

**Convention against Torture
and Other Cruel, Inhuman
or Degrading Treatment
or Punishment**Distr.
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COMMITTEE AGAINST TORTURE
Thirty-fifth session
7-25 November 2005**List of issues to be considered during the examination of the second periodic
report of the UNITED STATES OF AMERICA (CAT/C/48/Add.3)****Article 1**

1. If, according to the report,¹ “[t]he definition of torture accepted by the United States upon ratification of the Convention ... remains unchanged”, why did the Department of Justice issue a memorandum in August 2002² which concluded “that torture as defined in and proscribed by section 2340-2340A [of the United States Code] covers only extreme acts?” Please explain how this is compatible with article 1 of the Convention.
2. Please explain the substantive reasons why, if the definition of torture remained unchanged, the August 2002 memorandum was itself replaced in December 2004,³ by a new memorandum and whether any of the conclusions of the August 2002 memorandum are still valid. How does a memorandum interpret a convention, and is it legally binding?
3. Please explain the compatibility with the Convention of the memorandum of 30 December 2004,⁴ which states that “[t]he term ‘torture’, in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices ...”,⁵ and that “[t]he [Convention against Torture] thus treats torture as an ‘extreme form’ of cruel, inhumane, or degrading treatment”,⁶ and that “[t]he requirement that torture be an extreme form of cruel and inhuman treatment is expressed in article 16 ...”⁷ [of the Convention]. J. Herman Burgers and Hans Danelius,⁸ quoted as authorities in the 30 December 2004 memorandum, expressly state that “... extreme or extremely severe pain [was] suggested during the *travaux préparatoires*, but the phrase ‘severe pain’ was considered sufficient to convey the idea that only acts of a certain gravity shall be considered to constitute torture”. Please explain how this interpretation is compatible with article 1 of the Convention.
4. Please explain why the interpretation of both memorandums seems to be much more restrictive than previous United Nations standards, namely the Declaration on the Protection of

All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁹ which states that “[T]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”

Article 2

5. Considering that the reservation of the State party to the Convention states that the “provisions of articles 1 through 16 of the Convention are not self-executing”,¹⁰ the only legislation that has been enacted to give effect to the Convention was a law giving the United States courts criminal jurisdiction over extraterritorial acts of torture.¹¹ Is the State party actively considering formally incorporating all the provisions of the Convention into domestic law? If not, how will the State party ensure that its legislative, judicial, administrative and other measures fully meet the obligations of the Convention? What guarantees and controls does the State party have to ensure the monitoring of the activities of law enforcement officials in prisons and other detention centres under the jurisdiction of states of the Union or under its jurisdiction or de facto control?¹²

6. Is the transfer of detainees from one place of detention to another duly registered and is this registrar public? Do foreigners detained under the jurisdiction of the State party receive any consular assistance? Please provide updated and detailed data regarding the incarcerated population in the State party’s territory¹³ and in areas under the jurisdiction of the State party, including in Afghanistan, Iraq and Guantánamo Bay.¹⁴ Regarding the latter, please provide information on their exact legal status, the offences they are detained for, for what period and the process which determines the length of their detention. Do detainees have access to legal advice, medical treatment and family visits? Is there any independent review of the grounds of detention and their continuing applicability? Please provide detailed information on the matter.

7. According to information before the Committee,¹⁵ the State party has established secret detention facilities, including on-board vessels, and holds unacknowledged detainees with no access to the International Committee of the Red Cross (ICRC), no notification of families, no oversight with regard to their treatment, and in most cases no acknowledgement that they are even being held. Please provide a list of all detention facilities where detainees are being held under the de facto effective control of the State party’s authorities,¹⁶ outside its territory or on State party vessels, as well as information on the number, nationality, charges against and exact legal status of these persons. Why have such secret detention facilities been established? Does the State party assume responsibility for alleged acts of torture perpetrated by its own public agents outside its territory but in territories under its jurisdiction or de facto control,¹⁷ as well as in cases where those acts are perpetrated by persons who are not public agents but are subject to the control of the State party?

8. In view of the numerous allegations of torture and ill-treatment of persons in detention under the jurisdiction of the State party and the case of the Abu Ghraib prison, what specific measures have been taken to identify and remedy problems in the command and operation of those detention facilities under the jurisdiction of the State party? What measures have been undertaken to ensure that the ICRC has appropriate access to all such facilities and to all detainees, and that its reports are made known to sufficiently senior members of the chain of command for purposes of implementation?

9. Under the State party's domestic law, is it possible to derogate from the principle of the absolute prohibition of torture? Have any measures taken by the State party derogated from this prohibition? Can any provision of the Patriot Act of 2001 be interpreted as a possible derogation? What legal or administrative measures has the State party put in place to ensure that the Convention's prohibition against torture is not derogated from under any circumstances?

10. Please comment on information transmitted to the Committee that criminal responsibility of perpetrators of torture may be waived under the President's authority as Commander-in-Chief. Does the State party attribute to any person the right to authorize torture or ill-treat anyone under any circumstances? If so, to whom? How is such an authorization compatible with article 2 of the Convention? Has there been an independent investigation regarding the possible responsibility of the high-ranking officials of the Administration, including the CIA, the Department of Defense, the Department of Justice and the Armed Forces, for authorizing or consenting in any way, including through the issuance of orders or guidelines, to acts committed by their subordinates, especially during the interrogation of detainees, which could be considered as acts of torture?

11. Can an order from a superior be invoked as a justification of torture? Please indicate the appropriate legal measures in place to ensure this does not occur. Are there any circumstances, such as "necessity", "self-defence", "superior orders", or any other principle, which can be invoked as a defence for those who torture or ill-treat detainees?

12. Have the several versions of interrogation rules, instructions and methods, specially regarding persons suspected of terrorism, that have been adopted been consolidated for civilian and military use, especially for the CIA and the military intelligence services? Are persons detained outside the State party, but under its jurisdiction, protected by the same norms regarding interrogation rules, instructions and methods?

Article 3

13. Please provide detailed information on the provisions implementing article 3 of the Convention in domestic law and on the procedures, including judicial remedies, to ensure that it is implemented in practice, including in respect of persons under the jurisdiction of the State party outside its territory. Have any decisions prohibiting expulsion, refoulement or extradition to another State under article 3 of the Convention been revoked? Are any categories of foreign persons considered as having committed a crime or suspected of having committed a crime automatically excluded from the protection of article 3 of the Convention?

14. Does the reservation of the State party to article 3 of the Convention restrict or change the protective scope of this provision? Please explain the practical differences between article 3 of the Convention and the State party's reservation to article 3.¹⁸ How and by whom is the determination that a person is "more likely than not" to be tortured made? Please provide examples, *in abstracto* if necessary.

15. May foreigners who claim the right not to be removed to another State under article 3 of the Convention appeal to the courts against the decision of the Secretary of State? Do asylum-seekers have the right to appeal against removal? Please provide detailed information on

any such procedure. Does an appeal against a removal have suspensive effect? Please provide information on the number of appeals filed and their outcome. Does the State party have a list of “safe third countries” for removal? If so, how is it created and maintained?

16. According to information before the Committee, the State party has adopted a policy to send, or to assist in the sending of persons to third countries, either from the State party’s territory or from areas under its jurisdiction, for purposes of detention and interrogation. How many persons have been affected by this policy, to which countries were they sent, and what measures have been adopted to ensure that they will not be subjected to torture? Please comment on allegations¹⁹ that persons are detained without charges in certain countries at the request of the State party’s authorities.

17. Are enforced or involuntary disappearances, which can be considered a form of torture, a crime punishable by law in the State party? How does the State party prevent persons removed to another State to be interrogated from disappearing?

18. Please provide further information on the procedure used to obtain diplomatic assurances that a person will not be tortured if removed or extradited to another State.²⁰ Have there been any cases where those assurances were not considered adequate and, therefore, the person was not removed or extradited? Please provide examples, *in abstracto* if necessary. Please provide details of the assurances that must be fulfilled by the receiving country in order for the State party to remove or extradite a person. What monitoring mechanisms are in place to assess if the assurances have been honoured?²¹ Please provide further information on the “rule of non-inquiry” of the Secretary of State.²² What purpose does this rule serve?

19. According to information before the Committee, persons have been sent to countries which the State party itself considers not to respect human rights,²³ where they have been tortured and ill-treated. Were those cases investigated, and what was the result of the investigations? Are all the State party’s agencies, when operating outside the State party’s territory, under the obligation to respect the non-refoulement rule? Please explain “extraordinary renditions”, the procedures followed and the guarantees extended.

Article 4

20. Does torture, under the State party’s federal law, constitute a specific type of criminal offence when committed inside the State party?²⁴ If so, please provide examples. If not, is the State party actively considering making torture a specific federal crime, if committed inside its territory? How is this lacuna reconciled with the necessity of preventing torture and, specifically, with the obligations of the State party under articles 1, 2 and 4 of the Convention? According to the State party report,²⁵ acts of torture “may be prosecuted” as other criminal acts (assault, homicide, kidnapping, rape, etc.). Please explain how and under which other offences acts of torture can be prosecuted.

21. According to the State party’s report,²⁶ the Uniform Code of Military Justice includes the offences of cruelty and maltreatment, but does it include the offence of torture? If not, please explain why and how this is compatible with the State party’s obligations under article 4 of the Convention.

Article 5

22. According to the domestic law of the State party, in what cases do foreigners have penal immunity regarding the crime of torture, including if they are present in the territory of the State party? Considering that there were investigations pending at the date of submission of the report,²⁷ have any prosecutions been initiated under the extraterritorial criminal torture statute?²⁸ Taking into consideration that the prohibition of torture and conspiracy to torture extends to contractors outside the State party,²⁹ have any contractors been charged with this specific offence?

Article 10

23. Are the terms of the Convention applicable to the armed forces and other personnel, including contractors, when participating in peacekeeping or other military operations either alone or as part of an internationally authorized contingent? If so, have they been informed of their obligations under the Convention, and which other international human rights instruments apply to them?

24. What educational programmes and information, rules and instructions, and mechanisms of systematic review exist for military personnel involved in the custody, interrogation or treatment of individuals in detention?

25. What use does the State party make of private contractors in respect of the operation of detention facilities and the interrogation of detainees, and how is this personnel recruited? According to information before the Committee, human rights training for contractors is non-existent or very limited. Please provide detailed information on their training.

Article 11

26. Could the use of the word “extreme” in the December 2004 memorandum³⁰ create unnecessary confusion for trainers and personnel, considering that, according to the report by Major General Fay, Lieutenant-General Jones, and General Kerna, “military personnel or civilians appeared to have abused Iraqi prisoners due to ... confusing interrogation rules”.³¹

27. Please provide detailed examples of revisions of interrogation rules, instructions, methods and practices after the August 2002 memorandum was superseded by the December 2004 memorandum.³² Are there any specific interrogation rules, instructions and methods for specific agencies, or do the same apply to all personnel, including the limits on interrogation techniques? Please provide the Committee with all the interrogation rules, instructions and methods currently applicable.

Article 12

28. Please provide information on the programmes, activities, resources and results of the Civil Rights Division of the Department of Justice.

29. Since October 1999, what has been the outcome of the enforcement of the Civil Rights of Institutionalized Persons Act?³³ How many investigations ended in prosecution for torture or cruel, inhuman or degrading treatment or punishment, or similar offences? What measures have been taken to improve conditions of detention? Please provide detailed information.

30. Please provide statistical data regarding deaths in custody disaggregated by location of detention; gender, age and ethnicity of the deceased; and cause of death. Please provide detailed information on the results of the investigations in respect of those deaths, including any specific recommendations made following the inquiries.

31. Please provide information in respect of the numerous deaths of detainees which have occurred under the State party's jurisdiction in Afghanistan and Iraq, allegedly after being tortured. Have those deaths been fully and impartially investigated, those found to be responsible prosecuted and punished in accordance with the seriousness of the offences?

32. Please provide updated detailed information on any specific cases of torture or cruel, inhuman or degrading treatment or punishment or similar offences committed by personnel of the State party in Afghanistan, Iraq and Guantánamo Bay, including number of cases, their status, the authorities before which they are pending and their outcome. In the view of the State party, how did such acts occur, and what actions have been taken to ensure that there will be no recurrence of any such acts in places of detention under the State party's control?

33. Please comment on the information that the official investigations conducted into allegations of torture and ill-treatment in Afghanistan and Iraq, and especially in the Abu Ghraib prison, were not fully independent. Were any investigations³⁴ carried out by an independent, judicial or non-military authority? If not, are any independent investigations foreseen in the future? Are there any independent entities monitoring these facilities (national or international or non-governmental)? Please provide the results of the investigations that were still ongoing at the time of submission of the report, including by the Naval Criminal Investigation Service and by the Naval Inspector General.³⁵

Articles 13 and 14

34. Do the Combatant Status Review Tribunals and the Administrative Review Boards³⁶ have any jurisdiction regarding complaints of torture and cruel, inhuman or degrading treatment or punishment? How is their impartiality ensured when dealing with such cases?

35. Please provide detailed information on how, in practical terms, the "Justice For All Act" of 2004 has provided an improvement of the rights of victims of torture to obtain redress?³⁷ Since the enactment of the Act, has there been an increase in the number of complaints? Please provide statistical information.

36. What remedies are available to detainees under the State party's jurisdiction outside the State party's territory with regard to acts of torture, and before what authority may they seek compensation? How many detainees have exercised this right so far? Please provide a breakdown of the statistical data regarding complaints of torture or ill-treatment according to

gender, age, location of the complainant, and result of the investigation. Has compensation been provided to date, to how many victims, and in what amounts? Please provide information on compensation given to the Abu Ghraib victims.³⁸

37. Please explain how the Prison Litigation Reform Act, which contains a provision establishing “that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury”,³⁹ is compatible with, amongst others, article 13 of the Convention, in view of the fact that it limits the right of victims to complain and increases the possibility of impunity for perpetrators.

38. Have victims of torture perpetrated by personnel of the State party been treated in any Centre for Victims of Torture in the State party?⁴⁰

39. Please update information on the habeas corpus cases pending before district courts,⁴¹ following the decisions of the Supreme Court in *Rasul v. Bush*. Does the State party ensure the right of habeas corpus to detainees under its control in other parts of the world?

40. Is the State party considering reviewing its decision not to apply the Geneva Conventions of 12 August 1949 to detainees who are considered “enemy combatants” by the State party, in Afghanistan, Iraq, Guantánamo Bay or in other locations under the jurisdiction of the State party? What is the exact legal status of those persons, and what international instruments are applicable to them for the protection of their human rights?

Article 15

41. Please provide examples of any judicial cases where the courts have declared statements inadmissible on the ground of having being obtained coercively.

42. How is the provision in article 15 of the Convention prohibiting the use of any statement obtained as a result of torture as evidence in any proceedings, except against the alleged torturer, specifically guaranteed at the Combatant Status Review Tribunals and at the Administrative Review Boards?⁴² Please provide information on any statement that has been considered inadmissible in this context.

Article 16

43. The reservation by the State party to article 16 limits the meaning of cruel, inhuman or degrading treatment or punishment to the treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the Constitution. In practical terms, what kinds of treatment or punishment are prohibited, and admissible, by the amendments but not by the Convention? Please provide concrete examples.

44. In view of the reservation by the State party to article 16, is this article fully applicable outside the State party’s territory, or in territories under the jurisdiction of the State party or under the de facto control of the State party?⁴³ Please clarify what is considered to be within the Special Maritime and Territorial Jurisdiction. Does article 16 of the Convention apply to the Special Maritime and Territorial Jurisdiction?⁴⁴ Is cruel, inhuman or degrading treatment or punishment committed by its agents against foreigners outside the territory of the State party punishable by law in the State party?

45. Please provide examples of practical implementation of the National Detention Standards by which non-citizen detainees were provided with better conditions of detention.⁴⁵ Please provide information on the measures taken to address the complaints of harassment and sexual violence against immigrant women by border patrol agents.

46. According to information before the Committee, several deaths following the use of tasers have occurred, raising serious concerns about the safety of this instrument. Please provide detailed information on their use, including any measures taken to make their use safe.

47. Why are juveniles detained with adults in federal or state facilities, and under what conditions, considering that federal law prohibits juveniles being held in custody with adults? How many juveniles are still detained with adults in federal or state facilities?⁴⁶

48. According to information before the Committee, detained women are kept shackled during childbirth. Why does the State party consider such a measure to be necessary? Please describe the measures taken to prohibit detainees being chained together in gangs and to hitching posts.⁴⁷ What measures have been taken to review the regime of super maximum security prisons?⁴⁸

49. What measures have been taken to prevent sexual violence against detainees, including inter-prisoner violence? What specific measures have been taken to protect female, juvenile and immigrant detainees against this type of violence? How many complaints have been lodged by detainees and what was the outcome of the investigations; if compensation was paid, what was the amount?

50. How is the use of solitary confinement regulated and how is detainees' mental health monitored?⁴⁹ How is prolonged isolation and indefinite detention, with or without charges, compatible with the obligation of the State party under article 16?

51. Please provide information in respect of allegations that extreme pain is experienced during the procedure of execution by lethal injection, as the sedative is not properly administered.⁵⁰ How are executions monitored, especially those by lethal injection?

52. According to information before the Committee, the State party has authorized the use of interrogation techniques such as 20-hour interrogations, stress positions, isolation, sensory deprivation, hooding, exposure to cold or heat, sleep and dietary adjustments, use of dogs to instil fear, removal of clothing, forced shaving, use of female interrogators, physical contact and removal of religious items. If this is the case, how does the State party reconcile the use of such techniques with its obligations under article 16 of the Convention? Please provide detailed information on interrogation techniques authorized and practised in Guantánamo Bay, Afghanistan, Iraq, and in other places of detention under the State party's control. Are there any specific rules regarding the use of gender or sexualized practices as methods of interrogation?

53. While acknowledging the federal structure of the State party, it is the federal State that is responsible for the international obligations assumed by the State party under the Convention. Please provide detailed information on the existing mechanisms the State party has to monitor the implementation of the Convention at the state level, in order to fulfil its international obligations under the Convention? Please provide detailed information on the McCain and

Graham-Levin amendments as well as on the changes they will introduce to the current legislative, administrative, judicial and other measures preventing cruel, inhuman or degrading treatment or punishment.

Other issues

54. Is the State party considering making the declaration under article 22, recognizing the competence of the Committee to receive and consider individual communications?
55. Is the State party considering withdrawing any of its reservations to the Convention, as they might be interpreted, and applied, as limiting the full application of the Convention?
56. Does the State party envisage ratifying the Optional Protocol to the Convention? If so, has the State party taken any steps to set up or designate a national mechanism that would conduct periodic visits to places of deprivation of liberty in order to prevent torture or other cruel, inhuman or degrading treatment or punishment?
57. Please indicate whether the State party's legislation prevents and prohibits the production, trade, import, export and use of equipment specifically designed to inflict torture or other cruel, inhuman or degrading treatment. If so, please provide information about its content and implementation. If not, please indicate whether the adoption of such legislation is being actively considered.
58. Please provide information on the legislative, administrative and other measures the State party has taken to respond to the threats of terrorism, and please describe if, and how, these measures have affected human rights safeguards in law and practice. Please describe the relevant training given to law enforcement officers, the legal remedies available to persons subjected to anti-terrorist measures, the number of complaints of non-observance of international standards, and the outcome of these complaints.
59. Please provide information on the legislative and other measures the State party has taken to prevent domestic violence and to classify acts of domestic violence as specific offences under the criminal law.

Notes

- ¹ CAT/C/48/Add.3 ("the report"), para. 11.
- ² United States Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, *Memorandum for Alberto R. Gonzales*, 1 August 2002, p. 46.
- ³ United States Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, *Memorandum for James B. Comey, Deputy Attorney General*, 30 December 2004.
- ⁴ Para. 13 and annex 3 to the report.
- ⁵ *Memorandum for James B. Comey*, op. cit., p. 6.

⁶ Ibid.

⁷ Ibid., p. 7.

⁸ Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff, 1988, p. 117, *in fine*.

⁹ Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975, art. 1.2.

¹⁰ Annex 4 to the report.

¹¹ See the core document (HRI/CORE/1/Add.49), para. 141 and the initial report (CAT/C/28/Add.5), para 47.

¹² De facto control of the State party, means, e.g., territories, or parts of territories, where United States troops are operating under United States command.

¹³ Initial report.

¹⁴ Annex 1 to the report, pp. 50 and 71.

¹⁵ Report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/2005/65), para. 364.

¹⁶ Conclusions and recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland - Dependent Territories (CAT/C/CR/33/3), para. 4 (b).

¹⁷ See note 12.

¹⁸ Para. 33 of the report.

¹⁹ Report of the Special Rapporteur on torture (E/CN.4/2004/56/Add.1), paras. 1818-1833.

²⁰ Para. 33 of the report.

²¹ Para. 43 of the report.

²² Para. 41 of the report.

²³ The State Department's annual Country Reports on Human Rights Practices, <http://www.state.gov/g/drl/rls/hrrpt/2004/c14136.htm>.

²⁴ United States Code, Title 18, part I, chapter 113C, para. 2340.

²⁵ Para. 16 of the report.

²⁶ Para. 19 of the report.

²⁷ Para. 50 of the report.

- ²⁸ United States Code, Title 18, part I, chapter 113C, para. 2340A.
- ²⁹ Para. 12 of the report.
- ³⁰ *Memorandum for James B. Comey*, op. cit.
- ³¹ Page 75 of the report (annex 1).
- ³² Para. 62 of the report.
- ³³ Para. 26 of the report.
- ³⁴ Page 74 of the report (annex 1).
- ³⁵ Page 68 of the report.
- ³⁶ Page 53 of the report (annex 1).
- ³⁷ Para. 65 of the report.
- ³⁸ Page 79 of the report.
- ³⁹ Para. 153 of the report.
- ⁴⁰ Para. 84 of the report.
- ⁴¹ Page 59 of the report.
- ⁴² Page 53 of the report (annex 1).
- ⁴³ See note 12.
- ⁴⁴ Para. 45 of the report.
- ⁴⁵ Para. 126 of the report.
- ⁴⁶ Para. 116 of the report.
- ⁴⁷ Paras. 121 and 124 of the report.
- ⁴⁸ Para. 95 of the report.
- ⁴⁹ Report of the Special Rapporteur on the question of torture (E/CN.4/2005/62/Add.1), para. 1857.
- ⁵⁰ *Ibid.*, para. 1858.
