

**HUMAN RIGHTS FIRST SUBMISSION TO THE OFFICE OF THE HIGH
COMMISSIONER FOR HUMAN RIGHTS**

**UNIVERSAL PERIODIC REVIEW: UNITED STATES OF AMERICA,
NOVEMBER 26, 2010**

1. Introduction

This report is a submission by Human Rights First to the Office of the High Commissioner for Human Rights (OHCHR) for consideration in its summary of stakeholder submissions for the United States' appearance before the Ninth Universal Periodic Review session, scheduled for November 26, 2010. The submission focuses primarily on three issues: (1) refugee protection and immigration detention; (2) counter-terrorism policies; and (3) hate crimes and discrimination. Our analysis is particularly relevant to sections I.A(B) and (C) of the Human Rights Council's Guidelines.¹

2. Executive Summary

In addition to the recommendations contained in section 6, the submission makes the following key points:

- **Refugee Protection and Immigration Detention:** Despite its leadership in protecting victims of persecution around the world, the United States has fallen short on its commitment to treat refugees who seek asylum in the United States in accordance with the 1967 Protocol Relating to the Status of Refugees and the International Covenant on Civil and Political Rights (ICCPR). The United States should change its laws and regulations to provide asylum seekers who are detained on arrival with prompt immigration court custody hearings, eliminate the one-year asylum filing deadline, and ensure refugees are not improperly excluded from protection or returned to persecution after interdiction at sea.
- **Counter Terrorism Policies:** The United States continues to hold more than 800 detainees in military facilities at Guantanamo Bay and in Afghanistan without charge or trial. Due to the government's overly broad definition of armed conflict and belligerency, many of these detainees are being held in violation of international law. Some are slated for trial in military commissions which do not comport with international due process standards. The government has also failed to provide adequate information about detainees reportedly abused in a "black site" in Afghanistan. Although the government has clarified and improved its interrogation methods, the interrogation guidance is still susceptible to abuse that would violate international law. The United States has also failed to adequately investigate past incidents of torture and detainee abuse, and to provide remedies and compensation for victims as required.
- **Hate Crimes:** Despite one of the most advanced systems of data collection and hate crime legislation in the world, bias-motivated violence continues to be a serious problem in the United States. Official response is not uniform across the country, and vulnerable groups continue to be subjected to violent acts motivated by racism, bigotry and intolerance. The government must remain vigilant in responding to acts of hate crime and persistent in seeking ways to enhance

¹ Human Rights Council, *Organizational and Procedural Matters, Human Rights Bodies and Mechanisms, Universal Periodic Review*, UN Doc. A/HRC/6/L.24 (September 24, 2007).

community outreach efforts in order to increase confidence in police and local government to adequately address the problem.

3. Failure to Adequately Protect Refugees

Outlined below are four examples of U.S. noncompliance with human rights commitments that undermine the protection of refugees:

A. Failure to Provide Independent/Court Review of Detention of Arriving Asylum Seekers: The failure to provide prompt, independent court review of decisions to detain arriving asylum seekers is inconsistent with U.S. commitments under the 1967 Protocol² and the ICCPR. On arrival, asylum seekers are subject to “mandatory detention” under expedited procedures. Subsequent parole assessments are conducted by U.S. Immigration and Customs Enforcement (ICE), the detaining authority. If ICE denies parole, the asylum seeker cannot appeal to a judge, even an immigration judge. While U.S. immigration judges review ICE custody decisions for other immigrant detainees, they are precluded under regulatory language from reviewing the detention of “arriving aliens.”³ Article 9(4) of the ICCPR provides that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” Article 31 of the Refugee Convention exempts refugees from being punished for illegal entry and provides that States shall not restrict the movements of refugees more than is “necessary.” The UN Special Rapporteur on the Human Rights of Migrants concluded that the U.S. immigration detention system lacks safeguards against arbitrary detention and recommended that the Departments of Homeland Security and Justice “revise regulations to make clear that asylum-seekers can request [their] custody determinations from immigration judges.”⁴ The UNHCR Executive Committee, of which the United States is a member, has recommended that detention of asylum seekers “should be subject to judicial or administrative review,” and UNHCR’s guidelines on the detention of asylum seekers call for procedural safeguards when an asylum seeker is detained, including “automatic review before a judicial or administrative body independent of the detaining authorities.”⁵ (See Human Rights First’s 2009 report “U.S. Detention of Asylum Seekers,” annexed, for comprehensive discussion and recommendations.)

B. Asylum Filing Deadline Inconsistent with Refugee Protocol Commitments: Due to a one-year filing deadline, many asylum seekers, including refugees determined to face a probability of persecution, have had their requests for asylum rejected or denied by U.S. adjudicators. Article 33 of the Refugee Convention prohibits the return of refugees to persecution. The UNHCR Executive Committee has specified that technical requirements like filing deadlines “should not lead to an asylum request being excluded from consideration.”⁶

C. Overly Broad Approaches to Exclusion from Refugee Protection: The U.S. approach to exclusion (denying asylum on the basis that the applicant has committed a serious crime, such as terrorism), reflected in U.S. immigration law and legal positions, is inconsistent with the Refugee Protocol. (See Human Rights First’s 2009 report “Denial or Delay,” annexed, for detailed explanation and recommendations.)

² The United States acceded to the Refugee Protocol in 1968, and in doing so bound itself to comply with the substantive provisions of the 1951 UN Convention Relating to the Status of Refugees.

³ Provisions located mainly at 8 C.F.R. 1003.19 and 212.5, as well as at 208.30 and 235.3.

⁴ Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants*, 123, UN Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008).

⁵ UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Guideline 5(iii) (Feb. 1999).

⁶ UNHCR, Executive Committee, *Refugees Without an Asylum Country*, Conclusion No. 15 (XXX), (1979) at (i).

D. Interdiction Policies Discriminatory and Do Not Ensure Protection: U.S. interdiction policies do not ensure compliance with the Refugee Protocol and other human rights conventions.⁷ U.S. procedures vary by nationality, translators are not required, and critical protection information is not provided to all nationalities. Haitians are given protection screening interviews only if identified through the so-called “shout test”—they must shout or otherwise indicate a potential fear of return—despite the lack of translators or information.

4. Counter-Terrorism Policies Violate International Law

A. Detention Authority: The United States continues to hold nearly 200 individuals in indefinite detention in Guantanamo Bay, Cuba. Although the Obama administration has repatriated some detainees, it has continued to hold many who have been cleared for release or won orders of release from a U.S. court. The government is now reportedly planning to hold about 50 detainees indefinitely without charge or trial. Another 600 or more individuals are detained by the United States in Afghanistan. Many of these individuals are being held in violation of Article 9(4) and Article 14 of the ICCPR, which states that detainees are entitled to public, independent and impartial court proceedings to determine the lawfulness of their detention. These detentions are problematic even if judged by the standards of International Humanitarian Law which might be argued to apply to these situations as *lex specialis*.

The United States under the Obama administration has slightly limited its claim of authority to detain terror suspects pursuant to the *Authorization for the Use of Military Force Act*. However, the authority it claims still exceeds the detention authority provided under international humanitarian law—including that governed by the Third and Fourth Geneva Conventions—by asserting overly expansive definitions of armed conflict and belligerency.

B. Detainee Treatment: Although the United States has improved the treatment of detainees at Guantanamo Bay and pledged to close all secret detention sites, the government has failed to provide adequate information concerning the treatment of detainees in its custody. Recent reports raise questions about the adequacy of the investigations into three alleged suicides at Guantanamo Bay. Human Rights First is concerned by allegations that some prisoners have been interrogated at a secret “black site” at the Bagram detention facility and denied access to ICRC officials. Humane treatment of prisoners in a non-international armed conflict is required by Common Article 3 of the Geneva Conventions, and the standards are even more rigorous in international conflicts. The United States needs to respond to requests for more information about the following issues:

1. Interrogation: In early 2009, President Obama issued an executive order ending the use of “enhanced interrogation techniques” and requiring U.S. interrogators to comply with the restrictions set forth in the Army Field Manual. The Manual still allows coercive interrogation techniques, such as sleep deprivation, prolonged isolation, sensory deprivation, and inducing fear and humiliation of prisoners. Such methods may be used alone or in combination pursuant to the Field Manual. Such techniques can cause long-lasting psychological and physical harm

⁷ The United States has taken the position, upheld in the Supreme Court’s 1993 decision in *Sale v. Haitian Centers Council*, that the Protocol’s prohibition against the return of refugees to persecution does not apply to U.S. interdiction on the high seas – a position that triggered international criticism including from the Inter-American Commission on Human Rights.

and can violate both longstanding rules of customary international law as well as such treaty provisions as Common Article 3 of the Geneva Conventions and Article 16 of the Convention against Torture, which prohibit cruel, inhuman, or degrading treatment or punishment.

2. Detainee Trials: The United States has improved the military commissions created to try some Guantanamo detainees. However, these commissions still do not meet the Common Article 3 requirement of a “regularly constituted court”. The United States should abandon the use of military commissions and try detainees in regularly constituted U.S. military tribunals or civilian federal courts.

C. Accountability for past violations: The United States has announced a preliminary review of whether federal laws were violated in the conduct of interrogations overseas. However, it has refused to investigate whether the abuses were due to illegal policies and practices sanctioned by senior U.S. officials, who may also be culpable. Article 7 of The Convention against Torture (CAT) demands such an investigation. Article 14 of the CAT and Article 2 of the ICCPR, as well as the Geneva Conventions, require the United States to provide remedies to victims of torture and abuse. The government has no plan for providing such remedies or compensation.

5. Combating Hate Crimes

Among the rights guaranteed by the ICCPR are the right to life (Article 6) and security of the person (Article 9)—rights that states have an obligation to ensure “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2).

Similarly, the International Convention against All Forms of Racial Discrimination (CERD) obliges states to condemn and eliminate racial discrimination by public institutions and officials and private individuals. Both government action as well as inaction can violate article 2 of the CERD. As such, there is no excuse for complacency or indifference by a government toward either public or private discrimination, particularly when it involves violence.

Such discriminatory violence—or hate crime—continues to occur across the United States, taking the form of vicious personal assaults and attacks on homes, personal property, and places of worship, cemeteries, community centers, and schools. People of African descent comprise the largest number of victims of violent hate crime, reflecting longstanding patterns of such crimes in the United States. However, new trends of rising anti-immigrant xenophobia help explain the significant rise in recent years in anti-Hispanic hate crimes. The public debate over the question of gay marriage has coincided with a sustained rise in attacks against lesbian, gay, bisexual, and transgender individuals (LGBT). Although anti-LGBT incidents are among the most under recorded, they are also characterized by a high level of violence. Jews and Muslims continue to be the principal victims of violence based on religious hatred and prejudice. Christian churches, their congregations, and clergy are also targeted for hate crimes.

The United States government generally recognizes that hate crimes are a serious and continuing problem. It has put in place a system of monitoring and reporting, and has created a sound legal base for prosecuting hate crimes. In 2009, a new Hate Crime Prevention Act was enacted, strengthening laws and extending hate crime protection to individuals victimized because of actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability.

Nonetheless, there is a need to improve the official response to hate crimes, including through better prosecution of bias-motivated incidents and advancement of police-community relations.

Underreporting of hate crimes to law enforcement agencies remains a serious problem. At the same time, police agencies do not take part in the reporting of hate crime to a sufficient extent. Despite an increase in the number of agencies that participate in the hate crime data collection program (13,690 in 2008, up 3.4 percent from 13,241 in 2007), far fewer agencies (2,145 in 2008, up nearly 6 percent from 2,025 in 2007), actually reported any hate crimes in their jurisdiction. Some 4,000 police jurisdictions still do not participate in the voluntary program.

6. Recommendations

1. Refugee Protection

- A. **Provide Immigration Court Review of Detention:** The U.S. Departments of Justice and Homeland Security should revise regulatory language and/or Congress should enact legislation to provide arriving asylum seekers and other immigrants with the chance to have their custody reviewed in a hearing before an immigration court. (See Human Rights First's 2009 report "U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison," annexed, for comprehensive recommendations on detention of asylum seekers.)
- B. **Eliminate Filing Deadline:** Congress should eliminate the asylum filing deadline.
- C. **Ensure Exclusion Complies with Protocol:** The administration and Congress should take steps to ensure the U.S. approach to exclusion is consistent with the 1967 Protocol. For example, Congress should eliminate the "tier III" undesignated category of terrorist organizations. (See Human Rights First's 2009 report "Denial or Delay," annexed, for detailed recommendations.)
- D. **Revise Discriminatory Interdiction Policies:** The United States should revise its maritime interdiction policies. Reforms should include providing translators and information about access to protection interviews to all nationalities, and implementing effective mechanisms to ensure that those with protection concerns are interviewed by trained asylum officers.

2. Counter-Terrorism

- A. **Interrogations:** The Administration should revise the U.S. Army Field Manual to ensure that it does not permit conduct that violates international human rights and humanitarian law.
- B. **Detainee Trials:** The Administration should abandon the use of military commissions and try detainees in regularly constituted U.S. military tribunals or civilian, federal courts.
- C. **Accountability for Past Violations:** Competent authorities should initiate prompt and impartial investigations into all credible allegations of torture and cruel, inhuman and degrading treatment. Those persons alleged to have participated in torture must be prosecuted (including those that committed, attempted to commit, or were complicit).

3. **Hate Crime:** In order to improve its response to violent hate crime in the United States, the U.S. government must (A) **support** local law enforcement in addressing the full range of violent hate crimes and **facilitate** federal involvement when local authorities are unable or unwilling to achieve a just result; (B) **improve** monitoring and data collection by taking steps to increase awareness and understanding by local jurisdictions of the importance of reporting hate crimes to the Federal Bureau of Investigation (FBI). It should also encourage reporting by law enforcement agencies that have not participated in reporting hate crimes or have underreported or reported no hate crimes; and (C) **expand** efforts to prevent hate crimes and increase reporting to the police by funding tolerance education, community relations and hate crime prevention initiatives.