HUMAN RIGHTS WATCH

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300
Email: hrwnyc@hrw.org

HUMAN RIGHTS WATCH

www.hrw.org

December 18, 2007

Ms. Mary Beth West
Consultant
United States Department of State
west.marybeth@gmail.com

Dear Ms. West:

We write to thank you for meeting with Human Rights Watch and other civil society groups on November 28, 2006 to discuss the report by the United States to the Committee on the Elimination of all forms of Racial Discrimination (CERD). At the meeting you asked for our perspectives on issues that should be included in the government report. We are grateful to have the opportunity to provide you with some initial thoughts in this letter.

Gather detailed information about state policies (Article 2(1))

Article 2 (1)(c) of the CERD treaty requires "review [of] governmental, national and local policies." We understood from our meeting that you are encountering some problems in gathering sufficient information from states. While we understand that state and local authorities have many pressing demands, the CERD obligation is clear and unequivocal – all levels of government must gather and provide information necessary to ensure that their policies do not violate CERD. The federal government must ensure that state and local authorities conduct such reviews, just as it must look carefully at its own record.

As a non-governmental organization with significantly lesser resources than the federal government, Human Rights Watch's own work is proof that it is possible to obtain illuminating information about state practices that implicate US obligations under CERD. For example, we have been able to compile detailed state data on such matters as the number and race of juveniles sentenced to life without parole, the racial breakdown of offenders admitted to prison with drug convictions, and the race of persons barred from voting because of state felony disenfranchisement laws. In some cases we have obtained the necessary data directly from the states themselves; in other cases, we have discovered that the federal government itself has collected the data. In short, we are convinced that you can obtain the data necessary to comply with your CERD reporting obligations on state as well as the federal practices if sufficient energy, determination, and ingenuity are applied.

With that in mind, we want to point out that several governmental agencies at the federal level already gather data from states that is relevant to the CERD report and could be used for some of the essential state-based analysis. Data is particularly rich in the area of criminal justice –an area

that is rife with racial disparities and therefore should be a central focus of the CERD report. For example, the Bureau of Justice Statistics collects from the states a wealth of data on many aspects of their criminal justice systems, from arrests through conviction and imprisonment, data which typically includes racial breakdowns. It also has highly detailed data on prison populations that is obtained through the annual National Corrections Reporting Program. In addition, the US Sentencing Commission, the Department of Homeland Security, the Federal Bureau of Investigations, the Government Accountability Office, and the Office of Juvenile Justice and Delinquency Prevention, among others, are additional federal entities that could be approached for detailed and recent state and federal information relating to racial disparities in many aspects of criminal justice. There is also a vast academic literature on state and federal criminal justice systems that you could draw on to help guide your analysis of the data.

We also note your decision to include a number of state-based case studies in the upcoming report. We think that such case studies will be an excellent addition to the report if they shed light on policies, practices, and attitudes (both good and bad) not captured in aggregated state data. Nevertheless, we are concerned about the choice of Oregon and South Carolina as the states for these case studies. As was raised by many groups in our November meeting, we believe that these two states are not sufficiently representative of the varied racial patterns and dynamics in the country. We recommend that you include a southwestern state with a large Latino population (such as Texas), a state known for its diversity (such as California), a state with several large urban areas (such as Illinois, New York, or California) and a state with a significant Native American population (such as Arizona, Oklahoma, or New Mexico) to improve the analysis and credibility of the report.

Finally, we encourage the US government not only to extract information from states, but also to use this opportunity to educate state officials about their own obligations under CERD. The federal government cannot comply with its obligations under CERD without cooperation from state and local partners. Conversely, state and local partners will not comply if they are not made aware of their own obligations under the treaty. Human Rights Watch views the effort to hold state and local officials accountable for their obligations to respect the rights contained in CERD and other similarly binding treaties as part of our ongoing work. We would welcome efforts at the federal level to similarly hold state and local officials responsible.

It is particularly important that the states – and other federal agencies – are educated about and understand the definition of racial discrimination under CERD. As you know, CERD prohibits laws or practices that may be facially race-neutral, but that have the "purpose or effect" of restricting rights on the basis of race. In that regard, it differs significantly from US constitutional jurisprudence. Unjustified racial disparities constitute discrimination regardless of whether they are motivated by racial animus or other subjective intent. As you gather and analyze state data, you will need to make judgments about whether the disparities you uncover are warranted. You will be uniquely situated to engage in fruitful dialogue with states and other federal agencies about the importance of ending unjustified racial disparities, particularly those that affect such a fundamental right, the right to liberty.

No one expects the US record under CERD to be perfect, but governmental officials and Committee members do expect a country as wealthy and powerful as the United States to

produce a detailed and accurate report. Without comprehensive information about the policies of states, the federal government can not paint an accurate picture of race-based practices and policies in the US. Failure to include such information risks sending a message to the world that the United States has something to hide.

Moving beyond these questions of research methodology, we would like to highlight three substantive issues areas that we encourage you to cover in detail in the report.

Racial Discrimination in Sentencing (Article 5(a))

Much of Human Rights Watch's work on abuses in the United States has focused on racial discrimination in criminal sentencing policies. We urge you to include the following three specific issues in your report: racial discrimination in the imposition of the death penalty, in drug sentencing, and in the imposition of life without parole sentences on youth.

With regard to the death penalty, expert studies have repeatedly documented the influence that the race of the perpetrator and victim in a particular crime has over the imposition of the death penalty. Race-of-victim bias in the death penalty has been a persistent problem. For example, in 1990, the US General Accounting Office reviewed the research on this issue and found that in 82% of the studies, the race of victim was found to influence the likelihood of being charged with capital murder or receiving a death sentence, i.e., those who murdered whites were more likely to be sentenced to death than those who murdered blacks.

We also draw your attention to ongoing problems that non-citizens face in having their rights to consular notification respected when they are involved in the criminal justice system – an issue that is particularly acute when they are facing the possible imposition of the death penalty. At least twenty foreign nationals have been executed in the United States in the last decade, nearly all without consular notification. As of October 2006, more than 120 foreign nationals from 29 countries are on death row in the United States. Unfortunately, a recent case in the Texas Court of Appeals, *Ex Parte Medellin*,[1] found that executions may proceed even when non-citizens were denied their right to consular notification.

In the context of juvenile justice, there are also serious problems with racial discrimination. Research studies have found that minority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system, from the point of arrest to sentencing.[2] In particular, Human Rights Watch found serious racial inequities in the imposition of the life without parole sentence on child offenders, a sentence that by itself constitutes a human rights violation even without the additional abuse of racial

---

[1] Case No. 5019-01 [CHECK CASE NUMBER} (Tex. Crim. App. Nov. 15, 2006).

[2] See., e.g., Eileen Poe-Yamagata and Michael A. Jones, *And Justice for Some* (Building Blocks for Youth Initiative for the National Council on Crime and Delinquency, 2000), available online at: http://www.buildingblocksforyouth.org/justiceforsome/jfs.html, accessed on September 14, 2005 (finding that youth of color are overrepresented and receive disparate treatment at every stage of the juvenile justice system); Mike Males and Dan Macallair, *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California* (Justice Policy Institute, Building Blocks for Youth Initiative, Feb. 2000), available online at: http://www.buildingblocksforyouth.org/colorofjustice/coj.html, accessed on September 14, 2004 (*The Color of Justice)* (showing that youth of color are 8.3 times more likely than white youth to be sentenced by an adult court to imprisonment in a California Youth Authority facility); Jolanta Juszkiewicz, *Youth Crime/Adult Time: Is Justice Served?* (Pretrial Services Resource Center, Building Blocks for Youth Initiative, Oct. 2000) available online at: http://www.buildingblocksforyouth.org/ycat/ycat.html, accessed on September 14, 2005 (showing over-representation and disparate treatment of youth of color in the adult system and questioning the fairness of prosecuting youth as adults).

discrimination. For our 2005 report on child offenders sentenced to life without parole, *The Rest of Their Lives*, [3] we collected data on the total number of youth offenders in each racial group serving life without parole. Our data reveal that blacks constitute 60 percent of the youth offenders serving life without parole nationwide and whites constitute 29 percent. In addition, the data show that black youth nationwide are serving life without parole sentences at a rate that is ten times higher than white youth (the rate for black youth is 6.6 as compared with .6 for white youth).

In every single state, the rate for black youth sentenced to life without parole exceeds that of white youth. The highest black rate in an individual state—40.5 (in Iowa)—is just under nine times greater than the highest white rate of 4.2 (in Louisiana). The highest Hispanic rate of 16.6 (in North Dakota) is 3.6 times greater than Louisiana's rate for whites.

Racial disparity is also a problem that affects drug sentencing. In our 2000 report, *Punishment and Prejudice*,[4] Human Rights Watch showed that blacks comprise 62 percent of drug offenders admitted to state prison. In seven states, blacks constitute between 80 and 90 percent of all people sent to prison on drug charges. Black men are sent to state prison on drug charges at 13 times the rate of white men. Two out of five blacks sent to prison are convicted of drug offenses, compared to one in four whites. Yet in absolute numbers, there are greater white drug offenders than black.

Rights of Noncitizens (General Recommendation 30 of the CERD Committee)

Human Rights Watch urges the State Department to include information about the treatment of non-citizens – a matter that the Committee highlighted in General Recommendation No. 30.

We particularly urge you to focus on the obligation to "ensure . . . that non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law" (Recommendation 30, Par. 27). In that regard, we ask you to focus on three issues: the unintended effects of overbroad terrorism-related bars on asylum seekers in the United States, the denial of habeas rights for noncitizens arrested as part of the fight against terrorism, and the discriminatory application of military commissions solely to try noncitizens.

Hundreds of vulnerable asylum seekers face possible deportation to their country of origin because of overbroad definitions of *terrorist activity* and *terrorist organization* in the Immigration and Nationality Act. There are two primary problems with the law. First, it labels as a terrorist anyone who provides "material support" to a terrorist group, without any exception for duress. As a result, asylum seekers who were forced at threat of death to give armed rebel groups food or water are being defined as supporters of terrorism and denied asylum based on the very same facts that make up the claim for asylum. Second, the law defines terrorist organization so broadly as to encompass any group of two or more people, whether organized or not, who bear arms against the law of the ruling government. This

---

[3] Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, http://hrw.org/reports/2005/us1005/, October 2005.
[4] Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, http://www.hrw.org/reports/2000/usa/, Vol. 12, No. 2 (G), May 2000.

turns every freedom fighter – including Hmong and Montagnard who fought alongside the United States – into members of a terrorist organization without any consideration as to whether the individual or organization actually targeted civilians or otherwise committed a terrorist act.

Although the Secretary of the Department of Homeland of Security has the authority to waive the application of these laws, in most cases, he has never exercised this authority. Over 550 reported cases are currently on hold at DHS's asylum office because of these bars and an undisclosed number of additional asylum cases before the immigration courts have also been rejected. Human Rights Watch believes that the expulsion of a non-citizen based on such overbroad definitions of terrorisms that does not in any way mirror either internationally-accepted definitions of terrorism or the Refugee Convention's grounds for expulsion violates the obligation to ensure that non-citizens are properly protected by domestic laws.

Human Rights Watch is also deeply concerned about two laws passed over the last year – the Detainee Treatment Act of 2005 (DTA) and the Military Commission Act of 2006 (MCA)– that deprive noncitizens labeled by the president as "unlawful enemy combatants" access to courts to challenge their designation and indefinite detention. Specifically, the DTA prohibits non-citizens being held at Guantanamo Bay from bringing any future habeas corpus challenges to their detention or their conditions of confinement. The MCA extended that prohibition, making it retroactive and applying it to any noncitizen labeled an "unlawful enemy combatant" no matter where he or she is detained. Just last month, the US government relied on this law to move to dismiss the case of Ali Saleh Khaled al-Marri, a citizen of Qatar who was indicted for credit card fraud while studying in the United States. But just weeks before his trial was to begin in 2003, President Bush declared al-Marri an "unlawful enemy combatant" and transferred him to a military brig in South Carolina where he has been ever since. According to the government's reading of the MCA, any non-citizen – even a lawful permanent resident of the United States – could be labeled an "unlawful enemy combatant" by the executive branch, placed in military custody, never notified of the basis of detention, and forever denied an opportunity to challenge the detention in an independent court.

In addition, Human Rights Watch is troubled by the recent creation of a separate system of justice solely designed to try non-citizens. Specifically, the MCA authorizes the use of a new type of military commission to try non-citizens who are labeled "unlawful enemy combatants" and accused of any one of a large number of terrorism-related crimes. Although the rules for these commissions are still being developed, HRW is concerned that provisions allowing the restrictions on discovery coupled with liberal use of hearsay evidence will lead to a system of trial by affidavit, under which non-citizens accused of terrorism-related crimes will be denied the opportunity to confront their witnesses and possibly be convicted based on the use of evidence obtained through torture, in violation of basic international human rights.

We also have serious concerns about certain policies of the United States that fail to comply with General Recommendation No. 30 by CERD Committee, which requires State parties to "[a]void expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life" (Par. 28). Across the country, non-

citizens suffer from abuse as a result of amendments to the immigration laws passed in 1996 that made deportation mandatory in certain cases and eliminated most forms of judicial review. Because of the deportation of growing numbers of non-citizens—including those who have been legally present in the country for decades but who have committed minor crimes—thousands of American families have been torn apart. In 2000, there were 8.9 million U.S. citizen children living in "mixed status" families in which at least one head of household was a non-citizen. According to the Department of Homeland Security's records, each year between 1997 and 2004, between 50 and 90,000 non-citizens have been deported from the country, totaling an estimated half million people deported in that time period.

At a minimum, under CERD and other human rights treaties, non-citizens should have a hearing at which their interests in remaining in the United States (such as family ties) are balanced against the interest of the United States in deporting them. We recognize that the governmental interest in deportation is much stronger when the non-citizen is convicted of a serious, violent crime. Nevertheless, we note that under current law in the United States conviction for many relatively minor crimes can result in the deportation of a long term legal permanent resident, and his or her separation from family members and the country that has become home.

Criminal Justice: Re-entry Issues (Articles 5(c) and 5(e))

Racial disparities in arrests, convictions and sentences to prison also yield racial disparities in the impact of collateral consequences that haunt ex-offenders, including limitations on the right to vote and to obtain public housing.

With regard to the right to vote, a 1998 Human Rights Watch and Sentencing Project report[5] found that relative to their numbers in the US population, black men are disproportionately represented among those who are barred from voting because of felony convictions: of 3.9 million Americans who are disenfranchised because of such convictions, 1.4 million, or one-third are black men. Black men are disenfranchised at numbers seven times the national average. We found the racial impact in certain individual states to be extraordinary. For example, in Alabama and Florida, 31 percent of all black men were permanently disenfranchised in 1998.

With regard to public housing access, African Americans are disproportionately represented among those who have criminal records, and as such are much more likely to be rejected for public housing on this basis. As documented in a 2004 report by Human Rights Watch, *No Second Chance,*[6] criminal records as exclusionary criteria used by Public Housing Authorities throughout the United States are in and of themselves overbroad and therefore unreasonable as a means of promoting public safety. If exclusionary policies have a significant racially disparate impact, and such an impact cannot be justified on public safety grounds, then the policies would contravene the provisions of CERD.

---

[5] Human Rights Watch and the Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, http://www.hrw.org/reports98/vote/, October 1998.
[6] Human Rights Watch, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, http://hrw.org/reports/2004/usa1104/, November 2004.

Furthermore, racial and ethnic minorities are disproportionately represented among the impoverished of the United States: in 2002, 24.1 percent of blacks and 21.8 percent of Hispanics were below the poverty line. As a result, minorities are more likely than whites to need housing assistance and, indeed, racial and ethnic minorities constitute 70 percent of those who currently reside in conventional public housing.

Conclusion

We again thank you for the invitation to meet with you and share some of our concerns. We believe that you have the opportunity and capacity to write a complete, accurate, and important report that highlights both the strengths and weaknesses in US compliance with its obligations under CERD, thereby setting out an agenda for change and improvement.

We also want to be as useful as possible to you in the process of pulling this report together. We are available to provide any data and information available to HRW and hope that you will reach out to us with any follow-up questions and requests for assistance.

Sincerely,

Jennifer Daskal
Advocacy Director
US Program
Human Rights Watch

Alison Parker
Senior Researcher
US Program
Human Rights Watch

Cc: Robert K. Harris
Human Rights and Refugees Assistant Legal Advisor