>44</sup> without charge or trial is therefore arbitrary;
- Those not captured within an armed conflict cannot be held under provisions of international humanitarian law; instead they are entitled to the full protection of international human rights law.<sup>45</sup>

Despite the US government’s assertion to the Committee that no doubt exists as to their status as “enemy combatants”, four years on, many questions remain regarding the histories and background of the Guantánamo detainees. Although the government has failed to provide statistics on where people were initially detained or other information, it is now known, through habeas corpus applications (prior to the Detainee Treatment Act) and other sources, that the Guantánamo detainees include people seized as far away from Afghanistan as Gambia, Zambia, Bosnia and Egypt and Thailand.<sup>46</sup> There is also evidence to suggest that some of those detained during the conflict in Afghanistan were not involved in fighting but may have been innocent civilians who were simply in the wrong place at the wrong time. According to a statistical analysis of Department of Defense data on 517 Guantánamo

<sup>44</sup> The international armed conflict in Afghanistan is deemed to have ended with the conclusion of the Emergency Loya Jirga and the establishment of a Transitional Authority on 19 June 2002.

<sup>45</sup> See for instance, *Situation of detainees at Guantánamo Bay*, report of UN experts (UN Doc.E/CN.4/2006/120, 27 February 2006, para 54, cited below at page 18, note 62). See page 12 of *Guantánamo and Beyond* for a summary of the relevant international legal framework.

<sup>46</sup> They include six Algerians seized in Bosnia-Herzegovina in January 2002 whose removal was found by the Human Rights Chamber of Bosnia and Herzegovina and the UN High Commissioner for Human Rights to have been in violation of international law (see Amnesty International document: *USA: Beyond the Law*, page 4, note 5 (AI Index AMR 51/184/2002)).

detainees undertaken for the US law group the Center for Constitutional Rights in February 2006, 55% had no hostile acts listed against them as the basis for their detention and only 5% were captured by US forces, with the rest not picked up on the battlefield in Afghanistan but in Pakistan and handed over to the USA by warlords for bounty.<sup>47</sup> The US military itself has reportedly admitted to detaining innocent civilians in Guantánamo as well as low level fighters.<sup>48</sup> None has ever received a fair opportunity to raise their claims that they are unjustly imprisoned.

The USA's lack of transparency about who is being detained and its failure for more than four years to provide a list of detainees, have been further obstacles to justice in such cases. In March 2006, the Pentagon released transcripts of the CSRT hearings at Guantánamo which gave the names and countries of many of the detainees. This was done only pursuant to a court order after a protracted lawsuit filed under the Freedom of Information Act by the Associated Press. Even then, this was not a list of names as such, and the information was not complete (the minority of detainees who have not yet gone through CRST proceedings were not included).

### *2.3. Continuing concerns about torture and ill-treatment of detainees in Iraq and Afghanistan:*

Although the US has reportedly improved its procedures since Abu Ghraib, there continue to be reports of torture or ill-treatment of detainees by US troops. In September 2005, several members of the National Guard were sentenced to up to 12 months' imprisonment after pleading guilty at courts-martial to ill-treating Iraqi detainees in March 2005. Although the military authorities have declined to provide full details, the ill-treatment reportedly included using an electro-shock stun-gun on handcuffed and blindfolded detainees. The Los Angeles Times referred to a member of the battalion as having reported that "the stun gun was used on at least one man's testicles".<sup>49</sup> In December 2005, five soldiers received sentences ranging from 30-days to six months confinement for kicking and punching Iraqi detainees as they were awaiting transfer to a detention facility in September.

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<sup>47</sup> [www.ccr-ny.org/v2/reports/report.asp?ObjID=JbXOoOpVig&Content=708-19K](http://www.ccr-ny.org/v2/reports/report.asp?ObjID=JbXOoOpVig&Content=708-19K): Some cases are described in AI's report *Guantánamo: Lives Torn Apart, The impact of indefinite detention on detainees and their families*, published 6 February 2006 (AMR 51/007/2006), hereafter referred to as *Lives Torn Apart*.

<sup>48</sup> See for example Center for Constitutional Rights: Graham Myths (<http://www.ccr-ny.org/v2/reports/report.asp?ObjID-V9mCOgUtSh&Content=666>) Amnesty International provides accounts of the histories of some individual Guantánamo detainees in case sheets entitled: *Who are the Guantánamo Detainees?* (<http://web.amnesty.org/pages/guantanamobay-library-eng#cases>)

<sup>49</sup> Associated Press, Jeremiah Marqez, *California Guard sergeant gets year in Iraq detainee abuse case*, 10 September 2005; Los Angeles Times, Scott Gold and Rone Tempest: *More Tumult besets guard unit in Iraq*, 15 October 2005



The US authorities apparently took swift action to investigate the abuses and prosecute the perpetrators in the above cases, which AI welcomes. However, the organization is concerned that there are insufficient safeguards to protect detainees from torture and other ill-treatment. There have been other reports of the abusive use by US troops of electro-shock weapons such as tasers: dart-firing weapons which can also be used close-up as stun guns. Memos obtained by the ACLU in December 2004 under Freedom of Information Act requests, for example, revealed that four members of a US special operations unit had been disciplined for excessive force, including improperly using tasers on prisoners. According to the memos, dated June 2004, detainees held in Iraq often arrived at prisons bearing “burn marks” on their backs.<sup>50</sup> An eye-witness told Amnesty International about a more recent incident in November 2005 in which two detainees were shocked with tasers used as stun guns while they being transferred to a medical facility within Camp Bucca. Such incidents, particularly during transfers, were not uncommon, according to the same source. AI believes that electro-shock weapons are inherently open to abuse and it has called on the US authorities to suspend their use of tasers.

AI has also received reports of Iraqi detainees in US custody being subjected to disciplinary sanctions which amount to torture or other ill-treatment. There have been reports that Camp Bucca internees, for example, have been exposed to extreme cold as punishment, including being forcibly showered with cold water and later exposed to a cold air conditioner.<sup>51</sup>

In December 2005, AI wrote to the US authorities about a photograph in which a juvenile was shown immobilized in a four-point restraint chair in Abu Ghraib prison, reportedly as a punishment. AI drew attention to international and US standards stipulating that restraints should never be applied as punishment and expressing concern that prolonged immobilization in restraints in the manner shown could carry a health risk. The US authorities informed AI that they had suspended use of the restraint chair in Abu Ghraib, pending a review of procedures.<sup>52</sup> However the restraint chair continues to be used in other US facilities housing “war on terror” detainees, including Guantánamo, where there have been further allegations of ill-treatment involving use of the chair (see below).

In Afghanistan there have been reports of detainees held in forward operating bases, at least up to March 2005, being subjected to abuses including hooding, shackling and deprivation of food and water<sup>53</sup>. In October 2005 the Pentagon announced an investigation into television footage purportedly showing a group of US soldiers burning the bodies of two Taliban members and using their charred corpses to taunt villages suspected of harbouring insurgents.

<sup>50</sup> BBC News 8 December 2004 <http://news.bbc.co.uk/1/hi/world/americas/4080761.stm>

<sup>51</sup> See AI report *Beyond Abu Ghraib: Detention and Torture in Iraq*.  
<http://web.amnesty.org/library/index/engmde140012006>

<sup>52</sup> Letter to Amnesty International from Major General John D. Gardner, Deputy Commanding General, Detainee Operations, Multi-National Force-Iraq, 17 January 2006. The original photograph was by John Moore of Getty Images.

<sup>53</sup> Testimony to a BBC radio broadcast on 2 June 2005 of detainees released in March 2005, reported in Amnesty International’s report: *USA US detentions in Afghanistan: an aide-mémoire for continued action* (AMR 51/093/2005).o

While conditions in the Bagram detention facility are reported to have improved, they are still very basic with many prisoners held in wire pens or living under bright indoor lights which are dimmed for only a few hours a night.<sup>54</sup> It has also been reported that detainees have been subjected to cruel punishments, including being handcuffed for hours in a small cell or placed in isolation for days, for minor rule infractions.<sup>55</sup>

#### *2. 4. Torture and ill-treatment and cruel, inhuman and degrading conditions in Guantánamo Bay*

AI considers that the conditions of confinement of the Guantánamo detainees, together with the indefinite nature of their detention, constitutes cruel, inhuman or degrading treatment or punishment in violation of Article 16 of the Convention.

The USA has reported to the Committee that detainees receive adequate housing, recreation and medical facilities; write to and receive mail from their families and friends; and may worship in accordance with their beliefs. However, numerous detainees have alleged that the medical and dental care provided has been slow and on some occasions withheld as part of a punitive and coercive regime.<sup>56</sup> There have been long delays in receiving mail which is often heavily redacted; some mail has allegedly not been received at all. There have also been allegations that detainees have at various times been subjected to religious intolerance by their captors; these have included allegations of guards damaging copies of the Qu'ran, laughing at detainees while they were praying and playing loud music during the call-to-prayer.

While some detainees have been transferred to a section where they have more out-of-cell time and contact with other detainees, most continue to be confined to small cells with little contact with other inmates and minimal opportunities for exercise. Some detainees are held in extreme isolation in Camp V: a segregation block apparently modelled on “supermaximum” security prisons on the US mainland, which the Committee has found to be “excessively harsh”.<sup>57</sup> Inmates in Camp V are reportedly held for up to 24 hours a day in solitary confinement in small concrete cells. They are allowed out of their cells three times a week for a shower and exercise, although reportedly this is often reduced to once a week. Such conditions fall short of UN minimum standards which provide that prisoners should receive at least one hour of exercise daily. Prisoners in Camp Five are reportedly subjected to 24 hour lighting, which US courts have held to be “cruel and unusual” in US mainland segregation units.

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<sup>54</sup> New York Times, 26 February 2006, op cit. (note 31).

<sup>55</sup> Ibid

<sup>56</sup> See *Guantánamo and Beyond*

<sup>57</sup> Conclusions and Recommendations of the Committee against Torture: United States of America. 15/05/2000. UN Doc. A/55/44

The conditions and uncertainty about their fate has reportedly contributed to severe mental and emotional stress and there have been numerous suicide attempts. The US Department of Defense has reported over 30 suicide attempts but has reclassified others as “manipulative self-injurious behaviour”,<sup>58</sup> indicating a disregard for detainees’ welfare as well as the circumstances underlying such incidents. As of February 2006, an unknown number of detainees remained on a hunger strike that initially started in mid-2005. Some are reported to be seriously ill.<sup>59</sup>

There have been serious allegations of ill-treatment of the hunger strikers during force-feeding. Although AI has no position on force-feeding *per se*, it considers that if forcible feeding is done in such a way as deliberately to cause suffering – as is described below – this would constitute torture or other ill-treatment.

Detainees have alleged having nasal tubes roughly inserted into their noses without anaesthetic or gel, causing choking and bleeding. Some of the hunger strikers have alleged being placed in punitive restraints during force-feeding and being subjected to verbal and physical abuse by guards. For example, Yousuf al-Shehri, a Saudi Arabian national, has described how, after seven days without food, he and several others were taken to the camp hospital, where they had shackles or other restraints placed on the arms, legs, waist, chest and head before being force-fed; he said that they were hit in the chest if they moved. Hunger strikers have also described being subjected to verbal abuse.<sup>60</sup> Lawyers for other detainees have told AI that hunger strikers had been moved into isolation in cold rooms, immobilized in restraint chairs and deliberately force-fed too much food, causing them extreme pain and, in some cases, diarrhoea. Detainees on hunger strike have also reportedly been deprived of “comfort items” such as blankets or books. The Department of Defense has denied that detainees have been ill-treated while being force-fed, stating that only in rare cases are the tubes inserted against detainees’ will but admitting that uncooperative detainees “would need to be restrained”.<sup>61</sup>

Kuwaiti national Fawzi al-Odah told his lawyer that on 11 January 2006 he ended his hunger strike after being threatened with force-feeding using a thick tube with a metal edge whilst restrained, and after hearing the screams of other hunger strikers. Most but not all of the hunger strikers had reportedly stopped the hunger strike by late February.

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<sup>58</sup> David Rose, *Vanity Fair*, January 2004

<sup>59</sup> On 1 December 2005 the US Department of Defense estimated the number of long-term hunger strikes - described among the guards as “voluntary fasting” - to be between thirty to thirty-three, although some of the detainees’ lawyers have given much higher numbers.

<sup>60</sup> These and other cases are described in Amnesty International’s report *Guantánamo: Lives torn apart, The impact of indefinite detention on detainees and their families*, 6 February 2006, AI Index AMR 51/007/2006

<sup>61</sup> [http://www.defenselink.mil/news/Dec2005/20051201\\_3504.html](http://www.defenselink.mil/news/Dec2005/20051201_3504.html)

In February 2006 five UN special rapporteurs, including the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, issued a report on their investigation into conditions at Guantánamo, calling for the facility to be closed. The rapporteurs said that some of the treatment, including use of solitary confinement, holding detainees naked, use of excessive force and the manner of force-feeding of detainees during the hunger strike amounted to torture.<sup>62</sup>

AI remains deeply concerned by the continued refusal of the USA to open up Guantánamo to independent, outside scrutiny. AI is particularly concerned by the refusal of the USA to allow visits by independent experts of the UN Commission on Human Rights consistent with the standard terms of reference for such visits.<sup>63</sup> This concern is heightened by the continuing reports of ill-treatment and poor condition of the hunger strikers and conflicting accounts given by the Pentagon and detainees and their lawyers.

AI has called on the US government *inter alia* to close the Guantánamo facility and open up all US “war on terror” detention facilities to independent external scrutiny; to promptly and impartially investigate all allegations of torture and other cruel, inhuman or degrading treatment or punishment of detainees; to ensure all detainees are provided with appropriate medical care; to ensure that detainees are allowed adequate contact with their families and that the families are kept fully informed of their legal status, health and well-being.

#### *2.4.(i) Children in Guantánamo*

At least three detainees who were under 18 when first detained remain in Guantánamo. They are Mohammed C, a Chadian national picked up in Pakistan, who was transferred to Guantánamo in January 2002 when he was just 15, Omar Khadr, aged 15 when captured in Afghanistan in July 2002, and Yousuf al-Shehri, whose alleged ill-treatment during force-feeding is described above. Mohammed C and Omar Khadr have alleged that they were tortured in US custody, including being beaten, placed in painful shackles, threatened with dogs and subjected to sleep deprivation; Omar Khadr also states he was threatened with rape and had pine solvent poured on him. Throughout their detention, they have been held in the

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<sup>62</sup> *Situation of detainees at Guantánamo Bay*, Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt, UN Doc. E/CN.4/2006/120, 15 February 2006, para. 54.

<sup>63</sup> AI is concerned that, in October 2005, the US refused to allow the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on the independence of judges and lawyers to visit Guantánamo. While it extended an invitation to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; to the Special Rapporteur on freedom of religion and belief and to the Chair-person-Rapporteur of the Working Group on Arbitrary detention, this was on strictly limited terms and they were not allowed to interview detainees.

same harsh conditions as adults, including prolonged solitary confinement in Camp V. Neither has been provided with rehabilitation or educational programs consistent with international standards for the treatment of juveniles in custody.

In November 2005, more than three years after his capture, Omar Khadr was named to stand trial before a military commission on a charge of murdering a US soldier in Afghanistan. Court documents indicate that during his detention he has undergone repeated interrogations during which he was given none of the special protections children are entitled to under international standards, including the right to counsel and to the presence of a parent or guardian at all stages of proceedings.<sup>64</sup> While AI considers that military commissions cannot in any case provide a fair trial<sup>65</sup> AI is particularly concerned that Omar Khadr should face such a proceeding and that evidence may be used against him which was extracted while he was held in violation of standards for the protection of children in custody. This would render his trial in any adult court unfair. AI is further concerned that evidence obtained as a result of treatment constituting torture or other ill-treatment may be used against him, in violation of Article 15 of the Convention, despite new instructions issued by the Department of Defense on admissibility of statements (see below under Article 15).

The detention of children in the circumstances described is in grave violation of international standards which recognize that children or child offenders are entitled to special care and protection. The standards require, among other things, that children should be detained only as a last resort, with their cases determined promptly. Omar Khadr's detention is also contrary to international standards on the treatment of child soldiers.<sup>66</sup>

## 2. 5. Secret Detention:

As noted in our preliminary submission, the USA is believed to be holding an unknown number of detainees in secret CIA-run detention facilities (sometimes called "black sites") outside the USA. Such facilities have reportedly been located at various times in countries which include Jordan, Pakistan, Thailand, Afghanistan, the British Indian Ocean territory of

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<sup>64</sup> These are among a range of safeguards set out under the UN Standard Minimum Rules for the Administration of Juvenile Justice which reflect several provisions of the ICCPR. The rules state that the same principles for the protection of children in the juvenile system should guide the treatment of children in the adult criminal justice system. Similar safeguards are set out under the Convention on the Rights of the Child, signed but not ratified by the USA.

<sup>65</sup> AI's concerns about military commissions are set out in many publications including *Guantánamo and Beyond* and a March 2006 fact sheet: *Military commissions for "war on terror" detainees* (<http://web.amnesty.org/library/print/ENGAMR510502006>).

<sup>66</sup> The USA has ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which provides inter alia that State Parties shall take all feasible measures to ensure children in their jurisdiction recruited or used in hostilities are demobilised and shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration (Article 6(3)).

Diego Garcia and countries in Eastern Europe. Not even the ICRC has access to such detainees whose names, fate and whereabouts remain unknown, leaving them outside the protection of the law in what therefore constitute “disappearances”, a crime under international law. Such a practice facilitates the perpetration of torture and other grave violations and may in and of itself amount to torture.<sup>67</sup>

The US government has refused to confirm or deny it is holding suspects in secret detention, but sources allege that the practice was instituted under enhanced powers given to the CIA to conduct covert operations following 11 September 2001.<sup>68</sup> The government has admitted to taking a number of senior alleged members of al-Qa’ida into custody, whose whereabouts remain unknown, in some cases for more than three years. They include Ramzi bin al-Shibh, Khalid Shaikh Mohammed and Abu Zubaida. Amnesty International’s inquiries to the US authorities about these and other cases have been without response.<sup>69</sup>

Although the practice is shrouded in secrecy, there is also a growing body of testimony from individuals who allege having been held in secret US detention facilities and subjected to torture or ill-treatment. They include detainees who have reported being held in a secret US-operated prison in Afghanistan before being transferred to Guantánamo. While in Afghanistan, they say they were held in total darkness, chained to walls, subjected to loud music and tortured with sleep deprivation.<sup>70</sup>

In 2005, Amnesty International conducted extensive interviews with three Yemeni men who separately gave consistent accounts of having been held for up to 19 months in at least four secret US-run facilities, one of which was underground. From information provided subsequently it is likely they were held in Djibouti, Afghanistan and somewhere in Eastern Europe.<sup>71</sup> All three remained in isolation, including from each other, for the whole period of

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<sup>67</sup> *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 44/1990, UN. Doc. CCPR/C.50/D/440/1990 (1994): the Human Rights Committee determined that the “disappearance” in circumstances not unlike those in US undisclosed locations (“prolonged incommunicado detention in an unknown location”) amounted to torture. See also the statement by the UN Commissioner for Human Rights Louise Arbour, 7 December 2005: undisclosed detention “amounts to disappearance”, which in and of itself has been found to amount to torture or ill-treatment of the disappeared person or of the families and communities deprived of information about the missing person”.

<sup>68</sup> This is believed to be a Memorandum of Notification signed by Bush on 17 September 2001, see *Human Dignity Denied*, pages 107-116.

<sup>69</sup> See *Human Dignity Denied; Torture and Accountability in the ‘war on terror’* (AI Index AMR 51/145/2004), pages 107-114. Guantánamo and Beyond, pp 118-122

<sup>70</sup> Human Rights Watch: *US Operated Secret “Dark Prison” in Kabul*, 19 December 2005, <http://hrw.org/english/docs/2005/12/19/afghan12319.htm>. see also AI report *Guantánamo and Beyond*, p.122 reference to Khaled El Masri, kept in secret detention in the “Salt Pit” in Kabul, even after the CIA realised it had the wrong man in a case of mistaken identity.

<sup>71</sup> The three men were Muhammad Abdullah Salah al-Assad, detained in Tanzania and handed over to US custody in December 2003, and Muhammad Bashmilah and Sala Qaru who were arrested in Jordan and transferred to US custody in October 2003. All three were returned to Yemen in May 2005. Their

their detention. According to their testimony, they were held for more than a year in one facility apparently designed for incommunicado detention and were kept in cells with blank walls, no floor coverings, no windows and constant artificial light. They spoke to no-one but their interrogators. They allege that in their cells there was a constant low-level hum of “white noise” (indistinct non-musical sounds), sometimes replaced by loud western music. They did not know which country they were in or whether it was night or day. Although none of the men alleged that they were beaten, prolonged solitary confinement in the conditions described can have severe physiological and psychological effects. One of the men told AI that over time, the daily horror of his isolation took a profound toll, so much so that he began to think he might already be dead. “I did believe this for a long time”, he said, “and sometimes I am still afraid it is true”.

While the Yemeni detainees said they never saw another detainee, they described signs in one facility suggesting that others were also being held (for example, swabs left in the shower-room and a reading list in various languages). None of the three, who were eventually handed over to Yemeni custody by the USA in May 2005, appeared to be “high value” detainees. Their cases suggest that the network of clandestine interrogation centres may be larger, more comprehensive and better organized than previously suspected. The three remained in Yemeni custody, reportedly at the behest of the USA, until their release in March 2006.

## 2. 6. *Treatment of enemy combatants in the USA – case of Ali-Saleh Kahlah al-Marri*

Ali-Saleh Kahlah al-Marri, a Qatari national, currently the only person detained as an “enemy combatant” on the US mainland<sup>72</sup>, has been held without charge or trial in a military prison in Charleston, South Carolina since June 2003. He had no access to an attorney for more than a year after he was detained, and a habeas corpus application is currently proceeding slowly in the US courts.

In August 2005, lawyers on behalf of Ali-Saleh Kahlah al-Marri filed a complaint in the federal courts seeking injunctive relief for the torturous conditions under which he was then confined. These included sleep deprivation, sensory deprivation, punitive shackling, exposure to cold, denial of a prayer rug and clock and disrespectful handling of the Qu’ran, treatment which has resulted in severe physical and mental health problems.<sup>73</sup> AI considers the

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accounts are given in AI’s Report: *USA/Yemen: Secret Detention and CIA “Black Sites”* (AI Index AMR 51/177/2005; and updated in AI’s report: *Below the Radar: Secret Flights to Torture and ‘Disappearance’*, published on 5 April 2006 (AI Index AMR 51/051/2006).

<sup>72</sup> Jose Padilla, the only other person formerly detained as an “enemy combatant in the USA was indicted on federal criminal charges in November 2005 and has since been transferred to the jurisdiction of the federal criminal justice system.

<sup>73</sup> Preliminary Statement in the *case of Ali Saleh Kahla al-Marri v Donald H Rumsfeld* and Commander C. T. Hanft, in the US District Court for the District of South Carolina, 8 August 2005.

treatment described to constitute cruel, inhuman or degrading treatment possibly amounting to torture.

The government filed a motion to dismiss the lawsuit on the ground that the plaintiff's claim was "barred by the doctrine of sovereign immunity" as the "United States is engaged in active military hostilities and plaintiff has been declared an enemy combatant". The government stated that, while the courts had played a role in challenges to the legality of the detention of enemy combatants (citing, *inter alia*, *Hamdi*) "the details of the conditions of detention for military detention has [sic] always been a matter left to the discretion of the military and Executive Branch officials, subject only to international obligations, which are not judicially enforceable".<sup>74</sup> Thus, the government has sought to foreclose judicial review of the conditions of detention of "enemy combatants" held in the USA who would otherwise be protected by the US Constitution, as well as claiming that the USA's international obligations are "not judicially enforceable" in US courts. AI is deeply concerned that this is yet another reflection of the US government's view that in the "war on terror", it has unfettered authority, including the freedom to violate the provisions of international treaties, even those that are non-derogable. Appeals in the case continue.

Meanwhile, Al-Marri's treatment remains entirely at the discretion of the US government. While there have been some modest improvements in his conditions since the lawsuit was filed, any "privileges" he receives (such as a prayer rug, exercise, items in his cell) are at the discretion of the detaining authority, and are reportedly often arbitrarily withdrawn for extended periods of time.<sup>75</sup> He continues to be held in extreme isolation, with no contact with any human being other than military staff and occasional visits with his attorneys.<sup>76</sup> For the 2 years and 8 months of his detention, he has not been allowed any visits or even telephone communication with his family, including his wife and five children, a situation that could continue indefinitely. Letters to and from his family are heavily censored and delayed. No current prisoner or detainee in the USA is subjected to such blanket social isolation and denial

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<sup>74</sup> *Ali Saleh Kahlah Al-Marri v Donald Rumsfeld*: government's Motion to Dismiss the Complaint, Civil Action No. 2:05-cv-02259-HFF-RSC, United States District Court for the District of South Carolina (filed 27 October 2005).

<sup>75</sup> Since filing a complaint in federal court in August 2005, Al-Marri has had access to library items where previously he was denied all books and news and religious items with the exception of the Qu'ran. His lawyers maintain his immediate environment, from adjusting the lights and turning the water supply on and off in his cell, has been "deliberately manipulated to degrade him" and that his prolonged isolation "has irreparably harmed his mental health and wellbeing and continues to do so" and, further, that "no rules or regulations govern" his treatment in custody, and that his treatment changes with each new shift. (*Ali Saleh Kahlah Al-Marri v Donald Rumsfeld*, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint": C/A No. 2: 05-v-02259-HFF-RSC, United States District Court for the District of South Carolina)

<sup>76</sup> He has also been visited several times by the ICRC during his detention



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of communication with the outside world. AI considers these conditions to violate the Convention against Torture.<sup>77</sup>

### 3. Refoulement and renditions (Article 3)

Information continues to emerge about the US practice of renditions and “disappearances” with which the practice has been closely linked. Several inquiries by European governments and the Council of Europe are underway following reports about alleged secret CIA-run detention centres in Central Europe, abductions of individuals by US agents from countries in Europe, and movement of aircraft believed to have been used by the CIA to transport detainees.

The US administration has acknowledged that it uses “rendition”, maintaining that the practice is aimed at transferring “war on terror” detainees from the country where they were captured to their home country or to other countries where they can be questioned, held or brought to justice. It has contended that these transfers are carried out in accordance with US law and international treaty obligations. However, there is mounting evidence that the US has systematically violated international law in the practice of renditions, by carrying out abductions; transfers of individuals to countries with a record of torture; and enforced disappearances.

Although the government has denied sending people to countries for the purpose of torture, there is evidence that they have arranged for specifically selected countries with a record of torture to receive certain “war on terror” detainees for interrogation, effectively “outsourcing” torture. While the government has provided no details of such cases, there is direct testimony from individuals who allege they were tortured after being rendered by the USA, or with US collusion, to other countries.<sup>78</sup> In addition, numerous detainees are alleged to have been threatened by US interrogators that they would be sent to countries where they would be

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<sup>77</sup> His conditions also breach minimum standards under the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which reflect and elaborate on Convention provisions. For instance, Principle 19 which provides that a detained or imprisoned person “shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulation”.

<sup>78</sup> See, for example, cases cited on pages 20-22 and 122-124 of *Guantánamo and beyond*, and pages 182-183 of *Human Dignity Denied*. Such cases include Australian national Mamdouh Habib, who was allegedly transferred from Pakistan with US involvement to Egypt where he was allegedly subjected to severe torture, and Osama Nasr Mostafa Hassan, abducted in Milan and allegedly driven to a US airbase in Italy, where he was interrogated and drugged before being taken to a US base in Germany and then flown to Egypt, where he was allegedly tortured, including with electric shocks. In June 2005 an Italian judge ordered the arrest of 13 CIA agents for their alleged involvement in his abduction.

tortured, if they refused to cooperate.<sup>79</sup> New information on the practice, with case examples, is given in Amnesty International's recent report: *Below the radar: secret flights to torture and rendition*.<sup>80</sup>

As stated in our preliminary submission AI considers diplomatic assurances, which the US government relies on in certain cases, to be unacceptable as evidence that no substantial risk of torture or ill-treatment exists in the receiving state. We note also that, in his interim report to the General Assembly, the UN Special Rapporteur on torture also expressed the firm view that such assurances are unreliable and ineffective in the protection against torture and ill-treatment; that such assurances are sought usually from states where the practice of torture is systematic; and that states cannot resort to them as a safeguard where there are substantial grounds for believing that a person would be subjected to such treatment upon return.<sup>81</sup> AI's concern about US practice in this regard is compounded the fact that the US conditioned its ratification of the Convention on the understanding that, under Article 3, the phrase "substantial grounds" means "if it is more likely than not" that someone would be tortured, a higher standard of proof than is intended under the Convention. AI shares the Committee's views that the USA should withdraw its reservations, interpretations and understandings relating to the Convention.<sup>82</sup>

AI is concerned that former Guantánamo detainees have been returned to countries where they are at risk of torture or ill-treatment or prolonged, arbitrary detention. In March 2006, the Pentagon reported that 187 Guantánamo detainees had been released since 2002 and 80 others to prisons in more than a dozen countries, including Saudi Arabia and Morocco, both with a known record of torture and arbitrary detention. In September 2004, 29 Pakistan nationals were returned from Guantánamo to the "control of Pakistan for continued detention".<sup>83</sup> More than six months later they were still detained in Pakistan without charge or trial. Wahid al Qadasi was returned to Yemen in April 2004 where he was held without charge or trial until his release earlier this year. Several former detainees returned to Russia from Guantánamo in March 2004 have been arrested and allegedly tortured in Russian custody. One of them, Rasul Kudaev, was detained in October 2005 and reportedly kicked in the head, beaten and severely injured by members of the Organized Crime Squad in Nalchik, in the North Caucasus region of Kabardino-Balkaria. He was then transferred from police headquarters but continued to be

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<sup>79</sup> A number of Guantánamo detainees have said they were threatened with transfer to countries such as Jordan, Egypt and Morocco where they were told they would be tortured, see page 20 of *Guantánamo and Beyond*.

<sup>80</sup> *Op cit*, at note 71

<sup>81</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/60/316, 30 August 2005, paras. 51-2.

<sup>82</sup> Conclusions and Recommendations of the Committee Against Torture: United States of America, UN Doc. A/55/44 (2000), para. 180(a).

<sup>83</sup> *Transfer of detainees completed*. Department of Defense news release, 18 September 2005

detained without charge, without any information given to his family about his whereabouts or state of health.<sup>84</sup> He remained in detention as of March 2006.

The US government has recently announced its intention to transfer around two-thirds of the remaining Guantánamo detainees to their home countries for release or possible further detention. AI continues to urge that none of the Guantánamo detainees be sent back to countries where they are at risk of violations including torture or ill-treatment, arbitrary detention or unfair trials.

#### **4. Training of persons involved in the custody, interrogation or treatment of detainees and rules for interrogations (Articles 10 and 11)**

AI is concerned that the prohibition of torture and other cruel, inhuman or degrading treatment has not been fully included in the training of law enforcement personnel or others who may be involved in the interrogation, custody or treatment of individuals detained in the context of the “war on terror”. Although interrogation rules have reportedly been revised, and the report of the April 2003 Pentagon’s Working Group on Detainee Interrogations apparently rescinded,<sup>85</sup> there remain a number of concerns as outlined below.

The Detainee Treatment Act of 2005, Section 1002, provides that no person in the custody of the Department of Defense (DoD) or in a DoD facility shall be subjected to any treatment or interrogation technique not authorized by and listed in the US Army Field Manual on Intelligence Interrogation. While this undoubtedly will provide more protection than has hitherto been the case, there remain issues of concern.

A new Army Field Manual, the first revision in 13 years and reported to be in near-final form, has not yet been published. While it will reportedly expressly prohibit the use of dogs in interrogations and other practices such as prolonged stress positions, stripping and food and sleep deprivation, there remain questions as to whether it may retain practices – for example “fear up harsh” -- which could involve torture or other ill-treatment. Also, while the field manual would cover treatment of all detainees in DoD facilities (even if questioned by non-military personnel), it does not apply to other facilities, for example, CIA-run secret detention facilities.

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<sup>84</sup> <http://web.amnesty.org/library/Index/ENGEUR460412005>

<sup>85</sup> In its preliminary submission, AI referred to the Pentagon Working Group report of April 2003 (which recommended interrogation techniques going beyond the Army Field Manual) and stated that the document had never been rescinded. In its updated Annex to its Second Periodic report, “the Department of Defense determined that the Report of the Working Group on Detainee Interrogations is to be considered as having no standing in policy, practice, or law to guide any activity of the Department of Defense”. See UN Doc. CAT/C/48/Add.3/Rev.1, 13 January 2006, para. 78.

In December 2005, the US government approved a new 8-page policy directive (Directive 3115) governing interrogations of those in military detention to accompany the revised Field Manual. The directive assigns responsibility for interrogation techniques to senior Pentagon civilians and commanders and establishes training and reporting guidelines. However, while it states that “acts of physical or mental torture are prohibited”, it does not elaborate other than to ban the use of dogs in interrogations and to order that detainees be treated humanely “in accordance with applicable law and policy”. The directive does not explicitly bar “cruel, inhuman or degrading treatment”, nor does it incorporate provisions of international treaties such as the ICCPR, the Geneva Conventions’ Common Article 3 or the UN Convention against Torture.

While the directive requires that CIA interrogators follow Pentagon guidelines when questioning military prisoners, this does not apply to detainees outside DoD custody, e.g. in “black sites” (see *Secret Detention*, 2. 5, above). The directive also reflects the Executive’s view that ultimately its authority at war is not limited, in that it appears to allow for exceptional authorization even of prohibited techniques, stating, under Section 3.4.1. “Intelligence operations will be conducted in accordance with applicable law, this Directive and implementing plans, policies, orders, directives and doctrine ... *unless otherwise authorized, in writing, by the Secretary of Defense or Deputy Secretary of Defense.*” (AI emphasis).

#### *4. 1. Role of medical personnel in interrogations:*

There have been credible reports of army medical personnel having been complicit in devising psychological and physical methods of interrogation of detainees at Abu Ghraib prison in Iraq and Guantánamo, some of which amounted to torture or cruel, inhuman or degrading treatment.<sup>86</sup> They are alleged to have assisted in using detainees’ medical records to design individual prisoner interrogation plans that included sleep deprivation, prolonged isolation and exposure to temperature extremes, and to have coached interrogators on questioning techniques. Medical professionals are also reported to have failed to report evidence of torture or ill-treatment, falsified medical records to cover up torture and other human rights violations and failed to maintain medical records or provide proper care of disabled or injured detainees.<sup>87</sup>

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<sup>86</sup> Sources include M. Gregg Bloche, M.D., J.D., and Jonathan H. Marks, M.A., B.C.L., “When Doctors Go to War,” *New England Journal of Medicine*, Volume 352(no. 1) January 6, 2005, pp. 3-6 and documents obtained by the ACLU under the Freedom of Information Act as well as interviews with military and medical personnel. A confidential report by the ICRC released in late 2004 referred to the participation of medical personnel in interrogations, in what it called “a flagrant violation of medical ethics” (reported by New York Times, 13 January 2005: “*US doctors tied to torture at Guantánamo, Abu Ghraib*”)

<sup>87</sup> See for example: *Iraq – Torture of detainees at Abu Ghraib*, MDE 14/032/2004, June 2004.

In June 2005 the Department of Defense (DOD) issued a memorandum setting out principles and procedures to guide medical personnel in the protection and treatment of detainees in US military custody.<sup>88</sup> However, these guidelines were seriously deficient and differed in a number of key areas from the UN principles of medical ethics.<sup>89</sup> While the UN principles state that it is a breach of medical ethics for health personnel to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical or mental health, the DOD guidelines limited the principles to personnel involved in “provider-patient treatment relationship with detainees”. Thus, this could still allow medical personnel not directly involved in patient care to participate in interrogations. While the DOD principles referred to the obligations of all health personnel to “uphold the humane treatment of detainees”, this was not defined and there was no reference to upholding international standards, as specifically provided in the UN principles; rather the DOD guidelines allowed health professionals to continue to assist in interrogations, stating only that they should not assist in those which are “not in accordance with applicable law”. The guidelines also allowed disclosure of detainee medical records for any intelligence or national security related activity. As Physicians for Human Rights has pointed out, this is not only a breach of medical ethics but “the disclosure of medical records to interrogators is likely to deter detainees from seeking medical care in the first place. This is an extraordinarily important protection, particularly given the high levels of depression and suicide attempts among those in detention”.<sup>90</sup>

The 2006 Defence Authorization Act included a section requiring the Secretary of Defense to establish a uniform policy on medical professionals’ interaction with detainees and revised guidelines were reportedly being drafted or nearing completion as of March 2006.<sup>91</sup> The Act required the Secretary of Defense to submit to the congressional defence committees a report on the policy not later than 1 March 2006, but the Senate Armed Services Committee had reportedly not received a report as of 22 March 2006. AI has urged the DOD to ensure that such guidelines conform to international standards and believes that the US government should provide clarification of this issue without delay.

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<sup>88</sup> Medical Program Principles and Procedures for the Protection and Treatment of Detainees in the Custody of the Armed Forces of the United States. HA Policy: 05-006, issued June 2005.

<sup>89</sup> UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by General Assembly resolution 37/194 of 18 December 1982).

<sup>90</sup> Letter from Physicians for Human Rights to William Winkenwerder, Assistant Secretary of Defense for Health Affairs, 17 June 2005.

<sup>91</sup> H.R. 1815, Section 750.

### **5. Failure to investigate or punish torture and other cruel, inhuman or degrading treatment; failure of command accountability (Articles 2, 4, and 12)**

In its preliminary submission, AI notes *inter alia* that no US agent has been prosecuted for “torture” or “war crimes” despite available legislation and this remains the case, as does failure to make torture a distinct crime within US territory.

In *Human Dignity Denied*, Amnesty International describes cases of torture and other violations where punishments do not appear to have been commensurate to the gravity of the offence, as required under Article 4(2). They include the case of an army private sentenced to 3 years for shooting an unarmed Iraqi detainee, who was handcuffed, in the back of the head. The soldier, who had allegedly said earlier that he wanted to kill an Iraqi, was charged with premeditated murder, which carries a potential life sentence, but the court-martial panel of soldiers reduced this to involuntary manslaughter. The mild penalties imposed in this and other cases contrasted with heavier sentences imposed on members of the US military charged with offences against fellow soldiers.<sup>92</sup> Soldiers have continued to receive light penalties even in cases involving deaths under torture, as illustrated by the Dilawar, Habibullah and Mowhoush cases, cited above. In the Bagram cases no-one was charged directly with the deaths, and only one soldier received a custodial sentence (of five months’ imprisonment). One soldier, who admitted administering more than 30 blows to the legs of one of the detainees who died received a demotion and an honorable discharge.

AI’s report also noted that, while the Army Criminal Investigation Command, responsible for investigations into abuses by the military, is described by the Pentagon as an “independent investigative agency”, it is the commanders in the field who decide whether to pursue judicial or disciplinary action. Many cases, including cases involving serious crimes, have been dealt with administratively, with light penalties imposed.<sup>93</sup> Of some 250 military prosecutions to date for alleged abuses committed by US personnel in the “war on terror”, the heaviest sentence is believed to be the ten year prison term imposed on Charles Graner, convicted on ten charges including aggravated assault and maltreatment for the torture of detainees at Abu Ghraib.

In some cases which have gone to trial light sentences have been imposed after soldiers testified that that they were acting under unclear rules or procedures, or believed they were obeying lawful orders. As AI has already noted, most of those court-martialled have been low-ranking soldiers and no senior officers who may have been responsible for ordering, or turning a blind eye to ill-treatment, have been prosecuted.

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<sup>92</sup> These and other cases are described on pages 157-158 of *Human Dignity Denied* (web.amnesty.org/library/Index/ENGAMR511462004)

<sup>93</sup> page 156 of *Human Dignity Denied* gives examples of such cases. As of May 2005, in over 70% of announced official actions taken in response to substantial allegations of abuse, the punishment was non-judicial or administrative (*Guantánamo and Beyond*, p. 4).

AI has already drawn the Committee's attention to serious deficiencies in investigations into deaths in custody, including delays and cover-ups, which have hampered prosecutions. A comprehensive report published by Human Rights First in February 2006 reveals the shocking extent of such deficiencies. The report notes that although nearly 100 detainees have died in US custody in the "war on terror", with 34 cases being classified as suspected or confirmed homicides, only 12 deaths have resulted in punishment of any kind for any US official and that, while the CIA has been implicated in several deaths, not one CIA agent has faced a criminal charge. Moreover, the penalties were generally mild, with the five month sentence imposed in the Bagram case being the steepest sentence for anyone involved in a torture-related death. The report found that the lack of accountability stemmed from investigative and evidentiary failures including inadequate record-keeping; failure of agencies to disclose critical information on cases and routine failure of investigators to interview key witnesses or collect and maintain usable evidence. They also found that commanders often failed to report deaths of detainees in the custody of their command or delayed reporting them for days or weeks, complicating efforts to collect evidence.<sup>94</sup>

The report noted that, while the military have taken some corrective steps, including reopening over a dozen investigations and clarifying the rules for reporting deaths and conducting autopsies, they have not addressed systemic flaws in investigations or in the prosecution and punishment of wrongdoers. Amnesty International supports the recommendations contained in the report, namely, that the President as Commander-in-Chief should immediately move to implement the ban on cruel, inhuman and degrading treatment and clarify his commitment to abide by the ban; that the President, US military and relevant agencies should take immediate steps to make clear that all acts of torture and abuse are dealt with seriously and take concrete steps to hold all those who engage in wrongdoing accountable;<sup>95</sup> and that Congress should establish an independent commission to review the scope of US detention and interrogation operations worldwide.

As a matter of principle, across all countries, Amnesty International takes the position that justice is best served by prosecuting war crimes, crimes against humanity, and other grave violations of international law, such as torture, in independent and impartial civilian courts.

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<sup>94</sup> Command's Responsibility: Detainee Deaths in US Custody in Iraq and Afghanistan, Human Rights First, February 2006: [www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf](http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf)

<sup>95</sup> The report suggests that such a plan might include implementation of a single, high-level convening authority across the service branches for allegations of torture or abuse which would bring more independent oversight to the process to discipline and punishment.

## **6. The right of individuals to have complaints of torture or ill-treatment promptly and impartially examined, and to compensation for torture or ill-treatment (Articles 13 and 14)**

In its report to the Committee, the USA states that its legal system provides a variety of mechanisms through which persons subjected to torture or other abuse may seek redress, including the filing of civil actions for monetary damages or declaratory relief. However, such avenues are largely excluded to non-US nationals held in US custody outside the USA. A potential avenue for accountability is the Alien Tort Claims Act (ATCA), which provides federal jurisdiction over tort claims filed by aliens over violations of international law or a treaty to which the US is a party. In March 2005, the ACLU and Human Rights First filed a federal lawsuit on behalf of eight former detainees who had been tortured and ill-treated in US military custody in Afghanistan and Iraq. The lawsuit sought a declaration that Secretary Rumsfeld and other senior commanders were legally responsible for the acts of torture and it also sought compensatory damages under the ATCA.<sup>96</sup> In March 2006 the government filed a motion to dismiss the case arguing that Secretary Rumsfeld was immune from the suit because he was acting “within the scope of his employment” and, further, that the federal courts had no jurisdiction over the claims for compensation in such cases. The motion stated *inter alia* that “the United States is unaware of any authority allowing such extensive judicial intrusion into war-making functions” in the case of “alien detainees dissatisfied with the military’s wartime detention practices”. The government also contended that the Detainee Treatment Act, barring the cruel, inhuman or degrading treatment of detainees held outside the USA, “does not create a private cause of action”.<sup>97</sup> A ruling on the motion was pending at the time of writing.

While litigation continues on the question of whether “war on terror” victims of abuses by US forces can file for monetary damages in the US courts, the Detainee Treatment Act of 2005 denies the Guantánamo detainees access to the federal courts to complain about their ongoing treatment or conditions of confinement. The relevant section states:

*“...no court justice or judge shall have jurisdiction to hear or consider (1) 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 (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense” (Sec. 1005) .*

This could deny the detainees, among other things, the right to seek federal court injunctions to stop torture or cruel, inhuman or degrading treatment, or complain about conditions of detention. In the USA such court oversight has been an important remedy against ill-

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<sup>96</sup> [http://www.humanrightsfirst.org/us\\_law/etn/lawsuit/index/asp](http://www.humanrightsfirst.org/us_law/etn/lawsuit/index/asp)

<sup>97</sup> *Arkan Mohammed Ali, et al, v Rumsfeld*, Defendant’s and the United States’ Motion to Dismiss, in the US District Court for the District of Columbia, Civ. No. 05-1378 (TFH).



treatment. The denial of such protection in the case of “war on terror” detentions leaves detainees even more vulnerable to torture and ill-treatment, and the US government unaccountable. As noted above, the US government is seeking to have the Act applied retroactively which could affect more than 200 lawsuits on behalf of over 300 Guantánamo detainees which are currently pending before the US courts. The cases include complaints about conditions of confinement and treatment, as well as petitions for habeas corpus.

As AI noted in its preliminary submission, the US authorities have an obligation to ensure that anyone who has suffered torture or ill-treatment in US custody has access to, and the means to obtain, full reparations wherever they may reside, and this should include rehabilitation as well as monetary damages. In its report to the Committee the US government describes the system for handling claims from victims of abuse by U.S. military personnel in Iraq, citing in particular the Foreign Claims Act and the role of the Foreign Claims Commission in investigating, adjudicating and settling claims arising out of an individual’s detention. However, AI has received first hand testimony from former detainees who were allegedly among those tortured or ill-treated in Abu Ghraib and other detention facilities and who as late as March 2006 had not received any compensation and were apparently unaware of the system of making claims. While little detailed information on reparations appears to be publicly available, it has been alleged that many Iraqis injured through the negligent or criminal conduct of U.S. soldiers are not compensated for their injuries and face various obstacles to presenting claims.<sup>98</sup>

The US does not mention in its report any system for handling claims with respect to abuses by U.S. personnel in Afghanistan or Guantánamo Bay, although applications for compensation in Afghanistan under the Foreign Claims Act may reportedly be made via the office of Judge Advocate General. AI has received several reports of victims of abuse in Afghanistan being paid *ex gratia* and possibly arbitrarily determined sums which appear paltry compared to the injury received. For example, the family of an 11-year-old boy shot in the shoulder by US soldiers as he tried to run home after hearing gunfire outside his village, told AI that US troops flew him and his uncle to the military hospital in Kandahar where he was operated on and discharged. A US official gave them \$100 and they were left to make their own way home, some 60 Km away.<sup>99</sup> Some relatives of victims who died in US custody have reported to AI not receiving compensation or of being uncertain on how to proceed<sup>100</sup>, while others who received the discretionary *ex gratia* payments (called *salatia* payments) complained that it was not clear how US forces determined the amount and that it was,

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<sup>98</sup> See, for example, Borrowman, Scott J, Brigham Young University Law Review, 2005, *Sosa v. Alvarez-Machain and Abu Ghraib-Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*:

[http://www.findarticles.com/p/articles/mi\\_qa3736/is\\_200501/ai\\_n1535317#continue](http://www.findarticles.com/p/articles/mi_qa3736/is_200501/ai_n1535317#continue)

<sup>99</sup> [http://web.amnesty.org/wire/March 2006/Afghanistan](http://web.amnesty.org/wire/March%2006/Afghanistan)

<sup>100</sup> This was the case with the family of Dilawar, who died after being tortured in Bagram base in December 2002, until they obtained the assistance of a lawyer. They had still not received compensation at the time of writing but the case was being pursued.

invariably, far less than the earnings or potential earnings lost. AI is concerned that people without access to legal representation may find it particularly difficult to proceed with claims. AI hopes that the US government will provide further clarification of this issue.

## **7. Admissibility in proceedings of statements extracted under torture (Article 15)**

One of AI's many concerns about the military commissions, established under a military order by President Bush in November 2001 to try foreign "enemy combatants for war crimes and related offences", is that the rules for the commissions did not exclude statements extracted under torture or other cruel, inhuman or degrading treatment. On 24 March 2006, the Department of Defense issued a formal instruction barring military commissions prosecutors from offering as evidence statements obtained as a result of torture.<sup>101</sup> The Instruction was issued shortly before a hearing before the US Supreme Court on the constitutionality of the commissions. On explaining why such a ban had not been issued earlier, the Department of Defense stated that "President Bush has been clear that the United States does not condone torture" and that "The Department of Defense, of course, abides by that admonition and had believed that a specific commission rule was unnecessary and would erroneously suggest that torture had actually occurred".<sup>102</sup>

Amnesty International is concerned that the Instruction, while being a step in the right direction, still falls far short of the requirements of the Convention. The Instruction portrays the ban as a matter of US policy rather than a binding legal prohibition; it includes the same restricted definition of torture based on the US reservations, declarations and understandings which the Committee called on the US to withdraw; and it does not exclude statements obtained by the use of cruel, inhuman or degrading methods. Amnesty International is concerned that the combination of the admissibility of "evidence" extracted by ill-treatment and the US administration's limited definition of what constitutes torture will render this ban meaningless.

Furthermore, Section 1005 of the Detainee Treatment Act allows evidence obtained under coercion, and thereby possibly torture, provided it has "probative value," to be considered by the Combatant Status Review Tribunals in Guantánamo. This is the first time the USA has legalized the use of evidence obtained by torture in military proceedings, in violation of its obligations under constitutional standards and international law.

AI is also concerned by the circumstances in which a recent trial court in the USA admitted evidence which the defendant alleged was extracted under torture. AI concluded that the trial -- of Ahmed Omar Abu Ali, convicted in a US federal court in November 2005 on charges of

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<sup>101</sup> Department of Defense, Military Commission Instruction No. 10, 24 March 2006, available on <http://www.defenselink.mil/news/Mar2006/d20060327MCI10.pdf>.

<sup>102</sup> US Department of Defense, American Forces Information Service, News Articles, 22 March 2006.

conspiracy to commit acts of terrorism<sup>103</sup> -- was flawed as the jury was not allowed to hear evidence supporting the defendant's claim that his videotaped confession, on which the prosecution had relied almost exclusively, had been obtained as a result of torture in Saudi Arabia. Ahmed Abu Ali told the court that he was flogged and beaten by the Saudi Arabian Ministry of Interior's General Intelligence while held in prison in Saudi Arabia, with the apparent knowledge of the USA. Coerced statements are inadmissible in trials in the USA. However, during the trial, general statements on the treatment of detainees from Saudi Arabian officials were used to undermine Abu Ali's allegations, while the defence lawyers were not allowed to present any evidence pertaining to Saudi Arabia's general record on torture, not even from the US State Department's reports. AI is seriously concerned that the trial may set a precedent in US courts by which statements obtained by torture and ill-treatment are accepted as evidence. AI is further concerned that failure to allow the defence to present its evidence, while accepting general claims from Saudi officials denying torture, breached the fundamental fair trial principle of "equality of arms".

## **VIOLATIONS OF THE CONVENTION UNDER US DOMESTIC LAW (including violations of Article 16)**

### **8. Measures to prevent or remedy violations of the Convention (Articles 2, 12, 13,)**

Since the Committee's consideration of the USA's initial report, Amnesty International has documented numerous cases of ill-treatment of individuals by US law enforcement officials, in some instances amounting to torture, as well as cruel, inhuman or degrading conditions of confinement. The US system provides a range of remedies for torture and ill-treatment at state and federal level. The US Justice Department, through its Civil Rights Division, has the power to bring criminal prosecutions against state or federal officials as well as to seek injunctions to change systemic practices which violate US civil or constitutional rights. While the latter have led to major improvements in some custodial facilities and police departments, such actions focus on individual jurisdictions, are lengthy to undertake, and are limited in practice to a relatively small number of police or custody agencies. Few states have independent, external monitoring bodies authorized to conduct regular inspections of jails or prisons and to report on conditions and investigate abuses. Some police oversight bodies also lack scope, independence or resources, and complaints against the police are not always dealt with adequately. While victims of abuses can seek compensation through civil actions in the courts, litigation is costly and without serious injury liable to result in substantial damages such a remedy is not available to all victims in practice. Furthermore, the Prison Litigation Act of 1996, although not preventing litigation, has made it more difficult for prisoners to file

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<sup>103</sup> *United States v. Ahmed Omar Abu Ali*, US District Ct. for Eastern District of Virginia.

lawsuits and reduces the compensation for attorneys who represent inmates in civil rights cases.

Although many acts constituting torture or ill-treatment are liable to prosecution under state and federal penal laws and federal civil rights acts, greater protection would exist if the US enacted a crime of torture for offences within US territory in line with its obligations under the Convention. AI is further concerned that the USA has not made a declaration under Article 22, recognizing the competence of the Committee to receive and consider individual communications. As the US has also declared the treaty to be non-self-executing, individuals under US jurisdiction cannot take cases of violations of the Convention to their own domestic courts or to the international protection body set up under the treaty – thereby depriving them of some of the essential guarantees under the treaty.

AI is particularly concerned by the US reservation to article 16, the serious impact of which has already been shown with regard to the treatment of aliens in US custody overseas who the US government has argued have no legal protection against “cruel, inhuman or degrading treatment”, a position which remains open to question despite the Detainee Treatment Act.<sup>104</sup> Within the USA, the reservation signals the USA’s willingness to accept the treaty only insofar as it meets the definition of “cruel and unusual” punishment under the US constitution and requires no change to existing US law. This is of concern because there are laws and practices in the USA which are not unconstitutional (e.g. use of stun belts, electro-shock weapons, conditions in isolation units, holding juveniles with adults) but which fall short of international standards or are of concern to the Committee and other human rights bodies. There are also no binding, national standards or training in the USA with regard to certain practices which commonly lead to abuses (for example, use of restraints, electro-shock weapons).

The following updates or expands upon areas of concern raised in our preliminary briefing.

### **9. Ill-treatment and excessive force by law enforcement officials**

While statistics show that US police resort to force in only a small proportion of incidents, there continue to be disturbing reports of police ill-treatment or use of excessive force in jurisdictions across the USA. They include cases of physical abuse sometimes amounting to torture and ill-treatment and cases where unarmed suspects are shot in circumstances which do not appear to involve an immediate threat to life. In practice officers are rarely prosecuted for on-duty force and inquiries have found that disciplinary action has often been inadequate.<sup>105</sup> While a number of police departments have improved their policies in recent

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<sup>104</sup> See above 2,1 and AI’s Preliminary Briefing to the Committee, p. 10, note 40 (August 2005)

<sup>105</sup> AI’s reports of police ill-treatment include: *USA: Rights for All*, chapter 3 (AI Index AMR 51/35/98); *Race, Rights and Police Brutality* (AI Index AMR 51/147/99); *Amnesty International renews call for investigation into homophobic abuse by Chicago police officers* (AI Index AMR 51/092/2001);

years others still do not have adequate systems for monitoring police abuses, such as tracking officers involved in repeated complaints.

There is evidence that racial minorities are disproportionately the victims of police ill-treatment, including physical and verbal abuse and questionable shootings<sup>106</sup> Discriminatory treatment during police stops and searches – sometimes leading to other abuses such as excessive force – has often been reported. A survey published by the Justice Department’s Bureau of Justice Statistics in 2005 found, for example, that black or Hispanic residents were more likely to be searched or issued with tickets after being stopped by police and more likely to report that police had used excessive force.<sup>107</sup> However, national legislation to prohibit “racial profiling” in law enforcement (the targeting of individuals on account of their race, religion, national origin or ethnicity) at federal, state and local levels, and to provide monitoring and enforcement mechanisms, has yet to be enacted.<sup>108</sup>

Lesbian, gay, bisexual and transgender (LGBT) people are also at risk of discrimination and ill-treatment by police. In September 2005 Amnesty International published a report: *Stonewalled: police abuse and misconduct against lesbian, gay, bisexual and transgender people in the United States*.<sup>109</sup> The report found that, although progress had been made in the recognition of the rights of LGBT people, serious police abuses, including gender-based violence amounting to torture and ill-treatment, against the LGBT community persist. The abuses described in AI’s report included use of sexually explicit, abusive language, humiliating and unnecessary body searches, threats, physical abuse and rape. Amnesty International’s research showed that within the LGBT community, transgender individuals, people of colour, youth, immigrants, homeless individuals and sex workers experienced a

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*Amnesty International’s Concerns on Police Abuse in Prince George’s County, Maryland* (AI Index AMR 51/126/02); *USA: Excessive and lethal force? Amnesty International’s concerns about deaths and ill-treatment involving tasers* (AI Index: AMR 51/139/2004); *USA: Amnesty International’s continuing concerns about taser use* (AI Index: AMR 51/030/2006).

<sup>106</sup> While national data is not available, this is borne out in local statistics, reports of Justice Department investigations into specific departments and other data. See also reference to the Bureau of Justice Statistics report, below

<sup>107</sup> *Contacts between Police and the Public: Findings from the 2002 National Survey*, Justice Department, Bureau of Justice Statistics, April 2005 (<http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf>) The national found the likelihood of being stopped by police did not differ proportionately among white, black or Hispanic drivers and that the differential treatment occurred afterwards; it also noted that further research was needed to analyse the data. However, other research into specific jurisdictions has shown proportionately more black drivers are stopped by police compared to whites, with similar findings with regard to other types of police stops and searches.

<sup>108</sup> The End Racial Profiling Act (ERPA) of 2004 was reintroduced into Congress in 2005 and is still pending. An earlier version of the act was first introduced in 2001 with bipartisan support but lapsed in the aftermath of September 11 2001. There has been a reported increase in incidents of people being stopped, searched or detained on the basis of their religious origin since 11 September 2001. See Amnesty International USA: *Threat and Humiliation: Racial Profiling, Domestic Security and Human Rights in the United States*, op cit

<sup>109</sup> *Stonewalled, Police Abuses against lesbian, gay, bisexual and transgender people in the USA*, September 2005: [web.amnesty.org/library/Index/ENGAMR511222005](http://web.amnesty.org/library/Index/ENGAMR511222005)

heightened risk of abuse. The report also found that police fail to respond adequately to “hate crimes” committed against LGBT people. The report makes a number of recommendations for better police training and accountability as well as improved procedures for the investigation of complaints.

*9.1. Electro-shock weapons:*

Despite the concerns expressed by the Committee in its concluding observations to the USA’s initial report,<sup>110</sup> there has been a substantial increase in the use of electro-shock weapons by law enforcement officials in the past five years. More than 7,000 US local police and jail agencies, as well as the US military, currently deploy new generation high powered tasers: dart firing electro-shock weapons which can also be used close-up as traditional “touch” stun guns. Police departments deploying tasers claim they reduce injuries and save lives by providing officers with an alternative to using their firearms or batons. AI acknowledges the importance of developing non-lethal or “less lethal” force options to decrease the risk of death or injury inherent in the use of firearms or other impact weapons. However, AI’s research shows that tasers are often used in situations where police use of lethal force – or even batons – would never be justified. In many US police departments tasers have become a routine force tool deployed at a relatively low level on the “use of force” scale.<sup>111</sup>

More than 150 people are now reported to have died in the USA after being struck with tasers, with the numbers continuing to rise. While coroners have usually attributed the deaths to factors such as drug intoxication, in at least 23 cases coroners have found the taser shock to have directly caused or contributed to the death. Studies have raised concern that taser shocks may exacerbate a risk of heart failure in cases where people are under the influence of drugs or have underlying health problems: factors applying in many of the cases where people have died.<sup>112</sup> Most of those who died were unarmed men who did not appear to pose a serious threat when they were electro-shocked. Many were given multiple or prolonged shocks, another potential risk factor cited in recent studies.<sup>113</sup> The rising death toll heightens Amnesty

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<sup>110</sup> Conclusions and Recommendations of the Committee against Torture: United States of America, UN Doc. A/55/44 (2000), paras. 175-180, at para. 179 (f).

<sup>111</sup> AI’s concerns regarding use of tasers are described in: *USA: Excessive and lethal force? Amnesty International’s concerns about deaths and ill-treatment involving tasers* (AMR 51/139/2004) and *USA: Amnesty International’s continuing concerns about taser use*, March 2006 (AI Index AMR 51/030/2006). web:amnesty.org/library/index/engamr510302006

<sup>112</sup> Such studies are outlined in AI’s reports, *ibid*

<sup>113</sup> e.g. Eric Hammock died in April 2005 after being tasered more than 20 times by Fort Worth, Texas, police officers when he tried to run away while being questioned for alleged trespassing; Patrick Lee was tasered 19 times by Nashville police in September 2005 and became unconscious at the scene; Ronald Hasse died after being tasered twice by Chicago police, one of the shocks lasting for 57 seconds: the medical examiner ruled he died from taser shocks, with metamphetamine being a contributory factor; Jeffrey Turner was tasered four times in a jail in Ohio in January 2005 for banging repeatedly on his cell window: the coroner ruled the death a homicide, with the taser a contributory factor.

International's concerns about the safety of stun weapons and the lack of rigorous, independent testing of their medical effects.

Apart from health concerns, electro-shock weapons are particularly open to abuse as, portable and easy to use, they can inflict severe pain at the push of a button without leaving substantial marks. Despite such risks, there is little independent scrutiny of taser use in the USA, and no consistent or binding national standards or guidelines. AI has documented many cases where the use of such weapons has constituted cruel, inhuman or degrading treatment in violation of Article 16 of the Convention as well as breaching international guidelines on the use of force. They include use of tasers on children; elderly people; mentally disabled or intoxicated individuals involved in disturbed but non-life-threatening behaviour; pregnant women; unarmed suspects fleeing minor crime scenes; people already in restraints; and people who argued with officers or failed to comply immediately with police commands.<sup>114</sup> In most of the cases documented, officers were not found to have violated their departments' policies.

Amnesty International has called on US state, federal and local authorities to suspend all transfers and use of tasers and other electro-shock weapons pending a rigorous, independent inquiry into their use and effects.

In some US jurisdictions (including the federal system) electro-shock stun belts continue to be used on high security prisoners during transportation, hospital visits or court hearings. Although AI does not have comprehensive data on their use, more courts have reportedly started using stun belts following an incident in Atlanta, Georgia, in March 2005, in which a prisoner overpowered a deputy in court and killed three people, and because visible shackles have been found to undermine defendants' right to a fair trial.<sup>115</sup> Agencies which deploy stun belts include the US Marshal's Service, a federal agency. AI has condemned such devices as inherently cruel and degrading because the wearer is under constant fear of being subjected to an electric shock at the push of a remote control button by officers for the whole time the belt is worn.

## *9.2. Other restraint devices/techniques leading to breaches of the Convention*

Many US police and prison agencies authorize the use of Oleoresin Capsicum (OC) spray (also known as "pepper spray"), an inflammatory agent derived from cayenne peppers. OC spray inflames the mucous membranes, causing coughing, gagging, choking, shortness of breath and an acute burning sensation on the skin and exposed areas. OC spray has been promoted as a safer alternative to weapons such as chemical mace or batons. However, since its introduction in the early 1990s, there have been many reported instances of abuse. These

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<sup>114</sup> Cases include: a women 8 months pregnant, shocked when she refused to sign a speeding ticket; two boys tasered for refusing to leave a shopping mall; a 12-year-old tasered after he had already been placed in restraints; a 15-year-old autistic boy shocked while he was pinned to the ground; a mentally ill woman tasered between 9 and 15 times while in jail; a 13 year old girl weighing 65 lbs who was in handcuffs in a patrol car when shocked.

<sup>115</sup> J. Lambet: *Stun belts are replacing shackles in court, security is literally shocking*, The Kansas City Star, 28 January 2006

have included reports of prisoners being indiscriminately exposed to large quantities of OC spray during cell extractions. In Florida, for example, prisoners have alleged being sprayed in their cells with pepper spray for minor offences, causing burning and blistering to their skin.<sup>116</sup> Since the early 1990s, more than 100 people are reported to have died after being exposed to pepper spray during their arrest by police. While most deaths have been attributed by coroners to other causes, there is concern that OC spray could be a factor in some cases, especially when combined with other restraints, as it affects the respiratory system. AI has expressed concern that, as with tasers, OC spray is usually placed at a relatively low level on the police use-of-force scale, for example, in cases of individuals who, although resisting officers, do not pose a serious threat. However, there is evidence in some departments of a decline in the use of OC spray as this is substituted by the taser. AI remains concerned that there are not enough stringent guidelines regulating the use of chemical sprays by US police and in prisons.

During the past decade many suspects in US custody have died from “positional asphyxia” after being placed in dangerous restraint holds such as a “hogtie” or “hobble restraint”, with their wrists or elbows bound behind them to their shackled ankles. This form of restraint is considered to be a particularly dangerous and potentially life-threatening procedure, especially if the subject is in a prone position. The National Institute of Justice has issued guidelines warning of the dangers of hogtying and advising against placing a suspect in a prone position while in restraints.<sup>117</sup> However, AI is disturbed that many agencies continue to use the procedure in some form.<sup>118</sup>

In recent years, at least 18 people have died in US detention facilities after being immobilized in four-point restraint chairs, including several people who had also been pepper-sprayed and shocked with stun weapons. AI has documented cases in which people have been strapped into the chairs as punishment, or have been left immobilized in them for prolonged periods without adequate safeguards, in violation of international standards on use of restraints and standards prohibiting ill-treatment.<sup>119</sup> As described above, detainees in Guantánamo have also reportedly been subjected to cruel, inhuman or degrading treatment through use of restraint chairs (see 2.4. above). AI remains concerned about the safety of restraint chairs and the lack of clear regulations or monitoring of their use. Although the Committee has previously recommended that the USA should abolish restraint chairs as methods of restraining those in custody, on the ground that they lead to breaches of Article 16,<sup>120</sup> they continue to be used in a wide range of US custody facilities including local jails, federal immigration detention centres and juvenile detention facilities.

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<sup>116</sup> Lawsuit filed by Florida Institutional Legal Services in September 2003 claiming that correctional officers in four Florida prisons “maliciously and sadistically” used pepper spray and teargas on prisoners, some of whom were mentally ill.

<sup>117</sup> National Institute of Justice (NIJ) Advisory Guidelines for the Care of Subdued Subjects (June 1995) and NIJ Bulletin on Positional Restraint, October 1995.

<sup>118</sup> See, for example AI’s report: *USA Excessive and Lethal Force*, op cit, pages 56-61

<sup>119</sup> AI report: *The Restraint Chair: How Many More Deaths?* (AI Index AMR 51/31/2002)

<sup>120</sup> Conclusions and Recommendations of the Committee against Torture: United States of America, UN Doc. A/55/44 (2000), paras. 175-180, at para. 179 (f).



## 10. Long term isolation in super-maximum security confinement.

Thousands of prisoners, many of them mentally ill, continue to be held in long-term isolation in “super-maximum security” facilities, sometimes referred to as Security Housing Units (SHU Units) or Extended Control Units (ECU).<sup>121</sup> At least 30 states and the federal government operate more than 50 such facilities which include entire prisons or units within prisons. As noted above, the US has also constructed similar facilities to house “war on terror” detainees held outside the USA, for example, Camp V in Guantánamo.

While prison authorities have always been able to segregate prisoners who are a danger to themselves or others, or to impose fixed terms of segregation as a penalty for disciplinary offences, super-maximum security facilities differ in that they are designed to house large numbers of prisoners in long-term, or even indefinite, isolation as an administrative control measure. Prisoners in the most restrictive units are typically confined for 23-24 hours a day in small, sometimes windowless, solitary cells with solid doors, with no work, training or other programs<sup>122</sup>; their out-of-cell time is limited to no more than 3-5 hours a week. The facilities are designed to minimize contact between staff and inmates and prisoners are often subjected to regimes of extreme social isolation and reduced sensory stimulation. The length of time inmates are assigned to such facilities varies, but many spend years, and some their whole sentence, in such units. Many units continue to breach specific standards under the UN Standard Minimum Rules for the treatment of Prisoners: for example standards specifying the need for windows, natural light, fresh air and daily outdoor exercise.

Studies have shown that prolonged isolation in conditions of reduced sensory stimulation can cause severe physical and psychological damage. However, mentally ill or disturbed prisoners continue to be held in super-maximum facilities in some states, without adequate treatment or monitoring. In a few jurisdictions, as a result of litigation brought on behalf of prisoners, courts have ordered changes to conditions in super-maximum security units, for example, the removal of the severely mentally ill. However, such rulings are confined only to the specific jurisdiction where the litigation has taken place, and there have been only a few such court decisions. No court to date has found that long-term super-maximum security confinement *per se* violates the US Constitution. In general, US courts have given broad leeway to states to impose harsh conditions of segregated custody on security grounds.

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<sup>121</sup> At the end of 1998 about 20,000 prisoners, or 1.8% of all those serving sentences of 1 year or more in state and federal prisons, were housed in such facilities (King, R.D. (1999) The rise and rise of supermax: An American solution in search of a problem? *Punishment and Society*, 1, 163-186) See also Collins W.C., Supermax Prisons and the Constitution, Liability Concerns in the Extended Control Unit *Department of Justice National Institute of Corrections (NIC)*, November 2004 ; Pizarro J., Stenius, V.M.K. Supermax Prisons: Their Rise, Current Practices, And Effect on Inmates, *The Prison Journal* Vol 84.No.2. June 2004 248-264.

<sup>122</sup> While some units provide in-cell programs through TV these are limited and rarely interactive. Many prisoners are not provided with any programs and remain idle and in complete isolation.

In some states, children under 18 are placed in super-maximum security units, in violation of international standards. Youthful offenders in general tend to be more unruly than older inmates and may be frequently punished with isolation when in adult prisons. A joint report published by AI and Human Rights Watch in September 2005 described how child-offenders serving life without parole were often placed in long-term isolation as punishment for disruptive or disturbed behaviour. In Colorado, 13 out of 24 child offenders contacted for the report had spent time in Colorado's super-maximum prison.<sup>123</sup>

Some prisoners held on terrorism-related charges in the federal system have been held in prolonged isolation in punitive conditions while awaiting trial. For example, AI raised concern with the US government that the pre-trial conditions of Dr Sami Al-Arian (held on charges of alleged support for Palestinian Islamic Jihad), which included isolation, inadequate exercise and heavy shackling during visits with his attorney, were unnecessarily punitive and inhumane.<sup>124</sup> AI has also reported on cruel, inhuman and degrading conditions under which detainees arrested after 11 September 2001 were held in the Security Housing Unit of the Metropolitan Detention Center in New York, where they were held in prolonged solitary confinement, with 24 hour lighting in their cells and inadequate exercise.<sup>125</sup>

## **11. Women prisoners remain vulnerable to sexual abuse**

As the US government states in its report to the Committee, US states and the federal jurisdiction have taken a number of measures to address the problem of sexual abuse in prisons, including the sexual abuse of women prisoners by male guards. 49 states now have laws which criminalize all forms of sexual contact between staff and inmates.<sup>126</sup> The Prison Rape Elimination Act (PREA) of 2003, drafted primarily to combat inmate-on-inmate sexual assaults, also covers staff sexual misconduct. Although the federal government has yet to adopt national standards as called for under the PREA (consultations to implement this process are currently underway), several states have implemented the provisions through state legislation.<sup>127</sup>

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<sup>123</sup> *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, Amnesty International, Human Rights Watch, p. 58

<sup>124</sup> He was tried and acquitted of most charges in December 2005 after nearly three years of detention.

<sup>125</sup> See USA: Amnesty International's concerns regarding post September 11 detentions in the USA (AMR 51/044/2002) pages 28-30. The detainees were held for months without charge before being released or deported. They have also alleged they were physically abused by guards, allegations which were sustained by a subsequent Office of Inspector General investigation.

<sup>126</sup> Vermont is the now the only state not to have enacted such legislation, compared with five states in 2001 and 14 in 1999. Rape and sexual assault have always been crimes under US law. Sexual misconduct laws prohibit all sorts of sexual contact even those which have sometimes been claimed were "consensual".

<sup>127</sup> The PREA, passed in September 2003, provides inter alia for the gathering of national statistics about rape in prison of both male and female prisoners by staff or other inmates; the creation of a national review pane; and grants for state and local authorities to establish more effective programs to tackle the problem.

However, many women in prison remain vulnerable to sexual abuse by staff, and victims may be subject to retaliation for reporting incidents of abuse.<sup>128</sup> According to a recent AI survey of state policies on custodial sexual misconduct, four states (Arizona, California, Delaware and Nevada) still permit holding an inmate criminally liable for engaging in sexual misconduct with a prison official and one state (Arizona) does not take into account the inmate's lack of consent, so even an inmate who is raped could be charged under the law.<sup>129</sup> In addition to rape, which is a form of torture, other types of sexual abuse in prisons commonly include sexually offensive language; male staff intimately touching female prisoners while conducting searches, and male staff watching women while they are naked. Not all such practices may be covered under state sexual misconduct laws. Some jurisdictions continue to allow practices which AI considers are inherently cruel and degrading or are open to abuse: these include allowing male staff to conduct pat down searches of clothed women prisoners; allowing male staff to patrol areas where women may be viewed in their cells while dressing or washing or when taking showers.<sup>130</sup>

In most US jurisdictions, male guards continue to have unsupervised access to female jail and prison inmates, contrary to international standards which provide that female prisoners should be attended and supervised only by female officers. In some states, male guards make up the majority of custodial staff in women's prisons.<sup>131</sup> AI believes such policies make women prisoners especially vulnerable to abuse by officials: unlike in male prisons, most complaints of sexual abuse by women prisoners involve abuses by male staff.

The US has argued that anti-discrimination employment laws in the USA mean that they cannot refuse to employ male guards in women's prisons (or female guards in men's prisons). However, some jurisdictions have placed certain restrictions on male duties in women's prisons (often in response to abuse reports) and US courts have upheld such restrictions as lawful. International standards provide that measures which are designed solely to protect the right and special status of women are not considered discriminatory.<sup>132</sup>

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<sup>128</sup> Protective measures are not always taken or, if they are, this may result in the woman being placed into solitary confinement while the case is under investigation.

<sup>129</sup> *Abuse of Women in Custody: Sexual Misconduct and the shackling of pregnant women*, AIUSA, March 2006. [http://www.amnestyusa.org/women/custody/custody\\_all.pdf](http://www.amnestyusa.org/women/custody/custody_all.pdf) (hereinafter cited as *Abuse of Women in Custody*)

<sup>130</sup> More than half of state statutes allow for cross-gender "pat-down" searches under certain circumstances according to AI's survey.

<sup>131</sup> Rule 53(2) of the *Standard Minimum Rules for the Treatment of Prisoners* states that no male member of staff shall enter the part of the institution set aside for women unless accompanied by a woman officer. Rule 53(3) states that women prisoners shall be attended and supervised only by women officers.

<sup>132</sup> Principle 5(2), *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*.

## 12. Shackling of pregnant women

AI is concerned that many states continue to use restraints (including chains and leg shackles) on sick and pregnant women when they are transported to and kept in hospital, regardless of their security status. Thirty-eight US state departments of corrections and the Federal Bureau of Prisons may use restraints on pregnant women in the third trimester. In some jurisdictions women are kept in restraints while in labour up until the moment of birth and shackled again shortly afterwards.<sup>133</sup> For example, Shawanna Nelson, a prisoner in Arkansas, had her legs shackled together throughout more than 12 hours of labour in September 2003; they were removed only at the point of delivery after repeated requests from nurses and a doctor.<sup>134</sup> In September 2005, Samantha Luther, a prisoner in Wisconsin, was allegedly taken in handcuffs and leg shackles to the local hospital and informed that labour was going to be induced (she was two weeks away from the due date of birth). Reportedly, her handcuffs were taken off while her leg shackles remained on, providing 18 inches between her ankles. She was reportedly left in the shackles until just before birth.<sup>135</sup> The Wisconsin Department of Corrections reported in January 2006 that staff had been directed to end the use of restraints on pregnant inmates during labour, delivery and recovery.

The routine use of restraints in such circumstances is cruel and degrading and contravenes international standards which require that restraints should be used only when “strictly necessary”. Medical experts have also reported that shackling of women while in labour may endanger the health of the woman and her child. While 17 departments of correction told AI they have adopted policies prohibiting restraints during labour and delivery or do not restrain women “in practice”, other states do not have guidelines or policies prohibiting such practices.<sup>136</sup> 23 state corrections departments and the federal Bureau of Prisons have policies that expressly allow restraints during labour.<sup>137</sup>

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<sup>133</sup> At least 23 states and the Federal Bureau of Prisons have policies or practices allowing women to be restrained during labour ( *Abuse of Women in Custody*, op cit)

<sup>134</sup> Adam Liptak: *Prisons Often Shackle Pregnant Inmates in Labor*, New York Times 2 March 2006

<sup>135</sup> Amnesty International USA. *Excessive Use of Restraints on Women in US Prisons: Shackling of Pregnant Prisoners*, (<http://www.amnestyusa.org/women/custody/shackling.html>)

<sup>136</sup> Only six correctional departments have told AI they have written policies prohibiting use of restraints on inmates during labour and birth (Connecticut, DC, Florida, Rhode Island, Washington and Wyoming); Hawaii, Iowa and Kansas reported they have no policy but that practice is not to restrain women during labour and birth; Alabama, California, Missouri, Montana, New Mexico, New York, South Dakota and Texas told AI they did not use restraints during labour and delivery but it was unclear if this was based on policy or practice.: *Overview of State Laws on Custodial Sexual Misconduct and Restraints*: [www.amnestyusa.org/women/custody/abuseincustody.html](http://www.amnestyusa.org/women/custody/abuseincustody.html) ( March 2006)

<sup>137</sup> *ibid*

### 13. Ill-treatment of children and youth in detention

Most youth offenders are tried in state and federal juvenile justice systems, the underlying aim of which is rehabilitation and reform. However, serious abuses have been reported in some juvenile detention facilities, including beatings, cruel punishments, overcrowding, neglect and inadequate rehabilitation or educational programs. In the past decade, the US Department of Justice has investigated and ordered reforms or closure of a number of facilities. However, allegations of ill-treatment persist, including the cruel use of restraints and use of solitary confinement, despite the latter being prohibited under international standards. There is concern over the use of “boot camps” where children are subjected to particularly harsh regimes.

In January 2006 a 14-year-old boy died hours after being admitted to the Bay County Sheriff’s boot camp in Florida. A videotape reportedly showed staff kicking, punching and choking him. There had been previous complaints of abuse at the facility. However, it was revealed that boot camps were exempt from rules introduced in 2004 which restricted use of restraints and force in Florida’s juvenile facilities.<sup>138</sup> In California, in August 2005, an 18-year-old mentally disturbed youth committed suicide after spending eight weeks alone locked in his cell, prompting renewed calls for reform of the state’s juvenile detention facilities, many of which failed to provide adequate safeguards for vulnerable youth. Extended 23-hour lockdown is now reportedly banned in California youth facilities. However, the practice still exists elsewhere.<sup>139</sup>

#### 13.1. Holding children with adults

In its report to the Committee, the USA states that in federal prisons juveniles are not regularly held in prison with the regular prison population and that “Federal law prohibits juvenile offenders held in custody of federal authorities from being placed in correctional institutions or detention facilities in which they could have regular contact with adult offenders”. However, as the USA acknowledges, practice varies at the state level. Furthermore, under federal and state laws children under 18 may be tried and sentenced as adults for certain offences, in which case they could be held in adult facilities and incarcerated alongside adults (see also the section on life without parole, below). Since 1980 there has been a growing trend in the USA to try and sentence children as adults and to hold them in adult facilities. By 1997 all but three states (Nebraska, New York and Vermont) had changed

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<sup>138</sup> The camp was later closed and the Justice Department is investigating, but others exist around the country.

<sup>139</sup> For example, a report released by the Nevada ACLU in July 2005 criticised a Clark County juvenile facility in Las Vegas for isolating unruly teenagers in their rooms for long periods when they were not a threat, as well as for improper use of pepper spray and restraint chairs.

their laws to make it easier for child offenders to stand trial and be sentenced in adult criminal courts.<sup>140</sup> A national survey by the US Department of Justice found that, as of 1998, approximately 14,500 youthful offenders (most aged 16 or 17) were in adult facilities (9,100 in jails and 5,400 in prisons).<sup>141</sup> The same survey found that only 13 per cent of institutions maintained separate units for youthful offenders. The Justice Department study also found that 39% of the child offenders in adult prisons had been sentenced for non-violent crimes, such as property or drugs offences. Young people in adult prisons often face harsh conditions and inadequate educational or rehabilitation, and they can be particularly vulnerable to rape or sexual assault by other inmates. As noted above, young offenders in adult prisons are also at risk of being placed in isolation or super-maximum security confinement.

### *13.2. Child offenders serving life without parole*

A joint study published in October 2005 by AI and Human Rights Watch reported that, as of 2004, at least 2,225 child offenders under 18 at the time of the crime were serving sentences of life without parole in the USA.<sup>142</sup> 42 US states and the federal system permit children prosecuted as adults to be sentenced to life-without-parole. In 27 of the 42 states, the sentence is mandatory for anyone, child or adult, found guilty of certain enumerated crimes. AI considers such a sentence to constitute cruel, inhuman or degrading punishment in the case of child offenders, who are still developing physically, mentally and emotionally. It is also prohibited under the Convention on the Rights of the Child, signed but not ratified by the USA. One third of the youth offenders identified by the study as serving life without parole entered prison while still children, in violation of international human rights standards which prohibit the incarceration of children with adults.

Of the cases examined, 16 per cent of the offenders (most of whom were sentenced for homicides) were aged between 13 and 15 at the time of the crime and 59 per cent received the sentence for their first ever conviction. Many were convicted of “felony murder” based on evidence of their participation in a crime during which a murder took place, but without direct evidence of their involvement in the killing. Once in prison, even when still under 18, they were commonly denied access to vocational or other programs because of their whole life sentence. The study found that black youth nationwide were serving life without parole sentences at a rate ten times higher than for white youth (and constituted 60% of all child offenders serving life without parole). The study was unable to draw conclusions on the available data as to the cause of the racial disparity. However, it reflected research studies

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<sup>140</sup> *Juvenile Offenders and Victims: 1999 National Report*, p. 89

<sup>141</sup> *Juveniles in Adult Prisons and Jails: a National Assessment*, US Department of Justice, Office of Justice Programs, October 2002

<sup>142</sup> *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, Amnesty International, Human Rights Watch, [web.amnesty.org/library/Index/ENGAMR511622005](http://web.amnesty.org/library/Index/ENGAMR511622005)

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which have found that minority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system in the USA.<sup>143</sup>

Although nearly all of the cases in the study involved children sentenced under state laws, the researchers were contacted by one youth offender, who was 15 at the time of his crime and is serving life without parole in the federal system for his role as a lookout in a conspiracy to commit murder.<sup>144</sup> The federal Bureau of Prisons had earlier told AI that it had no prisoners serving life without parole who were sentenced as children and AI is currently seeking information on whether there are others in the system.

The report called on the US and state governments to propose and urge legislators to enact legislation abolishing the sentence of life without parole for children, to suspend the sentence pending its abolition and to grant child offenders serving such sentences immediate access to parole procedures. It also recommended that prosecutors cease seeking such sentences and, instead of filing charges against child offenders directly in criminal court, refer all child offenders to juvenile court.

#### **14. The Death Penalty**

Amnesty International opposes the death penalty as a violation of fundamental rights: the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment. The cruelty of the death penalty is manifest not only in the execution but in the time spent under sentence of death. When the USA ratified the Convention, it did so on the understanding that the Convention did not restrict or prohibit it from applying the death penalty, “including any constitutional period of confinement” prior to execution.

In the USA death row inmates typically spend more than a decade awaiting execution, some more than 20 years. For example, Clarence Ray Allen was executed in California on 17 January 2006 after 23 years on death row. A 77-year-old Native American, he was blind, confined to a wheelchair and suffered from serious heart disease and diabetes. One of the US Supreme Court judges, Justice Stephen Breyer, wrote a dissenting opinion to the Supreme Court’s decision not to grant a stay of execution in his case stating that he believed, in the circumstances, that it “raises a significant question as to whether his execution would constitute cruel and unusual punishment”.<sup>145</sup> Several courts outside the USA have held that

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<sup>143</sup> See, e.g. Eileen Poe-Yamagata and Michael A. Jones, *And Justice for Some* (Building Blocks for Youth Initiative for the National Council on Crime and Delinquency, 2000), available online at: <http://www.buildingblocksforyouth.org/justiceforsome/jfs.html>

<sup>144</sup> *The Rest of Their Lives*, page 120.

<sup>145</sup> *Allen v Ornoski* 06-0091

long periods of confinement on death row renders the punishment cruel, inhuman or degrading, as has the Human Rights Committee.<sup>146</sup>

While the length of stay on death row is related (at least in part) to the appeals system, an essential safeguard against wrongful conviction, this does not reduce the cruel, inhuman or degrading nature of confinement on death row. Constitutional challenges and changes to death penalty laws at various points have also put many cases on hold, increasing the time spent in cruel conditions and in a state of uncertainty. Most death row prisoners' living conditions are extremely bleak. They are typically confined to small cells for most of the day often in conditions of extreme deprivation and isolation, and are excluded from prison educational and employment programs. Added to this is the cruelty of not knowing if and when they will be executed.

The US takes the position that methods of execution currently employed in the United States do not constitute cruel and unusual punishment under the US Constitution.<sup>147</sup> However, in January 2006, the US Supreme Court agreed to decide whether it would hear appeals filed by three inmates arguing that lethal injection (the method used by most states) was unconstitutional because the mix of drugs used caused excessive pain. The appeals were based on a study reported in the medical journal, the *Lancet*, on 16 April 2005, which said that 21 of 49 inmates executed by lethal injection in Arizona, Georgia, North Carolina and South Carolina may have been conscious and feeling pain.<sup>148</sup> AI has also documented cases in which individuals given lethal injection were moving and apparently conscious and in pain for part of the procedure. A decision by the court on whether to accept the case for appeal is due in April 2006.

In recent years the US has abolished the death penalty for child offenders<sup>149</sup> and the mentally retarded. However, the AI retains many concerns about how the US death penalty is implemented, including execution of the seriously mentally ill and borderline mentally disabled; racial disparities; lack of access of indigent defendants to adequate legal counsel and

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<sup>146</sup> e.g. the Judicial Committee of the Privy Council decision in 1993 in *Pratt and Morgan*, Jamaica. The Supreme Court of Canada ruled in 2001 that the potential for long incarceration before execution was a "relevant consideration" in making the extradition of 2 Canadian citizens to the US conditional on death sentences not being imposed (*US v Burns*, S.C.R. 283,353,123). The Human Rights Committee has expressed concern about the long stay on death row which "in specific instances, may amount to a breach of article 7 of the Covenant" (Concluding observations of the Human Rights Committee: United States of America, 03/10/95. CCPR/C/79/Add.50;A/50/40, paras. 266-304 )

<sup>147</sup> This was stated, for example in the USA's combined second and third periodic report to the Human Rights Committee on implementation of the International Covenant on Civil and Political Rights, submitted on 21 October 2005 ([www.state.gov/g/drl/rls/55504.htm](http://www.state.gov/g/drl/rls/55504.htm))

<sup>148</sup> The study found that sodium thiopental, which is used as anaesthesia in lethal injections, may not work properly, and that a second drug which induced paralysis would mean the condemned person "would experience suffocation and excruciating pain without being able to move or communicate that fact".

<sup>149</sup> AI is concerned, however, that child offenders who are non-US nationals and who may be classed as "enemy combatants" might still be named to be tried before military commissions and possibly sentenced to death (no such child offender has yet been so charged).



fair trial concerns - practices which breach international standards, including those set out in the ECOSOC guidelines.<sup>150</sup> These and other concerns have been documented in numerous AI reports.<sup>151</sup>

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<sup>150</sup> Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the Economic and Social Council in Resolution 1984/50 adopted on 25 May 1984 and Resolution 1989/64, adopted on 24 May 1989

<sup>151</sup> AI's most recent major report on the death penalty is USA: '*People are seeing you do this*': *The execution of mentally ill offenders* (AI Index: AMR 51/003/2006, January 2006, <http://web.amnesty.org/library/Index/ENGAMR510032006>)



**APPENDIX 1. AMNESTY INTERNATIONAL'S PRELIMINARY BRIEFING TO  
THE UN COMMITTEE AGAINST TORTURE**

**UNITED STATES OF AMERICA:  
Amnesty International's preliminary briefing  
to the Committee against Torture (August 2005)**

In advance of the adoption by the Committee against Torture (the Committee) of its list of issues in relation to the second periodic report submitted by the United States of America (USA),<sup>1</sup> Amnesty International wishes to outline in this preliminary briefing its principal concerns regarding the implementation by the USA of its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention). The key issues presented here will be developed in more detail in the briefing which will be submitted by Amnesty International in advance of the Committee's examination of the US report at its 36<sup>th</sup> session in May 2006.

Since the submission of its initial report, the US administration has continued to assert its condemnation of torture and ill-treatment and its commitment to what it calls the "non-negotiable demands of human dignity".<sup>2</sup> However, these statements run counter to what has been happening in practice. Since the atrocious attacks of 11 September 2001, the USA has taken the lead in pursuing what it terms a "global war on terror". Amnesty International is deeply concerned that, while the USA has a duty to protect the security of its citizens, many of the measures taken in this context have shown a disregard for international human rights and humanitarian law and standards, including the fundamental rights set out under the Convention.

Foremost among these concerns are reports of the widespread use of torture and other cruel, inhuman or degrading treatment (hereinafter ill-treatment) of detainees held in US custody in Afghanistan, Iraq, Guantánamo Bay in Cuba, and

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<sup>1</sup> UN Doc. CAT/C/48/Add.3/Rev.1, 6 May 2005.

<sup>2</sup> U.S. President's statement on the United Nations International Day in Support of Victims of Torture, 26 June 2004, see Annex 2, *ibid*.

other locations outside the USA.<sup>3</sup> As Amnesty International has argued in recent reports, many of these violations are a direct result of government policy, including moves by the administration to narrow its interpretation of the definition of torture under Article 1 of the Convention; the authorization of methods of interrogation prohibited under the Convention as cruel, inhuman or degrading treatment; holding detainees incommunicado; “disappearances”; and generally the removal of detainees from the protection of the law, thereby creating a climate in which torture and other ill-treatment can flourish. The government has also failed to show leadership or to take action to ensure that those responsible for violations at the highest levels are held accountable.

On the domestic front, the USA retains many laws, institutions and mechanisms to address human rights violations and provide redress for victims of violations. However, practices identified by the Committee as incompatible with the provisions of Article 16 of the Convention, including the use of electro-shock devices and “excessively harsh” conditions of solitary confinement in “supermaximum” security prisons,<sup>4</sup> remain in force. Some of these practices have been exported for use by US forces abroad and/or have informed the treatment of detainees in US custody in the context of the “war on terror”. Amnesty International will address these and other domestic human rights violations in its detailed briefing.

The USA’s ratification of the Convention came with various “reservations, interpretative understandings and declarations”, the effect of which was to limit the application of the Convention by ensuring that it offered no greater protection than already existed under US law. Far from withdrawing them, as recommended by the Committee in 2000,<sup>5</sup> government officials have cited those same reservations, declarations and understandings to advise that harsh interrogation techniques employed in the context of the “war on terror” could be lawfully authorized and applied with impunity.

While the USA has long taken a selective approach to international standards, Amnesty International believes that the US government has taken unprecedented steps in recent years to withdraw from, or disregard, its obligations under international

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<sup>3</sup> See Amnesty International’s reports, *Human dignity denied: Torture and accountability in the ‘war on terror’* (AI Index: AMR 51/145/2004, October 2004) (hereinafter *Human dignity denied*) and *Guantánamo and beyond: The continuing pursuit of unchecked executive power* (AI Index: AMR 51/063/2005, May 2005) (hereinafter *Guantánamo and beyond*). Official inquiries have found ill-treatment went beyond a few isolated cases, as the government initially claimed.

<sup>4</sup> Conclusions and Recommendations of the Committee against Torture: United States of America, UN Doc. A/55/44 (2000), paras. 175-180, at para. 179(f).

<sup>5</sup> See *ibid.*, para. 180(a).

treaties, a development which threatens to undermine the whole framework of international human rights law, including the consensus on the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment. This is an extremely disturbing development which we hope the Committee will take into account when considering the US report.

### **Articles 1 and 16: The use of torture and other cruel, inhuman or degrading treatment**

As Amnesty International has documented in various reports, there has been a pattern of torture and other ill-treatment of detainees held in US custody in Afghanistan, Iraq, Guantánamo Bay in Cuba, and other locations outside the USA, both pre-dating and post-dating the torture and other ill-treatment in Abu Ghraib. Evidence derives from a wide range of sources, including official investigations, information from agents who witnessed interrogations and victim testimony.

Allegations of ill-treatment in Abu Ghraib and elsewhere include acts which fall clearly within the definition of torture under Article 1 of the Convention. Other forms of ill-treatment violate the prohibition against cruel, inhuman or degrading treatment under Article 16 and may amount to torture when imposed over a prolonged period or used in combination, which was often the case. Reported methods of torture and other ill-treatment include prolonged incommunicado detention; “disappearances”; beatings; death threats; threats of torture; electric shocks; forcing shackled detainees into painful stress positions; sexual humiliation; threats of rape; forced nudity; exposure to extreme heat or cold; denial of food or water; immersion in water; use of dogs to inspire fear; racial and religious insults; sensory deprivation techniques such as hooding and blindfolding, sleep deprivation, exposure to loud music and prolonged isolation.

Many of the measures taken were specifically for the purposes of interrogation, or to “soften up” detainees for interrogation, as found by several official inquiries. Government memoranda also authorized techniques specifically to break down “high value detainees” during interrogation.

Conditions of detention such as those in Guantánamo, specifically prolonged isolation and indefinite detention, have been part of the ill-treatment of detainees and themselves amount to cruel, inhuman or degrading treatment.

At least 27 detainees who died in US custody had their deaths listed as “homicides”, in some cases after substantial evidence of torture. For example, records from an investigation carried out into the deaths of two detainees held incommunicado at the US airbase in Bagram, Afghanistan, in December 2002, indicated that they were severely beaten over several days;

one was beaten more than 100 times with blows to the leg and was kept hooded and chained to a ceiling.<sup>6</sup>

When ratifying the Convention, the USA entered an “understanding” regarding Article 1 which arguably restricts the scope of the definition of torture provided in this article. A Justice Department memorandum prepared in August 2002, reportedly in response to a CIA request for legal protections for its agents, concluded *inter alia* that interrogators could cause a great deal of pain before crossing the threshold to torture. Specifically, it suggested that torture would only occur if the pain rose to the level “that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions”.<sup>7</sup> This memorandum came to light only in June 2004, after the Abu Ghraib scandal broke, and has subsequently been withdrawn (see below).

The panel appointed in May 2004 by Secretary of Defense Donald Rumsfeld to review the Pentagon’s detention operations (the Schlesinger Panel) also took an apparently narrow definition of torture. Releasing the panel’s report on 24 August 2004, Chairman John Schlesinger said “There is a problem in defining torture. We did not find cases of torture, however”.<sup>8</sup> In the actual report, the panel suggested a definition of torture as “any treatment that causes permanent harm”, reflecting the language in the USA’s reservation to the Convention against Torture and in 18 U.S.C. 2340, which refers to “prolonged mental harm”.<sup>9</sup>

In order to avoid any further moves to narrow the definition of torture, and to demonstrate its commitment to the prohibition of torture, the US government must withdraw its understanding to Article 1 and ensure that any domestic legislation criminalising torture strictly follows this Article’s definition.

## **Article 2:**

In its second periodic report to the Committee against Torture, the USA asserts its unequivocal opposition to the use or practice of torture under any circumstances, including war or public emergency. While this assertion is welcome, there are serious concerns about the government’s commitment in practice to taking effective measures to prevent acts of torture or other ill-treatment in the context of its “war on terror”. For example:

- The US government has made similar assertions in the past, at a time when secret memoranda (later published) in which senior administration officials advised the government on how to avoid its obligations under international law, including treaties

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<sup>6</sup> Deaths in US custody in Afghanistan and Iraq are described on pages 109-116 and in Appendix 1 of *Guantánamo and beyond*.

<sup>7</sup> Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, Office of the Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, August 1, 2002, p. 6.

<sup>8</sup> Press Conference with members of the Schlesinger Panel, Department of Defense News Transcript, 24 August 2004.

<sup>9</sup> Final Report of the Independent Panel to Review Department of Defense Detention Operations, August 2004. [http://www.defenselink.mil/news/Aug\\_2004/d20040824finalreport.pdf](http://www.defenselink.mil/news/Aug_2004/d20040824finalreport.pdf)

prohibiting torture and other cruel, inhuman or degrading treatment were in force. These documents were apparently government policy during a period (2002-2004) when detainees in Afghanistan, Guantánamo and other locations, and later Iraq, were subjected to widespread torture and other ill-treatment.

- The Justice Department memorandum of August 2002, narrowing the definition of torture, stating that the US President had authority, in wartime, to override international treaties prohibiting torture and that the defences of “necessity” and “self-defense” were available to officials who torture,<sup>10</sup> was replaced in late December 2004.<sup>11</sup> The replacement memorandum, while undoubtedly an improvement on its predecessor, leaves numerous questions unanswered and the door open to possible future abuses. Specifically, it sets aside (as “unnecessary” for discussion) rather than rejects both the notion that the President has the authority to order torture and that torturers can be immune from prosecution or conviction through the use of the defences of “necessity” and “self-defense”.<sup>12</sup>
- The US administration has sanctioned interrogation techniques that, even if, used in isolation or for a limited time, may not amount to torture, constitute cruel, inhuman and degrading treatment and have been used for prolonged periods and in combination, causing pain and suffering - physical, mental or both - that is “severe”.<sup>13</sup> These techniques have included stripping, hooding, stress positions, isolation, “sleep adjustment” and the use of dogs in interrogations.
- The December 2004 memorandum does not address the question of cruel, inhuman or degrading treatment, despite the fact that its August 2002 predecessor claims that these are “acts... that states need not criminalize”, which leaves this position the only one which the U.S. administration has so far offered. This ignores the fact that such treatment is absolutely prohibited under international human rights and humanitarian law, even in time of war or public emergency. The Justice Department has recently asserted that it is not legally bound to apply Article 16 of the Convention to those held outside the USA (see below).
- There is evidence that the decision not to apply the Geneva Convention to detainees in Afghanistan or Guantánamo (or to grant them protections under other international treaties or US law) created a climate of impunity that transferred to Iraq. The US government continues to assert that “enemy combatants” are not entitled to such protections. In a central policy document, which has not been rescinded, President

<sup>10</sup> See pages 59-60 of *Human dignity denied*.

<sup>11</sup> Daniel Levin, Acting Assistant Attorney General, *Memorandum for James B. Comey, Deputy Attorney General, Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*, 30 December 2004.

<sup>12</sup> See pages 107-108 of *Guantánamo and beyond*.

<sup>13</sup> See Conclusions and Recommendations of the Committee against Torture: Special report of Israel, UN Doc. A/52/44 (1997), para. 257, where the Committee concluded that methods of interrogation not dissimilar to those used by the USA constituted torture, and that “[T]his conclusion is particularly evident where such methods of interrogation are used in combination”.

Bush has stated that some detainees “are not legally entitled to such [humane] treatment”.<sup>14</sup>

- Thousands of detainees remain in US custody in Iraq, Afghanistan, Guantánamo and other locations, many in conditions conducive to torture and other ill-treatment. These include *incommunicado* detention; denial of access to lawyers, families or the courts; “disappearances” and detentions in secret locations. Some conditions, for example prolonged isolation and *incommunicado detention* may in themselves constitute ill-treatment.
- Allegations of torture and other ill-treatment continue to be reported. For example, an Afghan detainee released from five months’ detention in March 2005 told the BBC that, while detained in a US Forward Operating base in Afghanistan, he had been stripped naked during interrogation and deprived of food and sleep.<sup>15</sup> Amnesty International is currently investigating other reports of torture and other ill-treatment.

**The USA must clarify to the Committee, in no uncertain terms, that under its laws no one, the President included, has the right or the authority to torture or ill-treat detainees or to order their torture or ill-treatment, under any circumstances whatsoever; that every one, the President included, who does so will have committed a crime; and that the defences of “necessity,” “self-defence” and “superior orders” are categorically not available to those who torture or ill-treat detainees. Amnesty International is deeply concerned that anything short of this clarification will indicate that there are “grey areas” in US law, policy and practice where torture and other ill-treatment are considered acceptable.**

### **Article 3:**

There is evidence that the USA has engaged in “renditions” (secret transfers) of detainees to third countries with a record of torture and other ill-treatment, in grave disregard of its obligations under Article 3. Indeed, there is disturbing evidence that the US has deliberately “outsourced” torture by specifically selecting countries with a record of torture to receive certain “war on terror” detainees for interrogation.<sup>16</sup> In March 2005, based on interviews with current and former government officials, the New York Times reported that the CIA had been given expansive authority to conduct renditions shortly after 11 September 2001 and had since flown 100 to 150 “war on terror” suspects to various countries, including Egypt, Jordan, Pakistan, Saudi Arabia and Syria.

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<sup>14</sup> Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, the Chief of Staff to the President, the Director of Central Intelligence, the Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff. *Subject: Humane treatment of al Qaeda and Taliban detainees*, The White House, 7 February 2002.

<sup>15</sup> See Amnesty International’s report, *US detentions in Afghanistan: An aide-mémoire for continued action* (AI Index: AMR 51/093/2005, June 2005).

<sup>16</sup> See page 20 of *Guantánamo and beyond* and pages 182-183 of *Human dignity denied*.



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While the practice is shrouded in secrecy, several individuals transferred from US custody (or with US collusion) to third countries have testified to having been tortured.<sup>17</sup>

In its second periodic report to the Committee, the US government states that it “does not transfer persons to countries where the United States believes that it is ‘more likely than not’ that they will be tortured”, adding that “The United States obtains assurances as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred”.<sup>18</sup> The “more likely than not” standard places a higher burden on the individual opposing his or her return or transfer than under the Convention against Torture. Amnesty International considers diplomatic assurances to be unacceptable as evidence that no substantial risk of torture or ill-treatment exists in the receiving state, especially given the record of torture and lack of legal protections in many of the countries concerned. Such assurances are both evasive of and erosive of the absolute prohibition on torture and other ill-treatment in general and on *refoulement* in particular, in addition to being inherently unreliable.

#### Articles 4 and 5:

The US government has not made torture a distinct crime under federal law, except with regard to acts committed outside US territory (the Anti-Torture Act, 18.U.S.C. section 2340, enacted in 1994). Despite mounting evidence that war crimes and other international crimes, including torture, in some cases resulting in death, have been committed by US forces in the “war on terror”, no US agent has been prosecuted for “torture” or “war crimes” under available legislation. Indeed, during key periods, as noted above, senior administration officials were advising the government on how to immunize US agents from criminal liability for torture and war crimes.

Following exposure of torture and other ill-treatment at Abu Ghraib and elsewhere, a relatively small number of low-ranking soldiers have been court-martialled for offences under the Uniform Code of Military Justice (UCMJ). High ranking officers, including commanders who may have been responsible for authorizing or turning a blind eye to torture and other ill-treatment, have not been prosecuted. Although the UCMJ does not expressly criminalize “torture”, there are several offences recognized under it which can be used to punish acts of torture or ill-treatment, including “cruelty”, “maltreatment” and “assault”, as well as manslaughter or murder. However, in many cases the punishments do not appear to have been commensurate with the grave nature of the offence as required under Article 4 (2). In over 70% of announced official investigations conducted in response to substantiated allegations of abuse, the punishment has been non-judicial or administrative.

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<sup>17</sup> See, for example, cases cited on pages 122-124 of *Guantánamo and beyond*, and recent testimony provided to Amnesty International from Yemeni detainees allegedly tortured in Jordan before being transferred to US custody in an undisclosed location (See Amnesty International’s report, *USA/Jordan/Yemen: Torture and secret detention: Testimony of the ‘disappeared’ in the ‘war on terror’* (AI Index: AMR 51/108/2005, August 2005)).

<sup>18</sup> US second periodic report, para. 27.

Only one civilian contractor, but no CIA agent, has so far been charged with an offence, despite allegations of abuse involving such personnel. The only civilian contractor to be charged so far was a contractor working with the CIA accused of beating a detainee so severely during interrogations that he died of his injuries. The contractor was charged with assault under the Patriot Act rather than for torture or war crimes. The Military Extraterritorial Jurisdiction Act of November 2000 (MEJA), which can be applied to civilian contractors working for the US abroad, was not used in this instance.<sup>19</sup>

Failure to recognize and punish torture and other ill-treatment outlawed under international law can lead to a climate of impunity which encourages such crimes. The USA must ensure that its criminalization of torture covers all the conduct prohibited by the USA's international obligations and is applicable to all detention centres.<sup>20</sup>

Amnesty International believes that greater protection would exist were the US to enact legislation specifically criminalising torture under US domestic law. This should include amending the UCMJ expressly to outlaw torture. This would send a clear message at all levels that acts falling within the definition of Article 1 will not be tolerated or prosecuted under the guise of a lesser offence, and would serve to strengthen the deterrence as well as punishment of such crimes.

#### **Article 10:**

The US government has failed to ensure that education and information regarding the prohibition of torture and other cruel, inhuman or degrading treatment has been fully included in the training of relevant personnel involved in "war on terror" detentions and interrogations. Rather, through its selective application of international standards, the government has sought to circumvent its obligations in this regard. The administration has also been silent during public debates on torture initiated by prominent individuals in the USA on various occasions in the past few years.

Official inquiries have pointed to the gross deficiencies in training and supervision of personnel involved with detainees in Iraq and Afghanistan during critical periods, including soldiers, medical personnel and civilian contractors. A Schlesinger Panel member has stated for example that the "extreme lack of resources [and] the policy failure at all levels to assure a clear and stable set of rules for treatment and interrogation ... opened the door to abuse" at Abu Ghraib, adding that the situation was "compounded by inadequate training". The Army Inspector General's report in July 2004 also noted numerous instances where interrogations in

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<sup>19</sup> See pages 158-160 of *Human dignity denied*.

<sup>20</sup> As Amnesty International has described in *Human dignity denied* (page 140), the Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (4 April 2003) advised the government in 2003 that 18 U.S.C 2340 did not apply to the conduct of US personnel at Guantánamo on the ground that the naval base fell within US territory (the opposite of what the government was at that time claiming before the US courts on the applicability of the US Constitution). This is yet another example of attempts to avoid criminal liability for possible acts of torture by US agents outside the USA.

Afghanistan and Iraq were carried out by soldiers, contractors and medical personnel without the relevant training. The Fay report into abuses in Abu Ghraib noted evidence that “little, if any, training on Geneva Conventions was presented to contractor employees”.<sup>21</sup> There is ample testimony that the administration’s decision to reject the applicability of the Geneva Conventions to “war on terror” detainees in Afghanistan and Guantánamo ended up causing confusion to interrogators in Iraq, contributing to torture and other ill-treatment. There was also a lack of cultural awareness training with regard to detainees.<sup>22</sup>

While military training manuals have been revised (see below), these do not apply to the CIA. Continued failure to apply the Geneva Conventions to those the administration designates as “enemy combatants” could still leave the door open to torture and other ill-treatment. President Bush’s statement in 2002, quoted above, that some detainees are not legally entitled to humane treatment – a document which has not been rescinded - remains cause for concern.

#### **Article 11:**

In Section 1.2 of *Human dignity denied* (pages 57-73), Amnesty International describes in detail the various interrogation techniques authorized for use by US forces in Afghanistan and Guantánamo, and later exported to Iraq. The techniques were listed in a series of official documents and memoranda, including directives signed by Secretary of Defense Rumsfeld and the then Commander of the US Forces in Iraq, Lieutenant General Ricardo Sanchez. They include many of the interrogation techniques recommended in the April 2003 final report of the Pentagon’s Working Group on Detainee Interrogations in the Global War on Terrorism (a document which has never been rescinded), some of which went beyond standard US army interrogation doctrine and include: hooding; mild physical contact; dietary manipulation; environmental manipulation (e.g. adjusting temperature); sleep adjustment and sleep deprivation; threat to transfer to a third country (where the subject is likely to fear he would be tortured or killed); isolation; prolonged standing; increasing anxiety by use of aversions (e.g. presence of dogs).

According to reports, a revised version of the 1992 military interrogation field manual (FM 34-52), which was in final draft form in June 2004, will expressly prohibit the use of dogs in interrogations and other practices such as stress positions, stripping and sleep deprivation. However, it will reportedly include methods which amount to cruel, inhuman and degrading treatment even when applied strictly, notably treatment described as “fear-up harsh,” and whose application in the past has led to torture and even death.<sup>23</sup> In addition, the field manual would only govern interrogations by Department of Defense personnel and not, for example,

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<sup>21</sup> See pages 164-166 of *Human dignity denied*.

<sup>22</sup> See page 22 of *Human dignity denied*.

<sup>23</sup> See for instance in the case of the death during interrogation of Iraqi Maj. Gen. Abed Hamed Mowhoush, on 26 November 2003. Official documents on the trial of those suspected of killing him were released by *The Washington Post*, and are available on [http://www.washingtonpost.com/wp-srv/nation/documents/mowhoush\\_court\\_document.pdf](http://www.washingtonpost.com/wp-srv/nation/documents/mowhoush_court_document.pdf), accessed 5 August 2005.

those conducted by the CIA (although it would reportedly prohibit other agencies such as the CIA from holding unregistered detainees in DOD-controlled facilities).

The current director of the CIA, Porter J. Goss, has told the US Senate Armed Services Committee that all current interrogation methods being used by the CIA are legal and none constitute torture.<sup>24</sup> However, Goss referred to the methods of “water boarding,” in which a detainee is strapped down, forcibly pushed under water and made to believe he might drown, as “what I will call professional interrogation techniques...”.<sup>25</sup> This, despite the fact that similar methods have been described by human rights monitoring bodies as amounting to torture.<sup>26</sup> The reluctance of the government (and official agencies investigating abuses) to call certain practices “torture”, or to assert an absolute prohibition in law and practice against all forms of cruel, inhuman or degrading treatment, continues to give cause for concern about legal guidance provided.<sup>27</sup>

In December 2002, Secretary of Defense Rumsfeld authorized stripping, isolation, sensory deprivation, hooding, stress positions and the use of dogs in interrogations in Guantánamo. While he subsequently rescinded the order, in April 2003 he signed a further memorandum authorizing techniques which included isolation and “sleep adjustment” on a case-by-case basis; he also reserved the right to authorize any “additional interrogation techniques” in individual cases. This has not been withdrawn. The door remains open, therefore, for the government to authorize techniques, including those which may amount to torture, on a discretionary basis in individual cases.

The USA continues to run a network of detention facilities in which detainees are deprived of basic legal safeguards, a situation in which torture and other ill-treatment can occur. While Guantánamo detainees now have limited access to the US courts and legal counsel (despite legal submissions by the US government arguing against such access), detainees in Afghanistan, where some of the worst cases of torture and other ill-treatment are alleged to have occurred, have no such access. The ICRC continues to be denied access to a number of detainees or facilities in Afghanistan, including Forward Operating Bases.<sup>28</sup> Many of the

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<sup>24</sup> See page 127 of *Guantánamo and beyond*.

<sup>25</sup> Hearing of the Senate Armed Services Committee. Subject: Threats to U.S. National Security. 17 March 2005. The Transcript is available at <[http://www.humanrightsfirst.org/us\\_law/etn/docs/fedwires125g.htm](http://www.humanrightsfirst.org/us_law/etn/docs/fedwires125g.htm)>, accessed 9 April 2005.

<sup>26</sup> See for instance *Ann Maria Garcia Lanza de Netto v. Uruguay, on behalf of Beatriz Weismann de Lanza*, Communication No. 8/1977 (3 April 1980), UN Doc. CCPR/C/OP/1 at 45 (1984), para. 9. The Human Rights Committee describes similar method (immersion of the victim’s head in dirty water, near to asphyxia, and ‘submarino seco’) consistently, alongside other methods, as “torture,” the only question being whether they actually took place, and found a violation of Article 7 of the International Covenant on Civil and Political Rights (para. 16).

<sup>27</sup> Neither the government nor official inquiries have found any of the approved interrogation techniques amounted to torture even if alone or in combination they would fall into this category. For example, at Senate confirmation hearings, neither Mr Gonzales or Ms Rice were willing to describe “waterboarding” as torture (see page 128 of *Guantánamo and beyond*). Mr Gonzales has also asserted that the USA is not bound by Article 16 in regard to treatment of prisoners held outside the USA.

<sup>28</sup> Recent reports that the US intends to transfer several hundred detainees currently in US custody in Afghanistan and Guantánamo to the custody of their home countries does not allay concern that prisoners will continue to be held in US custody without access to legal safeguards. There is also concern that new prisons being proposed to

thousands of detainees in US custody in Iraq are also held for various periods in *incommunicado* detention, deprived of access to lawyers, their families or the courts.

Furthermore, an unknown number of so-called “high-value detainees” – perhaps several dozen – are allegedly being held in CIA custody in secret locations in Afghanistan and elsewhere, leaving them outside the protection of the law in what therefore constitutes “disappearances”, itself a crime under international law. Their conditions and treatment remain unknown and are not subject to any outside scrutiny.<sup>29</sup> “Disappearances” have been found by human rights monitoring bodies to constitute torture.<sup>30</sup>

### **Articles 12 and 13:**

In its report to the Committee on the treatment of detainees held by US forces outside its territory, the USA states that it “has taken and continues to take all allegations of abuse very seriously” and cites the extensive investigations which have taken place. However, the criminal and administrative inquiries to date have lacked the necessary independence and scope to address the extent of torture and other ill-treatment. The Church Committee, for example (which the US government has described in its report as “the most comprehensive [investigation] to date”) found “no link between approved interrogation techniques and detainee abuse”,<sup>31</sup> despite many of these violating international standards prohibiting torture or other ill-treatment. The Church investigation did not interview a single detainee or former detainee, nor did it interview Secretary Rumsfeld.

Most of the investigations to date have consisted of the military investigating itself, and none has investigated the higher echelons of the administration, or the USA’s involvement in secret transfers to and secret detentions in other countries. The involvement of the CIA in these and other cases has not been scrutinized. No criminal investigation has been conducted into the role of senior government officials who may have engaged in a conspiracy to sanction acts which constitute torture and other war crimes and/or to immunize officials from criminal liability for torture and other ill-treatment.<sup>32</sup>

The administration has also failed to adequately investigate evidence of torture and other ill-treatment in Afghanistan, Guantánamo and Iraq pre-dating the Abu Ghraib scandal, raised by organizations including the ICRC and Amnesty International. Its investigations into deaths in

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house Afghan detainees may be modelled on US supermaximum security prisons, in which conditions of prolonged isolation may amount to cruel, inhuman or degrading treatment.

<sup>29</sup> See pages 100-116 of *Human dignity denied*.

<sup>30</sup> See Human Rights Committee, *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994).

<sup>31</sup> Unclassified executive summary of review of Department of Defense interrogation operations, conducted by the Naval Inspector General, Vice Admiral Albert T. Church, III, 10 March 2005, <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>, p. 13.

<sup>32</sup> See Chapter 12 of *Guantánamo and beyond*.

custody also raise issues of concern, including delays and cover-ups and/or an absence of autopsies in some cases which have hindered investigations.<sup>33</sup>

#### **Article 14:**

As noted in the USA's report to the Committee, there are a range of mechanisms by which persons within the USA and foreign nationals outside the USA can seek compensation for violations by US officials. The onus is on the victim to initiate lawsuits for financial compensation. Amnesty International is concerned that foreign nationals held outside the USA in the context of the "war on terror" lack the means and resources to access these procedures and thus are without an effective remedy.

As emphasized by the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law,<sup>34</sup> the issue of reparation should focus not only on monetary compensation, but consider restitution, satisfaction, guarantees of non-repetition and rehabilitation.

Rehabilitation is an important form of reparation in the case of torture survivors. There are undoubtedly people who have suffered physical and psychological sequelae as a result of their treatment in US custody during the "war on terror". Some, as noted, have died. The ICRC has reported detainees held in Iraq "presenting signs of concentration difficulties, memory problems, verbal expression difficulties, incoherent speech, acute anxiety reactions, abnormal behaviour and suicidal tendencies", symptoms which "appeared to have been caused by the methods and duration of interrogation".<sup>35</sup> Amnesty International has spoken to former Guantánamo detainees who have described ongoing physical and mental problems as a result of their treatment in US custody, but who have received no assistance after being peremptorily removed back to their home countries.<sup>36</sup>

The US authorities should ensure that anyone who has suffered torture or ill-treatment while in US custody has access to, and the means to obtain, full reparations wherever they may reside.

#### **Article 15:**

The US report to the Committee states that US law provides strict rules regarding the exclusion of coerced statements and the inadmissibility of illegally obtained evidence in criminal trials.

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<sup>33</sup> See, for example, pages 146-152 of *Human dignity denied* and Chapter 13 of *Guantánamo and beyond*.

<sup>34</sup> UN Doc. E/CN.4/2005/59, 21 December 2004, Annex I.

<sup>35</sup> *Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during arrest, internment and interrogation, February 2004*. The leaked report can be found at [http://www.globalsecurity.org/military/library/report/2004/ICRC\\_report\\_Iraq\\_feb2004.htm](http://www.globalsecurity.org/military/library/report/2004/ICRC_report_Iraq_feb2004.htm).

<sup>36</sup> See, for example, interviews cited on pages 13-20 of Amnesty International's report, *USA: The threat of a bad example: Undermining international standards as "war on terror" detentions continue* (AI Index: AMR 51/114/2003, August 2003, <http://web.amnesty.org/library/index/engamr511142003>)

However, the Committee should be aware that the rules for military commissions, introduced by President Bush by Military Order on 13 November 2001 to try non-US nationals designated as “enemy combatants”, do not exclude statements extracted under torture or other coercive methods. A February 2002 memorandum from the Justice Department to the Pentagon, made public by the administration on 22 June 2004, states that “incriminating statements may be admitted in proceedings before military commissions even if the interrogating officers do not abide by the requirements of *Miranda*”.<sup>37</sup>

Amnesty International is concerned that any guilty pleas or detainee testimony (including witness testimony) brought before the military commissions could be the result of the conditions in which detainees have long been held without any legal process, and which amount to cruel, inhuman or degrading treatment, as well as interrogation techniques which may amount to torture or other ill-treatment.

Amnesty International has called for trials by military commissions to be abandoned as they are in flagrant violation of international law and standards for a fair trial on a number of grounds.<sup>38</sup>

#### Article 16:

The Committee may wish to examine the link between the USA’s reservation to Article 16 and abuses that have been authorized or alleged in the “war on terror”.<sup>39</sup> In January 2005, then White House Counsel Alberto Gonzales reported to the Senate that the Justice Department “has concluded that under Article 16 [of the Convention against Torture] there is no legal prohibition under the Convention against Torture on cruel, inhuman or degrading treatment with respect to aliens overseas”.<sup>40</sup>

This conclusion was based on the fact that the USA’s reservation to Article 16 limited the application of Article 16 only to conduct already prohibited by the Fifth, Eighth and Fourteenth Amendments to the US Constitution, and that these amendments were themselves limited and did not provide rights for aliens ill-treated by US officials outside the USA.<sup>41</sup>

The argument that no alien in US custody outside the USA has any legal protection from “cruel, inhuman or degrading treatment” is untenable and incompatible with human rights and humanitarian law. The USA should abandon this position and withdraw its reservation to Article 16.

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<sup>37</sup> Memorandum for William J. Haynes, II, General Counsel, Department of Defense. Re: Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 26 February 2002. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court established the right to remain silent and the right to legal counsel prior to any interrogation.

<sup>38</sup> See page 69 of *Guantánamo and beyond*.

<sup>39</sup> See pages 170-172 of *Human dignity denied*.

<sup>40</sup> Responses of Alberto R. Gonzales, Nominee to be Attorney General, to the written questions of Senator Dianne Feinstein, January 2005.

<sup>41</sup> See page 7 of *Guantánamo and beyond*.

**Article 16 and US domestic law:**

The USA has failed to amend its laws or practices in areas of concern raised by the Committee after its consideration of the USA's initial report in May 2000. Amnesty International has particular concerns about the following:

- **Supermaximum security (supermax) prisons:** Thousands of prisoners are held in supermax facilities in long-term solitary confinement under conditions which may constitute cruel, inhuman or degrading treatment or punishment. Prisoners assigned to such facilities include the mentally ill and juveniles. Although courts have ordered improvements to conditions in some supermax units, these decisions are limited in application. Conditions remain extremely harsh in many states and often the review procedures for assignment to supermax confinement are deficient.
- **Sexual abuse of female detainees and prisoners:** The Committee expressed concerns on this issue in its concluding observations on the USA's initial report.<sup>42</sup> While some measures have been taken (for example, the Prison Rape Elimination Act),<sup>43</sup> Amnesty International is concerned that male guards continue to have unsupervised access to female prisoners in many states, in contravention of international standards and in circumstances which can make such prisoners vulnerable to sexual abuse. Cases of sexual assault of female prisoners by male guards continue to be reported.
- **Electro-shock weapons and other restraint devices:** The Committee expressed concerns on this issue in its concluding observations on the USA's initial report.<sup>44</sup> In its second periodic report to the Committee, the USA states that the use of electro-shock stun belts, restraint chairs and other restraint devices such as stun guns, chokeholds and pepper spray, is not prohibited *per se* by the US Constitution, but that there are recommended limits on their use. However, there are no consistent, binding standards for the use of such devices, and in many instances they are deployed in a way that amounts to cruel, inhuman or degrading treatment or punishment. Amnesty International is particularly concerned by tasers: dart-firing electro-shock weapons used by more than 5,000 local US police and jail agencies. Since 2001, more than 130 people are reported to have died in police custody in the USA and Canada after being struck with tasers, raising serious concern about the safety of such weapons.<sup>45</sup> Apart

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<sup>42</sup> See para. 179(d).

<sup>43</sup> The Act, passed in September 2003, provides *inter alia* for the gathering of national statistics about rape in prison of both male and female prisoners by staff or other inmates; the creation of a national review panel; and grants for state and local authorities to establish more effective programs to tackle the problem.

<sup>44</sup> See para. 179(e).

<sup>45</sup> See Amnesty International's report, *USA: Excessive and lethal force? Amnesty International's concerns about deaths and ill-treatment involving tasers* (AI Index: AMR 51/139/2004, November 2004, <http://web.amnesty.org/library/index/engamr511392004>). The report documents 74 deaths, the vast majority occurring in the USA. At least 58 more people have died in taser-related incidents since the report was published in November 2004. Although the deaths have usually been attributed to factors such as drug intoxication or heart



from health concerns, electro-shock weapons are particularly open to abuse as they can inflict severe pain at the push of a button without leaving substantial marks. Amnesty International's research has shown that tasers have been widely used against individuals who do not pose a serious threat, including children, the elderly and people under the influence of drink or drugs. At least two people have died after being stunned and strapped into restraint chairs.<sup>46</sup>

- **Police brutality:** The Committee expressed concerns on this issue in its concluding observations on the USA's initial report.<sup>47</sup> Amnesty International continues to receive reports of police brutality and unjustified shootings, although some large departments have improved their procedures following federal investigations into systematic problems of excessive force. Lesbian, gay, bi-sexual and transgender (LGBT) individuals are particularly at risk of police abuse in some areas, as a forthcoming Amnesty International report will document.
- **Children in prison:** The Committee expressed concerns on this issue in its concluding observations on the USA's initial report.<sup>48</sup> Children under the age of 18 continue to be housed with adults in some facilities, in violation of international standards. More than 2,000 juvenile offenders in the USA, sentenced as adults for serious crimes, are currently serving sentences of life without parole, a sentence Amnesty International believes is cruel, inhuman and degrading punishment when imposed on child offenders.

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disease, coroners have found taser shocks directly contributed to deaths in at least 15 cases. Questions remain in other cases and some medical experts believe taser shocks can exacerbate a risk of heart failure in cases where people are agitated, under the influence of drugs or have underlying health problems.

<sup>46</sup> *Ibid*, pages 52 and 57.

<sup>47</sup> See para. 179(c).

<sup>48</sup> See para. 179(i).

**APPENDIX 2: CONVENTION AGAINST TORTURE AND OTHER CRUEL,  
INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT- PART I,  
ARTICLES 1 TO 16.**

**Adopted and opened for signature, ratification and accession by  
General Assembly resolution 39/46 of 10 December 1984**

***entry into force 26 June 1987, in accordance with article 27 (1)***

**(Relevant Articles)**

**PART I**

***Article 1***

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

***Article 2***

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

**Article 3**  **General comment on its implementation**

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

**Article 4**

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

**Article 5**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
  - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
  - (b) When the alleged offender is a national of that State;
  - (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

**Article 6**

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as

provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

#### ***Article 7***

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

#### ***Article 8***

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

**Article 9**

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

**Article 10**

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

**Article 11**

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

**Article 12**

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

**Article 13**

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

**Article 14**

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

***Article 15***

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

***Article 16***

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.