

United States of America

Amnesty International submission to the UN Universal Periodic Review

Ninth session of the UPR Working Group, November-December 2010

Despite its important role in the development of international human rights law and standards, all too often the USA's own human rights record has been found wanting, as has its willingness to apply international standards to its own conduct. With this in mind, Amnesty International welcomes the statement in March 2010 by US Secretary of State Hillary Clinton that the USA is committed to the universality of human rights and to "holding everyone to the same standard, including ourselves." An example of this commitment, she said, was the USA's participation in the UPR.

This submission does not cover the full range of Amnesty International's human rights concerns relating to the USA. A selected list of the organization's reports providing more detail is attached as an Appendix.

B. Normative and institutional framework of the State

The USA has been slow to ratify human rights treaties and when it has ratified them it has frequently lodged reservations or other limiting conditions, or failed to implement the treaty into domestic law, or refused to apply the treaty's provisions extraterritorially. In addition, the USA has attached a federalism clause to ratifications to the effect that the treaty "shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the [treaty] and otherwise by the state and local governments". Under article 27 of the Vienna Convention on the Law of Treaties, which the USA signed in 1970 and many provisions of which it says it considers constitute customary international law, a state may "not invoke the provisions of its internal law as justification for its failure to perform a treaty". In its General Comment 31, the UN Human Rights Committee reminded all states with a federal structure of government that the ICCPR "shall extend to all parts of federal States without any limitations or exceptions" (article 50).

The USA's tendency neither to incorporate international human rights law into its domestic legal system nor to adopt human rights obligations not previously recognized in US law has had particular ramifications in the counter-terrorism context in recent years. The US Justice Department's legal approval of interrogation techniques that violated the prohibition of torture and other ill-treatment, for example, exploited the reservations and other limiting conditions attached to US ratification of treaties such as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the International Covenant on Civil and Political Rights (ICCPR). The US reservations to article 16 of UNCAT, and article 7 of the ICCPR, which prohibit cruel, inhuman or degrading treatment, mean that the USA only considers itself bound to that prohibition to the extent that it matches existing US constitutional law. According to the Justice Department during the administration of President George W. Bush, "enhanced" interrogation techniques such as 'waterboarding' and sleep deprivation, when employed for national security purposes in a secret detention program, did not violate the Constitution.

While President Barack Obama has taken action – by executive order, not by express recognition or implementation of international obligations – to end the CIA's direct use of "enhanced" interrogation techniques and long-term secret detention, the reservations to the ICCPR and UNCAT remain in place.

The USA's claim to be a progressive force for human rights also continues to be contradicted by its ratification record. It is, for example, one of only two countries that are not party to the Convention on the Rights of the Child (CRC). There are 186 states parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and 160 states party to the International Covenant on Economic, Social and Cultural Rights (ICESCR); however, the USA is not among them.

Since 2006, the USA has appeared before the UN Human Rights Committee, Committee Against Torture, Committee on the Rights of the Child (for consideration of US compliance with the optional protocols), and Committee on the

Elimination of Racial Discrimination (CERD). Many of the recommendations of these treaty monitoring bodies, and of UN experts who have examined the US record on a range of issues, remain unmet.¹

In the domestic arena, the USA has many laws, mechanisms and institutions to protect human rights and provide a remedy for violations of the US Constitution. However, there are laws and practices which fall short of international human rights standards, as noted by treaty monitoring bodies. These include laws which are directly contrary to international human rights standards (e.g. those allowing the prosecution and sentencing of children as adults), as well as practices arising from inadequate oversight or remedy.

Full enjoyment of the treaty rights of those under US jurisdiction is affected by factors such as race, nationality, ethnicity, indigenous status, income and gender. US law falls short of international standards by generally protecting only against intentional discrimination, not policies or practices that have a discriminatory effect, as required under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and other international human rights treaties.

Despite extensive anti-discrimination and civil rights legislation, there remain wide inequalities in areas such as housing, employment, education, healthcare and the criminal justice system. Racial disparities continue to exist at every stage of the criminal justice system. For example, there were proportionately more than six times as many black males in prisons or jails in 2008 than white males, disparities stemming at least in part from laws and practices which have discriminatory impact. Marginalised populations can face particular difficulties in accessing justice: Native American women, for example, suffer from disproportionately high rates of rape and sexual assault, but only a small proportion of crimes against them are investigated or prosecuted, due to inadequate support services and jurisdictional complexities on tribal land.

C. Promotion and protection of human rights on the ground

(i) COUNTER-TERRORISM

Global 'war' framework

A central policy choice of the Bush administration – not a legal necessity – was to respond to the attacks of 11 September 2001 and the risk of further violence against civilians in terms of a constant global “war” without foreseeable end, rather than an international law enforcement effort in which use of military measures could only exceptionally be justified under international law. Today, the USA’s global war paradigm appears to be accepted by large parts of all three branches of the US government – the administration, Congress, and the federal judiciary. It is a framework under which fundamental human rights continue to suffer.

The USA should recognize that even where international humanitarian law does apply (in situations of armed conflict as recognized by international law), it does not displace international human rights law. The International Court of Justice has stated that the protection of the ICCPR and other human rights conventions “does not cease in times of armed conflict”, except through derogation.

Indefinite detention without charge or trial

On 22 January 2009, President Obama committed his administration to closing the detention facility at the US Naval Base in Guantánamo Bay, Cuba, in which hundreds of detainees have been held without charge or trial for years. However, the USA not only missed its own deadline for closure, it also looks set to continue the practice of indefinite detention even if it closes the Guantánamo facility. In May 2009, President Obama said his administration would work with Congress to develop an indefinite detention regime for detainees whom the USA determined could neither be prosecuted nor released. The administration determined that there were 48 Guantánamo detainees in this category. By April 2010, no such legislation had been finalized and the administration was still seeking congressional support to use Thomson Correctional Center in Illinois to hold such detainees, along with those facing US prosecution or awaiting transfer or release to another country.

¹ In support of its candidacy to the UN Human Rights Council – the Obama administration committed the USA “to meeting its UN treaty obligations and participating in a meaningful dialogue with treaty body members”. US Human Rights Commitments and Pledges, April 2009, <http://www.state.gov/documents/organization/121976.pdf>.

Amnesty International considers that a human rights approach to ending the Guantánamo detentions demands that any detainee not charged with a recognizable criminal offence for trial under fair procedures in an independent and impartial court should be immediately released, while ensuring that no-one is forcibly returned to a country where he would face human rights violations.

Hundreds of people have been held without charge or trial in US custody in Afghanistan, some for years. They have no access to legal counsel or to courts to challenge the lawfulness of their detention. The US authorities should assist the Afghan government in creating mechanisms to ensure fair trials for those in detention, including the option of mixed national/international tribunals to try those apprehended in counter-insurgency operations by Afghan as well as US and other international forces.

Trials by military commission

By April 2010, the Obama administration had referred six Guantánamo detainees for trial by military commission, including one who was a 15-year-old child at the time he was taken into US military custody. In November 2009, the Attorney General had announced that five Guantánamo detainees accused of involvement in the attacks of 11 September 2001 would be brought to the USA for trial in federal District Court. By mid-April 2010, however, the five remained in Guantánamo and the Attorney General said that the decision on where to try them and in which forum was being reviewed and he expected a decision "in a number of weeks".

The military commissions are creations of political choice, not demonstrably legitimate necessity. Even under a revised law passed in 2009, the commissions would fall short of international fair trial standards. International law requires that trials be conducted in independent courts; military commissions are not independent. Trial of civilians by military tribunals is inconsistent with international standards, especially when civilian courts are readily available. Applying inferior trial protections on the basis of nationality – US nationals cannot be tried by the military commissions – would violate the right to equality before the law. Any execution after such unfair trials would violate the right to life under international law.

Accountability and remedy

The lack of accountability for human rights violations committed by US personnel in what the previous US administration called the "war on terror" is perhaps starkest in relation to the program of secret detention operated by the USA from 2002 until 2009. Systematic human rights violations were committed in this program – including the crimes under international law of enforced disappearance and torture. Yet no-one has been brought to justice for such crimes. The program was authorized at high levels of government. There should be thorough investigations and full accountability.

The right to an effective remedy is recognised in all major international and regional human rights treaties. However, the lack of remedy for human rights violations committed against detainees held in US custody in the name of "countering terrorism" remains the rule rather than the exception. A combination of executive secrecy, judicial deference to the invocation of national security or war powers by the political branches, domestic party politics, and the USA's non-compliance with its international human rights obligations, continues to contribute to the absence of accountability and remedy.

International law requires that remedies not only be available in law, but accessible and effective in practice. Victims are entitled to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

(ii) CRIMINAL JUSTICE

Police and correctional agencies

US law enforcement and correctional agencies generally operate under professional standards. However, there are frequent reports of ill-treatment and excessive force by police or custody officials. Such officials are rarely prosecuted for abuses and some law enforcement agencies, as well as many prisons and jails, lack effective, independent oversight bodies. There are no binding national guidelines governing use of restraints or "less lethal" weapons such as **Tasers**.

More than 12,000 US law enforcement agencies deploy Tasers: dart-firing electro-shock weapons which can also be used close-up as stun guns. Over 400 people have died in the USA since 2001 after being struck by police Tasers, raising serious concern about the safety of such devices. Although most of the deaths have been attributed to other factors, coroners have found the Taser played a role in more than 50 deaths, and there are other cases where the cause of death was unclear. Tasers are widely used against individuals who do not pose a serious threat, including children, the elderly and people under the influence of drink or drugs. In many of the cases documented by Amnesty International, the use of Tasers violated international standards prohibiting torture or other ill-treatment.

Racial minorities continue to be disproportionately represented in complaints of police ill-treatment. Lesbian, gay, bisexual and transgender people are also at risk of discrimination and ill-treatment by police. There remains concern about **racial profiling** in many jurisdictions, with individuals allegedly stopped, searched or arrested on account of their race, nationality or perceived origin or religion. Legislation to bar racial profiling nationwide, with relevant data collection and monitoring, has been pending before Congress for several years but has not yet been enacted into law.

Since the late 1980s, more than 30 states and the federal government have introduced “**supermaximum security**” (**supermax**) facilities for the control of prisoners who are considered disruptive or a security threat. The conditions of prolonged isolation and reduced sensory deprivation in such units have been criticized by treaty monitoring bodies as incompatible with international human rights standards. Prisoners in the most restrictive units are typically confined for 23 to 24 hours a day in small, sometimes windowless, solitary cells, with no work or rehabilitation programs, or daily exercise. Although courts have ordered improvements to some supermax prisons, conditions remain extremely harsh in many states and often the review procedures for assignment to such facilities are inadequate.

Most US states have no laws to restrict the **use of restraints on pregnant women inmates**, including during labour: a cruel, inhuman or degrading practice which can endanger the health of the woman and her baby. The USA has not implemented the Human Rights Committee recommendation in July 2006 to prohibit the shackling of detained women during childbirth.

The death penalty

There have been more than 1,000 executions in the USA since 1993, and over 3,200 prisoners remain on death row around the country, including more than 50 on federal death row. The US capital justice system is marked by arbitrariness, discrimination and error. Studies continue to demonstrate that race, particularly race of murder victim, plays a role in who is sentenced to death. Research also shows that capital jurors are more conviction prone than prospective jurors excluded because of their opposition to the death penalty, and that racial issues can affect capital juror decision-making. More than 100 prisoners have been released from US death rows since 1977 on grounds of innocence. In numerous cases, prisoners have gone to their deaths despite serious doubts about their guilt or where inadequate legal representation for indigent defendants had meant that the sentencing jury had not been presented the full array of mitigating evidence available in the case. People with serious mental illness continue to be subjected to the death penalty. Despite the 2002 US Supreme Court ruling that people with “mental retardation” be exempt from the death penalty, the absence of a single national standard has led to arbitrariness and less than full protection in relation to this category of offender. Harsh conditions on death rows in many states add to the inherent cruelty of the death sentence.

Life sentences for children

The USA is believed to stand alone in the world in sentencing children to life imprisonment without the possibility of parole (LWOP), and there are currently more than 2,500 people serving LWOP for crimes committed when they were under 18 years old, in violation of a clear principle of international law.

Migrants in detention

Recent US policy measures to create a presumption against the detention of asylum-seekers who have a credible fear of persecution, and to reform the immigration detention system, are to be welcomed. However, hundreds of thousands of migrants continue to be routinely detained for violations of immigration laws, many without access to due process to challenge their detention or deportation as required under international standards. Many are held in harsh conditions in county jails, without access to family, legal counsel or adequate medical care. The US administration has declined to make standards governing conditions in immigration detention facilities legally enforceable.

(iii) ECONOMIC, SOCIAL AND CULTURAL RIGHTS

There is unequal access in the USA to basic amenities such as adequate food, shelter, work, healthcare, and education. There is a lack of affordable housing, for example, as well as job shortages and chronic income insecurity, particularly among minorities and women. There has been a rise in homelessness in recent years and in the number of households reported as going without adequate food.² Although legislation has recently been passed that will extend healthcare coverage to millions, millions will remain without coverage. Healthcare, along with housing and employment, is still not recognized in the USA as a universal right. The absence of a national strategy to tackle poverty and growing income inequality may leave the USA in breach of its obligation, as a signatory to the ICESCR, to do nothing to undermine the treaty's object and purpose, as well as its obligation under the ICERD to guarantee equality in access to education and training, housing, health care, social security and social services, as well as protection against unemployment. Although measures have been taken by government to aid economic recovery, following the recent crisis, these will not address systemic inequalities and failings.

Maternal mortality

Failure to ensure the "highest attainable standard of health", and the principle of non-discrimination set out in human rights treaties, is illustrated by US maternal mortality figures. Already high for a developed country, the maternal mortality rates in the USA have not improved in more than 20 years, and deaths and complications are on the rise.³ Women in the USA have a greater lifetime risk of dying from pregnancy-related complications than women in 40 other countries. Hundreds of women die each year from preventable pregnancy-related complications, with wide disparities in access to health care based on race, ethnicity, immigration or indigenous status and income. African American women are nearly four times more likely to die from pregnancy-related complications than white women.

Housing and other rights in the Gulf Coast States following Hurricane Katrina

Nearly five years after Hurricane Katrina devastated low-lying areas of the US Gulf Coast, there is a continued lack of access to housing and health care in the region, as well as resource problems within parts of the criminal justice system, preventing many displaced persons from returning home and compromising the rights of those who have returned. Not enough has been done at the federal, state or local level to replace affordable rental units and demolished public housing, as well as schools and hospitals, failings which have disproportionately impacted on the poor and communities of colour.

² A US Department of Agriculture survey published in November 2009 found a steep rise in the number of households going without food in 2008, due to the economic recession. The survey categorized 17.2 million people as 'having very low food security' because they regularly lacked sufficient to eat, with 50 million suffering food shortages at times.

³ Maternal mortality ratios rose from 6.6 deaths per 100,000 live births in 1987 to 13.3 per 100,000 in 2006. Some, but not all, of this increase is attributable to improved data collection (see AI report, *Deadly Delivery*, 2010).

Appendix 1: Amnesty International recommendations for action by the State under review

Amnesty International calls on the government of the United States of America:

International law and standards

- To issue an Executive Order on human rights to ensure that the administration's Inter-Agency Working Group on Human Rights serves as a coordinating body among federal agencies and departments to enforce and implement the USA's human rights obligations; to make mandatory human rights impact assessments and studies to ensure government policies, pending legislation and regulations are consistent with US human rights obligations; to require that Inspectors General incorporate human rights obligations and analysis into their reviews and investigations of government agencies, policies and programmes; and to ensure collaboration between federal, state and local governments aimed at meeting the USA's human rights obligations;
- To embark upon a programme of ratification, and ensure implementation into domestic law, of human rights and other instruments, including CEDAW, CRC, ICESCR, OPCAT, the International Convention for the Protection of All Persons from Enforced Disappearance, the Rome Statute of the International Criminal Court, the American Convention on Human Rights, and the Vienna Convention on the Law of Treaties;
- To review existing US ratifications, with a view to withdrawing all reservations, understandings and declarations that serve to undermine compliance with the treaties or undermine their object and purpose;
- To recognize the extraterritorial application of international human rights law to actions by US personnel vis-à-vis territories and individuals over which they exercise effective control, at all times, including during armed conflict;
- To review all outstanding recommendations from UN treaty bodies and experts with a view to implementing them.

Counter-terrorism

- To expressly reject the theory that the USA can detain any individual anywhere in the world at any time, and hold them in detention indefinitely, on the premise that it is involved in an all-pervasive global and perpetual armed conflict against non-state actors, a theory that is inconsistent with international law;
- To rely on ordinary criminal offences and procedures alone to justify detention of individuals who are unconnected to any ongoing international armed conflict as recognized by international law and are accused of essentially criminal conduct;
- To achieve the closure of the Guantánamo detention facility without compromising human rights principles, including by bringing detainees to trial in independent and impartial courts applying international fair trial standards, or immediately releasing them;
- To abandon military commissions as a forum for trials, and to use existing federal courts for prosecutions;
- To ensure that detainees in US custody in Afghanistan have access to legal counsel and to courts to challenge the lawfulness of their detention, and that independent human rights monitors have access to the detainees;
- To ensure that all transfers of detainees to the custody or territory of another state fully comply with international law, particularly obligations of non-refoulement, and to apply definitions at least as protective as those applied under international law;
- To not rely on diplomatic assurances where there is a risk of human rights violations such as torture or other ill-treatment by the receiving state, and to ensure that effective independent judicial control of transfers is accessible to detainees and that recourse to their procedures has suspensive effect on any transfer, particularly where there is credible evidence that a detainee will face abuse after transfer;
- To set up an independent commission of inquiry into all aspects of the USA's detention and interrogation policies and practices since 11 September 2001. This must not block or delay the prosecution of any individuals against whom there is already sufficient evidence of wrongdoing;
- To initiate effective independent criminal investigations, including into crimes under international law such as torture and enforced disappearance, committed by individuals acting for or on behalf of the USA;
- To ensure that all victims of human rights violations have full access to remedy.

Discrimination

- To meet its obligations under international law in relation to eliminating racial and other discrimination in all its forms, including laws and practices that may not be discriminatory in purpose, but in effect;
- To address racial disparities in the criminal justice system, including through further studies to determine the scope and nature of the problem;
- To pass into law national legislation to bar racial profiling in law enforcement, with effective complaints and compliance procedures.

Ill-treatment in police custody, jails and prisons

- To suspend the use of Tasers and similar devices in law enforcement unless strictly regulated and limited to situations where they are necessary to protect life and avoid resort to firearms;
- To review conditions in federal supermax prisons and to develop national standards to ensure humane conditions in all such units, with adequate review and monitoring procedures;
- To ensure that state and federal authorities ban the shackling of pregnant inmates, particularly women in labour, and to ensure that agencies that violate these laws are subject to appropriate sanctions;
- To increase investigations by the US Justice Department's Civil Rights Division of ill-treatment in prisons and jails, and of police departments accused of a "pattern or practice" of abuses.

Death penalty

- To ensure that state and federal authorities impose a moratorium on executions with a view to abolishing the death penalty nationwide; and that prosecutors in all jurisdictions cease pursuing death sentences.

Juvenile justice

- To end the use of life imprisonment without parole for offenders under 18 years old at the time of the crime, and to review all existing sentences in order to ensure that any such convicted offender has the possibility of parole.

Detention of migrants

- To detain migrants only in exceptional circumstances, with detention subject to judicial review and justified in each individual case;
- To ensure the adoption of enforceable human rights detention standards in all facilities that house immigration detainees, with effective oversight to ensure compliance;
- To restore to immigration judges the discretion to consider the individual circumstances of each person coming before the court and to waive deportation when circumstances warrant it.

Maternal mortality

- To ensure all women have equal access to timely and quality maternal health care services;
- To ensure that no-one is denied access to health care services by policies or practices that have the purpose or effect of discriminating on grounds such as gender, race, ethnicity, age, indigenous status, immigration status or ability to pay;
- To ensure that federal and state authorities implement programs to improve data collection and analysis in order to better identify and respond to issues contributing to maternal deaths.

Post-Katrina concerns

- To abide by the UN Guiding Principles on Internal Displacement and recognize that all internally displaced persons have the right to return to their homes or places of origin; and to ensure that the principles of equality and non-discrimination are applied to resettlement and return;
- To ensure that all Gulf Coast residents return to adequate housing and an environment consistent with the right to the highest attainable standard of health, and have equal access to education and the criminal justice system.

Appendix 2: Selected Amnesty International documents for further reference⁴

USA: Un-Natural Disaster: Human Rights in the Gulf Coast, April 2010⁵

USA: Deadly delivery: The maternal health care crisis in the USA, March 2010 (AI Index: AMR 51/007/2010)

USA: Still failing human rights in the name of global 'war', January 2010 (AI Index: AMR 51/006/2010)

USA: Impunity for crimes in CIA secret detention program continues, January 2010 (AI Index: AMR 51/008/2010)

USA: Blocked at every turn: The absence of effective remedy for counter-terrorism abuses, November 2009 (AI Index: AMR 51/120/2009)

USA: Conditions in Tamms maximum security prison in Illinois flout international standards for humane treatment of prisoners, August 2009 (AI Index: AMR 51/095/2009)

USA: Trials in error: Third go at misconceived military commission experiment, July 2009 (AI Index: AMR 51/083/2009)

USA: Too much cruelty, too little clemency: Texas nears 200th execution under current governor, April 2009 (AI Index: AMR 51/057/2009)

USA: Detainees continue to bear costs of delay and lack of remedy, April 2009 (AI Index: AMR 51/050/2009)

USA: Torture in black and white, but impunity continues: Department of Justice releases interrogation memorandums, April 2009 (AI Index: AMR 51/055/2009)

USA: Jailed Without Justice: Immigration Detention in the USA, published March 2009⁶

USA: Out of sight, out of mind, out of court? The right of Bagram detainees to judicial review, February 2009 (AI Index: AMR 51/021/2009)

USA: The promise of real change. President Obama's executive orders on detentions and interrogations, February 2009 (AI Index: AMR 51/015/2009)

USA: Torture acknowledged, question of accountability remains, January 2009 (AI Index: AMR 51/003/2009)

USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror', December 2008 (AI Index: AMR 51/151/2008)

USA: 'Less Than Lethal'? The Use of Stun Weapons in US Law Enforcement, December 2008 (AI Index: AMR 51/010/2008)

USA: Government must ensure meaningful judicial review of Mexican death row cases, March 2008 (AI Index: AMR 51/025/2008)

USA: Amnesty International's briefing to the Committee on the Elimination of Racial Discrimination. November 2007 (AI Index: AMR 51/178/2007)

USA: Maze of Injustice: The Failure to Protect Indigenous Women from Violence, April 2007 (AI Index: AMR 51/035/2007)

USA: The experiment that failed: A reflection on 30 years of executions, January 2007 (AI Index: AMR 51/011/2007)

USA: Stonewalled - still demanding respect. Police abuses against lesbian, gay, bisexual and transgender people in the USA, March 2006 (AI Index: AMR 51/001/2006)

USA: The execution of mentally ill offenders, January 2006 (AI Index: AMR 51/003/2006)

⁴ These documents and others are available on Amnesty International's website: <http://www.amnesty.org/en/region/usa>

⁵ Available at: http://www.amnestyusa.org/dignity/pdf/Un-Natural_Disaster_report.pdf

⁶ Available at: <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>