

## HUMAN RIGHTS WATCH

1630 Connecticut Avenue, N.W.  
Suite 500  
Washington, DC 20009  
Tel: 202-612-4321  
Fax: 202-612-4333  
Email: hrwdc@hrw.org

### US PROGRAM

David C. Fathi, *Director*  
Alice Farmer, *Aryeh Neier Fellow*  
Jamie Fellner, *Senior Counsel*  
Abigail Marshak, *Associate*  
Alison Parker, *Deputy Director*  
Sarah Tofte, *Researcher*

### ADVISORY COMMITTEE

Catherine Powell, *Chair*  
Catherine Albisa  
Ann Beeson  
Jeffrey Bleich  
Stephen Bright  
Tanya Coke  
David Cole  
Mike Farrell  
Vanita Gupta  
Lulie Haddad  
David Keller  
Wendy Patten  
Bill Quigley  
Bruce Rabb  
Steven Shapiro  
Alexandra Stanton  
Dorothy Thomas  
Robin Toone

### HUMAN RIGHTS WATCH

Kenneth Roth, *Executive Director*  
Michele Alexander, *Development & Outreach Director*  
Carroll Bogert, *Associate Director*  
Emma Daly, *Communications Director*  
Barbara Guglielmo, *Finance & Administration Director*  
Peggy Hicks, *Global Advocacy Director*  
Iain Levine, *Program Director*  
Andrew Mawson, *Deputy Program Director*  
Suzanne Nossel, *Chief Operating Officer*  
Dinah Pokempner, *General Counsel*  
James Ross, *Legal & Policy Director*  
Joe Saunders, *Deputy Program Director*  
Jane Olson, *Chair, Board of Directors*

June 29, 2009

Mr. Timothy Lockwood  
Chief, Regulation and Policy Management Branch  
California Department of Corrections and Rehabilitation  
Sacramento, CA

HUMAN  
RIGHTS  
WATCH

[www.hrw.org](http://www.hrw.org)

## Re: Proposed amendments to California Code of Regulations, Title 15, Article 7.5, Sections 3349 *et seq.*

Dear Mr. Lockwood:

I write to express the view of Human Rights Watch that California's proposed lethal injection protocol is inconsistent with international human rights law, including human rights treaties ratified by the United States.

Human Rights Watch is a nongovernmental organization established in 1978 to monitor and promote observance of internationally recognized human rights. It has Special Consultative Status at the United Nations, regularly reports on human rights conditions in the United States and more than seventy other countries around the world, and actively promotes legislation and policies worldwide that advance protections of domestic and international human rights and humanitarian law.

Human Rights Watch has been researching lethal injection in the United States for a number of years. Our 2006 report, [\*So Long As They Die: Lethal Injections in the United States\*](#), raised serious concerns that the three-drug protocol used in most states, including California, could in some cases result in extreme suffering for the condemned prisoner. In particular, the use of pancuronium bromide, a paralytic, as the second drug in the sequence creates a risk that an inadequately anesthetized prisoner could be fully conscious and experiencing excruciating pain, yet be unable to move, cry out, or otherwise communicate his suffering. In light of the irregularities that have attended many lethal injection executions—including six in California alone since 1999—this concern is not merely speculative.<sup>1</sup>

We appreciate the fact that California has revised its execution procedure in light of criticisms and concerns that have been raised in judicial proceedings and elsewhere. However, we are dismayed to learn that California's revised execution procedure employs the same three-drug protocol whose risks have been well documented by Human Rights Watch and others (*see* proposed new section 3349.4.3(b)(2)). We are particularly

<sup>1</sup> See Human Rights Watch, *So Long As They Die: Lethal Injections in the United States*, vol. 18, no. 1(G), April 2006, <http://www.hrw.org/en/reports/2006/04/23/so-long-they-die>, pp. 51-53.

concerned by the continued inclusion of pancuronium bromide. This drug plays no essential role in the execution process and greatly increases the risk of a torturous death. Indeed, the risk that paralytics like pancuronium bromide may mask unnecessary suffering is so well established that they are banned for use in animal euthanasia in California and many other states.

Human Rights Watch opposes the death penalty in all circumstances because of its inherent cruelty and finality. But until California abolishes capital punishment, international human rights law requires it to employ an execution method that will produce the least possible physical and mental suffering.

Several sources of international law support the conclusion that executions are permissible only when they inflict the minimum possible suffering. Article 7 of the International Covenant on Civil and Political Rights, a treaty ratified by the United States in 1992, provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. 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, art. 7 [hereinafter “the Covenant”].

The United Nations Human Rights Committee (HRC), the international body charged with monitoring compliance with the Covenant, has interpreted article 7 in the context of government executions. Its formal guidance states that “when the death penalty is applied by a State party for the most serious crimes, ... it must be carried out in such a way as to cause the least possible physical and mental suffering.” ICCPR, General Comment 20, U.N. HRC, 44th Session, U.N. Doc ccpr/c/21/Add.3 (1992), p. 6.

Applying that standard to the case of Charles Chitat Ng, a person who faced execution by lethal gas after extradition from Canada to California, the HRC noted that, while article 6, paragraph 2 of the Covenant allows for the death penalty under limited circumstances, the “method of execution provided for by law must be designed in such a way as to avoid conflict with article 7.” *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/469/1991 (1994), <http://www1.umn.edu/humanrts/undocs/html/dec469.htm>, para. 16.1. Because the manner by which the execution was to take place “would not meet the test of ‘least possible physical and mental suffering’” it violated the standards of the Covenant and constituted cruel and inhuman treatment. *Ibid.*, para. 16.4.

Also relevant are the terms of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the United States in 1994. It states in pertinent part:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 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 October 21, 1994, art. 16(1) [hereinafter “the Convention”].

Implementing the death penalty may violate the Convention against Torture—as an act of “cruel, inhuman or degrading treatment or punishment”—not only when the method of execution runs counter to the standards of the Convention, but also when the circumstances of a particular execution fail to comply with the Convention’s standards.

Non-treaty sources of international law also address limitations on the manner of execution. The Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council, require that “[w]here capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.” Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, approved by the Economic and Social Council by its resolution 1984/50 of May 25, 1984, art. 9. The European Union in 2001 adopted principles urging countries that practice the death penalty to ensure that the method of execution causes the “least possible physical and mental suffering.” European Union General Affairs Council, Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April 9, 2001.

The overwhelming weight of international authority thus requires that the death penalty be administered in a manner that preserves the principles of human dignity. That standard obligates a state actor implementing a death sentence to make every effort to minimize possible pain and suffering by the individual to be executed, even if that means that the state must reject a particular method in favor of an alternative that causes less suffering.

Unfortunately, in adhering to the three-drug protocol whose unnecessary risks have been extensively documented, California has failed to comply with these international law requirements. California must revise its procedures to ensure that executions are carried out so as to inflict the least possible physical and mental suffering on the condemned prisoner.

Very truly yours,

A handwritten signature in black ink, appearing to read "David C. Fathi". The signature is fluid and cursive, with a long horizontal stroke at the end.

David C. Fathi  
Director, US Program