

## United States<sup>1</sup>

**IHF FOCUS: rule of law and the judicial system; fair trial and detainees' rights; torture, ill-treatment and police misconduct; death penalty; asylum seekers and immigrants; women's rights; homosexuals' rights.**

The United States (US) continued its attempts to undermine the International Criminal Court (ICC) by seeking bilateral immunity agreements with a number of other states. The tactics employed against generally poorer and weaker states came under fierce criticism from human rights organizations. Measures undertaken in the fight against terror continued to operate as a threaten human rights and civil liberties.

The US failed to comply with international standards with regard to persons suspected of terrorism. In addition, the Bush administration was accused of seeking to limit women's reproductive rights and homosexuals' rights. The treatment of mentally ill detainees also brought the US under attack, as it emerged that such persons do not receive adequate treatment and are often victims of the penitentiary system. Despite some positive developments, the US continued to execute persons within its territory, despite international commitments and general concerns about the fairness of capital punishment.

### **Rule of Law and the Judicial System**

#### *The International Criminal Court (ICC)*

In June, Human Rights Watch (HRW) published a document entitled "Bilateral Immunity Agreements," which provides a summary of the bilateral negotiations around the world as part of US efforts to undermine the ICC. While the establishment of the ICC in 2002 represented an important step forward for international justice, the US' long-standing opposition to the ICC intensified since mid-2002. The Bush administration engaged in a widespread campaign to undermine and marginalize the ICC to prevent it from becoming an effective instrument of justice. After "unsigned" the Rome Statute, the US government threatened the future of United Nations peacekeeping operations and negotiated a Security Council resolution providing a limited, one year exemption for citizens of non-state parties to the Rome Statute—this includes US personnel—participating in UN peacekeeping missions of UN authorized operations. After this, the Bush administration launched a worldwide campaign to negotiate bilateral immunity agreements (BIAs) that would exempt US nationals from ICC jurisdiction.

The bilateral agreements sought by Washington would require states to send an American national requested by the ICC back to the US, instead of surrendering him/her to the ICC. Importantly, Washington's agreement would remove the ICC's oversight function, which is the fundamental principle underpinning the Rome Statute and is critical to close the door on impunity.

In a 28 March address to foreign ministers recommending strategies for responding to US requests for ICC immunity, HRW noted that since the judicial elections to the court it had received many reports of increasing US pressure on states to sign BIAs. A basic objective of the

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<sup>1</sup> Unless otherwise stated, this chapter is based on material from Human Rights Watch (HRW).

Rome Statute is to allow the court to step in and investigate or prosecute if states prove “unwilling or unable” to conduct good faith prosecutions.

HRW canvassed officials from numerous governments pressured by US diplomats. For example, US representatives made blunt threats to suspend military, economic and other forms of assistance if a bilateral agreement is not signed. These threats varied from one country to another. In one state they threatened to end assistance to upgrade the country’s principal airport, while in another they threatened to review and eliminate all “dispensable programs.”

In its report, HRW concluded that the ICC has the potential to be the most important multilateral rule of law mechanism created in decades. The election of the eighteen judges and the informal consensus selection of the prosecutor represent important progress in establishing the court. In addition, the quality of these men and women constitutes a powerful refutation of propaganda against the court. Governments were urged to resist the efforts to undermine it, and to defend the multilateral institution.

HRW developed six non-negotiable benchmarks for states engaging US interlocutors in BIA negotiations in order for governments who enter into discussions with the US to formulate a negotiating position that is fully consistent with the ICC treated.<sup>2</sup>

The American Servicemembers’ Protection Act (ASPA) revoked military assistance to countries that have ratified the ICC unless they conclude a separate bilateral agreement with the US by 1 July 2003, agreeing never to hand over US personnel to the ICC.

As of 15 March 2004, 85 countries had reportedly signed a BIA with the US. Of ICC member states, 57 (out of 92) had not signed a BIA.<sup>3</sup>

In a letter to Secretary of State Colin Powell dated 30 June, HRW charged that US officials were “engaged in a worldwide campaign pressing small, vulnerable and often fragile democratic governments to sign bilateral agreements with Washington [...]. These agreements would exempt 270 million Americans and foreign nationals working under contact to the US government from the authority of the court. [...] Whatever the administration thinks of the ICC, its tactics in pursuing these bilateral agreements are unconscionable.” The same letter stated that US Ambassador Lawrence Rossin published an article in Croatia raising questions about the viability of Croatia’s accession to NATO if Zagreb did not sign a bilateral immunity agreement. Before Bosnia’s signature and subsequent ratification of an agreement, Bosnian Foreign Ministry Mladen Ivanic said that the US message was that it would be “very difficult to continue military and other assistance” if Bosnia did not sign.<sup>4</sup>

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<sup>2</sup> HRW, “Bilateral Immunity Agreements,” 20 June 2003. Note: the document is only a summary. The status of bilateral negotiations around the world is rapidly changing so this document requires continuous updating.

<sup>3</sup> Citizens for Global Solutions, “Bilateral Immunity Agreements,” 15 April, at [http://www.globalsolutions.org/programs/law\\_justice/icc/bias/bias\\_home.html](http://www.globalsolutions.org/programs/law_justice/icc/bias/bias_home.html).

<sup>4</sup> See HRW, “Letter to Colin Powell on US Bully Tactics Against International Criminal Court,” 30 June 2003; and HRW, “US: End Bully Tactics Against Court,” 1 July 2003.

## **Fair Trial and Detainees' Rights**

### *Guantánamo Detainees*

Human rights organizations urged the release from the US military facility at Guantánamo Bay, Cuba, of all members of the Taliban armed forces held solely because of their participation in the war in Afghanistan as well as any civilians with no meaningful connection to al-Qaeda. Unless these detainees are prosecuted for a crime, there is no legal basis for their continued detention; the 1949 Geneva Conventions require their release and repatriation. Any detainee implicated in war crimes, crimes against humanity, or other criminal offenses, including acts of terrorism, should be prosecuted by courts that meet international fair trial standards.

The US was also urged to comply with the requirements of international human rights law with regard to persons held at Guantánamo who were apprehended outside areas of armed conflict and have no direct connection to an armed conflict. For such persons, even if they were alleged to be terrorist suspects, the laws of war did not apply. Under well-established human rights law, the US cannot lawfully hold these detainees without charges and without providing them access to legal counsel. There were numerous allegations that the detainees at Guantánamo include some civilians.

In addition to persons captured during the armed conflict in Afghanistan, the US took into custody alleged terrorist suspects from other locations, including Bosnia-Herzegovina. The US asserted that all detained terrorist suspects were being held as part of the worldwide war against terrorism, although the US has not applied the Geneva Conventions or international human rights law to their cases. As noted, terrorist suspects detained during the war in Afghanistan, if not POWs, must be treated as protected persons in accordance with the Geneva Conventions.

The US asserted that anyone apprehended for involvement in international terrorism against the US may be treated as an enemy combatant, no matter where they are found and regardless of the circumstances. This open-ended expansion of the concept of armed conflict had no basis under international law.<sup>5</sup>

## **Torture, Ill-treatment and Police Misconduct**

Since 11 September 2001, the US government has reportedly facilitated or participated directly in the transfer of numerous persons without extradition proceedings, a practice known as "irregular rendition," to countries in the Middle East known to practice torture routinely.

Expelling, returning or extraditing a person to a country where there are substantial grounds for believing that he/she would be subjected to torture is a violation of the UN Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, a treaty that the US ratified in 1994. The Bush administration acknowledged this obligation, and asserted it does not render suspects if it believes it is likely that they will be tortured.<sup>6</sup>

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<sup>5</sup> HRW, "Human Rights Watch Letter to Donald Rumsfeld," 6 March 2003.

<sup>6</sup> HRW, "United States: Stop Handing Over Detainees to Torturers," 7 November 2003.

- The US reportedly transferred Maher Arar, a Syrian-born Canadian citizen, to Syria after having detained him in New York as he was en route from Tunisia to Montreal. On 4 November in Ottawa, Arar publicly asserted that, while held in Syrian prisons for ten months, he was repeatedly tortured by being whipped with a thick electric cable and threatened with electric shocks.

### *Police Brutality*

At least 21 people were injured during an anti-war demonstration at Port of Oakland, California, on 7 April, after police reportedly fired non-lethal weapons, including beanbags, wooden bullets and sting ball grenades at demonstrators. Twelve of the victims were protesters, and nine were bystanders who were not involved in the demonstration. Those injured were reportedly hit in the back, arms, necks and faces.<sup>7</sup>

### *Treatment of Terrorist Suspects*

Since the US government launched a war against terrorism, increasing reports of misconduct by US officials towards detainees in US custody in different places around the world have raised suspicions of practices that amount to torture or cruel, inhuman or degrading treatment under the UN Convention against Torture. Moreover, keeping detainees *incommunicado*—without access to a lawyer, relatives or a court of law—facilitates torture and other forms of unacceptable conduct by interrogators and is in violation of due process standards.<sup>8</sup>

The US has incarcerated more than 650 people at Guantánamo Bay, Cuba, and more persons at other locations around the world. Detainees were held in legal limbo, arguably in contradiction with international covenants. The interrogation methods used in the facilities raised concerns: there were reports of sleep deprivation, prolonged standing or kneeling, being kept in painful or awkward positions, blindfolding, and signs of beating.<sup>9</sup> In April the US military acknowledged that at least three children, ages 13 to 15, were among the detainees in Guantánamo, in violation of international children's rights standards regarding detainees. The children were held in virtual isolation, did not have access to lawyers, had limited access to their families, and were subjected to interrogations.<sup>10</sup>

US authorities have categorically denied allegations that suspects in US custody were tortured or ill-treated. Yet, on 18 October, the day President Bush reiterated this denial, it was revealed that eight US soldiers had been charged with acts of brutality against prisoners of war in Iraq. One of the prisoners had died.<sup>11</sup>

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<sup>7</sup> AI, "USA: Call for Inquiry into possible excessive force against anti-war protesters," 15 April 2003, at <http://web.amnesty.org/library/Index/ENGAMR510562003?open&of=ENG-USA>.

<sup>8</sup> For details on US anti-terrorism measures, which compromised human rights, see IHF, *Anti-terrorism Measures, Security and Human Rights, Developments in Europe, Central Asia and North America in the Aftermath of September 11*, April 2003, at [http://www.ihf-hr.org/documents/doc\\_summary.php?sec\\_id=3&d\\_id=390](http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=390).

<sup>9</sup> AI, *United States of America – The Threat of a Bad Example: Undermining International Standards as "War on Terror" Detentions Continues*, 19 August 2003, at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/AMR511142003ENGLISH/\\$File/AMR5111403.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR511142003ENGLISH/$File/AMR5111403.pdf).

<sup>10</sup> HRW, "U.S.: Guantánamo Kids at Risk," press release, 24 April 2003.

<sup>11</sup> AI, "'We don't Torture People in America,'" 20 October 2003, at <http://web.amnesty.org/library/Index/ENGAMR511282003?open&of=ENG-USA>.

The fact that terrorist suspects at the hands US authorities in Guantánamo, Bagram and elsewhere had no access to any US court in order to challenge the circumstances of their arrest, the conditions of their detention or their treatment during interrogation created additional risks of torture or ill-treatment. Moreover, the US government continued to challenge every attempt to seek justice in the courts for the detainees. The one US national who has had access to the courts and alleged ill-treatment by US agents during his capture in and transfer from Afghanistan later withdrew those allegations as part of a settlement made with the government.

- John Walker Lindh alleged that he was subjected to shackling, blindfolding, and that he was bound naked to a stretcher in a shipping container without light or heat for two or three days. He alleged that he was threatened with death and torture. Just before a court was to hold a hearing on the claims, the two sides agreed to a plea bargain by which the defendant "put to rest his claims of mistreatment by the US military, and withdrew all claims of mistreatment."<sup>12</sup>

Even the International Committee of the Red Cross (ICRC), the only non-governmental organization to have had access to the detainees in Guantánamo, said in August that it had "observed a worrying deterioration in the psychological health of a large number of [the detainees]." This, and other similar statements related to detainees in Guantánamo, have been unusual as the ICRC's findings are generally confidential. As of October 2003, there had been over 30 suicide attempts among the detainees.<sup>13</sup>

According to media reports, detainees in Bagram Air Base have been subjected to "stress and duress" interrogation techniques amounting to torture and cruel, inhuman or degrading treatment. These techniques reportedly included restraining detainees in very painful positions, hooding, threats, and prolonged sleep deprivation and, in some cases, beatings.

- Two Afghan men, Dilawar and Mullah Habibullah, died in US custody in Bagram Air Base in December 2002. The autopsy reports gave the cause of death as "homicide" and "blunt force injuries" were found in both cases. The responsible Colonel played the incident down as a "mishap" in the war on terrorism. By October 2003, the US authorities had not published results of the investigation into the deaths.<sup>14</sup>

According to a HRW report, the US military is failing to conduct proper investigations into civilian deaths resulting from the excessive or indiscriminate use of force by its members in Baghdad, Iraq. HRW confirmed 20 deaths in the Iraqi capital alone between 1 May and 30 September 2003. In total, HRW collected credible reports of 94 civilian deaths in Baghdad, involving questionable legal circumstances that warrant investigation. This number did not include civilians wounded by US troops. The precise number of Iraqi civilians killed by US soldiers since the end of major military operations was unknown, and, astonishingly, the US military said that it kept no statistics on civilian deaths. By late October, the military had concluded only five investigations above the division level into alleged unlawful deaths. Of these, soldiers were found to have operated "within the rules of engagement" in four cases, in the fifth case a helicopter pilot and his commander face disciplinary action. However, according to HRW investigation, in two of these five cases, evidence suggested that soldiers had used excessive force. In some cases, US forces faced a real threat, which gave them the right to respond with force. But that response was sometimes disproportionate or indiscriminate, harming civilians or

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

putting them at risk. In the meantime, the lack of timely and high-level investigations into many questionable incidents has created an atmosphere of impunity.<sup>15</sup>

### *Excessive Use of Force by the Military*

In addition to allegations of excessive or indiscriminate use of force by the US military in Iraq, there were reports about other inadequate conduct towards detainees.

- On 25 April, the Norwegian newspaper *Dagbladet* published photos that showed American soldiers escorting naked Iraqi men through a park in Baghdad. The pictures revealed that someone had written the words “Ali Baba - Haram(i)”—which means Ali Baba – thief—in Arabic on the prisoners' chests. The article quoted a US military officer as saying that this treatment is an effective method of deterring thieves from entering the park and is a method which will be used again; another US military officer was quoted as saying that US soldiers are not allowed to treat prisoners inhumanely.<sup>16</sup>

### **Prisons and Detention Facilities**

Most US prisons were over-crowded, impoverished facilities. Many were rife with inmate-on-inmate violence (including rape). In some cases, inmates suffered physical and sexual abuse by correctional staff.<sup>17</sup> One in five male inmates had faced forced or pressured sexual contact in custody, and one in ten had been raped. One in four female inmates had experienced sexual assault; the perpetrators were often male correctional officers. Frequent sexual abuse was able to continue because of the negligence of the correctional authorities.

- Fifteen female inmates in New York prisons filed a lawsuit against the state, claiming that male guards routinely sexually abused them and that their complaints have been ignored. The alleged abuses range from demeaning sexual comments and voyeurism to rape. Women prisoners were deterred from reporting such sexual misconduct by intimidation.<sup>18</sup>

A positive move against this form of abuse was the adoption of the Prison Rape Elimination Act in July 2003. The act was signed into law on 4 September by President Bush. It authorizes federal grants for programs to prevent and punish prison rape, and cuts federal prison funding for states that do not control the sexual assault of prisoners.<sup>19</sup>

Mentally ill offenders faced mistreatment and neglect in many US prisons. One in six prisoners was mentally ill, many of them suffering from serious illnesses such as schizophrenia, bipolar disorder, and major depression. There were three times as many men and women with mental illness in US prisons as in mental health hospitals. Other prisoners victimized mentally ill

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<sup>15</sup> HRW, *Hearts and Minds: Post-War Civilian Casualties in Baghdad by U.S. Forces*, 21 October 2003, at <http://www.hrw.org/reports/2003/iraq1003/>.

<sup>16</sup> AI, “Iraq: Stripped naked and humiliated by US soldiers,” 25 April 2003, at <http://web.amnesty.org/library/Index/ENGMDE140972003?open&of=ENG-USA>.

<sup>17</sup> *Human Rights Watch World Report 2003*.

<sup>18</sup> Ginger Adams Otis, “Female Prisoners Sue State for Guards' Sex Abuse,” 17 March 2003, at <http://www.womensenews.org/article.cfm/dyn/aid/1257>.

<sup>19</sup> HRW, “Prison Rape: Groundbreaking New U.S. Law,” July 2003, at <http://www.hrw.org/update/2003/07/1>.

inmates and exploited them. Prison staff often punished them for the symptoms of their illness. Mentally ill prisoners were more likely than others to end up housed in especially harsh conditions, such as isolation, which could push them over the edge into acute psychosis. Totally inadequate treatment—or the lack of any treatment—could be attributed to a shortage of qualified staff, lack of facilities, and prison rules that interfere with treatment.<sup>20</sup>

Medical care for physical illness was also often inadequate.

- In an extreme case of neglect, health conditions for HIV-positive prisoners at Limestone Correctional Facility, Alabama, led to their death from malnutrition and preventable infectious diseases described in a report by Dr. Stephen Tabet. Even prior to Dr. Tabet's report, Alabama had ample notice of the dire conditions in Limestone, many of which were identified in the state's own report released in February.<sup>21</sup>

In the so-called super-maximum security ("supermax") prisons inmates spent twenty-three to twenty four hours a day isolated in their cells with scant opportunity to relieve the isolation, tedium, and harsh security restrictions—conditions that could constitute cruel, inhuman or degrading treatment. In 2002, there were two important and successful court challenges—one from the state's "supermax" prison in Boscobel, Wisconsin and another from Ohio's "supermax prison"—to these conditions. The problems included isolation, constant illumination of cells, insufficient natural light, inadequate possibilities for exercise and access to outdoor exercise facilities, insufficient phone contact with the outside world, inadequate care of mentally ill prisoners, and the very procedure of placement to "supermax" prisons. The lawsuits filed by human rights organizations led to improvements in these two prisons.<sup>22</sup>

On 29 October, the US Senate passed the Mentally Ill Offender Treatment and Crime Reduction Act. The legislation authorized federal grants to support collaborations between mental health, criminal justice, juvenile justice, and corrections systems to reduce the number of mentally ill offenders in the criminal justice system, to improve the mental health care received by those who are incarcerated, and to increase the number of transitional and discharge programs to help reduce the rate of recidivism of mentally ill offenders discharged from prison and jail.<sup>23</sup>

## **Death Penalty**

Sixty-five prisoners were executed in the US in 2003, mostly by lethal injection, bringing the year-end total to 885 executed since the use of the death penalty was reinstated in 1977. The 900<sup>th</sup> executed was carried out on 3 March 2004. Over 3,500 prisoners were under sentence of death as of the end of 2003. Thirty-eight of the 50 US states provided for the death penalty in law.

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<sup>20</sup> HRW, "Ill-Equipped: U.S. Prisons and Offenders with Mental Illness," October 2003, at <http://www.hrw.org/reports/2003/usa1003/>.

<sup>21</sup> "HRW Letter Urging the State of Alabama (U.S.) to Address Preventable Deaths of Prisoners," 22 September 2003, at <http://www.hrw.org/press/2003/09/us092203-ltr.htm>. The report of Stephen Tabet, published on 26 August 2003, is posted at [http://www.schr.org/prisonsjails/press%20releases/limestone\\_report.8-26-03\\_web.doc](http://www.schr.org/prisonsjails/press%20releases/limestone_report.8-26-03_web.doc).

<sup>22</sup> *Human Rights Watch World Report 2003*; Amnesty International, *Annual Report 2003*.

<sup>23</sup> HRW, "US Senate Passes Mentally Ill Offender Treatment and Crime Reduction Act," 5 November 2003.

It was also provided under federal military and civilian law.<sup>24</sup> The US is the country which has carried out the greatest number of known executions of child offenders (19 since 1990), and executed a child offender in 2003.<sup>25</sup> In the US, 31 states and the federal government as of the end of 2003 prohibited the execution of juvenile offenders, including the 12 states that have abolished the death penalty entirely.<sup>26</sup>

The Parliamentary Assembly of the Council of Europe (PACE) again warned the US that it was violating its obligations as an observer state by continuing to employ the death penalty. In a recommendation (1627 (2003)), accompanying resolution 1349 (2003), the PACE asked the Council of Europe's Committee of Ministers to make it a "minimum requirement" for retentionist states wishing to have their observer rights extended to "show their willingness to engage in a fruitful dialogue at parliamentary and governmental level" with the Council of Europe on the death penalty. In a report published in September, the PACE's Committee on Legal Affairs and Human Rights noted that on the part of the US "there is little willingness to engage in parliamentary dialogue with us—on this important issue."<sup>27</sup>

On 18 March the State of Maryland Senate voted by 24 votes to 23 to reject a bill to impose a moratorium on executions in the state pending further study of racial and geographic bias in the capital justice system. If enacted, the moratorium would have lasted until 2005.<sup>28</sup>

On 23 December, a Virginia jury voted that Lee Boyd Malvo should not be executed. He was convicted a few days earlier of the murder of Linda Franklin, one of ten people killed in a spate of sniper shootings in Maryland, Virginia and Washington, D.C. in 2002. Malvo was 17 years old at the time of the crime.<sup>29</sup> The decision by a Virginia jury to sentence to life imprisonment without parole offered further evidence that the juvenile death penalty in Virginia and throughout the US was being slowly but surely eliminated as a public policy option, according to the National Coalition to Abolish the Death Penalty (NCADP).<sup>30</sup>

The State of Oklahoma executed Kenneth Charm on 6 June despite overwhelming evidence that he was mentally retarded. The U.S. Supreme Court banned the execution of people with mental retardation in *Atkins v. Virginia* in 2002, citing the diminished moral culpability of such inmates. However, on 22 May, the Oklahoma Pardon and Parole Board denied Charm's clemency petition, setting his pending execution in motion.<sup>31</sup>

Gov. George H. Ryan of Illinois announced he was commuting the death sentences of 167 people, primarily to life in prison. The move emptied Illinois' death row and marked the largest commutation by a governor in modern US history. The announcement came at the end of a long process of deliberation for Ryan, who declared a moratorium on executions in 2000 because of concerns over possible innocence cases.

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<sup>24</sup> AI, "Facts and Figures on the Death Penalty," 6 April 2004, at <http://web.amnesty.org/web/web.nsf/print/deathpenalty-facts-eng>.

<sup>25</sup> Ibid.

<sup>26</sup> See <http://www.deathpenaltyinfo.org/article.php?did=205&scid=27>.

<sup>27</sup> AI, "Death Penalty News December 2003," AI index Act 53/004/2003, 1 December 2003.

<sup>28</sup> AI, "Death Penalty News March 2003," AI index Act 53/002/2003, 1 March 2003.

<sup>29</sup> AI, "United States of America: Evolving standards of decency," AI Index: AMR 51/003/2004, 6 January 2004.

<sup>30</sup> NCADP, "The Malvo verdict: One step toward abolition of juvenile death penalty," 23 December 2003.

<sup>31</sup> NCADP, "Oklahoma set to execute person with mental retardation in violation of *Atkins v. Virginia*," 3 June 2003.



Since 1976, the State of Illinois has executed 12 people, but released 13 people from death row due to actual innocence. According to Ryan, “Thirty-three percent of the death row inmates were represented at trial by an attorney who had later been disbarred or at some point suspended from the practice of law. Of the more than 160 death row inmates, 35 were African-American defendants who had been convicted or condemned to die not by a jury of their peers, but by all-white juries. More than two thirds of the inmates on death row were African-Americans. Forty-six inmates were convicted on the basis of testimony from jailhouse informants. Since we reinstated the death penalty there are also 93 people—93—where our criminal justice system imposed the most severe sanction and later rescinded the sentence or even released them from custody because they were innocent.”<sup>32</sup>

The Illinois Commission on Capital Punishment, which Ryan created after declaring the moratorium, issued 85 recommendations aimed at preventing the execution of innocent people. These recommendations included requiring that lawyers who represent clients in capital cases be better qualified; requiring that interrogations be videotaped; limiting testimony from prison informers; and not basing a death sentence on a single eyewitness. The Illinois legislature refused to enact the commission’s recommendations.<sup>33</sup>

### **Asylum Seekers and Immigrants**

A new policy, part of “Operation Liberty Shield” announced by Homeland Security Secretary Tom Ridge on 18 March, required the automatic and continued detention of all arriving asylum seekers from a list of 34 countries, including Iraq. Many of the countries had well-documented records of human rights abuse.

According to HRW, “The Bush administration has criticized the human rights records of abusive regimes, such as Iraq. Yet, under the policy, the administration will jail people simply because they have fled those same abusive regimes.”

The new policy created a blanket suspicion of links to terrorism based on nationality alone. Under the policy, for example, the US would hold in detention a dissident who fled Iran simply because Iran is on the list of countries where there are active terrorist organizations. Any decision to detain an asylum seeker should instead be based on a case-by-case assessment of security risk by an impartial decision maker.

Under the new policy, asylum seekers could face months and even years in detention before the immigration bureaucracy finally makes a decision on their claim. Under guidelines issues by the United Nations High Commissioner for Refugees, detention of asylum seekers should be the exception, not the rule. Detention should not be used if there are effective monitoring mechanisms, such as reporting obligations that offer a viable alternative to detention. When detention is necessary, it should last for only a “minimal” period.

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<sup>32</sup> “The death penalty: Arbitrary and capricious,” a condensed version of Ryan’s speech at Northwestern University, 14 January, 2003.

<sup>33</sup> NCADP, “NCADP welcomes larges commutation of death sentences in modern US history,” 11 January 2003.

Homeland Security officials indicated that they will not apply the mandatory detention policy to affirmative asylum applicants, meaning those who apply for asylum not at a port of entry, but from within the US.<sup>34</sup>

## Women's Rights

In June, the Center for Reproductive Rights published a document entitled *Penalized for Serving their Country: The Ban on Abortion for Women in the Military*. By statute, the US government bans almost all abortion services at US military hospitals and other medical facilities. Federal law provided that “no medical treatment facility or other facility of the Department of Defense may be used to perform an abortion except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest.” A servicewoman who did not come within the narrow “life, rape or incest” exception, even one whose health was jeopardized by her pregnancy, was prohibited from obtaining an abortion at US military health facilities, even if she would have paid for the procedure with her own money.

Although the US Constitution ensured that women in the US have the right to access safe and legal abortion, a woman serving in the US military, or the female spouse or dependant of a service member, were no able to exercise this constitutional right. The ban impacted over 100,000 US servicewomen and military dependants.

The US government endorsed the agreement made at the five-year review of the International Conference on Population and Development (ICPD). In this document, the US made a commitment—to its own citizens as well as to the international community—to ensure that “in circumstances where abortion is not against the law, health systems should train and equip health-service providers and should take other measures to ensure that such abortion is safe and accessible.” Additional measures should be taken to safeguard women’s health.<sup>35</sup>

On 5 November, President George W. Bush signed the so-called “Partial Birth Abortion Ban” into law.<sup>36</sup>

The federal abortion ban was opposed *inter alia* by the Center for Reproductive Rights on the following grounds:

- This law would ban safe and effective abortions as early as 12-15 weeks.
- The law makes no exception for the health of the woman or for cases of severe fetal anomalies.
- The federal abortion ban (Partial Birth Abortion Ban Act of 2003) does not use medical definitions or describe one specific procedure. The act describes "partial-birth abortion" so broadly that it covers steps doctors routinely take in performing abortions in the second trimester.

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<sup>34</sup> HRW, “US “Operation Liberty Shield” Undermines Asylum Seekers’ Rights,” 26 March 2003.

<sup>35</sup> See Key actions for the further implementation of the Programme of Action of the International Conference on Population and Development, para 63(iii). Center for Reproductive Rights, “Penalized for Serving their Country: The Ban on Abortion for Women in the Military,” June 2003, at <http://www.crlp.org>.

<sup>36</sup> “President Bush Signs Partial Birth Abortion Ban Act of 2003,” 5 November 2003, <http://www.whitehouse.gov/news/releases/2003/11/20031105-1.html>.

- The law is part of a larger agenda to outlaw all abortions. Decisions involving pregnancy and medical care should be left to women and their doctors, not politicians.

Representing doctors from Nebraska, New York, Virginia and Iowa, the center argued in a Nebraska federal court that the ban on safe abortion procedures violates the US Constitution and puts women's health in serious jeopardy. The law was blocked by federal courts in Nebraska, New York and California.

President George W. Bush signed into law the first-ever federal ban on abortion despite a June 2000 US Supreme Court ruling that found similar bans to be unconstitutional. The Supreme Court case, argued by the Center for Reproductive Rights, struck down an essentially identical Nebraska law.<sup>37</sup>

## Homosexuals' Rights

On 26 June, the Supreme Court struck down a Texas state law banning private consensual sex between adults of the same sex in a decision gay rights groups hailed as historic. The 6-3 decision of the court reverted course from a ruling 17 years ago that states could punish homosexuals for what such laws historically called "deviant sex". Legal analysts said the ruling enshrined for the rights time a broad constitutional right to sexual privacy, and its impact would reach beyond Texas and 12 other states with similar sodomy laws applied against the gay and lesbian community, and into mainstream America.<sup>38</sup>

The lack of access to marriage rights imposed discriminatory, and often damaging, burdens on same-sex partners, according to HRW. They may be denied shared health or employment benefits; protections against domestic violence; inheritance rights; the right to raise a child together; the right to make medical decisions for a sick partner or a partner's child; and rights to equal tax benefits and joint insurance policies.

On 18 November, the highest court in Massachusetts ordered in *Goodridge et. al. v. Department of Public Health* that gay and lesbian couples be admitted to the full rights of civil marriage. The court gave the state legislature six months to amend laws to conform with the decision. Since then, several prominent state officials—including Governor Mitt Romney, Attorney General Thomas Reilly, and Speaker of the House of Representatives Thomas Finneran—have suggested that the legislature create special "civil unions" for gay and lesbian couples. These "civil unions" would provide some of the rights of marriage, but would create a separate but unequal system that would fail to meet the court's stipulation.

Equality under law and protection against discrimination are basic principles of international human rights, as well as of civil rights in the United States. Numerous international bodies have affirmed that sexual orientation is a protected status. In Massachusetts, the Goodridge decision listed, "with no attempt to be comprehensive," 21 different laws conferring 16 different benefits on married couples in relation to property rights alone. Governor Romney and other state officials have also called for an amendment to the Massachusetts State

<sup>37</sup> Center for Reproductive Rights, "Federal Abortion Ban: Putting Women's Lives at Risk," [http://www.crlp.org/crt\\_pba.html](http://www.crlp.org/crt_pba.html).

<sup>38</sup> CNN, "Supreme Court strikes down Texas sodomy law," 18 November 2003.

Constitution to define marriage as the union of a man and a woman. Other politicians have advocated a similar amendment to the US Constitution.<sup>39</sup>

### *US Military Policy*

In a news report dated 23 January, HRW charged that the US military's "Don't Ask, Don't Tell" policy of discharging gay and lesbian servicemembers who reveal their sexual orientation violates human rights and deprives the military of skilled personnel. Under "don't ask, don't tell," any service member who acknowledged his/her homosexuality by word or deed was discharged. Between 1994 and the end of 2001, more than 7,800 servicemembers were forced out of the military because of the policy.

Supporters of "Don't Ask, Don't Tell" argued that permitting acknowledged gays or lesbians to serve in the military would impair unit cohesiveness and hence military effectiveness. As detailed in the HRW report, there was no evidence to support that argument.

The Pentagon has done little to protect gay and lesbian servicemembers from hostile treatment or violence by other servicemembers. Harassment of gay and lesbian servicemembers was committed with near total impunity. Many servicemembers endured harassment in silence for fear that reporting it would lead to disclosure of their sexual orientation and hence a discharge. But harassment has made life in the military so intolerable for thousands that they have "voluntarily" acknowledged their homosexuality in order to secure a discharge. Although the Pentagon announced in 2000 an Action Plan to combat anti-gay harassment, it has failed to implement it.<sup>40</sup>

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<sup>39</sup> HRW, "United States: Massachusetts Should Ensure Equal Access to Marriage," 25 November 2003, at <http://www.hrw.org/press/2003/11/us112503.htm>.

<sup>40</sup> HRW, "US Military's 'Don't Ask, Don't Tell' Policy Panders to Prejudice: Anti-Gay Harassment Flourishes," 23 January 2003. See also HRW, *Uniform Discrimination: The 'Don't Ask, Don't Tell' Policy of the US Military*, 23 January 2003, at <http://www.hrw.org/reports/2003/usa0103/>.