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Human Rights Watch's Submission to the Committee Against Torture in Response to United States Positions Expressed During the Committee's Consideration of the Second Periodic Report of the United States on May 5 and May 8, 2006.

Human Rights Watch commends the Committee for its vigorous and incisive questioning of the United States during two days of hearings in Geneva, on May 5 and May 8, 2006.

We were concerned, however, about the substance of a number of the United States' responses. The following document highlights areas of central concern that we hope the Committee will address in its final Conclusions and Recommendations.

(1) Accountability for Abuse (Articles 4, 5, 6, 7)

U.S. Position: The United States continues to argue that the instances of abuse and torture are limited to a few individuals, and that those involved have been held fully accountable for their unlawful acts. The United States also attacked figures put forth by Human Rights Watch (stating that out of several hundred cases of detainee abuse involving at least 600 personnel, only 54 service members had been convicted by courts-martial, and only 10 received sentences for more than one year), and instead offered its own figures: 89 persons convicted by courts-martial and 19 sentenced for more than one year.

Response: Having made numerous requests to the Department of Justice and Department of Defense for this information, Human Rights Watch welcomes the new openness and transparency with regard to these figures and urges the United States to provide details on those courts-martials that were not publicly reported. But, the underlying critique remains the same: the lack of real accountability for abuse. Even according to the government's own figures, there have been 29 deaths in military custody that were ruled homicides, yet only 19 individuals received sentences of more than one year. Out of the 270 actions taken against service members, the vast majority received administrative and disciplinary sanctions -- often just a letter of reprimand placed in their file. Moreover, not a single officer has been charged on the basis of command responsibility, despite internal investigations and released

government documents that show that many of the interrogation methods that led to widespread abuse at Abu Ghraib prison and in detention facilities elsewhere in Iraq and Afghanistan were first explicitly approved by the administration for use at Guantánamo Bay.[1]

(2) The Right to Redress (Articles 13, 14)

U.S. Position: The United States argues that it sufficiently complies with its obligations to ensure redress for torture and abuse.

Response: Since the passage of the Detainee Treatment Act in December 2005, detainees at Guantánamo Bay have been precluded from raising claims in an independent court alleging torture or other abuse *even after they are released from custody*. Moreover, there are no mechanisms in place, of which we are aware, for detainees in Iraq or Afghanistan to seek redress for abuse. And certainly, the "disappeared" prisoners held by the United States in undisclosed locations worldwide have no mechanism for raising claims of torture or abuse before an independent body – such persons are even denied visits by the International Committee of the Red Cross.

(3) Evidence Obtained Through Torture(Article 15)

U.S. Position: The United States argues that federal law and the new Military Commission Instruction Number 10, which purports to prohibit the use of evidence obtained through torture in military commissions, sufficiently satisfy its Article 15 obligation not to use evidence obtained through torture.

Response: Although Military Commission Instruction No. 10 bars the use of evidence obtained through torture in any of the military commission proceedings at Guantánamo Bay, it falls far short of what is required under the Convention.[2] The instruction does not bar the use of evidence acquired by abusive interrogations that fall short of torture but nonetheless violate the prohibitions against cruel, inhuman or degrading treatment. It is also unclear how evidence acquired through torture would be excluded in practice. The instruction does not oblige the prosecution to ascertain and disclose that evidence was obtained through torture. Nor does it establish who has the burden of proof in a case where the defendant raises a challenge to evidence on the grounds that it was obtained through torture. If the burden is placed on the defendant, without a concomitant obligation on the prosecution to disclose, this will be a meaningless prohibition. It will be extremely difficult, if not impossible, for a defendant to corroborate a claim of torture or abuse without the assistance of an independent investigation by the prosecution who, unlike the defense, has access to the interrogators and interrogation logs.

Moreover, Instruction No. 10 does not prohibit the use of evidence obtained through torture in either the Combatant Status Review Tribunals or Annual Review Boards (military bodies convened to evaluate the status of detainees at Guantánamo Bay). To the contrary, the Detainee Treatment Act requires these military bodies to assess whether statements from the detainee were obtained through coercion and then assess the "probative value of the statement."[3] The implication of this rule is that statements obtained through torture or cruel, inhuman or degrading treatment could be used as evidence if they have sufficient probative value

Another area of concern is the recent U.S. federal court case that appears to allow the use of evidence derived from torture. In November 2005, Ahmed Omar Ali was convicted on terrorism conspiracy charges and subsequently sentenced to thirty years in prison. At trial, the government relied extensively on a confession made by Ali while he was detained in Saudi Arabia. Ali maintains that he was tortured, beaten,

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[1] *See, e.g.,* Major Gen. George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade ("Fay Report") at 29, *available at* http://www.defenselink.mil/news/Aug2004/d20040825fay.

[2] U.S. Department of Defense, "Military Commission Instruction No. 10. "Certain Evidentiary Requirements," March 24, 2006, available at: http://www.defenselink.mil/news/Mar2006/d20060327MCI10.pdf.

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

whipped, and ultimately coerced into confessing.[4] The court, however, denied the defense team's request to present evidence of scars on his back suggesting that he had been tortured.[5] It also precluded the defense from presenting general evidence regarding Saudi Arabia's poor human rights record on torture, instead taking at face value Saudi officials' statements denying the existence of torture in Saudi Arabia. In so doing, they ignored U.S. Department of State country reports of widespread abuse of prisoners by the Saudi Arabian government.[6]

(4) Intelligence Operations

U.S. Position: The United States refuses to comment on any activities of Central Intelligence Agency (CIA) officers or contractors or any other intelligence officers.

Response: The Convention's prohibitions on torture and cruel, inhuman and degrading treatment apply equally to intelligence, civilian, and military operations. The United States' claim that it need not answer any questions about the practices and policies pursued by intelligence officers sets an untenable precedent for the Committee that suggests that torture and cruel, inhuman and degrading treatment can go unchecked and unmonitored if carried out by a state's intelligence branch.

As Ms. Nora Sveaass stated at the May 8 hearing, the Committee has never inquired into intelligence operations, but has instead asked about the rules, policies, and procedures that guide intelligence actions. This is clearly within the Committee's mandate. The Committee can – and should - inquire into whether the rules, policies, and procedures that guide intelligence actions comply with the prohibition against torture and cruel, inhuman and degrading treatment.

(5) Extraterritorial Reach of Article 3

U.S. Position: The United States takes the position that its Article 3 obligation not to send someone to a country where they will be in danger of being subjected to torture does not apply if a person is initially arrested or detained outside the territory of the United States. Rather, the United States argues that its legal obligation not to send someone to a country where they are in danger of being tortured only applies if the person is arrested or detained within the United States. In making this argument, the United States argues that the terms "expel," "return," and "extradite" refer to the act of sending an individual from one's own country to another.[7]

Response: The purpose and intent of Article 3 of the Convention is to prohibit member states from sending individuals to countries where they will be subjected to torture. That prohibition is clear; there is no basis for making the geographic location of where an individual is detained the triggering factor in its application.

The United States also argues a general policy not to transfer individuals to countries where they are more likely than not to be subject to torture, regardless of where they are initially detained, and that therefore the issue as to the applicability of a legal obligation is irrelevant. But a general policy – which can always be changed and modified – and a binding legal obligation carry very different weight. The U.S. claim that

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[4] Matthew Barakat, "Man Found Guilty of Plotting to Assassinate Bush gets 30 Years in Prison," *Associated Press*, March 30, 2006.
[5] Order, filed 2/3/05, United States v. Abu Ali, Criminal Docket No. 1:05-cr-00053-GBL-1 (E.D.VA).
[6] United States Department of State, Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices 2005: Saudi Arabia," March 8, 2006, available at: http://www.state.gov/g/drl/rls/hrrpt/2005/61698.htm. ("Ministry of Interior (MOI) officials were responsible for . . . incidents of abuse of prisoners, including beatings, whippings, and sleep deprivation. In addition, there were allegations of beatings with sticks and suspension from bars by handcuffs. There were allegations that these practices were used to force confessions from prisoners.")
[7] The United States concedes that the term "return" contains some ambiguity, but relies on a Supreme Court decision, *Sale v. Haitian Centers*, 509 U.S. 155, 179 (1993), a case interpreting the 1951 Refugee Convention, to argue that the term "return" exclusively prohibits the transfer from one's own territory to another. But as a matter of international human rights law, the provision in article 3 makes it clear that sending any person to a country where they are likely to be tortured is prohibited.

Article 3 is inapplicable to detainees held outside U.S. territory would create a dangerous loophole in the prohibition against returning individuals to states that torture.

(6) Diplomatic Assurances & Rendition to Torture (Article 3)

U.S. Position: The United States continues to promote its policy of relying on diplomatic assurances as a safeguard against a return to torture.

Response: Diplomatic assurances are unenforceable – and often unmonitored – promises by a receiving country that an individual returned to that country will not be subjected to torture. As is exemplified by the case of Maher Arar – a Canadian who was transferred to Syria, in reliance on diplomatic assurances, yet subsequently tortured anyway – these assurances often fail to protect transferred individuals from torture. Of particular concern, the United States accepts such assurances even without any monitoring provision. Moreover, when asked by Mr. FernandoMarino Menendez whether the United States would continue to rely on diplomatic assurances if the country had previously tortured an individual returned to its custody, in violation of prior diplomatic assurances, the United States answered that the past practices would be "highly relevant." The answer should have been, "no." Absent evidence of substantially changed conditions, no individuals should be transferred to a country that had previously subjected someone to torture or abuse.

(7) **Incommunicado Detention and Forced Disappearances (Articles 2, 5, 13, 14, 16)**

U.S. Position: The United States argues that there is no explicit prohibition on holding detainees incommunicado and denying the International Committee of the Red Cross (ICRC) access to these detainees. In making this argument, the United States notes that the Fourth Geneva Convention recognizes that, in certain circumstances, spies and saboteurs shall be regarded as having forfeited their "rights of communication."

Response: First, the United States is wrong in its interpretation of the Fourth Geneva Convention. The "spies and saboteurs" provision that the United States refers to was designed for an obvious and valid purpose: to keep the capture of a spy secret and to prevent spies and saboteurs from passing on information to their side during a military occupation. Under this provision, the United States could legitimately limit detainee contacts with the outside world that would create a security risk. That would include, as is the practice with detainees at Guantánamo, censoring letters sent via the ICRC. It might even entail prohibiting all letters from a detainee in a specific case. But the ICRC does more than carry letters – it examines the health and well-being of detainees and their conditions of detention, and does so in a confidential manner. There is no justification for the denial of ICRC visits to check on the condition of an entire group of detainees.

Second, as a matter of the Geneva Conventions and customary international humanitarian law, the ICRC must be granted regular access to all persons deprived of their liberty in an armed conflict.[8] According to the Geneva Conventions, visits may be refused for reasons of "imperative military necessity," but only as an exceptional and temporary measure. The ongoing incommunicado of detainees held by the United States can no longer be described as either exceptional or temporary.

Third, if the United States is claiming that the detainees were not picked up during an international armed conflict, then human rights law applies. Here, it is important to note that the "ghost detainees" held by the United States are not merely being held incommunicado, they are "disappeared," a serious violation of international human rights law.[9]

[8] See, e.g., Third Geneva Convention, article 126; Fourth Geneva Convention, article 7, par. 6 and article 143.

[9] See Declaration on the Protection of All Persons from Enforced Disappearances (1992), ("[E] nforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, *followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law"* (emphasis added).). A similar

Of note, the United States routinely criticizes other governments for holding people in incommunicado detention and for engaging in "disappearances." Belarus, Burma, China, Equatorial Guinea, Ethiopia, Indonesia, Nepal, North Korea, the Philippines, Russia, Sudan, Syria, Uzbekistan, and Zimbabwe were all criticized by the United States for the use of "disappearances" and incommunicado detention in the latest release of the State Department's annual Country Reports on Human Rights Practices (released on March 8, 2006, and covering events in 2005).

(8) No Federal Crime of Torture (Articles 2, 4)

U.S. Position: The United States argues that it need not enact a federal or military criminal law prohibiting torture because all acts of torture are already criminalized under federal, state, and military law.

Response: U.S. federal and military law do not adequately criminalize torture. The U.S. anti-torture statute, 18 USC Sec. 2340A, only covers acts of torture committed outside the United States. Under the Uniform Code of Military Justice, torture is addressed indirectly through substitute crimes such as assault and maltreatment. Mental torture is not covered by the substitute crimes for torture. Moreover, the maximum sentences for the substitute crimes are often quite low. Members of the military who torture detainees may be prosecuted for simple assault or aggravated assault, which carry a maximum sentence of six months; cruelty and maltreatment, which carries a sentence of one year; aggravated assault, which carries a maximum sentence of five years; and possibly maiming, which carries a sentence of seven years, but requires an intent and heightened proof of physical disfigurement or the destruction of a bodily part, which would not apply in a variety of torture cases that do not involve such injuries.[10] While prosecutors can obtain additional sentences and seek consecutive sentences under other criminal provisions, the fact remains that the available sentences for the substantive abuses are quite low. Thus, it is possible that even soldiers who have severely tortured detainees can receive minor punishments of mere months of confinement, as has occurred in the cases of those prosecuted for abuses perpetuated in Abu Ghraib and elsewhere in Iraq and Afghanistan. [11]

(9) Waterboarding: Definition of Torture (Article 1)

U.S. Position: The United States continues to refuse to denounce waterboarding as torture.

Response: Waterboarding is torture. It is a form of mock drowning that causes severe physical suffering in the form of reflexive choking, gagging, and the feeling of suffocation. It may cause severe pain in some cases. If uninterrupted, waterboarding causes death by suffocation. It is also foreseeable that waterboarding, by producing an experience of drowning, will cause severe mental pain and suffering. Many victims of waterboarding suffer prolonged mental harm for years and even decades afterward.

While the United States has stated that waterboarding will be prohibited under the new Army Field Manual on Intelligence Interrogation, this manual will not be binding on CIA officers. The United States should explicitly prohibit waterboarding by all agents of the government – including civilian intelligence officers.

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definition is found in the newly drafted (but not yet approved) International Convention for the Protection of All Persons from Enforced Disappearance.

[10] 10 U.S.C. §§ 893, 924, 928, 934 (2000).

[11] In a case from April 2003, for example, a Marine shown to have mock-executed four Iraqi juveniles (by making them kneel next to a ditch and firing his weapon to simulate an execution) was found guilty of cruelty and maltreatment and sentenced to thirty days hard labor without confinement and a fine of $6336. *See* United States Marine Corps, *USMC Alleged Detainee Abuse Cases Since 11 Sep 01*, Aug. 5, 2004, at 2, http://www.aclu .org/torturefoia/released/navy3740 .3749.pdf (last visited Apr. 15, 2006). Two other marines who used an electrical transformer to shock a detainee were found guilty of assault, cruelty and maltreatment, dereliction of duty, and conspiracy, but were sentenced to only eight months and one year respectively.