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Extract from the IHF report

Human Rights in the OSCE Region: Europe, Central Asia and North America, Report 2005 (Events of 2004)

United States

IHF FOCUS: rule of law; torture, ill-treatment and police misconduct; conditions in prisons; right to life; migrants, asylum seekers and refugees; rights of homosexuals.

The United States' (US) reputation as an advocate of human rights and democracy continued to be seriously damaged by its own human rights record in 2004.

Coercive interrogation tactics that frequently amounted to inhuman and degrading treatment and even torture of detainees were common practice in places of detention outside the US but under US military control, such as Guantánamo Bay, Afghanistan, and Iraq.

In addition, a number of actions and practices that undermine international law and human rights standards have become prevalent in the US government's "war on terror." In 2004, they included the indefinite detention of terrorist suspects who were neither charged of a crime nor brought before a court, the practice of holding suspects in "undisclosed locations," and transferring them to states known for torturing detainees, among other examples. Moreover, such practices raised questions about the government's respect for the rule of law, its own constitutional system of checks and balances and its democratic political culture.

After the pictures of torture and abuse in the prison of Abu Ghraib, near Baghdad, had caused an international outcry, it soon became clear that these incidents were not isolated cases, but rather that abusive practices were widespread in US-controlled places of detention in Iraq, Afghanistan, and Guantánamo Bay. On US territory, the use of tasers and racial profiling were a serious problem.

Prison conditions in the US remained a cause for concern, especially in regard to overcrowding, sexual harassment, rape, and medical treatment of prisoners.

In positive developments, the US Supreme Court ruled the death penalty unconstitutional for individuals who were under the age of 18 at the time of their offense. At the same time, however, executions were carried out: 59 prisoners were executed in the US in 2004. Over 3,400 individuals were on death row at year's end.

While in the state of Massachusetts, same-sex marriage became legal following a decision by the state's Supreme Court, conservative groups tried to push for an amendment to the US Constitution to prohibit states from issuing same-sex marriage licenses. The year 2004 also saw the tightening of immigration and asylum law.

Rule of Law

Guantánamo Detainees

As of the end of 2004, more than 500 men remained detained at Guantánamo Bay, Cuba, many since 2002, in conditions and subject to interrogation techniques that have repeatedly been described as cruel, inhuman or degrading. They were denied “prisoner of war” status by the US government and none of them had been brought before a “competent tribunal” to determine his status, as required by article 5 of the Third Geneva Convention. Instead they were labeled as “enemy combatants” or “terrorists” to justify the denial of many basic human rights.¹

The Guantánamo detainees were held incommunicado in tiny cells and subjected to repeated interrogations aimed at “encouraging their cooperation.”² The US insisted that detained “enemy combatants” had no right to judicial review of their detention, and US courts repeatedly held that they did not have jurisdiction over the detainees because they were foreign nationals held outside US sovereign territory.³

The Department of Defence persistently refused to give precise numbers of detainees held in Guantánamo, which allowed secret detainee transfers to take place.

In a landmark ruling in June 2004, the US Supreme Court stated in the case of *Rasul v. Bush* that US courts had jurisdiction to hear cases by Guantánamo detainees and that those held by the US must be afforded a meaningful opportunity to contest their detention before a neutral arbiter.⁴ Since that ruling, more detainees have had access to lawyers and are pursuing habeas corpus cases in federal courts.

Following the Supreme Court ruling, the Bush administration established the Combatant Status Review Tribunals (CSRTs) provided by a 2001 military order, with the aim of prosecuting non-US citizens who have allegedly participated in international terrorism against the US. In August 2004, the CSRTs began legal proceedings. However, the commissions were strongly criticized by many human rights NGOs because they did not meet international due process standards. Their rules permitted the exclusion of the defendant from the trial, deprived defendants of independent judicial oversight by a civilian court, sharply restricted the defendant’s rights to choose his lawyer, and allowed the use of evidence that the accused was not allowed to see nor confront. The CSRTs failed to guarantee that evidence obtained by means of torture or ill-treatment would not be used and they did not require that all of their members have any legal training. In the initial hearings, the panel members, only one of whom was a lawyer, were not familiar with basic concepts of criminal law, let alone the complex international law issues at stake. Poor translations by US government interpreters made a mockery of hearings and raised further fair trial concerns.⁵

- Due to the irregularities in the operation of CSRTs, a US district court ordered a halt to CSRT proceedings against Salim Ahmed Hamdan, a Guantánamo detainee, because of the military’s failure to determine the defendant’s legal status under the Geneva Conventions and because commission rules of evidence violated fair trial standards. The judge also pointed out that the CSRTs did not constitute the “competent tribunals” required by the Third Geneva Convention. The US government’s immediate reaction was to “vigorously disagree” with the ruling and to appeal it.⁶

¹ Douglas Jehl and David Johnston, “Rule Change lets C.I.A. freely send suspects abroad to jails,” *New York Times*, 6 March 2005, <http://query.nytimes.com/gst/abstract.html?res=F7061EFE35590C758CDDAA0894DD404482>.

² Ibid.

³ Amnesty International, (AI), “Guantanamo – an icon of lawlessness,” 6 January 2005, <http://web.amnesty.org/library/Index/ENGAMR510022005>.

⁴ Ibid.

⁵ *Human Rights Watch World Report 2005*, <http://hrw.org/english/docs/2005/01/13/usdom9853.htm>.

⁶ AI, “Guantanamo: Military Commissions – Amnesty International observer’s notes, No. 3. – Proceedings suspended following order by US federal judge,” 9 November 2004, <http://web.amnesty.org/library/Index/ENGAMR511572004>.

The Administrative Review Board (ARB) determines whether each Guantánamo detainee remains “a threat to the US” on a yearly basis – however, the laws of war require such reviews for security detainees at least every six months. Evidence extracted under torture or other coercion could be admitted both by the CRTs and the ARB.⁷

Many boycotted the CSRT process, and, as of January 2005, only two had been released as a result of it, while 230 had been confirmed as “enemy combatants.” By December 2004, the Department of Defense had conducted its first ARB review. Again, detainees had no access to lawyers or to secret evidence for this administrative review.⁸

Renditions

There were continued allegations of US participation in secret transfers of detainees to countries with records of torture. Former government officials reported to the *New York Times* that since the September 11 attacks, the CIA had flown 100 to 150 suspected terrorists from one foreign country to another, including to Egypt, Syria, Saudi Arabia, Jordan and Pakistan, all of which have been identified by the State Department as habitually using torture in their prisons.⁹ There were allegations that terrorist suspects were abducted in Europe, Africa, Asia, and the Middle East by – according to witnesses – hooded or masked American agents and frequently bound, gagged and sedated before being put on board airplanes. Upon arriving in foreign countries, rendered suspects were usually tortured and often vanished.¹⁰

Detention Under the Material Witness Law

The Material Witness Law allows the temporary detention of a person who has witnessed a crime when it appears he may flee. Originally applied to witnesses who were scared to testify – for example, witnesses to mafia trials – this law has been used by the US government since September 11 to circumvent due process proceedings and to arrest and detain Muslim men suspected of links to terrorism indefinitely and without charge. The Justice Department has refused to disclose the names or number of material witnesses it has held in connection with the “war on terror” or where and for how long these witnesses were detained, citing national security concerns and grand jury rules.¹¹

“Material witnesses” arrested in connection with alleged terrorist activities consistently reported to the American Civil Liberties Union (ACLU) and Human Rights Watch (HRW) that the Justice Department treated them as high profile terrorist suspects, arresting witnesses in their homes or in public with armed agents, shackling witnesses and transferring them to maximum security prisons and holding them in solitary confinement with the lights on 24 hours a day.¹² However, almost half of the “material witnesses” detained in counter-terrorism investigations since September 11 did not testify in any criminal proceeding.

- On 12 May, US citizen Brandon Mayfield, an Oregon attorney and Islam-convert, was detained as a “material witness” because the authorities believed that he was linked to the 11 March Madrid bombing. The Federal Bureau of Investigation (FBI) claimed that Mayfield’s fingerprints had made a “100% positive match” with a print on a bag of detonators found near the Madrid bombing. Based on this evidence, armed FBI agents arrested Mayfield at his law office and held him in solitary confinement, restricting contact with his family. The FBI searched his law offices and his home and seized his legal files. However, after spending three weeks in jail and under house arrest, the Justice

⁷ AI, “Guantanamo – an icon of lawlessness,” 6 January 2005, <http://web.amnesty.org/library/Index/ENGAMR510022005>.

⁸ Ibid.

⁹ Ibid.

¹⁰ Jane Mayer, “Outsourcing Torture –The secret history of America's 'extraordinary rendition' program, *New Yorker*, 14 February 2005, http://www.newyorker.com/fact/content/?050214fa_fact6.

¹¹ ACLU, “Overlooking Innocence: Refashioning the Material Witness Law to indefinitely detain Muslims without charges,” <http://www.aclu.org/iclr/malhotra.pdf>. See also the entry on Sweden.

¹² Ibid.

Department dismissed him as a “material witness” when Spanish authorities presented the person who had a real match to the Madrid print. In November, an international panel of scientists, commissioned by the FBI and led by the chief of the FBI’s Quality Control unit to review the Mayfield case, strongly criticized the FBI and blamed the faulty match on internal institutional pressures rather than technological failures, the explanation originally given by the FBI counter-terrorism unit.¹³

Out of all the “material witness” arrests that were documented by the ACLU and HRW, only one witness was not Muslim and Brandon Mayfield was one of only two who were not of Middle Eastern or South Asian descent. The government consistently used witnesses’ race, religion, and national origin to support their arguments that “material witnesses” had material information or were flight risks.

Torture, II-Treatment and Police Misconduct

In early 2004, photographs of Iraqi detainees tortured and ill-treated by US soldiers in Abu Ghraib prison, outside Baghdad, were made public, causing an international outcry. However, it soon became clear that the Abu Ghraib incidents were not isolated cases of abuse, but rather that abusive practices were widespread in US-controlled places of detention in Iraq, Afghanistan, and Guántanamo Bay.

On US territory, the use of tasers and racial profiling was also a serious problem.

Abu Ghraib Prison

In April, the international media published a series of photos taken by a US soldier at the Abu Ghraib prison in Iraq. They depicted, for example, a hooded detainee balancing on a box with arms outstretched and electric wires dangling from his hands, a young female soldier grinning and giving a thumbs-up next to naked male prisoners, and a naked man held by a leash like a dog – all pictures evidencing US soldiers torturing, abusing and humiliating Iraqi detainees. The US administration presented the cases as isolated incidents by a few soldiers.

Investigations into Abu Ghraib abuses found that Arabs’ fear of dogs was deliberately exploited to “soften up” high-value detainees.¹⁴ Unmuzzled military working dogs were used to intimidate and frighten detainees and, in at least one case, a detainee was bitten and severely injured.¹⁵ The removal of clothing was common practice in Abu Ghraib and used in a clearly degrading and humiliating manner to break down detainees.¹⁶ Male detainees were naked in the presence of female soldiers and sometimes their clothing was taken away as a disciplinary measure and they were placed naked in cells. Some soldiers were involved in even more sadistic abuse, including forcing groups of male detainees to masturbate while being photographed and videotaped; videotaping and photographing naked male and female detainees; forcibly arranging detainees in various sexually explicit positions for photographing; forcing naked male detainees to wear women’s underwear; a male MP guard having sex with a female detainee; and arranging naked male detainees in a pile and then jumping on them.¹⁷

The International Committee of the Red Cross (ICRC) had repeatedly informed US authorities about allegations of torture and cruel, inhuman or degrading treatment by US forces but they were neither believed

¹³ *Human Rights Watch World Report 2005*, <http://hrw.org/english/docs/2005/01/13/usdom9853.htm>.

¹⁴ *Investigation of Intelligence Activities at Abu Ghraib*, “Fay Report,” August 2004, <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>.

¹⁵ *Investigation of the 800th Military Police Brigade*, “Taguba Report,” 2004, http://www.npr.org/iraq/2004/prison_abuse_report.pdf.

¹⁶ *Investigation of Intelligence Activities at Abu Ghraib*, “Fay Report,” August 2004, <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>.

¹⁷ *Investigation of the 800th Military Police Brigade*, “Taguba Report,” 2004, http://www.npr.org/iraq/2004/prison_abuse_report.pdf.

nor adequately investigated by US authorities before the publishing of the photos and the resulting media pressure. The Schlesinger Panel appointed in May 2004 by Secretary of Defense Donald Rumsfeld to review the Pentagon's detention operations, cited serious under-resourcing of detention operations in Iraq as a reason that contributed to abuses. The panel concluded 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 further opened the door to abuse."¹⁸

In addition, an investigation of intelligence activities at Abu Ghraib, commonly known as the "Fay Report," revealed that 54 military intelligence, military police, medical personnel and civilian contractors had "some degree of responsibility or complicity in the abuses that occurred at Abu Ghraib." It found "failures of leadership" as well as confusion over which interrogation techniques were allowed in which theater of operation.¹⁹

Previously secret memorandums of the administration discussed ways that US agents might escape criminal liability if accused of torture and explicitly argued that the president, as commander-in-chief of the armed forces, could authorize torture. The administration chose to define torture very narrowly – among other things referring to the Abu Ghraib incidences only as "abuses."²⁰

Interrogators in Afghanistan also reportedly used tactics such as stripping detainees, isolating them for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation.²¹

As of early 2005, only seven low-ranking soldiers had faced criminal charges. Civilian leaders at the Pentagon or the CIA had not even been investigated. Some of the defendants have pleaded guilty and the convictions have ranged from ten months to ten years in prison.²²

Guantánamo Bay and "Undisclosed Locations"

Interrogation techniques authorized for use in Guantánamo included stress positions, isolation, hooding, sensory deprivation, exposure to suffocatingly hot or cold conditions from excessive air conditioning and apparently the use of dogs to intimidate detainees. Among the abuses reported even by FBI agents were the cruel and prolonged use of shackling, and the use of loud music and strobe lights. Furthermore, the ICRC, which was the only non-governmental organization allowed access to the detainees, stated that it had observed a "worrying deterioration" in the mental health of a large number of the detainees, and that their psychological condition had become a "major problem," sometimes even resulting in attempted suicides.²³

- Mohammed al-Kahtani, a Saudi Arabian national and Guantánamo detainee, was allegedly given tranquilizer, put on a plane, blindfolded in conditions of sensory deprivation and made to believe that he was being flown to the Middle East. However, the plane returned to Guantánamo several hours

¹⁸ *Final Report of the Independent Panel to Review DoD Detention Operations*, "Schlesinger Panel," August 2004, <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

¹⁹ *Investigation of Intelligence Activities at Abu Ghraib*, "Fay Report," August 2004, <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>.

²⁰ AI, "Human dignity denied – Torture and accountability in the 'war on terror'," 27 October 2004, <http://web.amnesty.org/library/Index/ENGAMR511452004?open&of=ENG-USA>.

²¹ *Investigation of Intelligence Activities at Abu Ghraib*, "Fay Report," August 2004, <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>.

²² Susan Candiotti, "Abu Ghraib soldiers plead guilty," CNN, 2 February 2005, <http://www.cnn.com/2005/LAW/02/01/abughraib.plea.deal/>.

²³ Douglas Jehl and David Johnston, "Rule change lets C.I.A. freely send suspects abroad to jails," *New York Times*, 6 March 2005, <http://query.nytimes.com/gst/abstract.html?res=F7061EFE35590C758CDDAA0894DD404482>.

later, where he was allegedly put in an isolation cell and subjected to harsh interrogations conducted by people he was led to believe were Egyptian national security operatives.²⁴

The practice of detaining terrorist suspects in “undisclosed locations” outside US territory and extraditing them from one foreign state to another for interrogation and prosecution, facilitated torture, ill-treatment and other violations of international standards governing the treatment of detainees.

- On 31 December 2003, Lebanese-born German national Kahlid el-Masri was on his way to Macedonia when he was detained by Macedonian border guards and taken away in handcuffs. He was accused of terrorism and interrogated for three weeks. Then he was turned over to officials he believed were from the US, who flew him to a prison in Afghanistan - where he claims he was shackled, beaten, injected with drugs and questioned persistently about his alleged links with al-Qaida.²⁵
- Australian detainee Mamdouh Habib was subjected to sleep deprivation, at the end of which he reportedly was bleeding from both his nose and ears. Another Australian national, David Hicks, alleged that he had been "deprived of sleep as a matter of policy" and that he and other detainees had been subjected to other forms of torture and ill-treatment in US custody. UK national Moazzam Begg was held in isolation for 600 days.²⁶
- Abdullah Tabarak, a Moroccan national, was transferred from Guantánamo Bay to Morocco in August 2004. In an interview he claimed that he had been tortured and ill-treated in US custody. He said that he had been beaten, given forcible injections, and held in a dark cell, which left him with eyesight problems. He also stated that he suffered from other physical problems as a result of his confinement, such as insomnia and nightmares.²⁷

Tasers

In September, the ACLU expressed concern about the reported cases of deaths following the use of tasers,²⁸ dart firing electro-shock weapons designed to cause temporary paralysis by delivering a 50,000 volt shock to a person's body. In the US, more than 5,000 law enforcement agencies were reported to be deploying or testing tasers.²⁹

Though undoubtedly a safer alternative than firearms when dealing with dangerous suspects, tasers were in practice mostly used as a routine force tool against people who did not pose a serious threat. They were frequently used in situations where the use of firearms, or even batons, would not have been justified. In some cases the use of tasers clearly constituted ill-treatment and torture. According to Amnesty International (AI), there were at least 103 taser-related deaths in the US and Canada between June 2001 and March 2005, with 65% of them occurring during the last 15 months.³⁰ The number was rapidly increasing as more police departments authorized use of the weapon.

²⁴ Neil A. Lewis, “Fresh details emerge on harsh methods at Guantánamo,” *New York Times*, 1 January 2005, <http://www.nytimes.com/2005/01/01/national/01gitmo.html?ex=1111899600&en=1e98591406d859b6&ei=5070&oref=login&oref=login>.

²⁵ *Guardian*, “US ‘kidnap’ probed by Germans,” 15 January 2005, <http://www.guardian.co.uk/usa/story/0,12271,1391075,00.html>.

²⁶ AI, “Guantanamo – an icon of lawlessness,” 6 January 2005, <http://web.amnesty.org/library/Index/ENGAMR510022005>.

²⁷ BBC, “Released Moroccan Guantánamo detainee tells Islamist paper of his ‘ordeal’,” 30 December 2004.

²⁸ ACLU, “ACLU urges San Francisco Commission to exercise caution in use of tasers,” 21 September 2004, <http://www.aclu.org/PolicePractices/PolicePractices.cfm?ID=16559&c=25>.

²⁹ AI, “USA/Canada: Excessive and lethal force? – AI’s concerns about deaths and ill treatment involving police use of tasers,” Facts and Figures, 30 November 2004, <http://web.amnesty.org/library/Index/ENGAMR511662004>.

There have been no rigorous, independent and impartial studies so far into the use and medical effects of tasers, especially when it comes to the effects on individuals under the influence of drugs or with preexisting heart conditions.

Racial Profiling

A year-long study conducted from July 2003 to August 2004 by AI/USA found that the unlawful use of racial profiling in police, immigration, and airport security procedures has expanded since the terrorist attacks of September 11. Racial profiling occurs when law enforcement authorities rely on race, ethnicity, national origin, or religion in selecting which individuals to subject to routine or spontaneous investigatory activities in the absence of a specific suspect description.³¹

Prior to the September 11 attacks, racial profiling was predominantly targeted at African Americans and Latinos; since then, the main targets have been persons who appear to be Arabs, Muslims, Sikhs or South Asians. According to the AI study, approximately 32 million Americans reported that they had already been victims of racial profiling.³² In February, the End Racial Profiling Act of 2004 was introduced in the US Congress. The legislation would curb profiling by law enforcement officials on the basis of race, religion, ethnicity or national origin.³³

Conditions in Prisons

Conditions in US prisons remained a cause of serious concern. The US – which has less than 5 % of the world’s population – holds nearly 23 % of the world’s prisoners.³⁴ To reduce prison populations, some states have begun instituting limited sentencing reforms, e.g., permitting alternatives to incarceration for low level first time offenders convicted of drug possession.³⁵ In November, however, voters in California rejected an initiative to reform the state’s infamous “three strikes law,” which imposes a mandatory life sentence on anyone who commits a third criminal offense even if it is a only a minor, non-violent one such as petty theft.

Prisons in the US were not only over-crowded, but also posed a threat to the physical and mental health of their inmates. Prisoners often had to face physical abuse – from fellow inmates as well as from prison staff – including sexual harassment, rape and beatings. In recent years, US prison inmates have been beaten with fists and batons, stomped on, kicked, shot, stunned with electronic devices, doused with chemical sprays, choked, and slammed face first onto concrete floors by the corrections officers.³⁶

- In January 2004 , a videotape at a California facility captured two officers beating and kicking two inmates. One officer struck an inmate approximately twenty times in the face while another officer was shown kicking a handcuffed inmate in the head.³⁷

Sexual harassment and rape was commonplace in prisons. Prisoners of both sexes, but primarily women prisoners, faced sexual abuse from correctional staff, including intercourse. Males prisoners were at risk of rape from other inmates, and staff typically ignored their requests for protection.³⁸ Approximately one in five male inmates in the US has been victim of sexual harassment; one in ten has been raped. The rates of sexual assault on female prisoners were as high as one in four in some facilities.

³¹ AI, “Threat and Humiliation – Racial Profiling, Domestic Security and Human Rights in the United States,” September 2004, http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf.

³² Ibid.

³³ 108th Congress, 2^d Session, H.R.3847, http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=h3847ih.pdf&directory=/diskb/wais/data/108_cong_bills.

³⁴ *Human Rights Watch World Report 2005*, <http://hrw.org/english/docs/2005/01/13/usdom9853.htm>.

³⁵ Information from HRW US Division to the IHF, 12 April 2005.

³⁶ HRW, “Prisoner Abuse: How different are U.S. Prisons?” 14 May 2004, <http://hrw.org/english/docs/2004/05/14/usdom8583.htm>.

³⁷ Ibid.

³⁸ Information from HRW US Division to the IHF, 12 April 2005.

- In January 2004, the US Department of Justice reported on inhuman conditions at Arizona’s juvenile detentions centers, including sexual abuse of the children by staff members (and fellow inmates) that reportedly occurred “with disturbing frequency” and a level of physical abuse that was “equally disturbing.”³⁹

The congressionally authorized National Prison Rape Reduction Commission began working in 2004 to document the problem of prison rape and establish standards to eliminate it. Its work complements other new federal efforts to develop reliable statistics on the prevalence of prison rape, and to provide anti-rape grants and training to prison authorities.⁴⁰ In September 2003 the Congress passed the Prison Rape Elimination Act, which is supposed to provide prison inmates better protection against sexual harassment and rape.⁴¹

Another cause of concern was the treatment of mentally ill prisoners. Some 16% of prisoners were mentally ill and prison mental health services – as well as the overall medical treatment of prisoners – were woefully deficient. In October, Congress passed the Mentally Ill Offender Treatment and Crime Reduction Act, which authorized US\$50 million to help keep people with mental illness out of the criminal justice system, to improve training for police in dealing with the mentally ill, and to improve the quality of mental health treatment in jails and prisons.⁴²

Medical treatment as a whole was substandard in many prisons.

- After several prisoners with HIV/AIDS died due to appalling living conditions and negligent or incompetent medical care, the Alabama Department of Corrections in June settled a lawsuit by agreeing to improve the care and treatment of prisoners with HIV/AIDS.⁴³

Right to Life

Death Penalty

Fifty-nine prisoners were executed in the US in 2004, the lowest number since 1996. This figure brought the year-end total to 944 executed since the death penalty was re-instituted in 1976. Over 3,400 individuals were on death row by the end of the year, including about 70 juvenile offenders. Five death row inmates were exonerated in 2004, bringing the number of individuals released from death row since 1973 because of evidence of their innocence to 117.⁴⁴

In March, the International Court of Justice (ICJ) ruled that the US had violated the rights of 51 Mexican nationals on death row because they had not been informed of their right to speak with their consular officials after they were arrested, as required by the Vienna Convention on Consular Relations (VCCR). The court rejected the US argument that the clemency process offered an adequate remedy and insisted that the courts had to provide “effective” review of the convictions to determine whether the violations caused “actual prejudice” to any of the 51 men. President Bush decided to comply with the ICJ decision to review the cases saying that foreign policy interests justified compliance with the decision.⁴⁵ However, only a few days later the Bush administration informed the United Nations that the US was withdrawing from the

³⁹ HRW, “Prisoner Abuse: How Different Are U.S. Prisons?” 14 May 2004, <http://hrw.org/english/docs/2004/05/14/usdom8583.htm>.

⁴⁰ *Human Rights Watch World Report 2005*, <http://hrw.org/english/docs/2005/01/13/usdom9853.htm>.

⁴¹ HRW, “Doing Something about Prison Rape,” 26 September 2003, <http://www.hrw.org/editorials/2003/prison092603.htm>.

⁴² *Human Rights Watch World Report 2005*, <http://www.hrw.org/english/docs/2005/01/13/usdom9853.htm#Death%20Penalty>

⁴³ *Ibid.*

⁴⁴ Death Penalty Information Center, “Facts About the Death Penalty,” www.deathpenaltyinfo.org.

⁴⁵ *International Herald Tribune*, 9 March 2005.

Optional Protocol of the VCCR, which gives the ICJ the right to hear disputes concerning the VCCR.⁴⁶ The ICJ ruling did also not affect other foreign nationals on death row. Hung Thanh Le, a Vietnamese national, was executed in Oklahoma despite his denial of consular notification. Around 120 foreign nationals from 30 countries remained on death row in the US as of February 2005.⁴⁷

The US Supreme Court declared the state of New York's death penalty law unconstitutional on 24 June, citing problems with the state's so-called "deadlock instruction," which requires more lenient sentencing (opportunity of parole after 20-25 years) for convicted criminals should a jury be unable to decide between a life sentence and the death penalty. The court held that such an instruction unfairly influences jurors to vote for the death penalty out of fear that the convicted individual may eventually be released from prison.⁴⁸ New York's death row has been effectively frozen since the decision and, as of February 2005, a majority in the State Assembly seemed to favor outlawing the death penalty altogether.⁴⁹

On 17 December, the Kansas Supreme Court ruled the state's death penalty law unconstitutional. The court found fault with the Kansas law because it requires juries to favor a death sentence when they find arguments for and against execution equal. The decision cleared the state's death row of six inmates.⁵⁰ As of February 2005, the Kansas state legislature had put off voting for an amended law, thus leaving open the possibility for an appeal of the case to the US Supreme Court.

In October, the Congress passed the Innocence Protection Act (IPA) as part of a larger anti-crime bill. The IPA seeks to prevent wrongful executions by raising the standards for adequate representation in death penalty cases, providing greater access to post-conviction DNA testing, and ensuring that those exonerated through DNA evidence in federal cases receive compensation.⁵¹

Also in October, the Supreme Court took up the issue of death sentences for juvenile offenders for the first time since 1989, when it upheld capital punishment for 16- and 17-year olds. The court heard arguments on a case involving Christopher Simmons, a Missouri inmate sentenced to death for a murder he committed in 1993 when he was 17 years old. The Missouri Supreme Court ruled in August 2003 that the death penalty for acts committed while a juvenile should be considered "cruel and unusual punishment," in violation of the Eight Amendment of the US Constitution, but the state appealed to the Supreme Court. On 1 March 2005, the Supreme Court ruled by a 5-4 margin that the death penalty was unconstitutional for individuals who were under the age of 18 at the time of their offenses, thus clearing death row of about 70 juvenile offenders in the nineteen states where such executions were permitted. The court noted the "overwhelming weight of international opinion against the juvenile death penalty" and believed a national consensus had emerged on the issue within the US itself. The decision takes the US out of the company of only a handful of countries which, in the last ten years, have been known to practice the death penalty for juvenile offenders.⁵²

The execution of individuals with mental illness continued to be an issue in 2004. The Supreme Court outlawed the practice in 1986, but a number of cases have arisen in which individuals displayed seemingly clear signs of mental illness before their executions. Despite calls from the UN Commission on Human Rights for more stringent steps to be taken to bring states in accordance with US law, executions of the mentally ill continued in 2004.

⁴⁶ HRW, "U.S. Strips Detainees of Key Protections - Diplomatic Convention Undermined," 11 March 2005, <http://hrw.org/english/docs/2005/03/11/usint10315.htm>.

⁴⁷ *Human Rights Watch World Report 2005*, <http://www.hrw.org/english/docs/2005/01/13/usdom9853.htm#Death%20Penalty>.

⁴⁸ Death Penalty Information Center, "New York's Death Penalty Law Declared Unconstitutional: People v. Stephen LaValle," <http://www.deathpenaltyinfo.org/article.php?scid=38&did=1066>.

⁴⁹ Healy, Patrick D., "Death Penalty Seems Unlikely to Be Revived," *New York Times*, 11 February 2005.

⁵⁰ CNN.com, "Kansas Death Penalty Ruled Unconstitutional," 17 December 2004, <http://edition.cnn.com/2004/LAW/12/17/kansas.death.penalty/>.

⁵¹ *Human Rights Watch World Report 2005*, <http://www.hrw.org/english/docs/2005/01/13/usdom9853.htm#Death%20Penalty>.

⁵² *New York Times*, "Supreme Court Abolishes Juvenile Death Penalty," 2 March 2005.

- Kelsey Patterson was executed by the state of Texas on 18 May despite the recommendation of the Pardons and Parole Board for clemency. He was convicted of a double murder in 1992 and had a long history of mental illness dating to 1981, when he was first diagnosed with paranoid schizophrenia. After shooting his victims, Patterson did not avoid arrest, but instead undressed and paced up and down the street in his socks, shouting incomprehensibly. A jury found him competent to stand trial although a federal judge noted in 2000 that his delusions did not allow him a rational understanding of the charges against him or the ability to consult his lawyers.⁵³

Migrants, Asylum Seekers and Refugees

Throughout 2004, new legislation and administrative policies continued to curtail the rights of immigrants and asylum seekers. Non-citizens faced violations of their right to seek asylum, to be free from arbitrary detention, to defend against their deportation when it would result in separation from their US citizen children or other close family members, and to be afforded full and fair deportation hearings.⁵⁴

In 2004, over 6,000 children arrived unattended in the US and were placed in immigration removal proceedings. These children often went through complex immigration court proceedings without lawyers. In January 2005, a bill called the Unaccompanied Alien Child Protection Act was introduced and offers the promise of a systemic reform in the treatment of these children. Under this bill, there would be a greater emphasis on ensuring pro bono lawyers and children would be eligible for guardians. The law would also address remaining deficiencies in the immigration system's treatment of children by requiring special training for immigration judges, prosecutors and pro bono attorneys.⁵⁵

In August, the Department of Homeland Security (DHS) expanded the use of expedited removal, initially applied only at airports and borders, to the area within 100 miles of US borders with Canada and Mexico. The expansion of expedited removal gave border patrol officers the power to issue deportation orders that were previously issued by trained immigration judges. This posed an increased risk for immigrants of improper or mistaken deportation and immigrants were deprived of the right to seek release from detention before an immigration judge in a custody hearing.⁵⁶

Numerous concerns have been raised about the implementation and lack of due process protections in the expedited removal system. The bi-partisan Commission on International Religious Freedom, authorized up by the government in 2003 to undertake a study relating to the treatment of asylum seekers in the US, concluded in early 2005 that there were serious problems with the expedited process that put asylum seekers at risk of improper return. In 15% of the cases observed by the commission experts, people who expressed a fear of return were not given a chance to be interviewed by an asylum officer.⁵⁷

The commission also expressed great concern about the conditions in which immigrants subject to deportation and asylum seekers lacking travel or identity documents were held in US detention centers. Most such asylum seekers were held in actual jails or jail-like facilities inappropriate for asylum seekers. The commission found that placing people seeking refuge together with criminals – as often was the case – in harsh conditions created a serious risk of psychological harm to asylum seekers. The report described 24-hour lights, chained walks to go to eat, no privacy even to use the toilet, little chance to exercise outdoors

⁵³ AI, “Another Texas Injustice: Mentally ill man two months from execution,” <http://web.amnesty.org/library/Index/ENGAMR510492004>; Death Penalty Information Center, Mental Illness and the Death Penalty, Important and Recent Cases, <http://www.deathpenaltyinfo.org/article.php?did=782&scid=66>.

⁵⁴ *Human Rights Watch World Report 2005*, <http://hrw.org/english/docs/2005/01/13/usdom9853.htm>.

⁵⁵ UNHCR “UNHCR Good Will Ambassador Angelina Jolie launches center for unaccompanied children”, 25 March 2005.

⁵⁶ Human Rights First, “DHS announces expansion of expedited removal,” 10 August 2004, http://www.humanrightsfirst.org/media/2004_alerts/0810a.htm; information from HRW to the IHF, 12 April 2005.

⁵⁷ Human Rights First, “New Report from U.S. Religious Freedom Commission Exposes Barriers Facing Refugees,” 8 February 2005, http://www.humanrightsfirst.org/media/2005_alerts/asy_0208_relig.htm

and being cut off from the outside world, even to communicate with a lawyer. Detainees were allowed to work but were paid only one dollar per day.⁵⁸

Unlike most European countries, asylum seekers arriving at ports of entry in the US who were unable to prove their identities to the satisfaction of immigration authorities, did not go before a judge before they were subject to detention to determine whether or not such detention was necessary. Once subject to this "mandatory detention," such individuals were entitled to periodic parole reviews, but rarely did an individual asylum seeker meet the requirements for release, especially in particular parts of the country. The commission found extreme disparities regarding who was released or granted asylum, depending on the region where someone sought refuge as well as their country of origin. The regions based in Miami, Texas and San Diego, for instance, released about 80% of their detainees, whereas New York released only 8% and New Jersey only 4%.⁵⁹ Similarly, there were disparities between the nationalities of individuals granted asylum, causing many to question the legal basis for such decisions. Between 2000 and 2004, more than 80% of Cubans were given a permanent right to stay, along with more than 60% of Iraqis. By contrast, just more than 10% of Haitians and fewer than 5% from El Salvador were granted asylum.⁶⁰

- It was an explicit US policy to discourage Haitians from fleeing to the US. Attorney General John Ashcroft ruled that all people arriving by boat – a vast majority of them Haitians – should be detained because freeing them would “encourage others to come.” An exception was made for Cubans who arrived by boat, who – by law – got parole and a green card.⁶¹ In violation of international law, hundreds of Haitians, fleeing their country following the riots after the exile of Haitian President Aristide in February 2004, were returned to Haiti. By October, 3,229 had been interdicted at sea. Only ten were found to be refugees.⁶²

In September 2004, the Republican Party leadership in the House of Representatives introduced a bill titled "The 9/11 Recommendations Implementation Act of 2004" (H.R. 10), intended to implement the recommendations of the US 9/11 Commission. The bill would have authorized the US government to deport non-citizens whom it labeled as national security threats or criminal aliens to countries where they would be at grave risk of torture, in clear violation of the US's obligations under the UN Convention Against Torture (CAT). Human rights groups, including HRW, strongly opposed the bill, stating that it would violate the US's CAT obligations and US domestic law and have "immediate and damaging consequences." In the face of strong public criticism, the House Republican leadership amended this section of the bill, and deleted the exemption from CAT protection against removal to countries where non-citizens are likely to be tortured. Instead, they enacted a provision that retained the ban on removals that would violate the CAT, but added draconian detention provisions for certain classes of non-citizens who were granted protection against return under CAT. These detention provisions lacked adequate standards and failed to provide for judicial review to safeguard against abuse. While this second version of the legislation did not ultimately pass the full Congress, certain members of the House publicly declared their intentions to re-introduce similar provisions in future legislative sessions.⁶³

Rights of Homosexuals

There were significant developments in 2004 regarding marriages between same-sex couples. Following a landmark decision by the Supreme Judicial Court of Massachusetts in November 2003, which ruled that the

⁵⁸ Immigration Portal, Nina Bernstein and Marc Santora, "Asylum Seekers treated poorly, U.S. panel says," 7 February 2005, <http://www.immigrationportal.com/showthread.php?t=162034>.

⁵⁹ *New York Times*, "The Persecuted, in Chains," 25 September 2004.

⁶⁰ Immigration Portal, "Asylum Seekers treated poorly, U.S. panel says," 7 February 2005, <http://www.immigrationportal.com/showthread.php?t=162034>.

⁶¹ *New York Times*, "The Persecuted, in Chains," 25 September 2004.

⁶² *Human Rights Watch World Report 2005*, <http://hrw.org/english/docs/2005/01/13/usdom9853.htm>.

⁶³ Immigration Portal, Nina Bernstein and Marc Santora, "Asylum Seekers treated poorly, U.S. panel says," 7 February 2005, <http://www.immigrationportal.com/showthread.php?t=162034>.

state could not refuse to marry same-sex couples, same-sex marriage became legal in Massachusetts in May 2004. However, marriage was denied to out-of-state residents and same-sex marriages granted by Massachusetts were not recognized in any other state in the US. For short intervals of time during 2004, same-sex couples were also able to obtain marriage licenses in various places in the US, most notably in San Francisco, though none were able to register their marriages. Six months after the new mayor of San Francisco had instructed the city officials to extend marriage ceremonies to everyone, regardless of gender, the California Supreme Court nullified the nearly 4,000 marriages that had already taken place and ruled that the mayor had exceeded his powers by granting marriage to same-sex couples.⁶⁴

The important developments that promoted gay rights also provoked vehement reactions by conservative groups, who pushed for an amendment to the US Constitution to create a federal definition of marriage as “the union of a man and a woman,” prohibiting states from issuing same-sex marriage licenses.⁶⁵ The Federal Defense of Marriage Act of 1996 already gives each state the right to refuse recognition of same-sex marriages licenses issued by other states, however, it does not prohibit states from allowing gay marriages. In 2004, the proposed amendment failed to gain the two-thirds majority in Congress required as a first step to amend the US Constitution, but conservatives promised to introduce it again in 2005.⁶⁶

During the 2004 presidential elections, ballot measures to constitutionally ban gays from marrying passed in all 11 states they were offered. The constitutional amendments varied in severity from state to state. The measures in Oregon, Mississippi and Montana only ban same-sex marriage. The rest also prohibit recognizing civil unions.⁶⁷

⁶⁴ Gay.com, David Kravets, “Court ruled Newsom overstepped authority, voids same-sex marriages,” 12 August 2004, <http://www.gay.com/news/article.html?2004/08/12/2>.

⁶⁵ Ramon Johnson, “Federal Marriage Amendment,” <http://gaylife.about.com/cs/gaymarriage/i/fma.htm>.

⁶⁶ Gay.com, “Marriage rights for same-sex couples,” <http://www.gay.com/news/roundups/package.html?sernum=329>.

⁶⁷ Gay.com, “Voters in 11 states ban same-sex marriage,” 3 November 2004, <http://www.gay.com/news/article.html?2004/11/03/2>.