

America's Human Rights Record

New UN Report Denounces Washington

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On May 26, the UN Human Rights Council issued a report titled "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development - Report of the Special Rapporteur (Philip Alston) on extrajudicial, summary or arbitrary executions."

Alston was damning in his criticism regarding "three areas in which significant improvement is necessary if the US Government is to match its actions to its stated commitment to human rights and the rule of law:"

(1) Its imposition of the death penalty under which innocent people are executed. Alston was shocked about "glaring criminal justice system flaws," citing Texas and Alabama as examples, but many other states are as derelict. He criticized politicized judges and recommended that Congress "should enact legislation permitting federal court habeas review of state and federal death penalty cases on their merits."

He condemned the 2006 Military Commissions Act and its provisions that violate international human rights and humanitarian law with regard to due process and fairness.

(2) America needs "greater transparency into law enforcement, military, and intelligence operations that result in unlawful deaths." Domestically, it provides inadequate information about deaths of immigrants and other detainees, but the worst failures are in international military and intelligence operations.

(3) The government fails to "provide greater accountability for potentially unlawful deaths in its international operations." It ignores civilian casualties, both their number and conditions under which they occur, and fails to provide ordinary people, including US citizens, with basic information regarding investigations and prosecutions when laws were violated. It fails to assure safeguards are in place to prevent so-called collateral damage - that is, civilians wrongfully (and at times willfully) targeted and killed.

Overall, "there have been chronic and deplorable accountability failures with respect to policies, practices and conduct that (cause) alleged unlawful killings - including possible war crimes - in the United States' international operations." Effective investigations have been lacking and guilty parties, throughout the chain of command, haven't been punished. Even worse, private contractors and civilian intelligence personnel have been granted "a zone of impunity" because of failures to hold them accountable. Alston recommends a national "commission of inquiry" and a special prosecutor to conduct thorough investigations "independent of the pressure on the political branches of Government."

More on this below.

In June 2008, Alston spent two weeks in America meeting with federal and state officials, judges and civil society groups, as well as victims and witnesses in five US cities. As a signatory to international human rights laws, including the four Geneva Conventions, the International Covenant on Civil and Political Rights, and Convention against Torture, the US is bound by their provisions and required to hold its civilians and military personnel accountable when they violate them.

Domestic Issues

The federal government, 35 states, and US military impose death penalties, often executing innocent people for failing to assure proper due process and fairness. Alston addressed the federal death penalty and its application in Texas and Alabama, the former for its largest number of US executions, the latter for having the nation's highest per capita rate of them.

Yet since 1973, 130 death row inmates nationwide were exonerated, and their numbers keep growing. Since 1977, 13 in Illinois were also declared innocent and freed, a state where governor George Ryan took unprecedented steps:

- on January 31, 2000, he declared a moratorium on further executions after acknowledging a deeply flawed system under which innocent men and women are executed;

- then in January 2003, he commuted the sentences of all 156 death row prisoners - an action only matched by the Supreme Court in *Furman v. Georgia* (June 29, 1972) when it struck down capital punishment at the state and federal levels, calling existing statutes unconstitutional, "arbitrary and capricious," and commuted the sentences of all 629 inmates on death row - until it reinstated it in *Gregg v. Georgia* on July 2, 1976.

Ever since, well over 1100 executions took place and three times that number await them on death row. Far too often they're innocent victims of injustice, people of color, poor, and unable to effectively deal with a hostile prosecutorial system, at least because:

- inadequate laws and/or practices don't protect them "governing the preservation of evidence (including DNA) or because of the passage of time;"

- after convictions, some state laws disallow use of DNA evidence; to countermand this, a federal law should mandate it as standard procedure;

- in some cases, biological evidence isn't relevant; and

- in others, "evidentiary or procedural issues preclude a just or reliable basis for imposing the death penalty."

The result is a deeply flawed criminal justice system affecting victims, their families, and communities when real criminals remain at large. Yet government officials are often indifferent to the problem, at both state and federal levels. Alston recommends changes:

- action to address the lack of judicial independence and inadequate right to counsel;

- a top-to-bottom criminal justice system analysis and overhaul followed by reforms,

especially for racial disparities in capital cases; and

— federal court reviews of all injustice claims when capital punishment is at issue.

Unfortunately, Alston doesn't challenge the death penalty but believes federal and state laws should only impose it for the "most serious crimes." However, who's to decide and on what basis.

He also says foreign nationals denied the right to consular notification were unfairly treated and should be provided review and reconsideration.

Judicial Independence

Texas, Alabama, and other states "have partisan elections for judges." However, "as research and practice show," this system "jeopardizes the right of capital defendants to a fair trial and appeal." Also, there's a direct correlation between public support for the death penalty and decisions made to impose it. "There is no such correlation in non-elective states." State officials told Alston that getting re-elected depends on supporting the death penalty and imposing it from the bench - even at times by overriding jury decisions for life in prison.

Right to Counsel

The right is fundamental but not applied if counsel quality is poor, as so often is the case when court-appointed or low-income defendants can't afford better representation. State funding to provide it is inadequate, and one Texas official told Alston that defense counsel competency in the state is "abysmal." Major reforms are needed to repair a broken system, in Texas and nationwide.

Racial Disparities

Persons of color in America are most vulnerable to receive death sentences in capital cases - especially if victims are white. Yet federal and state officials are indifferent to the problem or deny one exists. When confronted with evidence from various studies, they claim they were conducted by anti-death penalty advocates and dismiss the results. It's never been a good time to be poor, black, or Latino in America, especially when confronted by a hostile criminal justice system claiming to be impartial.

Systematic Evaluation of the Criminal Justice System

Far too little is done at the state or federal levels to ensure wrongful death penalties aren't imposed. Their frequency demands serious redress - firm measures to halt injustices this grave.

Federal Habeas Corpus Review

Habeas suits can be filed in federal courts to challenge death penalty convictions, but not easily. The 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) denies them on many grounds, imposes a six-month statute of limitation for filing, and restricts access to federal evidentiary hearings. Other problems also exist that limit defendants' rights even when wrongfully convicted - such as emphasizing "finality" over the right of due process and fairness. Serious reform measures are needed to redress this.

Most Serious Crimes

The definition is vague and applies to an intention to kill resulting in the loss of life as determined by a judge and jury. However, capital punishment may be imposed for crimes like running large illegal drug operations according to the 1994 Federal Death Penalty Act. Other crimes as well, including treason, terrorism, rape, kidnapping, and in the military for desertion or mutiny.

Consular Notification

America is party to the Vienna Convention on Consular Relations (VCCR). It grants foreign nationals the right to contact their consulates for help, but too often they're prevented from doing it - in Texas, for example, where the state legislature failed to authorize its courts to provide this review. At the federal level as well by Congress not doing it. Alston says VCCR is "a bedrock principle of international law" affecting not just foreign nationals on death row in US states, but "equally to any American who travels to another country." It's up to Congress to fix this.

Deaths in Immigration Detention

In June 2008, the federal government acknowledged at least 74 immigrant detention deaths since 2003. Newspaper reports suggest far higher numbers. They result from various causes, including denying medical care, poor quality or delayed care, and "inappropriate medication." Overall, the treatment of immigrants in detention is deplorable with little attention paid to basic needs along with abusive treatment by authorities.

Killings by Law Enforcement Officials

The Department of Justice (DOJ) Bureau of Justice Statistics (BJS) compiles data covering homicides (usually by other inmates but also by guards), suicides, "arrest-related killings," and other judicially related deaths.

Statistics on resulting prosecutions and convictions aren't available, but it's "clear that (their) number....is small...." It means serious offenses are committed against numerous people trapped in the criminal justice system that too often affords little of it to the most vulnerable.

International Operations - The Death Penalty Under the Military Commissions Act

From the time of their arrest and internment, Guantanamo detainees were denied any measure of due process and fairness. Five are charged with capital offenses under the Military Commissions Act (MCA), and others also may face the death penalty under this travesty of a law. Although Obama ordered a stay of Commission proceedings to decide on procedures to follow, he left open the likelihood that prosecutions will proceed under MCA provisions, and if done, they'll violate US obligations under international humanitarian law.

MCA "utterly fail(s) to meet basic due process standards." Several of its most egregious flaws include:

- Guantanamo detainees were tortured and subjected to cruel and abusive treatment;
- statements coerced through torture will be used as evidence at trials;

- whatever America says is classified will be unavailable to defense attorneys;
- detainees may be convicted by evidence he has never seen or knows anything about; and
- second and third-hand hearsay evidence will be allowed at trial.

“The MCA’s provisions constitute a gross infringement on the right to a fair trial and it would violate international law to execute someone under this statute.”

Detainee Deaths at Guantanamo

Full knowledge of detainee deaths isn’t known, including their number and causes. Alston cites five reported, four called suicides, the other attributed to cancer. Custodial powers are required “to ensure and respect the right to life.” As such, they bear responsibility for detainee deaths and are obligated to investigate and publicly report their findings and whatever evidence supports them. So far, DOD has stonewalled all efforts to comply, except to release redacted autopsies and other internal investigation reports.

Lack of Transparency Regarding Civilian Casualties

DOD officials told Alston that it doesn’t compile data on Afghan or Iraqi civilian casualties because body counts don’t relate to the effectiveness or legality of military operations. Yet doing it is important to judge if America is serious about avoiding them altogether and keeping them to a minimum when they happen. No evidence suggests that’s so.

Private Contractors

Credible reports indicate that private security and other contractors engage in indiscriminate and otherwise questionable force against civilians, causing numerous casualties that may number in the thousands. Little of this gets reported and transparency overall is lacking. “The most comprehensive study to date found that few firms ever report shooting incidents, that such incidents are often misreported, and that SIRs (serious incident reports) that are filed are almost uniformly cursory and uninformative.” As a result, private contractors get away with murder because no authority holds them accountable.

Civilian Intelligence Agencies

What’s true for contractors, applies to the CIA as well with credible reports of at least five custodial deaths from torture or other means. Claimed investigations were conducted. CIA involvement was never confirmed or denied. Its Inspector General told Alston that cases involving possible unlawful killings are classified, and no one so far has been prosecuted nor will they as Obama ruled out the possibility.

Transparency and Accountability for Unlawful Killings and Custodial Deaths

Failure to assure transparency and “effective investigations into, and meaningful prosecution of, wrongful deaths means the (US) Government cannot fulfill its obligation to ensure accountability for violations of the right to life.”

Military Justice System Failures

In Afghanistan, Alston witnessed a lack of transparency first hand and the Government’s

unwillingness to be held accountable for illegal conduct. Most often investigations are quashed or inadequately done. Moreover, they're never against senior officers, and light sentences are administered to the few convicted. America fails in its "legal obligation to effectively punish violations (or observe) the rule of law," as vital in war as in peace.

One study "of almost 100 detainee deaths in US custody between August 2002 and February 2006 found that investigations were fundamentally flawed." They also violated the military's own regulations for investigations, and resulted in "impunity and a lack of transparency into the policies and practices that may have contributed to the deaths."

Chief Warrant Officer Lewis E. Welshofer Jr.'s sentencing is typical of others. After being convicted of negligent homicide and dereliction of duty for the death of Iraqi Major General Abedd Hamed Mowhoush, he was confined to base for two months, fined \$6000, and reprimanded by letter. Welshofer's "sentence is not an anomaly."

Notable in all cases is that "command responsibility," the recognized basis for criminal liability since WW II, is absent from the Uniform Code of Military Justice (UCMJ) and US War Crimes Act. It means commanders go unprosecuted and accountability is undermined.

Civilian Justice System Failures

"For far too long, there has been a zone of de facto impunity for killings by private contractors (PCs) and civilian intelligence agents operating in Iraq, Afghanistan, and elsewhere." It's not for lack of an applicable legal framework. It's because "US prosecutors have failed to use the laws on the books to investigate and prosecute PCs and civilian agents for wrongful deaths," some of which occur from torture, abuse as well as willful homicides.

The DOJ has prosecutorial authority over PCs, civilian government employees, and former military personnel suspected of war crimes under two of its operations:

- the US Attorney's Office for the Eastern District of Virginia for detainee abuse cases; and
- the Domestic Security Section (DSS) of DOJ's Criminal Division for unlawful shootings committed while protecting convoys.

Both fall way short, and DSS representatives acknowledged the lack of convictions but withheld information on allegations received, investigations undertaken, or their status. "The lamentable bottom line is that DOJ has brought a scant few cases against PCs for civilian casualties, achieved a conviction only in one case involving a CIA contractor, and brought no cases against CIA employees....this vacuum is neither legally nor ethically defensible."

Ensuring Transparency and Accountability

It's only possible through the "will to enforce the rule of law," yet Alston's conclusion is that outcome is highly unlikely. "In short, war crimes prosecutions in particular are 'politically radioactive' " and won't happen. However, there are other steps the government can take to increase transparency and accountability:

- create a national "commission of inquiry" to conduct independent investigations of policies and practices causing deaths and other abuses; and

— appoint an independent special prosecutor, free from institutional or political pressures to the greatest degree possible.

In both cases, fundamental requirements require independence, impartiality, competence, and the power to obtain all sought information. Adequate funding is also essential and the right to publicly report findings and recommendations.

“The most credible response to the military justice system’s investigative failure and sentencing distortions would be the creation of a Director of Military Prosecutions (DMP) position” - much like in Australia, Canada, Ireland, New Zealand, and the UK “to ensure greater separation between the chain of command and the prosecution function.”

The DOJ should also establish a special office solely to investigate and prosecute cases involving PCs, civilian government employees, and former military personnel.

Reparations for Civilian Casualties

International law mandates that compensation for human rights violations be paid, and in some instances to families it has been. But it’s much too little for the families of too few victims.

The Foreign Claims Act requires payment of legal claims arising from negligent or wrongful deaths caused by military personnel outside of combat. Other programs also exist, including the Commander’s Emergency Response Program (CERP) for “condolence payments” and in Afghanistan authorization of “solatia payments.”

However, these are ad hoc efforts, and the “lack of systematic compensation for civilian casualties caused by private contractors is acute.” As their employer, the government bears ultimate responsibility but shuns it.

Targeted Killings: Lack of Transparency Regarding the Legal Framework and Targeting Choices

Credible evidence shows America engages in targeted killings on the territory of other states, and senior officials admit using drones for this purpose. Yet when queried, answers are evasive, not forthcoming, and disturbing justifications are given that violate the letter and spirit of international law.

Recommendations - For Domestic Issues

- enforce due process and fairness in death penalty cases;
- reform the system of partisan elected judges;
- public defenders should be competent, well funded, and oversight of this function should be independent of the executive and judicial branches;
- commissions should be established to review cases of wrongful convictions - discovered through subsequent exonerations;
- ways the death penalty is administered and implemented should be evaluated and changed;

- racial disparities in death penalty impositions need to be addressed and corrected;
- congressional legislation should let federal courts review death penalty cases on their merits;
- capital punishment should be used sparingly and only for the most serious crimes of willful killings; (ideally, it should be banned entirely as no civil society worthy of the name has the right to claim an eye for an eye);
- foreign nationals should have their executions stayed until proper consular reviews and reconsiderations are conducted;
- immigration detention deaths should be promptly reported and investigated; and
- Homeland Security should assure proper medical and other essential care is provided, consistent with international standards.

Guantanamo Detainees

The Military Commissions Act violates international laws and shouldn't be used for capital case prosecutions. Ones conducted should assure due process according to international human rights and humanitarian law requirements.

International Operations

- civilian casualties should be tracked and publicly disclosed;
- the DOD should ensure military justice transparency by establishing a central office of "registry" to track cases from investigation through final disposition and should include upcoming hearings, investigative findings, rulings, pleadings, testimony transcripts, and other pertinent materials;
- comprehensive criminal jurisdiction over armed conflict offenses should be ensured and "command responsibility" should be codified in the Uniform Code of Military Justice (UCMJ) and War Crimes Act;
- federal legislation should be enacted to provide criminal jurisdiction over private contractors and civilian employees, including the CIA and other intelligence branches;
- an independent commission of inquiry and special prosecutor should be established to investigate practices causing deaths and other abuses; also a Director of Military Prosecutions to hold everyone throughout the chain of command responsible for their alleged crimes;
- an office to investigate and prosecute private contractors, civilian government employees, and former military personnel should be created within the DOJ;
- enhanced reparations programs should be established to provide adequate compensation to families of those wrongfully killed;
- targeted killings must stop; reasons for them in lieu of capture should be explained and whether states in which they occur gave consent; specifically, international laws must be scrupulously enforced; and

— collaterally killed civilian numbers should be disclosed, by drones or other attacks, and measures should be in place to avoid them or hold them to a minimum.

In summary, Alston called America's human rights record "deplorable," and in need of major changes. In response, the Obama administration charged him with violating his mandate by accusing the US of failing to properly investigate allegations of unlawful US military killings in Iraq and Afghanistan.

Acting deputy at the US mission in Geneva, Larry Richter, said: "We do not believe that military and intelligence operations during armed conflict fall within the special rapporteur's mandate." Much more important is his lack of power to act on the crimes he discovered. Still he deserves credit for revealing what US authorities try hard to suppress and ignore.

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