



UNITED STATES

Submission to the Committee on the Elimination of Racial Discrimination

During its Consideration of the Fourth, Fifth, and Sixth
Periodic Reports of the United States of America
CERD 72nd Session

**HUMAN
RIGHTS
WATCH**

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I. Summary

Human Rights Watch would like to express our appreciation to the Committee on the Elimination of Racial Discrimination (the “Committee”) for this opportunity to provide it with information on the United States’ compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”).¹ We intend for this submission to be part of the record for the Committee’s review of the United States’ compliance with its obligations under ICERD during its 72nd session.

At the outset, we would like to acknowledge the much more comprehensive submissions of our colleague NGOs, specifically the joint shadow reports written by a wide cross-section of US NGOs and coordinated by the US Human Rights Network,² as well as the detailed report prepared by the American Civil Liberties Union,³ among others. These NGO submissions address an enormous range of policies and practices of the United States, and raise grave and important concerns about the record of the United States in upholding its obligations under ICERD. Many of these are issues that we have researched and reported on in the past.⁴

¹ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, adopted by the United States on November 20, 1994.

² US Human Rights Network, “International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Shadow Report 2008, Submitted to the 72nd Session Committee on the Elimination of Racial Discrimination, 18th February-7th March 2008,” December 2007, http://www.ushrnetwork.org/files/ushrn/images/2008_shadow_report/Shadow_Report_2008_web.pdf (accessed December 17, 2007).

³ American Civil Liberties Union (ACLU), “Race and Ethnicity in America: Turning a Blind Eye to Injustice, US Violations of the Convention on the Elimination of All Forms of Racial Discrimination,” December 2007, <http://www.aclu.org/intlhumanrights/racialjustice/cerd.html> (accessed December 17, 2007).

⁴ For example, Human Rights Watch has raised concerns about racial discrimination in the United States in the areas of drug sentencing, felony disenfranchisement, juvenile justice, and many others. See, for example: Human Rights Watch, *Custody and Control: Conditions of Confinement in New York’s Juvenile Prisons for Girls*, vol. 18, no. 4(G), September 2006, <http://hrw.org/reports/2006/us0906/>; Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (New York: Human Rights Watch, 2005), <http://hrw.org/reports/2005/us1005/>; “United States: L.A. Jail Should Lift Chaplain Ban,” Human Rights Watch news release, June 26, 2003, <http://hrw.org/press/2003/06/us062603.htm>; “USA: Children in Maryland’s Jails,” Human Rights Watch news release, October 27, 2000, <http://hrw.org/english/docs/2000/10/27/usdom653.htm>; Human Rights Watch, *No Minor Matter: Children in Maryland’s Jails* (New York: Human Rights Watch, 1999), <http://www.hrw.org/reports/1999/maryland/>; Human Rights Watch/Children’s Rights Project, *High Country Lockup: Children in Confinement in Colorado*, August 1997, <http://www.hrw.org/reports/pdfs/c/crd/us978.pdf>; Human Rights Watch, *United States - No Second Chance: People with Criminal Records Denied Access to Public Housing*, November 2004, <http://hrw.org/reports/2004/usa1104/>; Human Rights Watch, *United States – Punishment and Prejudice: Racial Disparities in the War on Drugs*, vol. 12, no. 2(G), May 2000, <http://www.hrw.org/reports/2000/usa/>; Human Rights Watch and The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, 1998, <http://www.hrw.org/reports98/vote/>; Human Rights Watch/United States, *Race and Drug Law Enforcement in the State of Georgia*, vol. 8, no. 4(G), July 1996,

For example, we believe that racial discrimination in the criminal justice system in the United States, a topic of ongoing concern to Human Rights Watch, is adequately discussed in the other NGO submissions. We therefore do not reiterate these same concerns here. Instead, in this submission we have sought to present the Committee with additional research by Human Rights Watch, some of which was compiled solely for this submission, which provides *new examples, data, or analysis* of failures of the United States to uphold its obligations under ICERD in seven specific areas.

First, we provide specific evidence of the United States government's failure to inform the constituent states about ICERD and its provisions and to seek information from the states, so that it can review their policies and practices in light of the treaty. We believe these failures constitute violations of Article 2.1 of ICERD.

Second, we view the discriminatory treatment of Haitian refugees as a violation of the right to equality before the law as provided in Article 5.

Third, in the context of racial disparities in the sentencing of black and white youth to life without the possibility of parole, in this report Human Rights Watch presents the Committee with new data that challenge the US government's assertion that "disparities are related primarily to differential involvement in crime by the various groups ... rather than to differential handling of persons in the criminal justice system."⁵ Our data demonstrate that in at least 10 states black youth arrested for murder are significantly more likely to be sentenced to life without the possibility of parole than white youth arrested for the same crime. We believe these data provide an egregious example of unequal treatment before the courts, in violation of the United States' treaty obligations under Article 5(a).

<http://hrw.org/reports/1996/Us2.htm>; Human Rights Watch/United States, *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders*, vol. 9, no. 2(B), March 1997, <http://www.hrw.org/reports/1997/usny/>; Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States* (New York: Human Rights Watch, 1998), <http://www.hrw.org/reports98/police/toc.htm>; Human Rights Watch, *No Escape: Male Rape in US Prisons* (New York: Human Rights Watch, 2001), <http://www.hrw.org/reports/2001/prison/report.html>; Human Rights Watch, *United States – Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11*, vol. 17, no. 2(G), June 2005, <http://hrw.org/reports/2005/uso605/>; Human Rights Watch, *United States – Human Rights Watch Presentation to the United States Sentencing Commission*, 2002, <http://www.hrw.org/press/2002/03/ussc0314.htm>.

⁵ Government of the United States, Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the Convention on the Elimination of All Forms of Racial Discrimination, April 2007, <http://www.ushrn.org/files/ushrn/images/linkfiles/CERD%20Report%204-07.pdf> (accessed January 28, 2008), para. 165.

Fourth, we show how the use of corporal punishment against youth of color in certain US public schools constitutes a discriminatory failure to protect these students against bodily harm, as required by Article 5(b).

Fifth, we show how the failure to protect the family unity and *nonrefoulement* rights of non-citizens deported after serving their sentences for criminal convictions violates Article 5(c).

Sixth, we demonstrate how, in the context of the HIV and AIDS epidemic, the United States is failing to uphold the right to non-discrimination in the enjoyment of the right to health in Article 5(e).

Finally, we show how the executive branch of the US government has violated its obligations under Article 6 by holding non-citizen “enemy combatants” at Guantánamo Bay, Cuba; by stripping non-citizens of their right to habeas corpus under US law; and by subjecting non-citizens to the unfair, fundamentally flawed system of trial by military commission in order to ascertain criminal responsibility in their cases.

In the sections that follow, for each of these violations we have analyzed in detail the applicable legal standards and recommended a particular course of action for the Committee to consider as it evaluates the conduct of the United States in light of its obligations under ICERD.

We urge the Committee to view this Human Rights Watch submission as a complement to the joint submissions and not as an attempt to catalog all of the instances in which the United States’ policies or practices raise concerns under ICERD. Seen in this light, we hope the Committee will find the following information helpful to its work.

II. Violation of the Obligation to Review Governmental Policies and to Propagate the Principles of ICERD: Article 2.1

Convention Standards and Concerns

The International Convention on the Elimination of all Forms of Racial Discrimination (“ICERD”) requires that states parties:

[T]ake effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.⁶

The United States is also bound to “ensure that all public authorities and public institutions, national and local, shall act in conformity”⁷ to eliminate racial discrimination and to “adopt immediate and effective measures ... to propagat[e] the purposes and principles of ... this Convention [ICERD].”⁸

Like our NGO colleagues, Human Rights Watch believes that the United States has failed to fulfill these obligations to review state and local policies and to promote understanding of ICERD. We would like to provide some specific examples, based on our own research, that illustrate this failure.

As the Committee is aware, the United States is a federal republic, which means that it recognizes and protects the independent powers of its constituent states along with those of the federal government. This federal structure of the United States is established by the US Constitution. Nevertheless, the internal workings of the United States are not of concern to the Committee, which holds a justified expectation that the international commitments of the United States will be upheld by all parts of its government. Unfortunately, with regard to obligations of the United States under

⁶ ICERD, Article 2.1(c).

⁷ ICERD, Article 2.1(a).

⁸ ICERD, Article 7.

multilateral human rights treaties (in contrast to multilateral trade, maritime, or military treaties), this legally justified expectation of the international community has been continually disappointed. The record of the United States with regard to ICERD is no exception.

In its Concluding Observations on the 2001 initial, second, and third periodic reports of the United States, the Committee:

[E]mphasize[d] that irrespective of the relationship between the federal authorities, on the one hand, and the States, which have extensive jurisdiction and legislative powers, on the other, with regard to its obligation under the Convention, the Federal Government has the responsibility to ensure its implementation on its entire territory.⁹

In addition, the Committee instructed the United States to “take all appropriate measures to review existing legislation and federal, State and local policies to ensure effective protection against any form of racial discrimination and any unjustifiably disparate impact.”¹⁰ It further recommended that “the next periodic report contain comprehensive information on its implementation [at] the State and local levels and in all territories under United States jurisdiction.”¹¹

In addition to these clear international obligations, as a matter of domestic law, the federal government of the United States is required to conduct oversight over its constituent states’ adherence to ICERD, a treaty that the US Senate ratified in 1994. Under Article VI of the US Constitution, ratified treaties become the “supreme law of the land” with a legal status equivalent to federal statutes. When it ratified the treaty, the US Senate stated its obligation to “take appropriate measures to ensure the fulfillment of this Convention.”¹² The federal government is therefore obligated to

⁹ Committee on the Elimination of Racial Discrimination, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” UN Doc. A/56/18, 59th Session, 30 July – 17 August, 2001, para. 383.

¹⁰ Committee on the Elimination of Racial Discrimination, “Concluding Observations: USA,” para. 393.

¹¹ Committee on the Elimination of Racial Discrimination, “Concluding Observations: USA,” para. 402.

¹² The United States stated in connection with its ratification of ICERD that the treaty is not “self-executing.” Nevertheless, the laws of the US and its states as well as their implementation must be consistent with ICERD. This follows directly from Article VI, section 2 of the US Constitution, which states that “all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land.” As a matter of international law, reservations to treaties may not contradict the object and purpose of the treaty at issue. Vienna Convention on the Law of Treaties, adopted May 22, 1969,

assume responsibility for US compliance with ICERD, and to ensure that “all public authorities and public institutions, national and local ... act in conformity” with the treaty’s terms.¹³

In fact, the United States has acknowledged that federalism is not an excuse for its failure to apply the treaty domestically. In the Addendum to its third periodic report, the US stated that federalism “does not condition or limit the international obligations of the United States. Nor can it serve as an excuse for any failure to comply with those obligations as a matter of domestic or international law.”¹⁴

Taken together, these international and domestic obligations of the United States impose two requirements on the federal government regarding its oversight of state policies relating to ICERD. First, the federal government has an obligation to inform the constituent states about the treaty and its provisions. Second, the federal government has an obligation to seek information from the states, so that it can review their policies and practices in light of the treaty, and to report to the Committee on policies or practices that have the purpose or effect of creating racial discrimination, and on measures taken to end such policies or practices. In fact, Human Rights Watch specifically wrote to Mary Beth West, the author of the 2007 US State Party Report to CERD, to suggest that such a review be undertaken (see Appendix 1 to view letter).¹⁵ Unfortunately, the United States has failed to follow these simple steps.

¹³ 1155 U.N.T.S. 331, entered into force January 27, 1980, signed by the US on April 24, 1970, Article 19(3). Instructive in this regard are the comments of the UN Human Rights Committee, responsible for interpreting and monitoring compliance with the International Covenant on Civil and Political Rights, which has stated that reservations or interpretive declarations should not “seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law.” UN Human Rights Committee, General Comment 24, Reservations to the ICCPR, UN Doc. CCPR/c/21/Rev. 1/Add. 6 (1994), para. 19.

¹⁴ ICERD, Article 2.1(a).

¹⁵ Government of the United States, Third Periodic Reports of States Parties Due in 1999, CERD/C/351/Add.1, Addendum, para. 167.

¹⁵ Letter from Human Rights Watch to Mary Beth West, December 20, 2006. See Appendix 1.

Illustration: Constituent States of the United States are Unaware of ICERD

Failure to inform states about ICERD

First, the federal government apparently has not informed the states of the existence of ICERD and their responsibilities under it. Human Rights Watch has contacted the attorneys general of all 50 states, and not one has responded affirmatively that it was aware of the treaty's existence or of state responsibilities under it.¹⁶ This reality casts doubt on the US government's claim in its 2007 fourth, fifth, and sixth periodic reports ("US State Party Report to CERD 2007") that "copies of the report and the Convention will also be widely distributed ... to relevant state officials."¹⁷ Our investigation in October and November 2007—seven months after the US government made this claim in April 2007—strongly suggests that it is false.

For example, the Florida Attorney General's office told a Human Rights Watch researcher, "I am not familiar with the Convention that you reference in your letter."¹⁸ Similarly, the Attorney General of Maryland wrote to Human Rights Watch, "I am not aware of our State's responsibilities under ICERD."¹⁹ The Attorney General of Kansas responded to Human Rights Watch's question "are you aware of ICERD and your state's responsibilities under it?" in the following manner:

If you could cite to the ... law ... imposing upon Kansas the 1969 [ICERD treaty] or creating a legal duty that applies to state officials we would perhaps be better able to respond to your question.²⁰

Similarly, the Attorney General of the state of Washington wrote to Human Rights Watch on November 1, 2007, "I am not aware of the Attorney General's Office receiving any formal request or statement regarding requirements of CERD."²¹

¹⁶ Letter from Human Rights Watch to the attorneys general for all 50 US states, October 19, 2007.

¹⁷ Government of the United States, Periodic Report Concerning ICERD, 2007, para. 50.

¹⁸ Human Rights Watch telephone interview with Allison Bethel, director of civil rights for the attorney general, State of Florida, October 24, 2007.

¹⁹ Email to Human Rights Watch from John B. Howard, Jr., deputy attorney general, State of Maryland, October 22, 2007.

²⁰ Letter to Human Rights Watch from Theresa Marcel Bush, assistant attorney general, State of Kansas, October 25, 2007.

²¹ Letter to Human Rights Watch from Traci Friedl, assistant attorney general, State of Washington, November 1, 2007.

Failure to review state policies

It is clear that the federal government has done little to raise awareness among its constituent states about ICERD. It has also failed to adequately review state policies and report to the Committee on those efforts. Instead, the federal government in its 2007 US State Party Report to CERD has mischaracterized the Committee's requests as requiring “[r]eporting at length on all 50 separate states and the territories,” which the federal government concludes, “would be extremely burdensome and so lengthy as to be unhelpful to the Committee.”²² Certainly, reporting at length on all 50 states would be burdensome, but this is not what the federal government is required to do. Instead, the federal government should submit to the Committee evidence of its review of state policies, particularly those that may raise concerns under the treaty.

Based on Human Rights Watch's investigations, it is clear that the federal government has failed to conduct such a policy review in preparation for its 2007 State Party report. For example, the Florida Attorney General's office told a Human Rights Watch researcher:

I am not familiar with the Convention that you reference in your letter, nor do I have any record of a request for information coming to my office. I have also checked with our main office in Tallahassee, Florida, where sometimes these communications get sent and they have no record of a communication. Now, could it have fallen through the cracks? Well, sure. But as I said, we have no reference of contact from the federal government or the National Association of Attorney Generals on this.²³

Similarly, the New Jersey Attorney General's office wrote to Human Rights Watch, “[T]o our knowledge, this Office has not been contacted by [the federal government],

²² Government of the United States, Periodic Report Concerning ICERD, 2007, para. 353.

²³ Human Rights Watch telephone interview with Alison Bethel, October 24, 2007.

nor has any information been requested from this Office concerning the Convention.”²⁴

In yet another example, the Michigan Attorney General’s office wrote to Human Rights Watch, “In reference to this office being contacted by either the National Association of Attorneys General or the federal government regarding a CERD report, my staff has reviewed our correspondence database and is unable to locate any correspondence related to this report. Additionally, this office contacted the Michigan Department of Civil Rights and the US Commission on Civil Rights but, again, we were unable to verify that such a request has ever been made or received by the state of Michigan.”²⁵

The alternative provided by the United States to the Committee—the Annex that covers some policies of four states—is an important and laudable first step. But it is far from sufficient. For example, the reviews of Illinois, New Mexico, Oregon, and South Carolina contained in the Annex fail to mention possible discrimination in the criminal justice systems of these states, which is an area of prime concern to the Committee and yet is not discussed in the Annex at all.²⁶

Recommendations to the Committee

- Urge the federal government to inform its constituent states about ICERD and its provisions and to present information in the next periodic report about the methods used to provide this information to the states.
- Require the federal government to use a centralized permanent institutional mechanism to review the policies and practices of the constituent states, and to report to the Committee on policies or practices that have the purpose or

²⁴ Letter to Human Rights Watch from Abbe R. Gluck, senior advisor to the attorney general, State of New Jersey, November 6, 2007.

²⁵ Letter to Human Rights Watch from Mike Cox, attorney general, State of Michigan, December 10, 2007.

²⁶ The 2007 US State Party Report to the Committee discusses federal efforts to address racial discrimination in federal prisons, but does not discuss any similar efforts or failings at the state level. Similarly, the report provides no analysis of state policies and statistics that might show “differential handling of persons in the criminal justice system,” and instead cites two studies from the early 1990s suggesting “that the disparities are related primarily to differential involvement in crime by the various groups (with some unexplained disparities particularly related to drug use and enforcement), rather than to differential handling of persons in the criminal justice system.” Government of the United States, *Periodic Report Concerning ICERD, 2007*, para. 165.

effect of creating racial discrimination, and on measures taken to end such policies or practices at the state and local levels.

III. Violation of the Right to Equality before the Law: Article 5

Convention Standards and Concerns

Article 5 of ICERD requires states parties to “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.” Therefore, government policies that apply unequal legal standards to non-citizens based on their national origin violate ICERD, unless such policies relate to “nationality, citizenship or naturalization.”²⁷ In this section, Human Rights Watch outlines how Haitian asylum seekers and refugees are treated differently from Cuban asylum seekers and refugees. As a result, Haitian refugees are at a higher risk of violation of their right to *nonrefoulement*²⁸ based on their national origin. This differential treatment of two groups of non-citizens constitutes prohibited discrimination under Articles 5 and 1.3 of ICERD.

ICERD defines “racial discrimination” to include:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, *or national or ethnic origin* which has the purpose or effect of nullifying the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²⁹

The Committee has called upon States to “ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin”³⁰ and has stated that laws on deportation and

²⁷ ICERD, Article 1.3.

²⁸ The international law norm of *nonrefoulement* protects refugees from being returned to a place where their lives or freedom are under threat. Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, adopted by the United States on December 16, 1966, protocol signed on November 1, 1968, Article 33. The United States became party to the Protocol Relating to the Status of Refugees on November 1, 1968, thereby binding it to uphold the treaty's terms.

²⁹ ICERD, Article 1.1 (emphasis added).

³⁰ Committee on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination Against Non-Citizens, CERD/C/64/Misc.11/rev.3, para. 9.

removal should “not discriminate in purpose or effect among non-citizens on the basis of race, colour, or ethnic or national origin.”³¹

The differential treatment by the United States of Haitian and Cuban asylum seekers and refugees should also be of particular concern to the Committee given its conclusion that “xenophobia against non-nationals, particularly migrants, refugees, and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices.”³²

Illustration: Discriminatory Treatment of Haitian Refugees

US immigration policies, including deportation policies, have the effect of discriminating against persons who are of Haitian national origin. This is made clear by an examination of the differences in how the United States treats persons of Haitian national origin and its treatment of those of Cuban national origin.

The United States discriminates against persons of Haitian national origin in two distinct ways. First, Haitian and Cuban migrants are treated differently on the high seas and in US territorial waters. Second, upon arrival in the US, people seeking asylum or refugee resettlement³³ in the US from Haiti have vastly different legal alternatives and are treated differently under the law than asylum seekers and resettled refugees from Cuba.

This differential treatment has the effect of discriminating against Haitians, which is worthy of condemnation on its face. But when one considers that the result of this discrimination may be a violation of a refugee’s right not to be returned to a place

³¹ Committee on the Elimination of Racial Discrimination, General Recommendation 30, para. 25.

³² Committee on the Elimination of Racial Discrimination, General Recommendation 30, preambular para. 2.

³³ The term “asylum seeker” is generally used to describe persons entering the United States (or under the power of the United States after interdiction on the high seas) who seek to lodge a claim for refugee status and who must satisfy US immigration authorities that they are in fact refugees as defined under US law. The term “refugee resettlement” generally refers to programs run by the United States to identify refugees residing outside of the United States, usually in a third country and often in a refugee camp setting, who are selected to settle inside the United States as recognized refugees.

where he or she fears persecution—a right the United States is bound to respect because it is a party to the 1967 Refugee Protocol—it is particularly reprehensible.³⁴

Inequality before the law on the high seas and in US territorial waters

When the US apprehends Haitian boat migrants on the high seas and in US territorial waters, it subjects them to a screening procedure that explicitly differs from the one that is in effect for nationals of Cuba. Cuban migrants interdicted by the US Coast Guard are subject to special rules that automatically give them the opportunity to express any fears of persecution. They are read a statement that invites them to raise concerns regarding why they should not be returned to Cuba, tells them that they can be processed as refugees through the US resettlement program in Havana, and assures them of an agreement with the Cuban authorities that they will not be prosecuted for their illegal departure. By contrast, all other migrants interdicted on the high seas—most commonly Haitians—are only given a credible fear interview if they spontaneously show or state a fear of return. This is known as the “shout test.”³⁵

On February 25, 2004, President Bush made a policy announcement specific to Haitians: “I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shore.”³⁶ In the ensuing days, the Coast Guard interdicted 905 Haitians. Only three of the 905 passed the “shout test,” but not a single person was deemed to have a credible fear of persecution, a lower threshold

³⁴ While at any time an individual may possess a well-founded fear of persecution given his or her particular circumstances, it must be noted that at various points in recent history, Haiti has been plagued by widespread human rights violations that made the risk of *refoulement* particularly acute. See, for example, “Haiti: Hundreds Killed Amid Rampant Impunity,” Human Rights Watch news release, April 14, 2005, http://hrw.org/english/docs/2005/04/14/haiti10491_txt.htm; “Haiti: Security Vacuum in the North, Numerous Journalists and Government Officials in Hiding,” Human Rights Watch news release, March 22, 2004, http://hrw.org/english/docs/2004/03/22/haiti8149_txt.htm; “Haiti: US Return of Asylum Seekers Is Illegal,” Human Rights Watch news release, March 2, 2004, http://hrw.org/english/docs/2004/03/01/haiti7772_txt.htm; “Haiti: Political Violence Condemned,” Human Rights Watch news release, December 18, 2001, http://hrw.org/english/docs/2001/12/18/haiti3433_txt.htm.

³⁵ Migration Policy Institute, “The New ‘Boat People’: Ensuring Safety and Determining Status,” January 2006, http://www.migrationpolicy.org/pubs/Boat_People_Report.pdf (accessed February 1, 2008), p. 12. Chinese migrants interdicted at sea are also specially treated, similarly to Cubans. Chinese migrants are given a written questionnaire asking them why they have left China and given the opportunity to express a fear of return if they have one. All other nationalities interdicted at sea would be subject to the “shout test.” However, as a practical matter, Haiti is the only other country whose nationals seeking asylum arrive by sea in significant numbers.

³⁶ Jerry Seper, “Coast Guard Repatriates Haitians: Turns Over 531 Refugees Taken from 13 Boats in Windward Passage,” *Washington Times*, February 28, 2004.

screening test than the “well-founded fear” established by the refugee definition in international and US law. All were returned to Haiti.

Only a tiny number of Haitians interdicted on the high seas have ever had asylum claims heard. Upon interdiction US officials provide no information to Haitians taken aboard US Coast Guard cutters about their right to seek protection. Between 1981 and 1990 the Immigration and Naturalization Service allowed only 11 Haitians out of 22,940 interdicted to pursue asylum claims.³⁷ During that same time period, *all* Cubans interdicted on the high seas were brought to the United States. Most were able to adjust their status to that of permanent residents under the Cuban Adjustment Act of 1966 (CAA).³⁸

Today the very few Haitians who pass the “shout test” and then a shipboard “credible fear” interview are taken to the US naval base at Guantánamo Bay, Cuba for a full refugee interview, albeit without the benefit of legal assistance. In 2005 only nine of the 1,850 interdicted Haitians received a credible fear interview and only one person was recognized as a refugee.³⁹ But even Haitians whom the United States recognizes as refugees at Guantánamo are still not admitted to the US. They are compelled to wait pending the agreement of a third country to admit them, which can take years. Canada has taken some Haitians, and in April 2007 the US and Australia announced a deal to “swap” Haitian refugees for mostly Sri Lankan and Burmese refugees.⁴⁰

Inequality before the law after arrival and in refugee resettlement

After their arrival in the United States, Haitians do not enjoy equality before the law with asylum seekers and refugees from Cuba. The Immigration and Nationality Act (INA), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), includes an expedited removal procedure by which low-level

³⁷ Ruth Ellen Wasem, Congressional Research Service, CRS Report for Congress, “US Immigration Policy on Haitian Migrants,” January 21, 2005, http://www.ndu.edu/library/docs/crs/crs_rs21349_21jan05.pdf (accessed February 1, 2008), p. 3.

³⁸ Cuban Adjustment Act (CAA), Public Law 89-732 (1966).

³⁹ “Our Opinion: US Policy Unjust to Haitians Fleeing Violence,” *Miami Herald*, January 9, 2006.

⁴⁰ “US/Australia: Refugee Deal Trades in Human Lives,” Human Rights Watch news release, April 18, 2007, <http://hrw.org/english/docs/2007/04/18/usint15736.htm>.

immigration officials are authorized to summarily remove certain arriving aliens from the United States without further hearing or review.

Expedited removal does not apply to “an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.”⁴¹ This provision provides preferential treatment for Cubans who arrive by aircraft, since they are the only nationality that fits the definition.

But Cubans who arrive by boat on US shores also have a distinct advantage over their Haitian counterparts. Under the wet foot/dry foot policy, based on the 1966 Cuban Adjustment Act, Cubans who manage to get their feet on US soil are paroled in and after one year of US residence are eligible for adjustment to permanent resident status.

Haitians receive none of these benefits. For example, David Joseph, a Haitian teenager, was one of the 216 persons on a wooden boat that landed at Biscayne Bay, Florida, on October 29, 2002. An immigration judge initially ruled that David should be released to his uncle, a legal resident living in Brooklyn, N.Y., who was willing to post a \$2,500 bond. The judge found that David’s asylum claim was credible, he posed no threat if released, and that he was unlikely to abscond. The US Board of Immigration Appeals affirmed the judge’s ruling to release David and found that the judge correctly applied the rules regarding release on bond to avoid unnecessary, prolonged detention.⁴²

Attorney General John Ashcroft soon stepped in and decreed that all Haitian boat arrivals should be jailed. He invoked “national security” as his rationale, arguing that a surge of other boat people from Haiti must not “injure national security by diverting valuable Coast Guard and [Department of Defense] resources from counter-terrorism and homeland security responsibilities.”⁴³

⁴¹ Immigration and Nationality Act (INA) § 235(b)(1)(F), 8 USC §1225.

⁴² Board of Immigration Appeals, *In re: David Joseph*, In Bond Proceedings, March 13, 2003.

⁴³ *In re D-J- 23* I&N Dec. 572 (A.G. 2003).

There is implicit racism and national origin bias in this reasoning, as the Coast Guard is not regarded as wasting its “valuable resources” by rescuing Cubans on the high seas, yet rescuing Haitians is characterized as a diversion of such resources from more important responsibilities.

At the time David Joseph landed on the shores of Florida, expedited removal was limited to ports of entry, so he was not subject to mandatory detention and was eligible for release from detention with provision of a financial guarantor (or, “on bond”). Since Attorney General Ashcroft’s ruling, however, expedited removal has been expanded to include all unauthorized boat arrivals, except Cubans. Federal regulations on this issue state, “the expedited removal authority implemented in this Notice will not be employed against Cuban citizens because removals to Cuba cannot presently be assured and for other US policy reasons.”⁴⁴ Had David been a Cuban, he most likely would be a US permanent resident today on the path to US citizenship.

Haitians also do not enjoy equality before the law in refugee resettlement programs as compared with their Cuban counterparts. Cubans have multiple legal alternatives, including an in-country refugee processing program, by which some are interviewed at the US interests section in Havana, processed, flown to the United States, and admitted with full refugee benefits. From fiscal year 2005 through the first 11 months of fiscal year 2007, the US admitted 12,149 Cubans as refugees through resettlement. During that same period of time, the United States has admitted only eight Haitians, all in 2005, into the refugee resettlement program.

In addition to refugee resettlement processing, Cubans are eligible both for the diversity visa program, and for the Special Cuban Migration Program—the “Cuban lottery”—that is open to all Cuban residents between the ages of 18 and 55 regardless of whether they qualify for immigrant visa or refugee programs. Lottery winners are paroled into the United States, and then, under the Cuban Adjustment Act, are able to adjust to permanent resident status a year after arrival.⁴⁵

⁴⁴ Federal Register, Doc 04-18469, August 11, 2004, Vol. 69, No. 154, pages 48877-48881.

⁴⁵ United States Interests Section, Havana, Cuba, “Immigrant Visas: General Information,” undated, http://havana.usinterestsection.gov/immigrant_info.html (accessed February 1, 2008).

Haitians, on the other hand, are not eligible for diversity visas and have no special lottery,⁴⁶ and, as mentioned, no in-country processing procedure exists for them in Haiti under the US refugee resettlement program.

Recommendations to the Committee

- Instruct the United States to reconcile its policies towards Haitian and Cuban asylum seekers and refugees in resettlement programs so that no discriminatory treatment of Haitians occurs, particularly with regard to the essential right to *nonrefoulement*.

⁴⁶ Embassy of the United States, Port-au-Prince, Haiti, “Visa Services,” undated, http://portauprince.usembassy.gov/visa_services.html (accessed February 1, 2008).

IV. Violation of the Right to Equal Treatment before the Courts: Article 5(a)

Convention Standards and Concerns

The US practice of sentencing youth offenders to life without the possibility of parole (LWOP) is a violation of US obligations under international law. Specifically, Article 10.3 of the International Covenant on Civil and Political Rights (ICCPR) provides that “juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status,” and Article 14.4 says that governments are to, “[i]n the case of juvenile persons ... take account of their age and the desirability of promoting their rehabilitation.”⁴⁷ Article 24.1 states that every child has “the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State.”⁴⁸ In 2006, the treaty body responsible for enforcing the ICCPR, the Human Rights Committee, concluded that “[t]he Committee is of the view that sentencing children to life sentences without parole is of itself not in compliance with article 24.1 of the Covenant.”⁴⁹

While the sentencing of youth to life without parole in the United States itself constitutes a violation of these and other important human rights norms, in this submission, Human Rights Watch presents data strongly suggesting that US jurisdictions also engage in racially disparate use of LWOP sentences. These data challenge the US government’s assertion that “disparities are related primarily to differential involvement in crime by the various groups ... rather than to differential handling of persons in the criminal justice system.”⁵⁰ As detailed below, we found significant disparities in the rate at which African-American youth and white youth arrested for murder face life without parole. In California, for example, an African-

⁴⁷ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, Article 14.4.

⁴⁸ ICCPR, Article 24.1.

⁴⁹ UN Human Rights Committee, “Concluding Observations of the Human Rights Committee on the United States of America,” July 27, 2006, CCCPR/C/USA/CO/3/Rev.1, December 8, 2006, <http://daccessdds.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement> (accessed February 1, 2008), para. 34.

⁵⁰ Government of the United States, Periodic Report Concerning ICERD, 2007, para. 165.

American youth arrested for murder is more than five times more likely to receive the sentence than a white youth arrested for murder.

Racial disparities evident in the imposition of LWOP sentences on youth constitute a violation of ICERD. Article 5(a) of ICERD requires states parties to “eliminate racial discrimination ... notably in the enjoyment of ... the right to equal treatment before the tribunals and all other organs administering justice.” The racial disparities in life without parole sentencing for youth also violate the Committee’s instruction in its Concluding Observations to “take firm action to guarantee the right of everyone ... to equal treatment before the courts,”⁵¹ and its recommendation that “States should ensure that the courts do not apply harsher punishments solely because of an accused person’s membership of a specific racial or ethnic group.”⁵²

Unfortunately, with regard to the use of the LWOP sentence, the US is failing to fulfill its obligations under ICERD and to heed these instructions from the Committee.

Illustration: Racial Disparities in the Sentencing of Youth to Life without Parole

To examine racial disparities in use of LWOP for youth, we first examined the rates of arrest for black and white youth. Like many others, we found that states across the country arrest black youth for murder at per capita rates that far exceed the murder arrest rates for white youth. On average across the country, black youth are arrested for murder at per capita rates that are six times higher than white youth.⁵³ Examining differences between states, we found (figure 1) that the states of Michigan, Wisconsin, and Missouri have much larger differences between their per capita rates of murder arrests for black and white youth than the average among the 25 states in

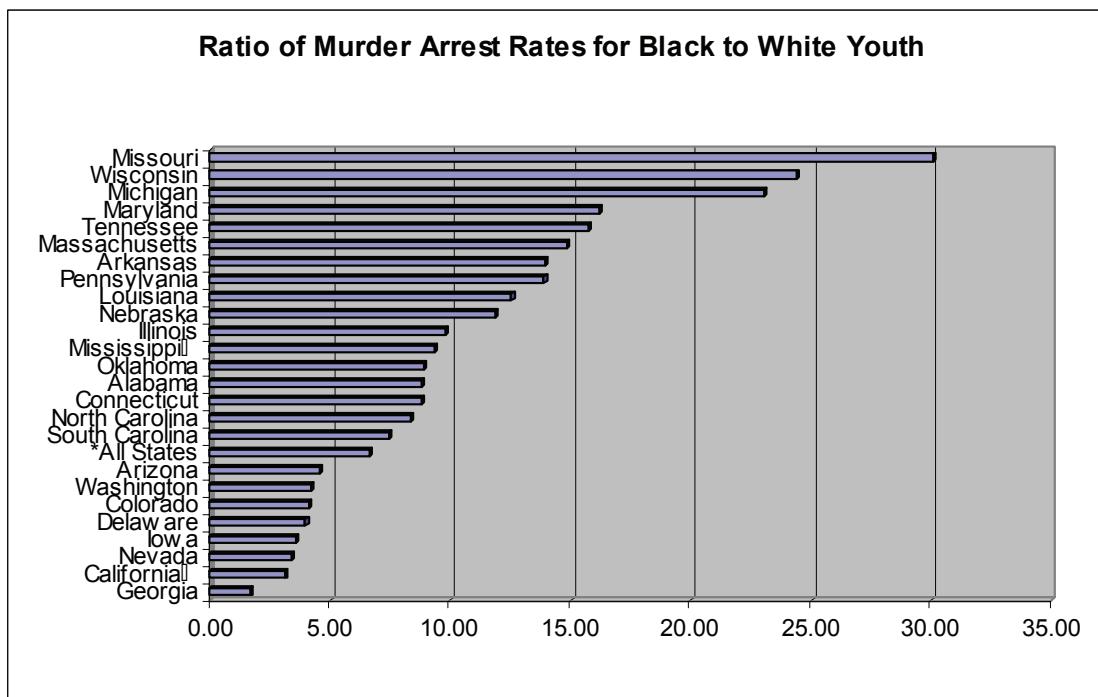
⁵¹ Committee on the Elimination of Racial Discrimination, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” UN Doc. A/56/18, 59th Session, 30 July – 17 August, 2001, para. 395.

⁵² Committee on the Elimination of Racial Discrimination, General Recommendation 31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, CERD/C/64/Misc.11/rev.3, para. 34.

⁵³ These racial disparities in per capita arrest rates for murder may reflect racial discrimination in the administration of juvenile justice in the United States, or they may reflect differences between black and white youth criminality. Most likely, the truth is some combination of these factors: in some instances black youth do in fact commit more murders than white youth, and in some instances the policing and criminal justice systems that cause youth to be arrested for murder are permeated with racial discrimination.

which data were available. To view the actual arrest rates themselves, as distinguished from the ratios showing the disparities, see Appendix 3.

Figure 1



Murder arrest data extracted by Human Rights Watch from data provided by the Federal Bureau of Investigation (FBI), “Uniform Crime Reporting Program: 1990-2005 Arrest by State” (extracted by code for murder crimes, juvenile status, and race), on file with Human Rights Watch. Population data extracted by Human Rights Watch from C. Puzzanchera, T. Finnegan, and W. Kang, National Center for Juvenile Justice, “Easy Access to Juvenile Populations Online: US Census Population Data,” State Population Data with Bridged Race Categories 2004, for ages 14-17, <http://www.ojjdp.ncjrs.gov/ojstatbb/ezapop/> (accessed January 2, 2008). Certain states are not included in the above figure because of insufficient data (see footnote 57 below). Ratio calculated using rates per 10,000 population of youth age 14-17 disaggregated by race and state.

Next, we examined the number of youth sentenced to LWOP. Based on data gathered from state departments of corrections in 2004, and updates gathered by Human Rights Watch and others during 2007, we now estimate that there are 2,381 youth offenders sentenced to life without parole in the United States.⁵⁴ This stands in stark contrast to the seven youth offenders serving life without parole in the only other country in the world known to impose this sentence: Israel.⁵⁵

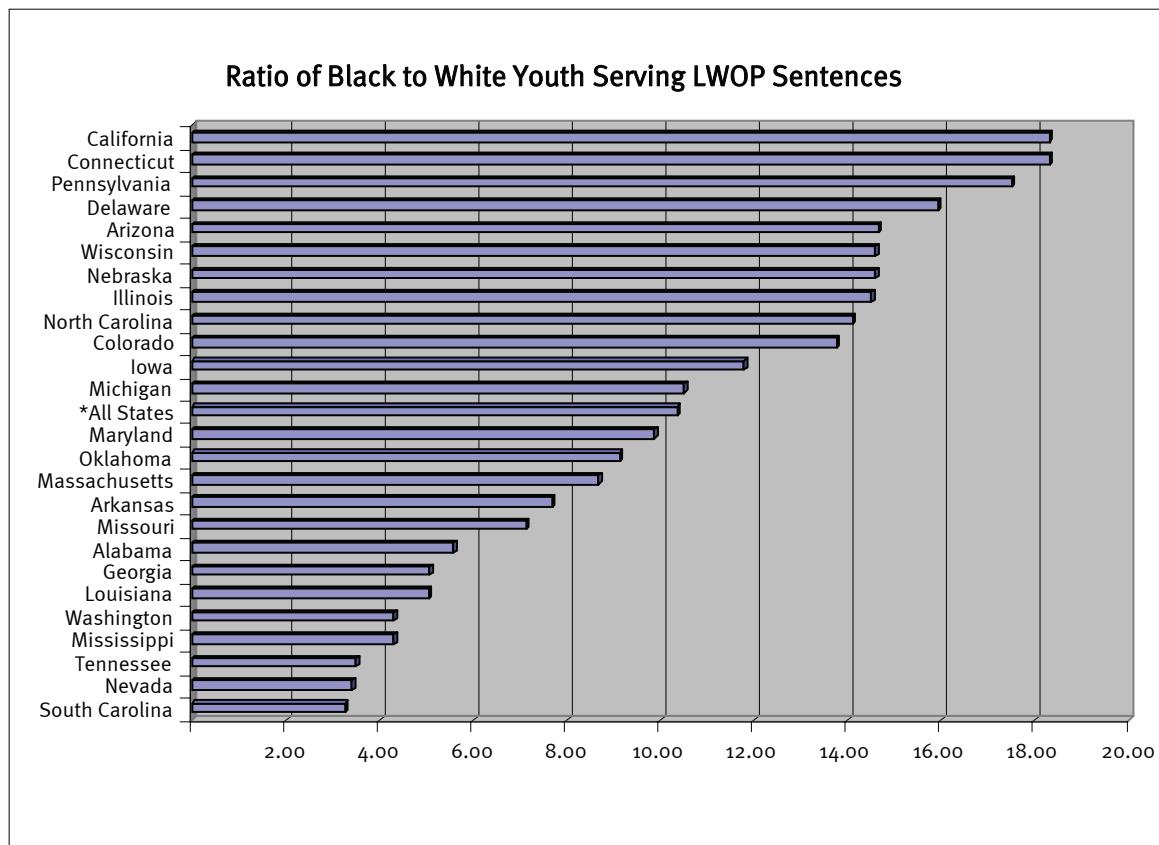
⁵⁴ See, for example: Center for Law and Global Justice, University of San Francisco School of Law, “Sentencing Our Children to Die in Prison: Global Law and Practice,” November 2007, http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP_Final_Nov_30_Web.pdf (accessed February 1, 2008), fn. 19; Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (New York: Human Rights Watch, 2005), <http://hrw.org/reports/2005/us1005/>.

⁵⁵ Center for Law and Global Justice, “Sentencing our Children to Die in Prison,” p. 17.

We have data on the race (white or black) of youth serving life without parole in the United States for 25 of the 39 states that apply the sentence in law and practice. As illustrated by figure 2 below, in all of these states, relative to the state population in the age group 14-17,⁵⁶ black youth are serving life without parole at rates that are higher than their white counterparts. On average, black youth are serving the sentence at a rate that is 10 times that of white youth. In the states of California, Connecticut, and Pennsylvania, black youth are serving the sentence at a rate that is 17.5 to 18.3 times higher than the rate for white youth.

⁵⁶ For all calculations introduced in this section, Human Rights Watch used state population data based on the 2000 Census, estimated for the year 2004 with bridged race categories. We used population data from 2004 because this provided us with the most fairly comparable population data to the LWOP sentencing data from states, which we collected in 2004. We used bridged race categories because most state correctional systems have not adopted the 31 new racial categories established in 1997 by the US Census Bureau. Therefore, we believe that using the bridged race population estimates for 2004 provides the most accurate comparative data. The National Center for Health Statistics explains that the bridged race data “result from bridging the 31 race categories used in Census 2000, as specified in the 1997 Office of Management and Budget (OMB) standards for the collection of data on race and ethnicity, to the four race categories specified under the 1977 standards. Many data systems, such as vital statistics, are continuing to use the 1977 OMB standards during the transition to full implementation of the 1997 OMB standards. The bridged-race population estimates are produced under a collaborative arrangement with the U. S. Census Bureau. The bridging methodology is described in the report, <http://www.cdc.gov/nchs/about/major/dvs/popbridge/popbridge.htm>.”

Figure 2



Youth offenders serving life without parole data originally published in Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (New York: Human Rights Watch, 2005), <http://hrw.org/reports/2005/us1005/>; and supplemented by data on under-18 offenders serving life without parole in California provided to Human Rights Watch from California Department of Corrections and Rehabilitation in April 2007. Data on under-18 offenders serving life without parole in Mississippi provided to Human Rights Watch from the National Association for the Advancement of Colored People Legal Defense Fund in October 2007 (report forthcoming). Population data extracted by Human Rights Watch from C. Puzzanchera, T. Finnegan, and W. Kang, National Center for Juvenile Justice, "Easy Access to Juvenile Populations Online: US Census Population Data," State Population Data with Bridged Race Categories 2004, for ages 14-17, <http://www.ojjdp.ncjrs.gov/ojstatbb/ezapop/> (accessed January 2, 2008). Certain states are not included in the above figure because of insufficient data. Ratio calculated using rates per 10,000 population of youth age 14-17 disaggregated by race and state.⁵⁷

⁵⁷ States that prohibit LWOP for youth offenders: Alaska, Colorado (as of 2005), District of Columbia, Kansas, Kentucky (cases under court challenge), New Mexico, and Oregon. No race data provided to Human Rights Watch from the states of Hawaii, Idaho, Montana, North Dakota and Virginia. No racial disparity rates calculated for Indiana, Minnesota, New Hampshire, Ohio, Rhode Island, South Dakota, and Wyoming because each of these states had either zero African-American or zero white youth sentenced to life without parole: IN (two white / zero African-American), MN (one white / zero African-American), NH (10 white / zero African-American), OH (zero white, one African-American), RI (zero white, one African-American), SD (six white / zero African-American) WY (three white / zero African-American). No racial disparity rates calculated for Florida because the FBI provided Human Rights Watch with murder arrest data only for the years 1990-1995, which were insufficient data to provide accurate rates comparable with other state data.

To examine if, once convicted, black youth and white youth face the same likelihood of being sentenced to life without the possibility of parole, Human Rights Watch sought data on youths convicted of murder, since murder is the crime that most commonly results in life without parole sentences for youth offenders.

Unfortunately, after several months of research, we were unable to find any state-based or nationally-based repository of data that tracked convictions of persons for murder, disaggregated by state, race, and youth offender status. To our knowledge, there is no such data source currently available in the country.⁵⁸ Similarly, there are no publicly available data on youth murder arrest rates, disaggregated by state and race. However, the Federal Bureau of Investigation agreed to produce a special dataset for us reporting on arrest rates disaggregated by state and race for the years 1990-2005. These data form the basis for Human Rights Watch's analysis in this submission.⁵⁹

With regard to the sentencing of youth to life without parole, the data provided by the FBI showed that, once arrested for murder, *black youth and white youth face strikingly different chances of receiving a sentence of life without the possibility of parole.*

Figure 3 presents the ratio of black youth arrested for murder to black youth sentenced to life without the possibility of parole (column B) and compares this ratio

⁵⁸ Human Rights Watch made extensive and repeated attempts to obtain national statistics on juvenile homicide convictions by state and race, but was unable to acquire the information. In early November 2007, efforts were made by Human Rights Watch staffers to locate state conviction data for juveniles by canvassing the internet for public or non-profit research, and statistics incorporating age, offense, and race were not located. On November 12, Human Rights Watch spoke with Melissa Sickmund, senior research associate at the National Center for Juvenile Justice (NCJJ), who explained that no national court reporting system exists to compile such data, and that there is no federal mandate to collect conviction information from individual states. On November 13, Human Rights Watch contacted the Department of Justice's Bureau of Justice Statistics (BJS) and spoke with Page Harrison, who explained that the BJS did not have such data either, and that the little conviction data they did have were largely estimates based on small samples. On November 19, Human Rights Watch spoke with Thomas Cohen and Erica Smith, BJS statisticians, who reiterated their colleague's belief that short of a large-scale request to individual state courts on conviction data, the arrest data maintained by the FBI's Uniform Crime Reporting Program was the best data source to conduct the analysis Human Rights Watch sought to do.

⁵⁹ It must be noted that arrest data are notoriously inaccurate as an indicator of actual criminal participation by different racial groups, youth or adult. With regard to youth, as noted by our colleague NGOs in the summary of their submission to the CERD Committee: “[R]acial disparities in school discipline and drop-out rates, in combination with increasing presence of law enforcement in public schools attended predominantly by low income youth of color and heightened ‘gang policing’ efforts targeting youth of color, have contributed to significant racial disparities in youth arrests ... [f]or instance, African-American youth are 16 % of the overall population, but represent 28 % of children arrested in the US.” US Human Rights Network, “ICERD Shadow Report 2008,” para. 52.

to the comparable ratio for white youth (column C). The difference between the ratio for black and for white youth is presented as a ratio in column D.

If race was not related to sentencing, we would expect that latter ratio to be equal to one. However, in 10 states, we found that the ratio was significantly higher.

California has the worst disparities in the nation: for every 21.14 black youth arrested for murder in the state, one is serving a LWOP sentence; whereas for every 123.31 white youth arrested for murder, one is serving LWOP.⁶⁰ In other words, black youth arrested for murder are sentenced to LWOP in California at a rate that is 5.83 times that of white youth arrested for murder. Among all 25 states for which we had data, black youth arrested for murder were sentenced to LWOP at a rate 1.56 times that of white youth arrested for murder.

These disparities support the hypothesis that there is something other than the criminality of these two racial groups—something that happens after their arrests for murder, such as unequal treatment by prosecutors, before courts, and by sentencing judges—that causes the disparities between sentencing of black and white youth to LWOP.

⁶⁰ Note that these rates are comparing FBI murder arrest data from the same years as LWOP sentencing data, but these data come from two different sources and thus do not necessarily track the same individual cases. We are using FBI murder arrest data as a proxy for criminality in order to compare criminality and sentencing trends.

Figure 3

State (Column A)	Black Murder Arrest Rate / Black LWOP Rate (Column B)	White Murder Arrest Rate / White LWOP Rate (Column C)	White Rate of LWOP per Arrests / Black rate of LWOP per Arrests (column D)
California	21.14	123.31	5.83
Delaware	3.00	12.00	4.00
Colorado	4.58	15.29	3.34
Arizona	16.33	52.71	3.23
Georgia	87.50	262.50	3.00
Connecticut	22.83	47.50	2.08
N. Carolina	22.44	37.83	1.69
Illinois	12.74	18.90	1.48
Pennsylvania	2.86	3.60	1.26
Nebraska	4.40	5.40	1.23

Murder arrest data extracted by Human Rights Watch from data provided by the Federal Bureau of Investigation, “Uniform Crime Reporting Program: 1990-2005 Arrest by State” (extracted by code for murder crimes, juvenile status, and race), on file with Human Rights Watch. Population data extracted by Human Rights Watch from from C. Puzzanchera, T. Finnegan, and W. Kang, National Center for Juvenile Justice, “Easy Access to Juvenile Populations Online: US Census Population Data,” State Population Data with Bridged Race Categories 2004, for ages 14-17, <http://www.ojjdp.ncjrs.gov/ojstatbb/ezapop/> (accessed January 2, 2008). Certain states are not included in the above figure because of insufficient data (see footnote 57, above). Youth offenders serving life without parole data originally published in Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (New York: Human Rights Watch, 2005), <http://hrw.org/reports/2005/us1005/>; and supplemented by data on under-18 offenders serving life without parole in California provided to Human Rights Watch from California Department of Corrections and Rehabilitation in April 2007 (report forthcoming). Data on under-18 offenders serving life without parole in Mississippi provided to Human Rights Watch by the National Association for the Advancement of Colored People Legal Defense Fund in October 2007 (report forthcoming). Iowa data could not be used for this comparison.

These data reveal unequal treatment in the criminal justice system. Because this unequal treatment cannot be explained by white and black youths’ “differential involvement in crime,”⁶¹ it constitutes a violation of US obligations under ICERD.

Recommendations to the Committee

- Instruct the United States to end the practice of sentencing youth to life without parole by the federal government and constituent states.

⁶¹ In addition, because arrest data may reflect racial discrimination in policing as well as actual criminal participation by different groups, racial disparities may in fact be worse than these data reveal. That hypothesis could be better tested if conviction data were available to conduct this analysis.

- Until the sentence is eliminated for youth throughout the United States, eliminate the unequal treatment in the criminal justice system that is causing the application of this harsh punishment to African-American youth at rates that are higher than those applied to similarly situated white youth.
- Urge the United States to compile and regularly publish accurate data on conviction and sentencing rates for youth offenders, disaggregated by race.

V. Violation of the Right to Non-Discrimination in Protection against Bodily Harm: Article 5(b)

Convention Standards and Concerns

Despite important improvements in public education in the past five decades in the United States, many of which were prompted by the landmark Supreme Court case, *Brown v. Board of Education* (1954), children of color continue to suffer from policies that have the purpose or effect of discriminating against them, both of which are prohibited by ICERD. There are myriad policies that raise concerns under ICERD, some of which are addressed in the 2007 US State Party Report to CERD. Other important concerns are raised in the joint NGO submission to the Committee, including intersections between poverty and inadequate education for children of color, as well as concerns raised by the federal law known as “No Child Left Behind.”

In this submission, Human Rights Watch presents the Committee with a specific illustration of discriminatory treatment suffered by children of color in US public schools: racial disparities in the use of corporal punishment. Though the federal government claims it “is actively engaged in the enforcement of anti-discrimination statutes ... in the area[s] of ... education,” Human Rights Watch believes that the United States has failed to give the issue of corporal punishment, and in particular its more widespread use against children of color, sufficient attention.⁶²

The use of corporal punishment in US public schools violates US obligations under Article 5(b) of ICERD to protect “the right of everyone, without distinction ... to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.”⁶³ As a consequence of seeking public education and training, children of color, specifically African-American and Native American students, find their rights to security of person violated at disproportionate rates in the United States.

⁶² Government of the United States, Periodic Report Concerning ICERD, 2007, para. 59.

⁶³ ICERD, Article 5(b).

Illustration: Corporal Punishment in US Public Schools

Corporal punishment in US public schools usually takes the form of paddling (striking the student's clothed or sometimes naked buttocks with a piece of wood approximately three inches wide, 20 inches long, and half an inch thick). Human Rights Watch has received additional reports of students being beaten in school with a set of rulers taped together,⁶⁴ a hall pass,⁶⁵ a thin wooden plank,⁶⁶ and a belt.⁶⁷ Students are punished for minor disciplinary infractions, such as tardiness or untucked shirt-tails, as well as the catch-all category of "disrespect for authority." Students are also subjected to corporal punishment for violent misbehavior such as fighting or threatening other students. Students as young as five years old are subjected to corporal punishment, though the practice is more prevalent among older students.

Corporal punishment is legal in public schools in almost half of the constituent states of the US.⁶⁸ According to federal government statistics, in the 2004-2005 school year (the most recent year for which data are available), 272,028 students were hit.⁶⁹ The practice is particularly prevalent in states in the South.⁷⁰ In Mississippi, 8 percent of school children, or 40,692 students, received corporal punishment in the 2003-2004 school year.⁷¹ More than 1 percent of school children

⁶⁴ Human Rights Watch interview with middle school student (name withheld) in Marks, Mississippi, December 12, 2007.

⁶⁵ Human Rights Watch interview with high school student (name withheld) in Jackson, Mississippi, December 5, 2007.

⁶⁶ Human Rights Watch interviews with middle school student and middle school teacher (names withheld) in Marks, Mississippi, December 12, 2007.

⁶⁷ Human Rights Watch telephone interview with middle school teacher (name withheld) in Sunflower, Mississippi, December 19, 2007 (referring to events that occurred in 1997).

⁶⁸ Corporal punishment in schools is legal in some form in 21 states: Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming. See, Global Coalition to End Violence Against Children, "End All Corporal Punishment of Children: United States," June 2007, <http://www.endcorporalpunishment.org/pages/frame.html> (accessed February 1, 2008).

⁶⁹ United States Department of Education, Office for Civil Rights, "Civil Rights Data Collection 2004," 2004, <http://vistademo.beyond2020.com/ocr2004rv30/wdsdata.html> (accessed December 19, 2007). The data collected refer to each student who was subjected to corporal punishment as opposed to each incident. The instructions issued direct schools to "Enter the number of students who ... received corporal punishment. Count each student only once regardless of the number of times punished." United States Department of Education, "Civil Rights Data Collection Individual School Report: ED102, Reporting Requirement," March 31, 2005, www.ed.gov/about/initis/ed/pbdfi/surveytoll/crdcollection/ed102_inst.pdf (accessed February 1, 2008).

⁷⁰ The states with the highest percentage of students paddled per year are, in order: Mississippi, Arkansas, Alabama, Tennessee, Oklahoma, Louisiana, Georgia, Texas, Missouri, and Kentucky. See, United States Department of Education, Office for Civil Rights, "Civil Rights Data Collection 2004."

⁷¹ United States Department of Education, Office for Civil Rights, "Civil Rights Data Collection 2004."

were similarly punished in seven other states: Arkansas, Alabama, Georgia, Louisiana, Oklahoma, Tennessee, and Texas.⁷²

The racially disparate use of corporal punishment in US public schools subjects students to violations of their right to be free from bodily harm. When compared to relevant percentages of the nationwide student population, both African-American boys and African-American girls are significantly more likely to be punished than their white counterparts; African-American boys make up only 8.6 percent of the national student population, but 27.7 percent of those paddled, while African-American girls make up 8.3 percent of the national student population and 10.7 percent of those paddled.⁷³ In Texas, where 50,489 students were beaten in the 2004-2005 school year, more than in any other state in the nation, African-American girls are almost twice as likely to be beaten as their white counterparts.⁷⁴ Native American students are also singled out for punishment more frequently than students of other races: in Oklahoma, for example, Native American boys are subject to corporal punishment at more than double their rate in the student population.⁷⁵

Schools that use corporal punishment at racially disproportionate rates create a hostile school environment in which students of color may struggle to succeed. Human Rights Watch has spoken with parents who removed their children from public school after they were subjected to racially motivated corporal punishment.⁷⁶ Numerous parents have expressed concerns to Human Rights Watch that white administrators and teachers inflicted bodily harm on African-American students more frequently and more harshly than white students.⁷⁷ A former school

⁷² United States Department of Education, Office for Civil Rights, "Civil Rights Data Collection 2004."

⁷³ African-American boys make up 8.58 percent of the national student population and 27.74 percent of those paddled; white boys make up 30.13 percent of the national student population and 43.24 percent of those paddled. African-American girls make up 8.30 percent of the national student population and 10.72 percent of those paddled; white girls make up 28.32 percent of the national student population and 9.33 percent of those paddled. United States Department of Education, Office for Civil Rights, "Civil Rights Data Collection 2004."

⁷⁴ African-American girls make up 6.81 percent of the statewide student population and 5.53 percent of those paddled; white girls make up 18.90 percent of the student population and 8.03 percent of those paddled. United States Department of Education, Office for Civil Rights, "Civil Rights Data Collection 2004."

⁷⁵ Native American boys make up 10.29 percent of the statewide student population and 21.93 percent of those paddled. United States Department of Education, Office for Civil Rights, "Civil Rights Data Collection 2004."

⁷⁶ Human Rights Watch interviews with parents (names withheld) in Stonewall, Mississippi, December 11, 2007 (white parents believe their sons were paddled more severely because of their friendships with African-American boys and ultimately chose to withdraw the boys from school based on the severity of the punishment).

⁷⁷ Human Rights Watch interviews with parents (names withheld) in Indianola, Mississippi on December 4 and 12, 2007.

administrator echoed those concerns,⁷⁸ while a former school board member of a major city expressed her belief that many white male teachers felt more comfortable paddling black girls than white girls.⁷⁹ In interviews with Human Rights Watch, both parents and students repeatedly linked the use of corporal punishment in schools to slavery, characterizing hitting young African-Americans as a measure of classroom control as a dehumanizing reminder of techniques used to control slaves on plantations.⁸⁰ One African-American student in a small town in Mississippi reported to Human Rights Watch that her African-American assistant principal told her that she should be paddled to make her behave “less ghetto” and “more like white people.”⁸¹

While there has been a steady decline in the use of corporal punishment in US public schools since the early 1980s, the federal government has an obligation to engage directly in the issue to eradicate the practice nationwide. Twenty-nine states have passed legislation banning the practice; governments in the remaining states must be pushed to do the same if the United States is to come into compliance with its obligations under ICERD.

Recommendations to the Committee

- Urge the United States to eliminate the use of corporal punishment in schools.
- Until such time as corporal punishment is eliminated in all public schools in the US, ensure that public school children enjoy the right to be protected against violence or bodily harm without racial discrimination in purpose or effect.

⁷⁸ Human Rights Watch interview with former elementary school principal and assistant superintendent (name withheld) in Jackson, Mississippi on December 7, 2007.

⁷⁹ Human Rights Watch interview with former Jackson Public Schools board member (name withheld), December 5, 2007.

⁸⁰ Human Rights Watch interviews with parents (names withheld) in Indianola, Mississippi on December 4, 2007 and Eupora, Mississippi on December 11, 2007, and with high school students (names withheld) in Sunflower, Mississippi on December 4, 2007 and Jackson, Mississippi on December 5, 2007.

⁸¹ Human Rights Watch interview with sixth grader (name withheld) in Eupora, Mississippi, December 11, 2007.

VI. Violation of the Right to Non-Discrimination in the Enjoyment of the Right to Family Unity: Article 5(c)

Convention Standards and Concerns

Although Article 1.2 of ICERD states that the treaty's prohibition on discrimination does not apply to "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens," the Committee has narrowed this exclusion. The Committee has clarified that states parties are obligated to prohibit and eliminate "racial discrimination in the enjoyment of civil, political, economic, social, and cultural rights."⁸² Except for certain political rights, such as the right to participate in elections, which may be confined to citizens, "[s]tates parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights."⁸³

As the Committee notes, any policies of differential treatment between non-citizens and citizens will constitute discrimination "if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."⁸⁴ Human Rights Watch believes that the US government's failure to protect the family unity and *nonrefoulement* rights of non-citizens during deportation after a criminal conviction violates this requirement of the treaty.

In particular, the policy of the United States to subject hundreds of thousands of non-citizens to summary deportation after they have finished serving their criminal sentences for a vast array of crimes directly and unequivocally violates the Committee's instruction that:

Punishments targeted exclusively at non-nationals that are additional to punishments under ordinary law, such as deportation ... should be

⁸² Committee on the Elimination of Racial Discrimination, General Recommendation 30, Article 1.3.

⁸³ Committee on the Elimination of Racial Discrimination, General Recommendation 30, Article 1.3.

⁸⁴ Committee on the Elimination of Racial Discrimination, General Recommendation 30, Article 1.4.

imposed only in exceptional circumstances and in a proportionate manner, for serious reasons related to public order which are stipulated in the law, and should take into account the need to respect the private family life of those concerned and the international protection to which they are entitled.⁸⁵

Illustration: Failure to Protect the Family Unity and *Nonrefoulement* Rights of Non-Citizens Deported for Crimes

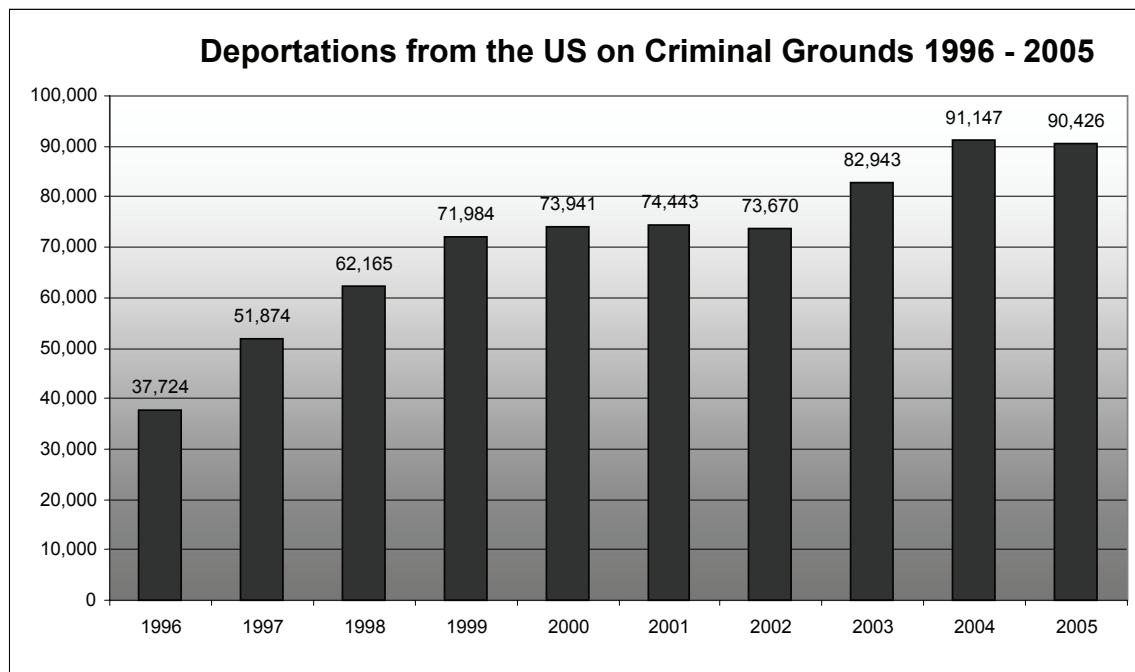
In 1996, the United States implemented legislation that requires deportation of non-citizens convicted of a crime, for both serious and minor offenses, after they have served their criminal sentence.⁸⁶ Under this legislation, some 672,593 immigrants in the US, many of whom were legal residents—some with families, who had lived in the US for decades, and who had committed nonviolent offenses—have been deported from the country as shown in Figure 4. As a result of these deportations, Human Rights Watch estimates that approximately 1.6 million adults and children residing in the US have been separated from their spouses and parents since 1997, when the 1996 laws went into effect.⁸⁷ Based on the US Census, we estimate that out of these 1.6 million family members left behind by deportees, 540,000 were US citizens by birth or naturalization.

⁸⁵ Committee on the Elimination of Racial Discrimination, General Recommendation 31, para. 37.

⁸⁶ Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

⁸⁷ Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, vol. 19, no. 3(G), July 2007, <http://hrw.org/reports/2007/us0707/>.

Figure 4⁸⁸

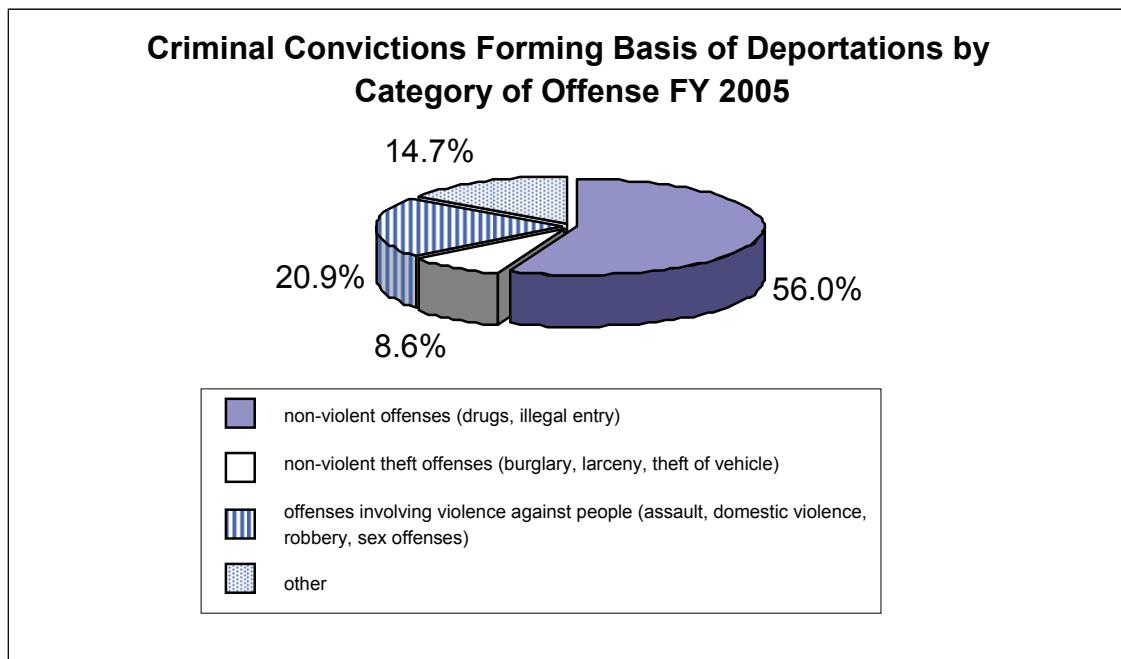


For reasons that are unclear, regular press updates by US Immigration and Customs Enforcement (ICE) always tout the deportations of violent criminals, but keep vague the other categories of immigrants deported.⁸⁹ Despite the fact that the relevant laws were passed ten years ago, data on the underlying convictions for deportations were released for the first time by ICE at the end of 2006 for fiscal year 2005. Illustrated in figure 5, these data show that 64.6 percent of immigrants were deported for non-violent offenses, including non-violent theft offenses; 20.9 percent were deported for offenses involving violence against people; and 14.7 percent were deported for unspecified “other” crimes.

⁸⁸ Source: for FY 1996 and FY 1997, Immigration and Naturalization Service (INS), “Enforcement Operations, Aliens Removed by Criminal Status and Region and Selected Country of Nationality,” *Statistical Yearbook 1997*, table 65, p. 185. For all subsequent years, Department of Homeland Security (DHS), “Yearbook of Immigration Statistics 2005,” <http://www.dhs.gov/ximgtn/statistics/publications/YrBk05En.shtml> (accessed February 1, 2008), table 41 and table 42. According to ICE, tables 41 and 42 should be added to calculate the total number of non-citizens removed on criminal grounds. Human Rights Watch telephone interview with Elizabeth M. Grieco, Ph.D., Office of Immigration Statistics, Department of Homeland Security, Washington, D.C., March 1, 2007.

⁸⁹ For example, one ICE press release highlights the deportations of two men: a Brazilian who was convicted of assault with a deadly weapon, domestic assault and unlawful possession of a firearm; and a Jamaican who was deported for “unnatural acts upon a child; providing obscene materials to minors; assault and battery; breaking and entering, larceny and possession of a controlled substance.” But the agency failed to describe the crimes of the 756 other immigrants deported during the same ICE operation. “ICE Removes 758 Criminal Aliens from 5-State Area During July,” Office of the Press Secretary, Immigration and Customs Enforcement Public Affairs press release, August 15, 2006, www.ice.dhs.gov/pi/news/newsreleases/articles/060815neworleans.htm (accessed May 30, 2007).

Figure 5⁹⁰



Applying these percentages from 2005 to the aggregate number of persons deported allows us to estimate that 434,495, or nearly a half million people, were non-violent offenders deported from the United States in the 10 years since the 1996 laws went into effect. In addition, we can estimate that 140,572 people were deported during that same decade for violent offenses. Based on these data, the deportations appear to fail the CERD requirement that deportation should only be imposed “in exceptional circumstances and in a proportionate manner.”⁹¹

In fact, the 1996 immigration law and its implementation violate the United States’ obligations under ICERD in at least three ways. First, non-citizens are deported without any administrative or judicial oversight that would allow an assessment of proportionality. Second, these laws apply not only to serious crimes, but also to minor offenses, and do not take into account whether the non-citizen has lived in the US legally for decades, building a home and family. This omission violates the

⁹⁰ Source: Mary Dougherty, Denise Wilson, and Amy Wu, Office of Immigration Statistics, Department of Homeland Security, “Immigration Enforcement Actions: 2005,” November 2006, http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf (accessed February 1, 2008), table 4, p. 5.

⁹¹ Committee on the Elimination of Racial Discrimination, General Recommendation 31, para. 37.

Committee’s instructions to “take into account the need to respect the private family life of those concerned” prior to deportation.⁹² Finally, deportation proceedings do not allow for consideration of whether a non-citizen has a well founded fear of persecution upon return to his or her country of origin.

ICERD makes clear that differential treatment between citizens and non-citizens may only occur if it is pursuant to a legitimate aim and proportional to the achievement of that aim.⁹³ While the United States may have legitimate reasons for seeking the deportation of individuals convicted of crimes who may pose a danger to society, there is no process under which the necessity or proportionality of the deportation can be assessed. The 1996 legislation prevents judges from considering whether minor crimes should not trigger deportation, whether a particular non-citizen shows evidence of rehabilitation, or if there are other compelling reasons for an individual non-citizen to remain in the US.⁹⁴

The Committee has made clear that deportations “should be imposed only in exceptional circumstances ... and should take into account the need to respect the private family life of those concerned.”⁹⁵ The legislation does not allow judges to strike a balance between the reasons for deportation—i.e., the seriousness of the crime—and the length and breadth of an immigrant’s ties to the United States. While it may be fair, for example, to deport an immigrant who commits murder within six months of his arrival in the US, it may be grossly unfair to deport a parent of young children who has lived legally in the US for 30 years and who was convicted of passing a forged check. Again, there is absolutely no procedure under US immigration law for most non-citizens convicted of crimes to bring these issues before a judge for review.⁹⁶

Finally, CERD General Recommendation 31 states that the US should ensure that deportees will not be sent back to a country or territory where they would run the risk

⁹² Committee on the Elimination of Racial Discrimination, General Recommendation 31, para. 37.

⁹³ Committee on the Elimination of Racial Discrimination, General Recommendation 30, Article 1.4.

⁹⁴ *Forced Apart*, pp. 45-78.

⁹⁵ Committee on the Elimination of Racial Discrimination, General Recommendation 31, para. 37.

⁹⁶ *Forced Apart*, pp. 45-78.

of serious violations of their human rights.⁹⁷ But many non-citizens are subject to deportation after serving their criminal sentences without consideration of the risk that they would be returned to persecution. These non-citizens have no opportunity in deportation proceedings to assert a fear of persecution based on one of the grounds that may establish refugee status. This is true despite the fact that under international law it is expected that judges will have an opportunity to consider not only the individual's fear of persecution, but also whether his or her criminal conviction is particularly serious as well as whether he or she "constitutes a danger to the community."⁹⁸ None of these factors can be weighed in deportation proceedings for non-citizens convicted of certain crimes in the United States.

Deportation is a necessary part of every country's enforcement of its immigration laws. But as explicitly discussed in the Committee's General Recommendations 30 and 31, the exercise of the power to deport must be governed by fair laws narrowly tailored to protect legitimate national interests.

Human rights law recognizes that the privilege of living in any country as a non-citizen may be conditional upon obeying that country's laws. However, a country like the United States cannot withdraw that privilege without protecting the human rights of the immigrants it previously allowed to enter. Human rights law requires a fair hearing in which family ties and other connections to an immigrant's host country are weighed against that country's interest in deporting him. The 1951 Convention Relating to the Status of Refugees and its related Protocol also require a hearing into a non-citizen's well founded fear of persecution prior to deportation. Unfortunately, that is precisely what US immigration law fails to do.

In this respect, the United States is far out of step with international human rights standards, including its obligations under ICERD.

Recommendations to the Committee

- Urge the United States to reinstate hearings that would allow immigrants facing deportation the chance to ask a judge to allow them to remain in the

⁹⁷ Committee on the Elimination of Racial Discrimination, General Recommendation 31, para. 40.

⁹⁸ Refugee Convention, Article 33.2.

United States when their crimes are relatively minor and their connections (especially their family ties) to the United States are strong.

- Require the United States to uphold its obligations to refugees by giving all persons subject to deportation an opportunity to raise their fears of persecution, and ensuring that only refugees who have been convicted of a “particularly serious crime” *and* who “constitute a danger to the community” of the United States may be returned to places where they fear persecution.
- Require the federal government to evaluate the kinds of crimes that render people deportable in order to prevent permanent and mandatory banishment from the United States for relatively minor non-violent crimes like theft or drug possession.

VII. Violation of the Right to Non-Discrimination in the Enjoyment of the Right to Health: Article 5(e)(iv)

Convention Standards and Concerns

ICERD requires states parties, when the circumstances so warrant, to take “special and concrete measures” to ensure the development and protection of racial groups “for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”⁹⁹ Moreover, under Article 5(e)(iv) of ICERD, the US is to eliminate racial discrimination and guarantee to everyone, without distinction, the right to public health.¹⁰⁰

The US has failed to develop legislative or policy responses adequate to address the HIV/AIDS epidemic in the African-American community. In some instances, the US promotes laws and policies that deny services and care to many African-Americans with HIV/AIDS. These actions exacerbate the disproportionate effect of HIV/AIDS upon the minority community and violate the US government’s obligations under ICERD.

Illustration: Racial Disparities in the Prevalence of HIV/AIDS

Marked racial disparities in the prevalence of HIV/AIDS in the United States are well documented.¹⁰¹ The African-American experience is the most dramatic. African-American women in the US are diagnosed with HIV/AIDS at a rate 19 times higher than that of white women, and African-American men are diagnosed at a rate seven

⁹⁹ ICERD, Article 2.2.

¹⁰⁰ ICERD, Article 5(e)(iv).

¹⁰¹ See, for example: Centers for Disease Control and Prevention (CDC), “HIV/AIDS Surveillance Report, 2004,” 2005, <http://www.cdc.gov/hiv/topics/surveillance/resources/reports/2004report/pdf/2004SurveillanceReport.pdf> (accessed February 1, 2008); CDC, “Racial Ethnic Disparities in Diagnoses of HIV/AIDS- 33 States,” *Morbidity and Mortality Weekly Report*, vol. 55, pp. 121-125 (2006), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5505a1.htm> (accessed February 1, 2008); Robert E. Fullilove, National Minority AIDS Council, “African-Americans, Health Disparities and HIV/AIDS,” November 2006, http://www.nmac.org/nmac2/PDF/NMAC%20Advocacy%20Report_December%202006.pdf (accessed February 1, 2008); Open Society Institute, “Improving Outcomes: Blueprint for a National AIDS Plan for the United States,” 2007, http://www.soros.org/initiatives/health/focus/phw/articles_publications/publications/improving_20070430/improving_20070501.pdf (accessed February 1, 2008), p. 8; Joint United Nations Program on AIDS (UNAIDS) and the World Health Organization (WHO), “Fighting HIV-Related Intolerance: Exposing the Links Between Racism, Stigma and Discrimination,” 2001, <http://www.safepassages.soton.ac.uk/pdfs/bpracism.pdf> (accessed February 1, 2008), pp. 6-8; Center for HIV Law and Policy, “Racial Disparities in HIV Care and Outcome: A Call for an Evidence-Based Response,” May 2006.

times higher than that of white men.¹⁰² A 2005 study in five US cities showed that 46 percent of African-American men who have sex with men were HIV-positive. HIV/AIDS is the leading cause of death of African-American women ages 25-34, and African-American women in all age groups have a 13 times greater risk of dying of HIV/AIDS than do white women.¹⁰³ African-American children constitute 71 percent of all pediatric AIDS cases in the US.¹⁰⁴

These statistics must be understood not in isolation but in the context of African-Americans as a marginalized group in American society. US government policy plays an important part in the environment of risk that fuels the epidemic in minority communities. One in four African-Americans lives in poverty.¹⁰⁵ Among those living with HIV/AIDS, African-Americans are more likely than whites to be homeless or unstably housed and to lack a high school education.¹⁰⁶ There is also a high prevalence of HIV infection in US prisons, where African-Americans represent 41 percent of the population. African-Americans are more likely than whites to have no medical insurance¹⁰⁷ and less likely to receive necessary anti-retroviral treatment even when presenting themselves for care.¹⁰⁸

As HIV/AIDS rages through African-American communities, the response of the US government ranges from neglect to undermining potential solutions. There is no national HIV/AIDS plan and no comprehensive plan to address the epidemic in minority communities. Medicaid, which offers health insurance to low-income persons, denies eligibility until applicants are disabled from full-blown AIDS. The

¹⁰² National Alliance of State and Territorial AIDS Directors (NASTAD), "A Turning Point: Confronting HIV/AIDS in African-American Communities," December 2005, http://www.blackaidsday.org/pubs_reports/ATurningPoint.pdf (accessed February 1, 2008), p. 1.

¹⁰³ R. Levine et al., "Black-White Mortality from HIV in the United States Before and After the Introduction of HAART Therapy in 1996," *Journal of American Public Health* (October 2007), 97: 1884-1892.

¹⁰⁴ National Institutes of Health (NIH), "HIV Infection in Minority Populations," April 2005, <http://www.niaid.nih.gov/factsheets/Minor.htm> (accessed February 1, 2008).

¹⁰⁵ US Census Bureau, "Statistical Abstract of the United States, 2007," 2007, <http://www.census.gov/compendia/statab/2007/2007edition.html> (accessed February 1, 2008).

¹⁰⁶ National AIDS Housing Coalition, "Transforming Fact into Strategy- Developing a Public Health Response to the Housing Needs of Persons Living with and at risk of HIV/AIDS," November 2006, <http://www.nationalaidshousing.org/PDF/SummitII/PolicyPaper.pdf> (accessed February 1, 2008), p. 1; Pan American Health Organization (PAHO)/WHO/UNAIDS, "HIV and AIDS in the Americas: An Epidemic With Many Faces," November 2000, http://www.who.int/hiv/strategic/en/amr_map_rio.pdf (accessed February 1, 2008), p. 34.

¹⁰⁷ NASTAD, "A Turning Point," p. 2.

¹⁰⁸ Center for HIV Law and Policy, "Racial Disparities in HIV Care," p. 3.

Ryan White CARE Act and the AIDS Drug Assistance Program (ADAP), designed to be “safety nets” for HIV/AIDS patients denied Medicaid eligibility, are chronically under-funded.¹⁰⁹ This gap leaves many without access to medical care or life-saving medications. One in five new HIV infections among African-Americans is a result of injection drug use, yet the US government prohibits the use of federal funds for proven harm reduction programs such as needle exchanges.

The high incidence of HIV infection in African-American communities throughout the United States, and the failure to address these disparities through public health programs, raise serious concerns about the US government’s adherence to its obligations under Article 5(e)(iv) of ICERD.

Recommendations to the Committee

- Urge the United States to create a national HIV/AIDS plan that addresses the epidemic in minority communities.
- Ensure that public health programs such as the Ryan White CARE Act, the ADAP, and harm reduction programs are adequately supported and include specific initiatives to address the epidemic in minority communities.

¹⁰⁹ In 2006, four people died while on the South Carolina ADAP waiting list. See, National Alliance of State and Territorial AIDS Directors, *ADAP Watch*, <http://www.nastad.org/Publications/adapwatch.aspx> (accessed February 1, 2008).

VIII. Violation of the Right to Non-Discrimination in the Enjoyment of Effective Protection against Arbitrary and Indefinite Detention and to Fair Trial Procedures: Article 6

Convention Standards and Concerns

Human Rights Watch believes that the failure to ensure the fair criminal trial of non-citizens designated as “enemy combatants” and the withdrawal of jurisdiction from the federal courts to review their detention constitutes a violation of US obligations under ICERD. Article 6 of ICERD establishes that all states parties must:

[A]ssure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention.¹¹⁰

The US policy of detaining non-citizens categorized as “enemy combatants” without providing adequate judicial review constitutes a violation of the fundamental human right to be free from arbitrary and indefinite detention. The right to be free from arbitrary and indefinite detention is a political right embraced under Article 5 of ICERD. It is also a right well established in international humanitarian and human rights law.¹¹¹ The right to fair trial procedures is also well established in these same bodies of law.¹¹²

¹¹⁰ ICERD, Article 6.

¹¹¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted August 12, 1949, 75 U.N.T.S. 31, entered into force October 21, 1950, ratified by the United States on August 2, 1955; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, adopted August 12, 1949, 75 U.N.T.S. 85, entered into force October 21, 1950, ratified by the United States on August 2, 1955; Geneva Convention relative to the Treatment of Prisoners of War, adopted August 12, 1949, 75 U.N.T.S. 135, entered into force October 21, 1950, ratified by the United States on August 2, 1955; Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted August 12, 1949, 75 U.N.T.S. 287, entered into force October 21, 1950, ratified by the United States on August 2, 1955; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3, entered into force December 7, 1978, signed by the United States on December 12, 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force December 7, 1978, signed by the United States on December 12, 1977; ICCPR, Article 9, para. 4; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10,

In General Recommendation 30, the Committee states that the United States should “[e]nsure that non-citizens enjoy equal protection and recognition before the law.”¹¹³ It also states that the United States should “ensure the security of non-citizens, in particular with regard to arbitrary detention” as well as “[e]nsure 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.”¹¹⁴ Furthermore, in General Recommendation 31 the Committee recommends that the United States should guarantee all persons the fundamental rights “enshrined in the relevant international human rights instruments” including the “right not to be arbitrarily arrested or detained.”¹¹⁵

Certain policies pursued by the executive and legislative branches of the United States have explicitly denied non-citizens the same right as citizens to judicial review of the decision to detain them, and to fair trial procedures, in violation of ICERD and the various recommendations of the Committee cited above. The differential treatment of non-citizens held as “enemy combatants” can be summed up in the following manner: only non-citizens held as “enemy combatants” have been detained by the executive branch of the United States at Guantánamo Bay, Cuba; only non-citizens have been stripped of their right to habeas corpus under US law; and only non-citizens are subject to the unfair, fundamentally flawed system of trial by military commission in order to ascertain criminal responsibility in their cases.

Illustration: Non-Citizens Denied the Right to Adequate Judicial Review of Detention Decisions and to Fair Trial Procedures

At the present time, there are approximately 275 non-citizen “enemy combatant” detainees incarcerated at Guantánamo.¹¹⁶ Of these detainees, not one has been

¹¹³ 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the United States on November 20, 1994, Article 13, Article 14, para. 1.

¹¹⁴ The ICCPR establishes a series of fair trial procedures in Articles 9, 10, and 14. In addition, the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 6 U.S.T. 3316, Article 3 prohibits “the passing of sentences ... without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

¹¹⁵ Committee on the Elimination of Racial Discrimination, General Recommendation 30, Article 5.18.

¹¹⁶ Committee on the Elimination of Racial Discrimination, General Recommendation 30, Article 5.19-20.

¹¹⁷ Committee on the Elimination of Racial Discrimination, General Recommendation 31, para. 23.

¹¹⁸ “Detainee Transfer Announced,” Department of Defense press release, December 28, 2007, <http://www.defenselink.mil/releases/release.aspx?releaseid=11591> (accessed February 1, 2008).

released based on an order issued by a federal judge or prosecuted as a citizen would be using federal criminal procedures (or by a court martial as a prisoner-of-war under the Geneva Conventions). They have been stripped of the right to bring habeas corpus petitions and are subject to unfair criminal proceedings under the Military Commissions Act of 2006.

Guantánamo is populated exclusively by non-citizens deemed to be “enemy combatants,” all of whom are denied the right to habeas corpus and to fair trial procedures. The treatment of Yaser Esam Hamdi, who was captured in Afghanistan in 2001, illustrates the administration’s decision to hold only non-citizens at Guantánamo.¹¹⁷ Hamdi was designated an enemy combatant by President Bush and detained in Guantánamo in 2002. When it became known that he was a US citizen, Hamdi was transferred to US military prisons in Virginia and South Carolina. (On September 23, 2004, the United States released Hamdi to Saudi Arabia on the condition that he relinquish his United States citizenship.)¹¹⁸

The 275 non-citizens who continue to be detained as “enemy combatants” at Guantánamo have thus far been subjected to particular discrimination based on the fact that they are not citizens. In 2005, President Bush signed the Detainee Treatment Act of 2005 (DTA) into law.¹¹⁹ The DTA prohibits non-citizens detained in Guantánamo from bringing future habeas claims. It states that “no court, justice, or judge shall have jurisdiction to hear or consider—(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba.”¹²⁰

These discriminatory habeas-stripping provisions were then expanded and made retroactive under the Military Commissions Act (MCA), enacted into law in October 2006. The MCA states that “[n]o court, justice, or judge shall have jurisdiction to

¹¹⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

¹¹⁸ “Transfer of Detainee Control Completed,” Department of Defense press release, October 11, 2004, <http://www.defenselink.mil/releases/release.aspx?releaseid=7827> (accessed February 1, 2008).

¹¹⁹ Detainee Treatment Act of 2005, Public Law No. 109-148, 119 Stat. 2739 (2005).

¹²⁰ Detainee Treatment Act of 2005, Section 1005(e). The other parts of Section 1005 set a deadline for the Secretary of Defense to submit a report explaining the procedures of Combatant Status Review Tribunals and the Administrative Review Boards. These reviews are held to determine the status of the detainees and the need to continue to detain them. They do not allow the detainees to challenge the legality of their detention.

hear or consider an application for a writ of habeas corpus filed on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”¹²¹ This removes the ability of non-citizens designated as enemy combatants, or awaiting such determination, to challenge their detention by petition for habeas corpus, or any other procedures that would provide for full and fair judicial review of the lawfulness of the detention. Courts have since relied on these provisions to dismiss non-citizen habeas petitions from the federal courts.

The administration is now relying on these restrictions to deny Ali Saleh al-Marri, a non-citizen *in the United States*, access to the courts to bring a habeas challenge to his detention. Al-Marri is a Qatari citizen who was on the eve of trial in civilian court for credit card fraud when the US government declared him an “enemy combatant” in 2003. He has been held in a military brig without charge and without any sort of meaningful review of the basis of his detention ever since. The US government claims that under the Military Commissions Act, federal courts lack jurisdiction over those the president labels “enemy combatants”—regardless of where they were arrested or detained.

The constitutionality of the habeas-stripping provisions of the Military Commissions Act is now being considered by the Supreme Court, which heard arguments in the case, *Boumediene v. Bush*, in December 2007.¹²² A decision is expected by mid-2008.

Whether or not the courts ultimately rule that the US Constitution protects detainees at Guantánamo Bay, international law prohibits indefinite detention without effective review. The detainees at Guantánamo apprehended during armed conflict have not been provided review of their cases in accordance with the Geneva Conventions.¹²³ Nor have they been provided review by a judicial authority in accordance with

¹²¹ Military Commissions Act of 2006, 10 U.S.C. 948a, Section 7(a).

¹²² *Boumediene v. Bush*, Supreme Court Docket No. 06-1195 (petition granted June 29, 2007).

¹²³ The Third Geneva Convention states that if there is “any doubt” whether a prisoner qualifies as a prisoner of war they “shall enjoy the protection of the [Geneva] Convention until such time as their status has been determined by a competent tribunal.” Third Geneva Convention, Article 5. The Fourth Geneva Convention states that persons detained for imperative reasons of security shall have the right to appeal “with the least possible delay” and to semi-annual review. Fourth Geneva Convention, Article 78.

international human rights law.¹²⁴ Thus all Guantánamo detainees should be entitled to a court review of the legality of their detention under the writ of habeas corpus. But this has not occurred.

The Military Commissions Act also creates an entirely new criminal justice system solely for non-citizens. The MCA outlines a new system of military commissions designed exclusively to try those non-citizens labeled “alien unlawful enemy combatants.”¹²⁵

While the US government argues that the military commissions provide sufficient procedural protections to guarantee a fair trial to detainees, the commissions do not meet international fair trial standards in a number of respects, including that the commissions are allowed to rely on evidence obtained through abusive interrogations.¹²⁶

By choosing to detain non-citizen “enemy combatants” without adequate judicial review and to try them using procedures that are flawed and unfair, the United States has not lived up to its obligations under ICERD. The US government has made a clear statement that the right of habeas corpus applies to citizens and does not apply to similarly-situated non-citizens. Furthermore, the government has violated international law by subjecting non-citizen “enemy combatants” to military commission trials that fall far short of fair trial procedures required under international law.

Recommendations to the Committee

- Require the United States to respect the rights to freedom from indefinite and arbitrary detention of any non-citizen subject to the jurisdiction or effective control of the United States (whether inside or outside its territory).

¹²⁴ ICCPR, Article 9, provides that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release.”

¹²⁵ Military Commissions Act of 2006, Section 1, subchapter I.

¹²⁶ See Human Rights Watch, *Fair Trial Standards: The Essential Components of a Fair Justice System*, August 23, 2006, <http://hrw.org/english/docs/2006/08/23/usdom14067.htm#fnref1>.

- Urge the United States Congress to repeal the sections of the Detainee Treatment Act and Military Commissions Act that strip non-citizen detainees of the right to habeas corpus and that set up a separate system of criminal justice for non-citizens only.
- Urge the United States to ensure that non-citizens are entitled to challenge the lawfulness of their detention on the same basis as US citizens.

IX. Acknowledgments

This report was written by Alison Parker, deputy director of the US Program, with significant assistance from Jen Daskal, senior counterterrorism counsel, Alice Farmer, Neier Fellow in the US Program, Bill Frelick, refugee policy director, Jeff Graham, intern to the US Program, and Megan McLemore, researcher in the HIV/AIDS program. It was edited by David Fathi, US program director, Joanne Mariner, director, counterterrorism program, Brian Root, statistical and methodological consultant, Clive Baldwin, senior legal advisor, and Joe Saunders, deputy program director. Data research was provided by Ashoka Mukpo, associate in the US Program, and production assistance was provided by Ashoka Mukpo, Andrea Holley, and Fitzroy Hepkins.

Human Rights Watch would like to thank the Soros Foundation, JEHT Foundation, and Atlantic Philanthropies for their generous support to the research upon which this report is based, and for their support to the work of the US Program. We would also like to thank John Schaefer for his assistance with data collection.

HUMAN RIGHTS WATCH

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HUMAN
RIGHTS
WATCH

X. Appendices

Appendix 1: Human Rights Watch Letter to
Mary Beth West

www.hrw.org

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Jennifer Daskal, *Advocacy Director*
Mie Lewis, *Aryeh Neier Fellow*
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Jane Olson, *Chair, Board of Directors*

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*,¹²⁷ 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.¹²⁸ 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 discrimination. For our 2005 report on child offenders sentenced to life without parole, *The Rest of Their Lives*,¹²⁹ 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).

¹²⁷ Case No. 5019-01 [CHECK CASE NUMBER} (Tex. Crim. App. Nov. 15, 2006).

¹²⁸ 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).

¹²⁹ 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.

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*,¹³⁰ 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 turns every freedom fighter – including Hmong and Montagnard who fought alongside the

¹³⁰ 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.

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 terrorism 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 report¹³¹ 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*,¹³² 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.

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.

¹³¹ 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.

¹³² Human Rights Watch, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, <http://hrw.org/reports/2004/usa1104/>, November 2004.

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

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



P.O. Box 30212
Lansing, MICHIGAN 48909

MIKE COX
ATTORNEY GENERAL

December 10, 2007

Ms. Alison Parker
Deputy Director
Human Rights Watch
100 Bush Street, Suite 1812
San Francisco, CA 94104

Dear Ms. Parker:

I am in receipt of your letter regarding the Committee on the Elimination of Racial Discrimination (CERD), a multi-national organization whose mission is to promote racial equality and non-discrimination. Specifically, you want to know whether this office has been contacted by the U.S. Government and to provide information regarding human rights violations in Michigan for their report to CERD.

While the Michigan Department of the Attorney General provides legal representation to various state departments and agencies, our Michigan Department of Civil Rights (MDCR) is the state agency given the authority to investigate and resolve racial discrimination complaints under the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2103 *et seq.* Because this office does not maintain a separate record of these complaints, we would be unable to provide any information related to this request.

In reference to this office being contacted by either the National Association of Attorneys General or the federal government regarding a CERD report, my staff has reviewed our correspondence database and is unable to locate any correspondence related to this report. Additionally, this office contacted the MDCR and the U.S. Commission on Civil Rights but, again, we were unable to verify that such a request has ever been made or received by the state of Michigan.

In view of the foregoing, I sincerely regret my inability to assist you in this matter.

Sincerely yours,

Mike Cox
Attorney General



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OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
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Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

November 1, 2007

Alison Parker
Human Rights Watch
100 Bush Street, Suite 812
San Francisco, CA 94104

RE: October 19, 2007, letter to Office of the Attorney General

Dear Ms. Parker:

Thank you for writing to the Washington State Office of the Attorney General (AGO) regarding the Human Rights Watch program. Your letter was assigned to me for response, as I am Chief Counsel to the Washington State Human Rights Commission (WSHRC). I am not aware of the AGO receiving any formal request or statement regarding requirements of CERD, but please feel free to forward further communication on this project to me.

Furthermore, I gathered from your letter that you are seeking information from individual states “on issues related to racial discrimination.” While I don’t know specifically what information you are seeking, I can probably best assist you by referring your organization to the WSHRC for information about discrimination in Washington State.

The WSHRC is a separate State agency created for the purposes of implementing anti-discrimination rules and policies, investigating complaints of discrimination, and educating the public about discrimination issues. Thus, the WSHRC is most likely to have current data on this subject, and is probably in the best position to provide the information you need. The contact information is as follows:

Marc Brenman, Executive Director
Washington State Human Rights Commission
PO BOX 42490
711 S Capitol Way, Ste 402
Olympia, WA 98504-2490

Tel: 360-753-6770 or 1-800-233-3247 (toll free).
Web: www.hum.wa.gov

ATTORNEY GENERAL OF WASHINGTON

Alison Parker
November 1, 2007
Page 2

I hope this information is of assistance to you. If I can be of further help, please don't hesitate to contact me again. As I mentioned above, I welcome additional information on the CERD program you are writing about.

Sincerely,

A handwritten signature in black ink, appearing to read "Traci Friedl".

Traci Friedl
Assistant Attorney General

TJF:jb

Enclosure

cc: Marc Brenman, Executive Director, Human Rights Commission



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

PAUL J. MORRISON
ATTORNEY GENERAL

October 25, 2007

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Alison Parker
Deputy Director, US Program
Human Rights Watch
100 Bush Street, Suite 1812
San Francisco, California 94014

Dear Ms. Parker:

I am responding to your letter received by this office by fax on October 19, 2007, as the designated record custodian for Attorney General Paul Morrison.

You are attempting to gather information concerning the federal government's report to the International Convention on the Elimination of all forms of Racial Discrimination (CERD). You state that the federal government "frequently explains in its periodic reports to the CERD Committee¹ that large areas of law and policy fall within the jurisdiction of the States, which lack the time to keep track of and report to the federal government on issues relating to racial discrimination. Human Rights Watch would like to know if this claim of the federal government is accurate."

Thus, you ask the following questions:

1. Are you aware of CERD and your state's responsibilities under it?

It does not appear that Kansas was a party to any agreement or resolution passed by this body or the federal government. If you could cite to the pre-emptive federal law and/or Kansas statute adopting and imposing upon Kansas the 1969 resolution or creating a legal duty that applies to state officials we would perhaps be better able to respond to your question.

2. Was your office contacted by Mary Beth West, who wrote the US Government's report to CERD? Our information indicates that these requests were sent out in the fall of 2006 by the National Association of Attorneys General.

We have thus far located no documents that meet the terms of this request. However, we note that many contacts with the NAAG are via email, and such correspondence is typically

¹<http://www.ohchr.org/english/law/cerd.htm>

not retained very long. Thus, while it is possible that a request for information was received and responded to, it may be that the electronic e-mail containing that information no longer exists. In addition, there has since been a change in Attorney General administrations since 2006, and thus, some of the staff who handled NAAG matters in 2006 are no longer with this office. We will continue to look for any 2006 records concerning this matter and will again contact you should we locate same.

3. Did you respond to Ms. West's request?

See answer to question number 2.

4. If you did not respond, what was the reason?

See answer to question number 2.

5. We have been informed that only the States of South Carolina, New Mexico, Oregon, and Illinois responded to Ms. West's Request. Is that correct?

We do not know and have no way of ascertaining who responded to a request that our office did not make. We suggest you contact the individual agency or persons that were coordinating a search to determine the over-all results.

Please note that the Kansas Open Records Act (KORA), K.S.A. 45-215 et seq. applies to public records existing at the time a record request is received; it does not require that public agencies answer questions or create records in order to provide information. Thus, if we do not already possess records that address the issues raised, we will not be able to provide additional information. If we locate any existing public records possessed by the Kansas Attorney General's office, and meeting the terms of your request, we will again contact you about this matter.

However, if you are interested in determining the scope of authority or Kansas involvement in racial discrimination matters, we suggest that you contact the Kansas Human Rights

Alison Parker
Page 3

Commission (KHRC) as this completely separate state agency is the state entity authorized to investigate racial discrimination complaints.²

Sincerely,

OFFICE OF THE ATTORNEY GENERAL
PAUL J. MORRISON



Theresa Marcel Bush
Assistant Attorney General

TMB:jm

²<http://www.khrc.net/> 900 SW Jackson, Suite 568-S, Topeka, KS 66612-1258, phone: 785.296.3206, fax: 785.296.0589

Appendix 3: Data on the Sentencing of Youth to Life without Parole

State	TTL JLWO P	W JLWOP ⑤	W Pop 14-17②	W JLWOP/ W Pop	Rate of W JLWOP (per 10K)	B JLWOP ⑤	B Pop 14-17②	B JLWOP/ B Pop	Rate of B JLWOP (per 10K)	B Juv Mur. Arr.	B Juv Mur. Arr. / B Pop	Rate of B Juv Mur. Arr. (per 10K)	W Juv Mur. Arr.	W Juv Mur. Arr. / White Pop	Rate of W Juv Mur. Arr. (per 10K)	B Juv Mur. Arr. Rate / B JLWOP Rate	W Juv Mur. Arr. Rate / W JLWOP Rate	W Rate of JLWOP Per Mur. Arr. / B Rate of JLWOP Per Mur. Arr.
Tennessee	4	2	247874	0.0000081	0.08	2	70896	0.0000282	0.28	361	0.0050920	50.92	80	0.0003227	3.23	180.50	40.00	0.22
Missouri	116	50	276947	0.0001805	1.81	65	50442	0.0012886	12.89	744	0.0147496	147.50	136	0.0004911	4.91	11.45	2.72	0.24
Louisiana	317	70	157338	0.0004449	4.45	246	109573	0.0022451	22.45	690	0.0062972	62.97	79	0.0005021	5.02	2.80	1.13	0.40
S. Carolina	26	8	146864	0.0000545	0.54	16	89859	0.0001781	1.78	406	0.0045182	45.18	89	0.0006060	6.06	25.38	11.13	0.44
Michigan	306	86	472104	0.0001822	1.82	210	109704	0.0019142	19.14	1472	0.0134179	134.18	275	0.0005825	5.82	7.01	3.20	0.46
Mississippi④	24	5	94294	0.0000530	0.53	18	78597	0.0002290	2.29	280	0.0035625	35.62	36	0.0003818	3.82	15.56	7.20	0.46
Arkansas	46	15	121135	0.0001238	1.24	31	32604	0.0009508	9.51	296	0.0090786	90.79	79	0.0006522	6.52	9.55	5.27	0.55
Massachusetts	60	25	295984	0.0000845	0.84	24	32724	0.0007334	7.33	102	0.0031170	31.17	62	0.0002095	2.09	4.25	2.48	0.58
Wisconsin	16	6	281593	0.0000213	0.21	9	28941	0.0003110	3.11	702	0.0242562	242.56	280	0.0009943	9.94	78.00	46.67	0.60
Maryland	13	2	197592	0.0000101	0.10	11	110041	0.0001000	1.00	1048	0.0095237	95.24	116	0.0005871	5.87	95.27	58.00	0.61
Alabama	15	4	170127	0.0000235	0.24	11	83615	0.0001316	1.32	438	0.0052383	52.38	101	0.0005937	5.94	39.82	25.25	0.63
Nevada	16	9	103702	0.0000868	0.87	4	13478	0.0002968	2.97	80	0.0059356	59.36	183	0.0017647	17.65	20.00	20.33	1.02
Oklahoma	49	19	153167	0.0001240	1.24	24	21199	0.0011321	11.32	200	0.0094344	94.34	162	0.0010577	10.58	8.33	8.53	1.02
Washington	23	15	304514	0.0000493	0.49	4	18799	0.0002128	2.13	58	0.0030853	30.85	225	0.0007389	7.39	14.50	15.00	1.03
Nebraska	21	10	94121	0.0001062	1.06	10	6454	0.0015494	15.49	44	0.0068175	68.17	54	0.0005737	5.74	4.40	5.40	1.23
Pennsylvania	433	72	582554	0.0001236	1.24	217	100341	0.0021626	21.63	620	0.0061789	61.79	259	0.0004446	4.45	2.86	3.60	1.26
Illinois	103	20	555591	0.0000360	0.36	74	141658	0.0005224	5.22	943	0.0066569	66.57	378	0.0006804	6.80	12.74	18.90	1.48
*All States	525		13118693	0.0000400	0.40	1138	2746069	0.0004144	4.14	11650	0.0042424	42.42	8396	0.0006400	6.40	10.24	15.99	1.56
N. Carolina	44	6	319350	0.0000188	0.19	34	128439	0.0002647	2.65	763	0.0059406	59.41	227	0.0007108	7.11	22.44	37.83	1.69
Connecticut	10	2	164125	0.0000122	0.12	6	26904	0.0002230	2.23	137	0.0050922	50.92	95	0.0005788	5.79	22.83	47.50	2.08
Georgia	8	2	320309	0.0000062	0.06	6	189429	0.0000317	0.32	525	0.0027715	27.71	525	0.0016390	16.39	87.50	262.50	3.00
Arizona	30	7	278675	0.0000251	0.25	6	16303	0.0003680	3.68	98	0.0060112	60.11	369	0.0013241	13.24	16.33	52.71	3.23
Colorado	46	14	230480	0.0000607	0.61	12	14356	0.0008359	8.36	55	0.0038312	38.31	214	0.0009285	9.28	4.58	15.29	3.34
Delaware	7	1	32162	0.0000311	0.31	6	12118	0.0004951	4.95	18	0.0014854	14.85	12	0.0003731	3.73	3.00	12.00	4.00
California③	227	35	1637481	0.0000214	0.21	74	189135	0.0003913	3.91	1564	0.0082692	82.69	4316	0.0026358	26.36	21.14	123.31	5.83

W = White, B = Black, Pop = Population, Juv. = Juvenile, Mur. Arr. = Murder Arrests

① = Data extracted by Human Rights Watch from data provided by the Federal Bureau of Investigations, Uniform Crime Reports, Arrests for Murder (non-manslaughter) (extracted by state, juvenile stat

② = US Census Population Data, Ages 10-17 from: Easy Acces to Juvenile Populations Online, Puzzanchera, C., Finnegan, T. and Kang, W. (2007), Available: <http://www.ojjdp.ncjrs.gov/ojstatbb/ezapo>

③ = Data provided to HRW from California Department of Corrections and Rehabilitation in April 2007 (report forthcoming, expected January 2007)

④ = Data provided to HRW from NAACP LDF in October 2007 (report forthcoming)

⑤ = LWOP Data provided to HRW by state departments of corrections and originally published in The Rest of Their Lives

NB: No race data provided to HRW from the states of Hawaii, Idaho, Montana, North C

NB: No youth serving LWOP as of 2004 in Maine, New Jersey, New York, Texas, Utah, and Vermont

NB: States that prohibit LWOP: Alaska, Colorado (as of 2005), Kansas, Kentucky (cases under court challenge), New Mexico, Oreg

NB: No racial disparity rates calculated for Indiana, Minnesota, New Hampshire, Ohio, Rhode Island South Dakota, and Wyoming because each of these states had either zero black or zero white youth

NB: No racial disparity rates calculated for Florida because FBI provided Human Rights Watch with murder arrest data only for the years 1990-1995, which were insufficient data to provide accurate rate

Submission to the Committee on the Elimination of Racial Discrimination

During its Consideration of the Fourth, Fifth, and Sixth Periodic Reports of the United States of America

CERD 72nd Session

The United States is not meeting its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty the US ratified in 1994.

This report, issued on the eve of international review of US compliance with the treaty, documents areas in which the US is falling short of its obligations. It focuses on areas that have been the subject of prior Human Rights Watch research, supplementing the analyses offered by other groups monitoring US performance under the treaty. Subjects detailed here include the failure of federal authorities to inform individual states of their obligations under the treaty, the discriminatory treatment of Haitian refugees by the US, and policies that have the effect of denying health care to many African-Americans with HIV/AIDS. In addition, the report presents new data collected by Human Rights Watch demonstrating that racial disparities in the sentencing of children to life in prison without possibility of parole are more pronounced than the US has acknowledged to date. The report concludes with recommendations of concrete steps US authorities should take to bring the US more fully into compliance with its obligations.

*A man in his cell at Louisiana State Penitentiary,
Angola Prison, in December 2006.*

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